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August 3, 2012

Hand delivered

Sandra Holt, COM
Vermont Superior Court, Washington Unit
65 State Street
Montpelier, Vermont 05602

Re: Anderson v. State of Vermont, Docket No. 480-6-12 Wncv

Dear Sandy:

Enclosed please find *Plaintiffs' Opposition to State's Motion to Dismiss and Plaintiffs' Reply to State's Opposition to Motion for Injunctive Relief.*

Thank you.

Sincerely,

Charles L. Merriman

CLM

Enclosure

cc: Clients (by email only)
Keith Aten, Esq. (by email and US mail)

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 480-6-12 Wncv

Ross C. "Rocky" Anderson,)
Benjamin L. Eastwood,)
Daniel M. Albert, and Nicole Killoran)
Plaintiffs)
)
v.)
)
State of Vermont,)
Secretary of State James Condos)
Defendants)

PLAINTIFFS' OPPOSITION TO STATE'S MOTION TO DISMISS and PLAINTIFFS' REPLY TO STATE'S OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF

The State filed a Motion to Dismiss and Opposition to Motion for Injunctive Relief, dated July 24, 2012. Plaintiff opposes Defendants' Motion to Dismiss, and replies to State's Opposition to Plaintiffs' Motion for Injunctive Relief, stating the following:

I. Summary of plaintiffs' argument.

Plaintiffs challenge the constitutionality of 17 V.S.A. §§ 2402(a)(4) and 2703 on their face and as applied by the Secretary of State. Plaintiffs seek injunctive relief because: (a) they are poised to suffer irreparable harm to their associational rights,[1] secured by the First and Fourteenth Amendment of the Constitution of the United States and by Articles 7th and 8th of the Vermont Constitution; and (b) under the *Anderson* test, plaintiffs are likely to succeed on the merits of their claims.

[1] The principal issue is not—as the State avers—the candidate's right to be placed on the ballot. It is the voters' right of association. As noted by the *Anderson Court,* ". . . limiting the opportunities of independent-minded voters to associate in the electoral arena . . . threaten to reduce diversity and competition in the marketplace of ideas . . . . [i]n short, the primary values protected by the First Amendment – 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open' – are served when election campaigns are not monopolized by the existing political parties." *Anderson v. Celebrezze,* 460 U.S. 780, 794, 103 S. Ct. 1564, 1573 (1983) (internal citations omitted).

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The State tacitly concedes that the harm (if it exists) cannot be remedied by any means other than injunction. In addition, the State concedes that "the test to determine whether a ballot access statute is unconstitutional" is spelled out in *Anderson*. *State's Motion,* p 5. Nevertheless, the State claims that plaintiffs will not pass the *Anderson* test and therefore should not be granted injunctive relief.

The State, however, addressed only one-half of the *Anderson* test when it exclusively challenged the weight of the burden placed on plaintiffs by the challenged statutes. With respect to the second issue, the State failed in its obligation to establish any legitimate interest in the challenged legislation when it failed to provide any testimony of the State's purported interests. The Court, therefore, should issue an injunction in favor of plaintiffs requiring the Secretary of State to include Rocky Anderson on the 2012 ballot for President of the United States.

II. The test.

Plaintiffs and the State agree on one point. There is one "test to determine whether a ballot access statute is constitutional." It is *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983). *State's Motion,* p 5. All other decisions are derivative of *Anderson* and none of these cases overrules or supersedes or negates or replaces the test in *Anderson.*

The test requires a balancing between the constitutional interests of voters and the non-constitutional, policy interests of the state. It bears considering, for a moment, the gravitas of those two distinct interests.

Constitutions, from which the state derives its power and in which the legislature finds its being, are government-limiting documents. The first ten amendments of the United States Constitution, the Bill of Rights, in particular constrain the power of the state in respect to the rights of individual citizens. An honestly articulated, rational policy goal of the legislature may

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limit the constitutional right of a citizen, but to do so is a grave thing not to be undertaken lightly by the legislature and not to be undertaken for political advantage. The court, when faced with a constitutional challenge to a legislative act, does not accord deference to the non-constitutional policy interests of the state over the specific constitutional protections accorded to the challenger. Rather, the court scrutinizes the rationale behind the constitutional intrusion, applying the degree of scrutiny appropriate to that intrusion, to determine whether the intrusion is constitutionally permissible. The degree of scrutiny is calibrated to the risk of constitutional depredation.

For example, the Vermont Supreme Court performed an in-depth review of the "important regulatory interests" supporting a resign-to-run canon. Citing favorably to *Clements v. Fashing,* 457 U.S. 957, 102 S. Ct. 2836 (1982) (plurality decision), the Court observed that a resign-to-run law serves an "important regulatory interest" by ensuring that a judge will not neglect duties or devote less time than the judge's full time and energies to the responsibilities of the judicial office. *In re Hodgdon*, 2011 VT 19, ¶ 14, 19 A.3d 598.

