UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIBERTARIAN PARTY OF ILLINOIS, LUPE DIAZ, JULIA A. FOX and JOHN KRAMER,	)	
Plaintiffs,	)	**Case Number: 1:12-cv-02511**
v.	)	**Judge Gottschall**
ILLINOIS STATE BOARD OF ELECTIONS and WILLIAM M. McGUFFAGE, JESSE R. SMART, HAROLD D. BYERS, BETTY J. COFFRIN, ERNEST L. GOWEN, JUDITH C. RICE, BRYAN A. SCHNEIDER and CHARLES W. SCHOLZ in their Official Capacities as Members of the Illinois State Board of Elections,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO MOTION TO DISMISS

Introduction

This memorandum and the accompanying Declaration of Richard Winger executed on June 18, 2012 ("Winger Decl.") are submitted in opposition to defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

The plaintiffs in this action are a minor political party (the Libertarian Party of Illinois, or "LP-Illinois"); its chairman (Lupe Diaz); its prospective candidate for Kane County Auditor in the general election to be held on November 6, 2012 (Julia A. Fox); and one of Fox's supporters (John Kramer). Defendant Illinois State Board of Elections ("Board") is comprised of its members and is the agency which has general supervision over the administration of the registration and election laws throughout the State of Illinois, 10 ILCS 5/1A-1. The individual

defendants are the members of the Board and are sued in their official capacities only.

Plaintiffs want to form a new political party within Kane County by means of plaintiff Fox's candidacy. They seek declaratory and injunctive relief from the requirement of 10 ILCS 5/10-2 ¶¶ 4 and 7 that a candidate for an at-large county office, such as plaintiff Fox, be part of a full slate of candidates for county offices (the "full-slate requirement") and from the June 25, 2012 deadline imposed by 10 ILCS 5/10-6 ¶ 1 for filing nomination petitions (the "filing deadline").[1] Each of these restrictions on access to the ballot, plaintiffs assert, is unconstitutionally burdensome and cannot be justified by a sufficient state interest.

Argument

I. PLAINTIFFS ARE NOT FORECLOSED BY THE ELEVENTH AMENDMENT

The Illinois State Board of Elections has "general supervision over the administration of the registration and election laws throughout the State." 10 ILCS 5/1A-1. It is commonplace for ballot access plaintiffs such as those at bar to sue in their official capacities the members of the agency that has overall responsibility for elections in the state and often to name the agency itself, which is comprised of its members, as a defendant. Examples are *Nader 2000 Primary Committee v. Illinois State Board of Elections*, No. 1:00-cv-04401 (N.D. Ill. 2000); *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006); *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768 (7th Cir. 1997).

In *Nader 2000*, *supra*, as in the present case, the named defendants were the Illinois State Board of Elections and its members in their official capacities. Judge Hibbler of this Court denied defendants' motions to dismiss the complaint and to dismiss the Board as a defendant and

[1]Plaintiffs no longer challenge the signature requirement set forth in 10 ILCS 5/10-2 ¶ 4.

granted the plaintiffs injunctive relief against the late-June filing deadline challenged in the present case. In *Lee, supra,* and *Libertarian Party, supra,* the named defendants were the members of the Illinois State Board of Elections in their official capacities. *See also, Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

The State Board of Elections is not merely comprised of its members (the individual defendants) it *is* the aggregation of its members. Dismissing plaintiffs' claims as against the Board would serve no logical or legal purpose because the individual defendants, who together are synonymous with the Board, would remain as defendants. Paradoxically, perhaps, if plaintiffs claims were dismissed as against the Board, the Board (as the aggregate of its members) would remain as a defendant.

The members of the Board are sued in their official capacities. While some "official capacity" claims against state officials have been deemed barred by the Eleventh Amendment, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101-02 (1984), such claims are not barred if they allege that a state official is attempting to enforce an unconstitutional state statute, *Ex Parte Young*, 209 U.S. 123 (1908), or is acting in violation of the federal constitution, *Greene v. Louisville & Interurban R.R.*. 244 U.S. 499 (1917). In the present case, plaintiffs assert that the full-slate requirement and the filing deadline are unconstitutional on their face and as applied to plaintiffs *and* that the defendants are acting in violation of the constitution by enforcing these requirements.

