

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JAMES T. PARKER,

Plaintiff,

vs.

No. 1:14-cv-00617-MV-GBW

DIANNA J. DURAN, in her official
capacity as New Mexico Secretary of
State.

Defendants.

**REPLY TO MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

The Plaintiff, by counsel, files this reply in support of the Motion for Temporary Restraining Order and Preliminary and Permanent Injunctive Relief.

Argument and Authority

The parties agree that James T. Parker will suffer irreparable injury if unjustly excluded from the 2014 general election ballot. Response at p. 1. Moreover, as to the ballot access question, the parties seem in agreement that the balancing test in *Anderson v. Celebrezze*, 460 U.S. 780, and as applied in similar cases, e.g. *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006) at 768, is applicable here. Response at p. 2. The salient issue is application of the balancing test to the case at bar in order to determine whether there is sufficient likelihood that the Plaintiff will prevail on the merits for the Court to issue the requested preliminary injunction.

I. Plaintiff Has a Substantial Likelihood of Successfully Challenging the State's Disparate Treatment of Independent Candidates.

A. New Mexico Petition Signature Requirements Discriminate Against Independent Candidates.

In analyzing the merits of this case, throughout its Response, the State seeks to enlarge the issues at bar and obscure the inequity rather than simply address the undisputed facts at hand using the applicable balancing test cited above. In particular, the Response emphasizes the significant ballot access advantages held by major parties, candidates of which sometimes (but not in the current case) may participate in contested primaries.

The State's Response ignores the applicable analysis, as applied to ballot access for the PEC District 4 position. In determining the magnitude of the ballot access restrictions faced by Plaintiff, the State claims, without citation to authority, that the only requirement is that such candidacies be "realistically possible". Response at p. 5. The State also argues that the sorry history of PEC District 4, where prior to this year no Commissioner candidate has ever appeared on the ballot, is "not illuminating." Response at p. 6. These assertions are not correct. The correct analysis, as cited by Plaintiff, is contained in *Lee v. Keith*, 463 F.3d 763 (C.A.7 (Ill., 2006) at 769:

The Supreme Court has held that ballot access history is an important factor in determining whether restrictions impermissibly burden the freedom of political association: "Past experience will be a helpful, if not always unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Storer*, 415 U.S. at 742, 94 S.Ct. 1274. The "inevitable question for judgment" is whether "a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.*

The State dismisses the lack of candidates in PEC District 4 as simply due to "a near total lack of interest on the part of potential candidates." This argument is posited without any consideration

of the impact of insisting that an independent candidate with two young daughters to educate, who is interested in serving, must jump hurdles that have never been jumped before, three times as high as any minor party candidate. On the other hand, there is no dispute that ballot access by independent candidates is hindered by a discriminatory, enormously burdensome signature requirement that even the State agrees is “admittedly difficult” to achieve. Response at p. 5.

Plaintiff, an independent candidate, in this case was faced with collecting 2,196 signatures, three times more than the burden that would have been faced by a minor party candidate. It is reasonable to conclude, from this evidence and the undisputed affidavits before the Court, that ballot access restrictions are preventing independent candidates, or at least this independent candidate, from running for the office of Public Education Commissioner.

As shown by the affidavit of Richard Winger attached to Plaintiff’s motion for preliminary injunction, no threat of an unruly, crowded ballot for PEC Commissioner has ever existed in PEC District 4, nor in any PEC District. Again, the historical evidence before the Court, including the experience of the Plaintiff, strongly supports the contention that ballot access restrictions, namely the discriminatory and onerous petition signature requirements, have effectively prevented the voters of PEC District 4 from the opportunity to consider an independent candidate for Commissioner.

B. Defendant’s Qualification Clause Analogy is Misplaced.

Defendant’s citation to *Cartwright v Barnes*, 304 F. 3d 1138 (11th Cir. 2002) at pp. 9-10 of the Response is a significant stretch. The Plaintiffs/Appellants in *Cartwright* invoked the Qualifications Clause, U.S. Const. art. 1, §2, cl. 2. as the basis of their constitutional challenge. *Id.* at 1139. The Qualifications clause requires Representatives to be twenty-five or older, seven years “a citizen” and an inhabitant of the State in which he shall be chosen. As a general