Here, as in *Hodgdon*, the challenged statutes "must be justified by important state regulatory interest[s,]" *State's Motion,* p 5, and the Court must carefully scrutinize those supposed important interests.

The *Anderson* test requires the Court to:

a. Consider the character and magnitude of the asserted injury to plaintiff's rights protected by the First and Fourteen Amendments;

b. Identify the precise interests put forward by the State as justifications for the burdens;

c. Determine the legitimacy and strength of each of the State's supposed precise interests; and

d. Consider the extent to which the State's supposed precise interests make it necessary to burden plaintiffs' rights.

Anderson v. Celebrezze 460 U.S. at 789.

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III. Burden on plaintiffs.

Plaintiffs testified that they had only one month to collect 1,000 signatures on the Secretary of State's "statements of nomination" and obtain town clerk certifications of each name appearing on original statements of nomination. Plaintiffs testified that the burden of obtaining certifications on original statements—as opposed to faxed copies—was unnecessary, was overly burdensome and severe, and caused plaintiffs to fail to meet the deadline for submitting 1,000 signatures with certified names.[2] Plaintiffs also testified that being required to pick a vice presidential candidate before beginning the signature collection process and approximately three months before the major party candidates choose their running mates at their conventions created a severe burden on plaintiffs.

In response, the State claimed that plaintiffs had unlimited time to collect the signatures and obtain certification and that, in any event, the burden cannot be considered severe because one party was able to make the deadline. There are two flaws in the State's claim.

First, Plaintiffs' Exhibit 1 establishes that the "statement of nomination" form, produced by the Secretary of State and used by the candidates, was not finalized prior to May 10, 2012. Thus, plaintiffs did not have limitless time to collect signatures and certifications on original "statements of nomination." They had one month and a couple of days.

Second, State's Exhibit A shows that in 2008, when the deadline for submitting certified "statements of nomination" fell sometime in September, six candidates (three independent candidates and three minor party candidates) managed to meet the certification burden. Director Sheele testified that this year, only one candidate met the burden.

[2] The challenged law requires that town clerks certify that the *name* appearing next to a signature is that of a registered voter in the town. 17 V.S.A. § 2402 (a)(4). The State mistakenly states that the "signatures [must] be certified as those of registered voters," *State's Motion,* p 3, and that the "signatures be verified as those of registered voters." *Id.* at 7.

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Director Sheele failed to inform the Court that this year many other candidates, both independent and minor party, attempted to be placed on the presidential ballot. See, e.g., http://www.jillstein.org/. With the exception of one candidate, these candidates could not meet the severe burden created by the confluence of the new deadline and the requirement to obtain certifications on original statements of nomination. State's Exhibit A supports plaintiffs' claim that the requirement of certification, in conjunction with the early filing deadline, creates a severe burden under the *Anderson* test.

IV. State's interests.

A. No showing of precise State interest.

Under the *Anderson* test, the State must articulate its precise interests so as to allow the Court to evaluate the legitimacy and strength of those interests. As conceded by the State, the State's interests must be legitimate, "important state interests" in order for the challenged legislation to be upheld as constitutional. *State's Motion,* p 5.

Here, the State produced no evidence or testimony of its precise interests. Thus, the State failed to make any showing that it has "important state interests" justifying the burdens imposed on plaintiffs.[3]

Plaintiffs acknowledge that Attorney Aten, the Assistant Attorney General charged with defending this case, proffered a lists of theoretical state interests—culled from the case law—consisting of the following: preventing frivolous or fraudulent candidacies; insuring an efficient election process; avoiding an overcrowded ballot and voter confusion; preserving the integrity and stability of the political system, and assuring that candidates have some modicum of support

[3] The Court received no testimony or evidence from the State regarding the State's precise interests justifying the challenged laws. On cross examination and over the State's objections, plaintiffs' attorney specifically asked Director Sheele, the State's only witness, to testify as to the State's interests in the challenged laws. Director Sheele testified that she did not know the legislative purpose of the laws and could not hazard a guess.

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prior to being placed on the ballot. *State's Motion* p 9. But Attorney Aten's review of cases from other jurisdictions regarding other state statutes does not identify for the Court the precise interests the Vermont Legislature sought to forward by enacting the challenged legislation. To meet its burden, the State was required to produce evidence of the State's supposed interests; mere speculation is not enough. *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579, 593, 2006 Fed.App. 0342P (reliance on suppositions, speculation, not sufficient to justify severe burden on First Amendment rights).