Defendants argue that the named defendants have an insufficient "enforcement connection" with the laws being challenged and that the proper defendants would be the local officials who have "the most obvious enforcement link" with those laws. On this analysis, a

group seeking to form a new party in many, but fewer than all, of the state's counties would have to sue all of the elections officials of all of those counties. Upon information and belief, no court has required such a practice.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

On most accounts the federal courts' construction of this seemingly straightforward language has been inconsistent and arguably incoherent, replete with fractured decisions grounded in conflicting theories.

In its five-to-four decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 100-185 (1996) (holding tribe's suit challenging violations of Indian Gaming Regulatory Act was barred by Eleventh Amendment), the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), another fractured decision in which a plurality of the Court had concluded that under Article I Congress could expand the federal courts' Article III jurisdiction. Justice Souter's lengthy dissent in *Seminole Tribe*, joined by Justices Breyer and Ginsburg,[2] addresses many of the inconsistencies in the Court's Eleventh Amendment decisions and argues that *Hans v. Louisiana*, 134 U.S. 1 (1890) and other pivotal cases were wrongly decided. The dissenters point out that "[t]he great weight of scholarly commentary agrees," *Seminole Tribe* at 110 n. 8: '"... the literature is remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states,'" citing Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1

[2]Justice Stevens also dissented, in a separate opinion.

(1988). In particular, "*Hans*'s holding that a principle of sovereign immunity derived from the common law insulates a State from federal-question jurisdiction at the suit of its own citizen" is simply wrong, *Seminole Tribe* at 117 (Souter, J. dissenting). Justice Souter further observed:

> ... plain text is the Man of Steel in a confrontation with "background principle[s]" and "postulates which limit and control." An argument rooted in the text of a constitutional provision may not be guaranteed of carrying the day, but insubstantiality is not its failing. ("For the purposes of *legal* reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration") .... That the Court thinks otherwise is an indication of just how far it has strayed beyond the boundaries of traditional constitutional analysis.
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> * * *
>
> I know of only one other occasion on which the Court has spoken of extending its reach so far as to declare that the plain text of the Constitution is subordinate to judicially discoverable principles untethered to any written provision [citing *Calder v. Bull*, 3 U.S. 386 (1798)].

Seminole Tribe at 116 n. 13 (Souter, J., dissenting) (internal citations omitted). Focusing on *Hans*, Justice Souter argued:

> Three critical errors in *Hans* weigh against constitutionalizing its holding as the majority does today. The first we have already seen: The *Hans* Court misread the Eleventh Amendment .... It also misunderstood the conditions under which common-law doctrines were received or rejected at the time of the founding, and it fundamentally mistook the very nature of sovereignty in the young Republic that was supposed to entail a State's immunity to federal-question jurisdiction in a federal court.

Seminole Tribe at 130 (Souter, J., dissenting) (internal citation omitted).

For these and other reasons, the *Seminole Tribe* dissenters and many commentators have urged a thoroughgoing reappraisal of the Court's Eleventh Amendment doctrine. However, the instant plaintiffs' claims require no such reappraisal to survive defendants' motion because, as explained above, they are viable under current law. For these reasons, plaintiffs' "official capacity" claims against defendants cannot be dismissed on Eleventh Amendment grounds.

II. STANDARDS FOR ADJUDICATING A MOTION TO DISMISS

In considering a Rule 12(b)(6) motion to dismiss, the court accepts the allegations contained in the complaint as true and draws all reasonable inferences in favor of the nonmoving party. The motion may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46. As explained below, the application of these standards requires that defendants' motion be denied.

