IN THE SUPREME COURT

OF THE

STATE OF VERMONT

ROSS "ROCKY' ANDERSON,
BENJAMIN EASTWOOD, DANIEL
ALBERT, and NICOLE KILLORAN,

v.
STATE OF VERMONT, SECRETAARY
OF STATE JAMES CONDOS,

Supreme Court Docket No. 2012-272

Ross "Rocky" Anderson, Benjamin Eastwood, Daniel Albert and Nicole Killoran
Appellees

Appeal from
Vermont Superior Court, Washington Unit
Docket No. 480-6-12 Wncv

APPELLEES' BRIEF

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STATEMENT OF THE ISSUES

1. Does 17 V.S.A. § 2404 (a)(4) impermissibly discriminate against independent Presidential Candidates and their supporters in violation of the 1st and 14th amendments to the United States Constitution?

2. Does 17 V.S.A. § 2404 (a)(4) violate Article 7th of the Vermont Constitution?

STATEMENT OF THE CASE

Under V.R.A.P 28(b) an appellee need not file a statement of the case unless dissatisfied with appellant's statement. In general, Appellant's statement is adequate. However, there are two corrections that must be made to Appellant's statement in order for it to be accurate.

First, Appellant writes: [t]he statement of nomination must also contain certifications by town clerks that *each signer* is a registered voter in the town listed on the statement." **Appellant's Br. 1** (emphasis added). In fact, town clerks do not certify signatures. Town clerks merely certify that "the persons whose names appear as signers" are registered voters in the town. 17 V.S.A. § 2402 (a) (4). In other words, the law merely requires that town clerks check their voter lists. The challenged law does not safeguard against fraudulent signatures.

Second, Appellant writes: "The trial court *concluded* that '[o]verall, 17 V.S.A. § 2402 appears to be a reasonable regulation of elections within the State of Vermont.'" **Appellant's Br. 4** (emphasis added). To the extent Appellant implies that the trial court reached a decision on the reasonableness of § 2402, Appellant's statement is inaccurate. The quote is orbita dictum; the trial court's actual ruling was much narrower: ". . . the statute *as applied* violates the First and Fourteenth Amendment to the United States Constitution . . . ." **PC 4** (emphasis added).

STANDARD OF REVIEW

As noted by Appellant, the Court takes plenary review of issues of law. *Brigham v State,* 2005 VT 105, ¶10, 179 Vt. 525, 889 A.2d 715. In reviewing constitutional challenges to ballot access statutes, courts must balance the constitutional interests of voters against the non-constitutional policy interests of the state. This is no mindless weighing test. To the contrary, to afford protection to voter's First Amendment fundamental right of political association, the Court must scrutinize the actual—not putative—rationale behind the state's intrusion into the constitutional right, calibrating the degree of scrutiny to the risk of constitutional depredation. The court must:

A. Consider the character and magnitude of the asserted injury to plaintiff's rights protected by the First and Fourteenth Amendments;
B. Identify the precise interests put forward by the State as justification 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 plaintiff's rights.

Specifically, the test which arose from the 1980 presidential race requires the Court to:

> . . . first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570 (1983).

If the challenged restriction is severe, strict scrutiny is applied. *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 2063 (1992), *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 1370 (1997). Regardless of the level of severity, though, ballot access

restrictions must be reasonable and non-discriminatory and must support "important regulatory interests," in order to pass constitutional muster. *Burdick v. Takushi,* 504 U.S. at 434.

ARGUMENT

I. 17 V.S.A. § 2402 (a)(4) unconstitutionally discriminates against independent presidential candidates and their supporters.

Major party presidential candidates are required to gather and submit to the Vermont Secretary of State the signatures of 1,000 Vermont registered voters to be included on their party's presidential primary. 17 V.S.A. § 2702. Independent presidential candidates are also required to obtain the signatures of 1,000 Vermont registered voters. However, independents candidates must do much more. They must obtain, from each and every town clerk in each and every town in which each signatory claims to be registered, a certification that the name appearing on the petition is the name of a registered voter in that town. 17 V.S.A. § 2402 (a)(4).

This second step is very burdensome,[1] discriminates against independent voters' right to associate politically, and serves no legitimate or important regulatory interests. The second step is made even more arduous by the Secretary of State's requirement that town clerks certify original statements of nomination, not faxes or photocopies of the same.

A. The Injury to Plaintiffs' constitutional rights.

Plaintiffs' right to associate politically and to cast their votes effectively are "of the most fundamental significance under our constitutional structure." *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 70 (3d Cir. 1999) (internal citations omitted). The burden of obtaining certifications on original statements is severe and, as found by the trial court,

[1] Appellees witness, Plaintiff Ben Eastwood, actually attempted to collect all town clerk certifications. **PC 86.** Eastwood testified that the task was truly onerous. **Id.** By contrast, Appellants failed to put on any witness with actual experience attempting to meet this requirement. Instead, Appellant's sole witness, Director Kathy Scheele, opined that the task could not be considered onerous because some people had managed to do it in the past. **PC 98-99.**

"prevented Plaintiffs from placing the name of their candidate [on the ballot]" in violation of the First and Fourteenth Amendment. **PC 4.**

But the injury to Plaintiffs' constitutional rights is a consequence of the law, not merely of the Secretary's application of the law. Section 2402 (a)(4) burdens independent candidates' and their supporters' fundamental right to associate by requiring that they take time away from disseminating their political message to perform a task not required of major party candidates. As Plaintiff testified, "[t]he burden is so high here in Vermont . . . [that Anderson's staff] had to take her time away from her duties as the –as the office manager for the national campaign . . . . her time would have been better spent actually campaigning and running the office." **PC 91-92.**

B. The State has no precise interest in the challenged statute.

Under *Anderson*, 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, its interests must be legitimate, "important state interests" in order for the challenged legislation to be upheld as constitutional. **PC 38.**

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.[2]

The state proffered a list of theoretical 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 prior to being placed on the ballot. **Appellant's Br. 5, PC 42.** But a review of cases from other

[2] The Court received no testimony or evidence from the State regarding the State's putative precise interests. Indeed, the State's only witness testified that she did not know the legislative intent of the challenged law. **PC 113.**

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 (2006) (reliance on suppositions, speculation, not sufficient to justify severe burden on First Amendment rights).