Even if the Court were to accept the State's speculations, the Court must scrutinize the "legitimacy" and honesty of the legislature's purported reasons for enacting the challenged legislation. See *Entergy Nuclear Vermont Yankee, LLC v. Shumlin,* 838 F. Supp.2d 183, 228-29 (2012) (looking beyond legislature's professed purpose in enacting specific law to legislature's actual motivation). This scrutiny is particularly necessary when, as here, the challenged legislation directly benefits major party politicians and their supporters. As noted by the United States District Court for the District of Maine:

> [t]he Court cannot be blind to the fact that restrictions on independent candidacies are enacted by members of major parties, who have some level of direct interest in the success or failure of independent candidacies. Laws enacted by major parties that tend to quell independent candidacies must be scrutinized carefully in order to preserve First Amendment rights of association and voting.

Stoddard v. Quinn, 593 F. Supp. 300, 308-309 (D. Me. 1984).

Recent events in Pennsylvania serve to underscore the need to closely question the veracity of legislators caught in the thrall of partisan politics. Pennsylvania recently enacted Act 18, a voter identification law requiring proof of identification for voting purposes. See 25 P.S. § 2602(z.5)(2), et seq. (defining "proof of identification.") The law is currently under challenge. *Applewhite et al v. Commonwealth of Pennsylvania,* Pa. Commw. Ct., Docket No. 330 MD

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2012.[4] The law was ostensibly passed to stem voter fraud. However, that purpose appears to be a ruse. According to Pennsylvania House Majority Leader Mike Turzai (R., Allegheny), the House Republicans passed the law so as to assure a win for Mitt Romney in Pennsylvania this year.[5]

In a nutshell, Attorney Aten's list is speculative and cannot show that an "important state interest" is being served by the challenged laws. See *Okemo Mountain, Inc. v. Town of Ludlow,* 171 Vt. 201, 206, 762 A.2d n1219, 1224 (2000) (opinions of Attorney General have no binding effect on court).[6]

B. Purported interests are not forwarded by the challenged legislation.

The Anderson test also requires the Court to "consider the extent to which [the State's] interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze* 460 U.S. 780, 789 (1983). In the event the Court disagrees with plaintiffs and finds that an assistant attorney general is competent to, sua sponte, define the interests of the legislature, plaintiffs assert that there is profound disconnect between the challenged legislation and the State's avowed interests. Simply put, the challenged legislation does nothing to promote the interests articulated by Attorney Aten and therefore must be found unconstitutional.

1. The law does not discourage "frivolous or fraudulent candidacies." The State did not specify how, "precisely," this law is designed to discourage frivolous or fraudulent

[4] The docket is available at http://www.pacourts.us/T/Commonwealth/.

[5] See http://www.philly.com/philly/news/20120803Closing_arguments_in_hearing_on_Pennsylvania_voter_ID_law.html.

[6] Undoubtedly, the State would argue that it need not "proffer empirical evidence in support of its articulated interests." *Council of Alternative Political Parties v. Hooks,* 179 F.3d 64, 78 (1999). Plaintiffs disagree with that premise, but will reserve that dispute for another day. The point here is not whether the State has to proffer evidence tending to show the validity of its interest; the point here is that the State's able counsel and advocate, Keith Aten, cannot, through the power of his considerable intellect, simply conjure up plausible state interests—through the expediency of a Westlaw search—and insist that the Court accept these as the "precise" interests which drove the legislation.

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candidacies. Certainly, if the law required—as the State mistakenly avers—that signatures be verified, that would discourage fraudulent candidacies. But the law does not require that.

As noted in Plaintiff's Motion, it is a simple thing to get one's hands on town checklists or the statewide checklist. One can then easily fill in 1,000 signatures by holding what is known among major party insiders as "pizza parties." At a pizza party, supporters sit around a table, drinking beer or soda or wine, eating pizza, and forging signatures on petitions. The petitions circulate so that no sequential handwriting looks the same and the fraud goes undetected. The challenged laws do nothing to protect against petition fraud.

It is unclear what the State means by a "frivolous" candidate. To the extent it means someone incapable of garnering many votes, State's Exhibit A shows that three "frivolous" candidates, none of whom garnered more than 150 votes, were able to get on the ballot under the challenged law. The law does not discourage "frivolous" candidacies.

2. The challenged law does not "insure an efficient election process." The State did not specify how the challenge law purports to "insure an efficient election process." That is because the challenged law actually leads to inefficiency. Town clerks are the election officials of their respective towns. 17 V.S.A. § 2452. Imposing additional burdens on town clerks to certify nominating statements hurts the efficiency of the election process.