III. STANDARDS FOR ADJUDICATING RESTRICTIONS ON ACCESS TO THE BALLOT

While the administration of the election process is largely entrusted to the states, they may not infringe on basic constitutional protections. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1974), citing *Dunn v. Blumstein*, 405 U.S. 330 (1972). *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (holding unconstitutional Ohio's election laws making it virtually impossible for a minor party to access the presidential election ballot), the first case in which the Supreme Court addressed the constitutional status of state restrictions on the electoral process, considered the nature of the rights at stake. The Court noted that such restrictions

> place burdens on two different, although overlapping, kinds of rights -- the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

Many electoral restrictions are, of course, justified by the state's legitimate regulatory interests. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Supreme Court has described the trial court's task in evaluating a constitutional challenge to a state-imposed restriction on access to the ballot as follows:

> It must 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 [restriction] is unconstitutional

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (holding that Ohio's March filing deadline for presidential candidate petitions was unconstitutionally burdensome).[3]

In *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (upholding Hawaii's prohibition against write-in voting in the context of a regulatory framework providing easy access to the ballot) the Supreme Court endorsed the *Anderson* methodology and examined the circumstances in which different levels of scrutiny should be applied, stating:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends [citing *Anderson* at 788]. Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest ... would tie the hands of States seeking to assure that elections are operated equitably and efficiently. * * *

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[3]The *Anderson* Court based its analysis on the First and Fourteenth Amendments generally and did not explicitly engage in a separate equal protection analysis. The Court stated, however, that it "rel[ied] ... on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment," *id*. at 786 n. 7, and indicated that those cases had been correctly decided. The earlier cases to which the Court referred employed traditional equal protection analysis but with varying levels of scrutiny. See *Williams v. Rhodes, supra*; *Jenness v. Fortson*, 403 U.S. 431 (1971); *Storer v. Brown, supra*; *American Party of Texas v. White*, 415 U.S. 767 (1974), *rehearing denied*, 417 U.S. 926; *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

* * *

> Under [*Anderson*'s "more flexible standard"], the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. ___, ___, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions [citing *Anderson* at 788] ....

The *Anderson* approach, as informed by *Burdick*, has been characterized as "a balancing test that ranges from strict scrutiny to a rational-basis analysis, depending upon the factual circumstances in each case." *Duke v. Clelland,* 5 F.3d 1399, 1405 (11th Cir. 1993), citing *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992). Actions of the states which affect access to the ballot are subject to a sliding scale, with more searching review applied to more burdensome regulations. *McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004). Voting regulations imposing "severe burdens" must be narrowly tailored to a compelling state interest, but "reasonable, nondiscriminatory restrictions" will usually be justified by "important regulatory interests." *Id.*, citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The *Anderson-Burdick* balancing test is a judicial attempt to achieve an "equilibrium between the legitimate constitutional interests of the States in conducting fair and orderly elections and the First Amendment rights of voters and candidates." *Libertarian Party of Maine v. Diamond*, 992 F.2d 365, 370 (1st Cir. 1993).

IV. THE JUNE 25TH FILING DEADLINE IS UNDULY EARLY

The first paragraph of ILCS 5/10-6 requires that plaintiff Fox's petition " . . . be filed with the county clerk of the respective counties not more than 141 but at least 134 days previous to the

day of [the] election," i.e., by June 25, 2012.

In *Nader 2000 Primary Committee, Inc. v. Illinois State Board of Elections*, No. 1:00-cv-04401 (N.D. Ill. 2000), Judge Hibbler of this Court denied defendants' motions to dismiss the complaint and to dismiss the Board as a defendant, and granted plaintiffs a preliminary injunction directing the members of the State Board of Elections to accept petitions that were notarized on or before August 7, 2000 and filed with the Board on or before August 29, 2000. *Id.*, Dkt. ## 24 and 25.

As in the present case, the defendants in *Nader 2000* were the Illinois State Board of Elections and its members in their official capacities. *Id.* The filing deadline provided in ILCS 5/10-6 was June 26th in 2000, when Judge Hibbler denied the motions to dismiss the complaint and to dismiss the Board as a defendant and granted the preliminary injunction. *Id.*; Winger Decl. ¶ 5. In *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004), discussed by defendants on page 9 of their memorandum, the defendants were also the members of the Illinois State Board of Elections. The relief which the 2004 Nader campaign sought from the 134-day filing deadline was denied principally because it had waited until June 27 to file the complaint. *Id.* at 736.