C. The state's purported interests are neither legitimate nor strong.

Even if the Court were to accept the State's speculations, the Court must scrutinize the "legitimacy and strength" of the legislature's purported reasons for enacting the challenged legislation. *Anderson,* 460 U.S. at 780. That is because there could be a disconnect between the putative reasons for a specific law and the legislature's actual motivation in passing the law. 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). The Court's 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 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 was ostensibly passed to stem voter fraud. However, according to Pennsylvania House Majority Leader Mike Turzai (R., Allegheny), the House Republicans passed the law to assure a win for Mitt Romney in Pennsylvania.[3]

In a nutshell, the state 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).[4]

D. The state's purported interests are not served by the challenged law.

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,* 460 U.S. at 789. In the event the Court finds that the state's unsupported allegations of legislative intent are sufficient to establish the state's "precise" interests there is profound disconnect between the challenged legislation and these interests. Simply put, the challenged legislation does nothing to promote the interests articulated by state.

1. The law does not discourage "frivolous or fraudulent candidacies." The state did not specify how the law discourages frivolous or fraudulent 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 Appellee's Motion for Injunctive Relief, **PC 31**, 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

[3] See http://www.philly.com/philly/news/20120803Closing_arguments_in_hearing_on_Pennsylvania_voter_ID_law.html. Apparently, Turzai's confidence in his ability to manipulate the political process was misplaced.

[4] 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). The issue here, though, is not whether the State has to proffer evidence tending to show the validity of its interest; the issue is whether the state may justify a law by simply speculating as to the state's possible.

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. **PC 61.** State's Exhibit A included eight presidential candidates—nine if one accounts for a write-in block. To aver that, without the challenged law, Vermont would be besieged by another twelve 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 California 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.*[5] On the issue of self-governance, Vermont was aggressively, radically republican. 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 law wars with the Vermont tradition of encouraging "uninhibited, robust, and wide-open" political debate. *Anderson* 460 U.S. at 794.

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 not assure any level of support for the petitioning candidate.

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

II. 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 muster. **Appellant's Br. 7, 8, 15.** 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 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.

III. 24 V.S.A. § 2402 (a)(4) violates Articles 7th of the Vermont Constitution.

The Common Benefits Clause is the Vermont Constitution's more liberal analogue to the Equal Protection Clause. *Baker v. State*, 170 Vt. 194, 202–03, 744 A.2d 864, 870–71 (1999). The *Baker* Court described the clause as being "broadly deferential to the legislative prerogative to define and advance governmental *ends,* while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective." *Id.*

As noted above, the State speculated as to the state interests forwarded by section 2402(a)(4). This is a far cry from the hard, factual and legislative analysis undertaken by the Baker Court in reviewing whether denying same sex couples the benefits and protections accorded to married couples violates Vermont's common benefits clause, or the Court's determination that a resign-to-run canon was the *only* means to achieve the State's interest in assuring an impartial judiciary. *In re Hodgdon*, 2011 VT 19, ¶¶ 23–24, 19 A.3d 598.

IV. Conclusion.

For the reasons given, Plaintiffs respectfully request the Court find that 17 V.S.A. § 2402 (a)(4) violates Plaintiffs' rights under First and Fourteenth Amendment to the United States Constitution and violates Plaintiffs' rights under Article 7th of Vermont Constitution.

In the alternative, Plaintiffs respectfully request that the Court affirm the trial court's finding that, as applied by the Secretary of State, 17 V.S.A. § 2402(a)(4) violates Plaintiffs' rights under the First and Fourteenth Amendment to the United States Constitution. **PC 4.**

Dated at Montpelier, Vermont, February 19, 2012.

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APPEAL CERTIFICATION

Counsel for Appellees hereby certifies the following pursuant to V.R.A.P. Rule 32(a)(7)(A):

The principal brief I have filed on behalf of my client is in compliance with V.R.A.P. 32(a)(7)(A). My brief uses 12-point font, and contains no more than 9,000 words. Specifically, as determined by Microsoft Word the brief contains 3,096 words exclusive of the Table of Contents, Table of Authorities and signature blocks.

Dated at Montpelier, Vermont, this 19th day of February, 2012.

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CERTIFICATE OF COMPLIANCE

Counsel for Appellees hereby certifies the following pursuant to V.R.A.P. Rule 32(a)(7)(A):

The principal brief I have filed on behalf of my client is in compliance with V.R.A.P. 32(a)(7)(A). My brief uses 12-point font, and contains no more than 9,000 words. Specifically, as determined by Microsoft Word the brief contains 3,276 words exclusive of the Table of Contents, Table of Authorities and signature blocks.

Dated at Montpelier, Vermont, this 9th day of April, 2012.

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