3. The challenged law does not prevent against an overcrowded ballot and voter confusion. Upon cross examination, Director Sheele conceded that (i) voter confusion becomes a risk when a ballot goes to two pages and (ii) that she could place another twenty names on the presidential ballot without running onto another page. State's Exhibit A included eight presidential candidates—nine if one accounts for a write-in block. To aver that, without the

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challenged law, Vermont would be besieged by another twenty candidates for president is simply not credible. The challenged laws do not discourage voter confusion or ballot clutter.

4. The challenged law does not "preserve the integrity and stability of [Vermont's] political system." This is the most intriguing, and dangerous, argument put forward by the State. *Storer v. Brown*, 415 U.S. 724, 735–36 (1974) affirmed a California law requiring candidates to disaffiliate, for one year, from their former political party prior to running as independent candidates. In upholding the law, the Court found that California adheres to the Federalist notion that "unrestrained factionalism may do significant damage to the fabric of government." The *Storer* Court denominated this a legitimate state interest that outweighs the interest of candidates and their supporters in making a late decision to seek independent ballot status. *Storer*, 415 U.S. at 736.

Vermont is not California. The notion that Vermont bought into the Federalist fear of factionalism is risible. Vermont, it is true, was a battleground state between the Federalists and the Jeffersonian Republicans, but principally over the issue of trade with England. Senator William Doyle, *And They Called the County Washington.*[7] On the issue of self-governance, Vermont was aggressively, radically republican, to the dismay of the Yorkers. Gary B. Nash, *The Unknown American Revolution: The Unruly Birth of Democracy and the Struggle to Create America* 270-71(citing Jefferson's coinage of the phrase "Vermont logic" to describe the formation of the Republic of Vermont on, in Ethan Allen's words, "the true principles of liberty and natural right"). Far from preserving the integrity of Vermont's political system, the challenged laws war with the Vermont tradition of encouraging "uninhibited, robust, and wide-open" political debate;

[7] Available at: http://www.central-vt.com/towns/history/HstACV.htm.

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5. The challenged law does not assure that candidates have some modicum of support prior to being placed on the ballot. Under the challenged laws, Calero, LaRiva, and Moore all were able to garner 1,000 signatures, get names certified, and get on the ballot in 2008. None received more than 150 votes. State's Exhibit A. The law does no assure any level of support for the petitioning candidate.

V. A word on *Burdick.*

The State relies heavily on *Burdick v. Takushi,* 504 U.S. 428, 112 S. Ct. 2059 (1992) for the proposition that plaintiffs' burden is light and the State's right to regulate is great. But *Burdick* does not address the constitutionality of Vermont's certification requirement for independent presidential candidates. *Burdick* addresses a wholly unrelated issue; a Hawaiian statute prohibiting write-in votes. The State seems to aver that if the Supreme Court would affirm a law as destructive of voters' rights as the Hawaiian law, surely Vermont's certification requirement must pass constitutional must. It is an unusual legal argument, but it does nothing in the way of providing meaningful analysis applicable to the present dispute.

The *Burdick* Court affirmed a Hawaii statute prohibiting write-in ballots, an issue not before this Court. In upholding the statute, the Court reviewed the comprehensive scheme created by Hawaii to ensure ballot-access to a wide array of potential candidates. Among other things, the Hawaii statute requires that *all* candidates, not just partisan candidates, compete in a primary. By filing nominating papers containing just 15 signatures sixty days before the primary, independent candidates can appear on the general election ballot, provided they receive 10 percent of the vote in the non-partisan primary or votes sufficient to nominate a partisan candidate. *Burdick*, 504 U.S. at 436. Only after considering the totality of Hawaii's ballot access laws did the Court find that "Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an

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unconstitutional burden on the First and Fourteen Amendment rights of the State's voters." *Id.* at 441.

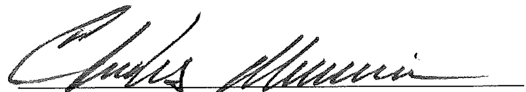
While Vermont hosts—and pays for—the major parties' primaries, Vermont does not hold or pay for a non-partisan primary through which independent candidates can attain access to the general ballot. The State did not show that the certification requirement is part of some comprehensive electoral scheme which provides—as in the case of Hawaii—constitutionally sufficient ballot access to non-major party candidates. Therefore, *Burdick* is inapposite.

VI. **Conclusion.**

For the reasons give and those made at the hearing and contained in plaintiffs' complaint and motion for injunctive relief, plaintiffs respectfully request the Court DENY the State's Motion to Dismiss and GRANT plaintiffs' Motion for Injunctive Relief.

Dated at Montpelier, Vermont on August 3, 2012.

PLAINTIFFS

By: 

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