The Illinois 134-day (June 25th) deadline applies to presidential and non-presidential candidates. It is the third-earliest such deadline in the nation. Winger Decl. ¶ 8 and Appendix A. Only North Carolina (June 14) and Vermont (June 14) have earlier deadlines. *Id.* June filing deadlines have been determined to be too early in *Nader 2000, supra,* and at least five additional cases: *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (Arizona), *Sigler v. McAlpine*, No. 3AN-88-8695 (Superior Ct. 1988) (Alaska), *Merritt v. Graves I*, No. 87-4264-R (D. Kan. 1988), *Fulani v. Lau*, No. cv-N-92-535 (D. Nev. 1992), *Nader 2000 Primary Committee v. Hazeltine*,

110 F. Supp.2d 1201 (D.S.D. 2000).

Finally, it is important to note that the petition filing deadline for candidates seeking access to a partisan primary ballot in Illinois is only 106 days before the primary, nearly a month later than the 134-day deadline applicable to plaintiff Fox. 10 ILCS 5/7-12. The Illinois legislature has apparently determined that 106 days is sufficient to accommodate the challenge process,[4] the finalization of ballots, the timely distribution of absentee ballots, and the programming of voting machines. The discrepancy between the pre-primary and pre-general election filing deadlines undermines defendants' argument that "[t]he 134 day deadline is very much the type of nondiscriminatory and reasonable rule that furthers important state interests, and is constitutional under the *Burdick/ Anderson* balancing test." Def. Mem. at 8.

V. THE FULL-SLATE REQUIREMENT IS BURDENSOME AND UNNECESSARY

The full-slate requirement provided in 10 ILCS 5/10-2 ¶¶ 4 and 7 is even more rare than the June filing deadline. In fact, "Illinois is the only state that has ***ever*** had a law requiring newly-qualifying parties (or any parties) to submit a complete slate of candidates." (Emphasis added.) Winger Decl. ¶ 4. Furthermore, the full-slate requirement applies only to petitions to form a new party in the state or any of its political subdivisions. 10 ILCS 5/10-2 ¶¶ 4 and 7. There is no such requirement applicable to established (i.e. major) parties.

The full-slate requirement is unduly onerous in that it requires a putative new party to recruit candidates and obtain access to the ballot in myriad races that it may be unable or unwilling to contest. Indeed, 10 ILCS 5/10-2 ¶ 7 provides:

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[4]The time-consuming nature of the petition challenge process is of the state's own making. If there were fewer restrictions on access to the ballot, there would be fewer challenges.

> In the case of a petition to form a new political party within a political subdivision [such as Kane County, where plaintiff Fox is running for Auditor] in which officers are to be elected from districts and at large, such petition shall consist of separate components for each district from which an officer is to be elected. * * * Each sheet of such petition must contain a complete list of the names of the candidates of the party for all offices to be filled in the political subdivision at large, but the sheets comprising each component shall also contain the names of those candidates to be elected from the particular district. * * *

When the cases cited by defendants in support of the full-slate requirement (Def. Mem. at 12) were decided, independent candidate petitions had to be filed six months earlier than new party petitions. The rationale for the full-slate requirement was that without it, independent candidates would create sham new parties to avoid the earlier filing deadline. Subsequently, the deadlines for independent candidates were made identical to those for new parties as a result of the Seventh Circuit's decision in *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006).

A ballot access restriction that is unique to Illinois and applies only to new parties but not to established parties cannot be, as defendants assert, "a reasonable, nondiscriminatory regulatory limitation on new political parties and candidates that is consistent with the First Amendment, a requirement that furthers important state interests . . . ." Def. Mem. at 13. The 49 other states have not found it necessary to implement a full-slate requirement in service of any state interests relating to elections.

Conclusion

Plaintiffs are not foreclosed by the Eleventh Amendment. Singly and in combination, the ballot access restrictions about which they complain do not pass the *Burdick/Anderson* test. Furthermore, they subvert plaintiffs' "constitutional right . . . to create and develop a new political party." *Norman v. Reed*, 502 U.S. 279, 288 (1992). For the foregoing reasons,

defendants' motion should be denied.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on June 22, 2012, he caused to be filed through the Court's CM/ECF system the foregoing document, a copy of which will be electronically e-mailed to the parties of record.

S/Gary Sinawski