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SARAH R. JARVIS

September 22, 2010

Claire Mee, Court Manager  
Vermont Superior Court  
Washington Unit  
65 State Street  
Montpelier, Vermont 05602

Trudell et al v. State of Vermont  
Docket No. 612-8-10 Wncv

Dear Claire:

Enclosed please find my Notice of Appearance on behalf of the plaintiffs, a Memorandum in Opposition to the State's Motion to Dismiss and a Request for an Expedited Hearing for filing in the above-captioned matter.

Thank you.

Sincerely,



Charles L. Merriman

CLM/dp

Enclosure

cc: Client  
Keith Aten, Esq.

STATE OF VERMONT

SUPERIOR COURT  
WASHINGTON UNIT

CIVIL DIVISION  
Docket No. 612-8-10 Wncv

GERALD TRUDELL and  
MYRON DORFMAN

vs.

STATE OF VERMONT, SECRETARY OF  
STATE DEBORAH MARKOWITZ

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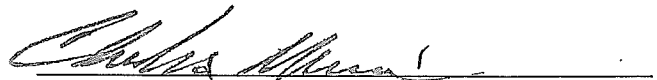
NOTICE OF APPEARANCE

Charles L. Merriman of Tarrant, Gillies, Merriman & Richardson of Montpelier, Vermont, hereby enters his appearance in the above-captioned matter on behalf of Gerald Trudell and Myron Dorfman and requests that copies of all documents be sent to him at P.O. Box 1440, Montpelier, Vermont, 05601-1440.

Dated at Montpelier, Vermont, this 22<sup>nd</sup> day of September, 2010.

TARRANT, GILLIES, MERRIMAN  
& RICHARDSON

BY:



Charles L. Merriman  
Attorney for Plaintiffs  
P.O. Box 1440  
Montpelier, Vermont 05601-1440

cc: Keith Aten, Esq.  
Clients

STATE OF VERMONT

SUPERIOR COURT  
WASHINGTON UNIT

CIVIL DIVISION  
Docket No. 621-8-10 Wncv

Gerald Trudell, Myron Dorfman, Laura Ziegler,	)
and Kevin Ryan	)
Plaintiffs	)
	)
v.	)
	)
State of Vermont, Secretary of State,	)
Defendant	)

PLAINTIFFS' OPPOSITION TO STATE'S MOTION TO DISMISS  
and  
PLAINTIFFS' REQUEST FOR AN EXPEDITED HEARING

Plaintiffs, by and through their attorneys, Tarrant, Gillies, Merriman & Richardson oppose the State's Motion to Dismiss filed September 15, 2010. In addition, Plaintiffs respectfully repeat their request, contained in their Petition for Declaratory Judgment, that the Court hold an expedited hearing on Plaintiffs' Petition. Defendant State of Vermont, through its attorney, has courteously authorized the undersigned to state that Defendant does not object to an expedited hearing.

Plaintiffs submit the following hurried Memorandum of Law in support of their position.

**I. Introduction.**

This case challenges the constitutionality of a recently enacted law changing the deadline by which independent candidates must file signature petitions for Vermont's November General Election. Prior to April 7 of this year, independent candidates were required to file petitions sixty days before the General Election. Independent candidates are now

required to file their petitions by the second Thursday after the first Monday in June.<sup>1</sup> 2010, No. 73, § 4.

Plaintiff Trudell, an independent candidate for U.S. Congress, attempted to file his petition containing the requisite number of signatures, during the week ending August 20, 2010.<sup>2</sup> The Office of the Vermont Secretary of State refused to accept Trudell's petition as timely, due to the change in the law. Trudell, therefore, will not appear on the November ballot unless this Court issues injunctive relief in the nature of a mandamus ordering the Secretary of State to include Trudell's name on the ballots.

On information and belief, the State is, at the moment of this writing, in the process of finalizing the ballots with the intent to print them soon. *Merriman Affidavit*, ¶ 2. Plaintiffs therefore respectfully request the Court hear and decide this matter as soon as possible to save the State the cost or reprinting the ballots in the event the Court grants Plaintiffs injunctive relief.

## **II. Plaintiffs' claims should not be dismissed.**

Defendant seeks dismissal of Plaintiffs' petition, under V.R.C.P. 12(b) (6), for failure to state a claim on which relief can be granted. *State's Motion*, p. 1. Defendant avers that the challenged legislation "serves important state regulatory interests" and does not impose unreasonable burdens on independent candidates. *Id.* Defendant's Motion should be denied for the following three reasons.

First, the purpose of a motion to dismiss is to test the law of the claim, not the facts which support it. *Levinsky v. Diamond*, 140 Vt. 595, 600 (1982), *overruled on other grounds by Muzzy v. State*, 155 Vt. 279 (1990). Moreover, a motion to dismiss cannot be granted "unless it

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<sup>1</sup> Petitions for independent candidates would be due September 3, 2010 under the old law and June 24, 2010 under the new law.

