Case No. 10-1265

IN THE UNITED STATES DISTRICT COURT
FOR THE TENTH CIRCUIT

KATHLEEN CURRY, RICHARD MURDIE LINDA REES AND GARY HAUSLER	)
Plaintiff-Appellants	)
v.	)
BERNIE BUESCHER, in his official Capacity as Secretary of State of the State Of Colorado	)
Defendant-Appellee	)

On Appeal from the United States District Court for the District of Colorado
The Honorable Marcia S. Krieger, District Court Judge
District Court Case No. 09-cv-026380-MSK-CBS

AMICUS CURIAE BRIEF OF JACQUELINE SALIT & JOELLE RIDDLE IN SUPPORT OF APPELLANTS AND FOR REVERSAL OF DISTRICT COURT

Respectfully submitted,

Harry Kresky
Law Office of Harry Kresky
250 W. 57th St., Ste. 2017
New York, NY 10107
212-581-1516

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July 12, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES

OTHER

IDENTITY OF AMICI CURIAE

Jacqueline Salit, a resident of the State of New York, is the President of the Committee for a Unified Independent Party, Inc. (doing business as IndependentVoting.org), a not-for-profit corporation qualified under Section 501(c)(4) of the Internal Revenue Code. IndependentVoting.org has as its mission to further the interests of independent voters who now account for some 40 percent of the U.S. electorate.[1] Ms. Salit's political analysis of independent voters and non-partisan political reform is widely published. She hosts a bi-monthly conference call in which approximately 135 independent activists from some 35 states regularly participate. Ms. Salit believes that the issues raised by the instant appeal are of interest to independent voters across the country inasmuch as they impact on their right of non-association with political parties and on the quality of candidates for whom they can vote.

Joelle Riddle is a resident of the State of Colorado. She was elected to the La Plata County Commission in 2006 and was a plaintiff in the instant litigation, but is not a party to this appeal because she decided not to seek re-election in the upcoming general election, thereby rendering her claims as plaintiff moot. Ms. Riddle is the founder of Independent Voters for Colorado. As a former Democrat who disaffiliated and attempted to run for public office as an independent, Ms.

[1] See Gallup polls the first half of 2010 at http://www.gallup.com/poll/15370/Party-Affiliation.aspx.

Riddle is deeply concerned about the implications of this appeal for other persons who seek to fully participate in the political process after becoming independents. She is concerned that an affirmance of the decision appealed from will encourage the State of Colorado and other States to continue to pass legislation that subordinates the interests of independent voters and candidates to the interests of the two major political parties. Ms. Riddle is a regular participant in the conference call hosted by Ms. Salit.

ARGUMENT

Amici curiae Salit and Riddle respectfully submit that in rendering the decision appealed from, the district court approached the issues before it solely from the vantage point of the interests of the Democratic and Republican Parties and, more broadly, the system which they dominate. There is little, if any, recognition of the legitimacy of independent alternatives, nor of the rights of American citizens to participate in the political process as they choose, whether or not that is consistent with the interests of the parties. This is evidenced in such statements as:

> …the process [for allowing unaffiliated candidacies] actually undermines the public goals stated above, creating the potential for voter confusion among candidates with similar platforms and even enables sham candidates to "bleed off" support from other candidates with similar policy positions. (Decision of district court ("Dec."), p. 10)

> [the waiting period challenged here] is necessary to , among other things, to ensure against "potential candidate[s] defeated in the primary from petitioning onto the ballot, thereby defeating the purpose of the primary system," and "independent candidacies prompted by short-range political goals, pique, or personal quarrel." (Dec., p. 21)
>
> The presence of independent candidates in an election has distinct benefits, but if it is totally unregulated, it can increase voter confusion and distraction, political opportunism, and obscure rather than clarify the differences between policy positions. (Dec., p. 20)

This two party bias has long been an element of the jurisprudence in the area of voting rights. *See, Storer v. Brown*, 415 U.S. 724, 736 (1974):

> A State need not take the course California has, but California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison). It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system.

Storer, relied on by the Court below, upheld a one year waiting period before a person who leaves a political party can run as an independent or as the candidate of another party. Much has changed since the decision in *Storer*. The percentage of the electorate self-identifying as independent has grown from 31 percent in 1974 to some 40 percent today.[2] And recent polls conducted by CNN show that 59% of

[2] See http://people-press.org/party-identification-trend/. (Pew Research Center for the People and the Press) and footnote 1 above.

Despite significant changes in the alignment of the electorate referenced above , in 2006, of 7,282 state legislators in the U.S., 7 are members of minor parties and 8 are independents. National Conference of State Legislatures; *Ballot Access News*, vol. 22, nos. 8 (http://www.ballot-access.org/2006/120106.html, Dec. 1, 2006) and 10 (http://www.ballot-

independent voters nationally "are angry at the two parties".[3] Indeed, the fact that so many Americans are becoming independents is a strong indication that the fabric of the current partisan arrangement has worn thin. Arguably, the true stability of our system lies in having our electoral system be as flexible and welcoming of independents as possible, not in an interpretation of the law that makes the system more brittle and unforgiving.