proposition, States may not impose additional qualifications for election to the House of Representatives beyond those contained in the Qualifications Clause. *See e.g., Storer v. Brown*, 415 U.S. 724 (1974) and *U.S. Term Limits, Inc v. Thornton*, 514, U.S 779 (1995). The 11th Circuit in 2002 made short work of the allegation that the 5% signature requirement of registered voters on a Libertarian Party candidate's nominating form constituted a violation of the Qualifications Clause: "We need not decide whether *Term Limits* provides an exhaustive definition of qualification applicable to all Qualifications Clause challenges. Instead, *Storer* and *Term Limits* identify certain types of ballot restrictions that are election procedures and not substantive qualifications and we conclude that Georgia's 5% requirement is likewise an election procedure and not a substantive qualification." *Id.* at 1141. In the present case before this Court the Plaintiff, James T. Parker, independent candidate for the Public Education Commission, District 4 does not invoke the Qualifications Clause, but rather the 1st and 14th Amendments. Complaint, Para. 2 (Dkt. 1, filed 7/3/14). The disparate treatment between minor party candidates and independent candidates is arbitrary and discriminatory in this case before this Court, just as the Florida Supreme Court held in *Danciu v. Glisson*, 302 So.2d 131 (Fla. 1974). See Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunctive Relief at 9 (Dkt. 2 filed 7/3/14).

II. The State Ignores the Fundamental Rights of the Voters in PEC District 4.

Defendants also give short shrift to the fundamental rights of voters "regardless of political persuasion" to cast their votes effectively. *See e.g. Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) and *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). 1,379 people signed James T. Parker's petitions and consideration of their fundamental right to cast their vote effectively is at issue as well. The New Mexico Supreme Court has repeatedly

recognized in ballot and petition challenges that it is not just the rights of the candidate that are at stake, but also the rights of the voters and people who signed a nominating petition, as well. *Charley v. Johnson*, 2010-NMSC-024 ¶ 10, 148 NM 246, 249 (2010) (“[W]e must keep in mind it is not just his [the candidate’s] interests that were at stake, but also the right of the citizens to nominate and vote for the candidate of their choice.”). See also *Gunaji v. Macias*, 2001-NMSC-028, ¶ 26, 130 N.M. 734, 31 P. 3d 1008 (recognizing “the basic right to vote for a candidate of one’s choice”) and *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (“laws restricting ballot access burden the right to cast one’s vote effectively”). Denying Plaintiff’s relief amount would amount to sanctioning the disparate treatment of independent voters and would deprive all of the voters who signed James T. Parker’s petitions of their right to “nominate and vote for the candidate of their choice”.

In other contexts, the United States Supreme Court has soundly denounced incursions on the right to “vote freely for the candidate of one’s choice...” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Creating classes of voters, some with more “voting power” is also prohibited: “How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and whatever their home may be in that geographical unit. That is required by the Equal Protection Clause of the Fourteenth Amendment.” *Gray v. Sanders*, 372 U.S. 368, 379 (1963). Under the law at issue in this case, a voter who signs an independent candidate’s nominating petition has a signature worth only one-third that of a signature on a minor party candidates nominating petition. See, *Moore v. Ogilvie*,

394 U.S. 814 (1969) (“The idea that one group can be granted greater voting strength than another is hostile to the one [person], one vote basis of our representative government.”). *Id.* at 818-819.

III. The Preliminary Injunction Should Issue.

Deadlines are fast approaching with respect to the 2014 general election ballot, and Plaintiff recognizes that the Court’s decision on his request for a preliminary injunction will probably, as a practical matter, conclude the lawsuit. While the State’s attorneys suggest expanding this litigation into a broad and sweeping constitutional challenge of the Election Code, all that is before the court is the issue of James T. Parker’s independent candidacy for PEC District 4. Accordingly, the relief sought by James T. Parker is narrowly tailored to prevent the acknowledged irreparable injury that will result if he is left off of the ballot. The relief sought is simply:

1. A declaration that, as applied to James T. Parker Section 1-8-51.E of the New Mexico Election Code is unconstitutional as inconsistent with the First and Fourteenth Amendments to the United States Constitution, as well as Article II, §18 of the New Mexico Constitution; and,
2. A preliminary injunction enjoining Defendant to place the name of James T. Parker on the 2014 general election ballot as a candidate for the PEC, District 4.

This relief will achieve the just purposes of preventing irreparable harm to James T. Parker and providing the voters who signed his petition and all of the voters in PEC District 4 a choice and the opportunity to consider an independent candidate.

James T. Parker, the father of two young school age daughters, wants the chance to run for the Public Education Commission in the upcoming election. Without a timely injunction and the opportunity of the voters of District 4 to choose the best candidate, his goal of timely

attempting to impact and improve the educational system for the benefit of his own daughters and for all of New Mexico by service on the Public Education Commission will be at best seriously delayed or, more likely, denied.

WHEREFORE, James T. Parker respectfully requests the Court to grant the Motion and for further relief as the court deems just and proper.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2014 I filed the foregoing Reply electronically through the CM/ECF system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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