<sup>2</sup> Trudell does not recall for certain whether he attempted to file Monday the 16<sup>th</sup> or Tuesday the 17<sup>th</sup>. Trudell does, however, possess a letter from the Secretary of State's office acknowledging that Trudell attempted to file with the

is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” *Richards v. Town of Norwich*, 169 Vt. 44, 48 (1999). Taken together, these principals burden the State with simultaneously accepting the facts as averred by Plaintiff and showing that the facts are wholly incapable of supporting Plaintiffs’ claim to relief. The State’s Motion fails to meet this standard.

The State asserts that Act 73 is constitutional because “independent and major party candidates are [treated] identically” and because the Act “imposes no greater burden on independent candidates than on major party candidates[.]” *State’s Motion*, p. 15. Courts, however, have long recognized that “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.” *Jenness v. Fortson*, 403 U.S. 431, 442 (1997) quoted in *Anderson v. Celebrezze*, 460 U.S. 780, 801 (1983).

As articulated by the *Anderson Court*, partisan candidates and independent candidates are decidedly different. Partisan candidates enjoy the support of experienced political organizations whereas an independent candidate must build his or her own organization from the ground up. Partisan organizations and affiliations with the same assist candidates in a myriad of ways. Being part of the Progressive or Democratic or Republican Party – and being branded as such – unquestionably aids the candidate in, among other things: timely obtaining signatures; raising money, within and without the state; and providing access to the partisan organization’s database from which likely supporters and volunteers can be contacted.

While the State’s notion that uniform deadlines for partisans and independents is “fair” has some facile appeal, the reality, as noted by the *Anderson Court*, is quite different “. . . ‘equal treatment’ of partisan and independent candidates simply is not achieved by imposing the [same] filing deadline on both.” *Anderson v. Celebrezze*, 460 U.S. at 801.

Second, the State failed to address Plaintiffs’ weightiest claim: that Act 73’s new

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Secretary’s office during the business week ending August 20, 2010.

deadline unconstitutionally impinges on the right of those voters (estimated to constitute approximately 1/3 of all Vermont voters) whose political preferences often lie outside the existing political parties. *Complaint*, ¶ 7. This failure ties to another weakness of the State's Motion. The State's interest – bureaucratic, albeit valid, in nature – in maintaining stability in the state's political system, does not rise to the same level of importance as the State's interest in providing for a healthy, vigorous, engaged, and educated<sup>3</sup> electorate. 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. at 794 (internal citations omitted).

Finally, there was no operational need to change to the filing deadline for independent candidates; had the Secretary of State accepted Trudell's otherwise compliant petition, the Secretary could have simply included Trudell's name along with the names of the subsequently successful partisan candidates. Thus, the State had no valid operational basis for changing the deadline; only the facile claim, debunked by the *Anderson Court*, that independents and partisans should be required to file their petitions on the same day. Thus, the State's purported “precise interest” *Anderson v. Celebrezze*, 460 U.S. at 789) in unfairly burdening independent candidates and independent voters alike amounts to no more than a claim, refuted by the *Anderson Court*, that uniform deadlines is somehow “fair.”

### III. Conclusion.

For the reasons given, Plaintiffs respectfully request the Court DENY Defendant's


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<sup>3</sup> According to the State Legislators opined that an earlier deadline for independent candidates “enables votes to make an informed decision at the time of the primary election.” The *Anderson Court*, however, flatly refuted that

Motion to Dismiss. For the reasons given, Plaintiffs further request that the Court set this case for an expedited hearing.

Dated at Montpelier, Vermont, September 22, 2010.

PLAINTIFFS

BY:   
Charles L. Merriman  
Tarrant, Gillies, Merriman & Richardson  
Attorney for the Town of Colchester  
P.O. Box 1440  
Montpelier, Vermont 05601-1440

cc: Keith Aten, Esq.

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claim. *Anderson v. Celebrezze*, 460 U.S. at 796-98.

STATE OF VERMONT

SUPERIOR COURT  
WASHINGTON UNIT

CIVIL DIVISION  
Docket No. 612-8-10 Wncv

GERALD TRUDELL and  
MYRON DORFMAN

vs.

STATE OF VERMONT, SECRETARY OF  
STATE DEBORAH MARKOWITZ

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AFFIDAVIT OF CHARLES L. MERRIMAN

I, Charles L. Merriman, being first duly sworn, depose and say that:


1. I am the attorney for the plaintiffs in the above-captioned matter.
2. On Tuesday, September 22, 2010, I spoke with the Vermont Attorney General's

Office regarding this matter. Based on that conversation, it is my understanding that the State is finalizing the General Election Ballots and intends to produce and print the ballots in the immediate future.

3. The foregoing facts are based upon my own knowledge, information and belief.

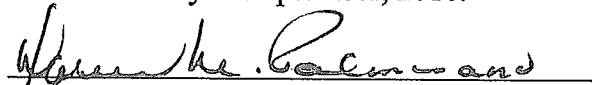
AND FURTHER DEPONENT SAYETH NOT.

Dated at Montpelier, Vermont, this 22<sup>nd</sup> day of September, 2010.

  
Charles L. Merriman

STATE OF VERMONT  
WASHINGTON COUNTY, SS.

SUBSCRIBED and sworn to before me this 22<sup>nd</sup> day of September, 2010.

  
Notary Public