Thus, a*mici curiae* respectfully submit that restrictions on participation in the political process such as that upheld by the district court, threaten, rather than contribute to the stability of our system. The rise of political independence and the resulting challenges to the dominance of the two parties and of the party system are healthy assertions of the power of democracy. Many of the arguments now being advanced with respect to open primaries in many parts of the country feature the connection between the inclusion of independent voters and a more vigorous, participatory public policy debate.[4]

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access.org/2007/020107.html#14, Feb. 1., 2007), vol. 23, no. 8 (http://www.ballot-access.org/2007/020107.html#14, Dec 1 2007). Of 535 Members of Congress, two are not members of one the two major parties. Of the 50 states, all have governors that are Democrats or Republicans. w*ww.thegreenpapers.com.*

[3] John P. Avlon, "Democrats, prepare for independents' day", CNN, at http://www.cnn.com/2010/OPINION/07/07/avlon.independent.voters/

[4]Phil Keisling, "To Reduce Partisanship, Get Rid of Partisans", March 21, 2010 *New York Times* (op-ed), http://www.nytimes.com/2010/03/22/opinion/22keisling.html?_r=1

That the district court has confused the stability of the parties with the stability of the overall political system is apparent in several aspects of its decision. In considering plaintiffs' equal protection argument, it identifies as similarly situated a citizen who joins a party and then must wait 12 months before he or she can petition for a place on the ballot in that party's primary, and a citizen who leaves a party and seeks to run as an independent. (Dec. pp 14-19) Such is not the case. The former category of candidate, the last minute "party joiner," may have as their motive to force an unwanted party primary, or to disrupt the process in some way. The latter category (the "party leaver") is more likely, as with the plaintiff Curry herein, a party member, including an elected official, who leaves because he or she has a principled disagreement with the party's perspective. Such a candidate likely believes that they can better represent their constituents as an independent, or that dissatisfaction with the viewpoint and candidates of the parties requires giving the voters another choice in the general election.[5] From the vantage point of the party, neither situation is desirable. But, from the vantage point of the voters they could not be more different. The former is an attempt to manipulate the party system which the party may legitimately seek to protect itself against. The latter is a constitutionally protected effort to present voters with another choice.

[5] Indeed, the parties stipulated that Curry changed her registration to unaffiliated after concluding that the "goals[,] political philosophy and beliefs of the Democratic leadership and the interests of her and her constituents in her district had diverged." Appellants' Opening Brief, pp. 8-9.

In addressing plaintiffs' First Amendment argument, the district court reasoned, on page 21, that the restriction in question here is necessary, "among other things, to ensure against "potential candidate[s] defeated in the primary from petitioning onto the ballot, thereby defeating the purpose of the primary system." Such candidates are commonly called "sore losers." And, there is a mechanism to address this, the "sore loser" statute. Enacted in many states, it prevents a candidate who loses his or her party's primary from running as an independent in the general election for which they sought the party's nomination.[6] Here, as well, the district court, perhaps out of confusion, gives undue deference to the interests of the parties and insufficient attention to the fact that exodus from the major parties can be a legitimate expression of a candidate, or voter's changing political views, for which they should not be penalized. The district court's failure to address the over breadth of the statute in question as a solution to the "sore loser" problem is a manifestation of this. Look at the situation of plaintiff Curry. She is not a "sore loser." She acted from principle, disaffiliating with an election upcoming, rather than running again as a Democrat when to do so would have made her either a disingenuous winner or a disgruntled sore loser. What public policy is served by applying the waiting period to her? It stifles competition by

[6] For example, in Illinois a candidate who loses his or her party primary is forbidden to run as the candidate of another party or as an independent in the general election for which they sought the party's nomination. *See* 10 ILL. COMP. STAT. 5/10-2, 3

depriving the voters of a viable independent candidate on the ballot in November. It does, however, serve the interest of the Party by ensuring that its candidate will not have to face Curry as a ballot qualified candidate (as opposed to a write in) in November.

In sum, in the matter of Kathleen Curry, the decision to become an independent is not unique. This is true of a growing number of officeholders formerly associated with both major parties, including New York City Mayor Michael Bloomberg, Florida Governor Charlie Crist, and Massachusetts State Treasurer Tim Cahill.[7] As important, growing numbers of American voters are becoming independents. Colorado must respect that trend and act accordingly.

[7] See, "Bloomberg severs G.O.P. ties, fueling further talk of '08 bid," *New York Times*, June 20, 2007; "Charlie Crist becomes an independent man," *Miami Herald*, April 29, 20l0; "Cahill prepares to leave his party," *Boston Globe*, July 7, 2009.

CONCLUSION

For all of the above reasons, the decision of the district court should be reversed and the relief sought granted to plaintiffs.

Dated: New York, NY
July 12, 2010

Respectfully submitted,
Law Office of Harry Kresky
250 West 57th Street
New York, NY 10107
(212) 581-1516
hkresky@harrykreskylaw.com

/s/
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By Harry Kresky

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32 (A)(7)(B)

Pursuant to F.R.A.P. 32(a)(7)(c), counsel for Amici Curiae hereby certifies that the foregoing brief complies with the volume limitations of F.R.A.P. 32 (a)(7)(B) and that the brief contains 1,773 words as measured by the word processing system (Microsoft Word 2007) used to prepare this brief.

/s/ Harry Kresky

DIGITAL CERTIFICATION

I do hereby certify that these digital submissions have been scanned with the most recent version of Norton Anti-Virus, Version 360, updated on July 13, 2010 and, according to the program, are free of viruses; and all required privacy redactions have been made.

/s/ Harry Kresky

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 13th day of July, 2010, a true and correct copy of the foregoing **AMICUS BRIEF** was filed and served via CM/ECF (an exact copy of hard copy to be filed), and that a true and correct copy was sent via the Court's CM/ECF system to the following and that one hard copy of this Amicus Brief will be sent via First Class, U.S. Mail, postage prepaid on or before July 13, 2010 addressed as follows:

William E. Zimsky, Esq.
Abadie & Schill, PC
1099 Main Avenue, Suite 315
Durango, CO 81301

zimsky@durangolaw.biz

Maurice G. Knaizer, Esq.
Deputy Attorney General
1525 Sherman Street
Denver, CO 80203

maurie.knaizer@state.co.us

/s/ Harry Kresky