IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

24TH SENATORIAL DISTRICT REPUBLICAN COMMITTEE;
KENNETH H. ADAMS, individually and as Chairman of the 24th Senatorial District Republican Committee,

Plaintiffs - Appellants,

and

DANIEL MOXLEY,

Intervenor/Plaintiff,

v.

JAMES B. ALCORN, in his official capacity as Chairman of the Virginia State Board of Elections;
CLARA BELLE WHEELER, in her official capacity as Vice-Chairman of the Virginia State Board of Elections;
SINGLETON B. MCALLISTER, in her official capacity as Secretary of the Virginia State Board of Elections;
VIRGINIA DEPARTMENT OF ELECTIONS;
EMMETT W. HANGER, JR.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA AT HARRISONBURG

PLAINTIFF/INTERVENOR DANIEL MOXLEY'S BRIEF IN REPLY TO APPELLEES' BRIEF

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GLOSSARY

The "Act" means Section 24.2-509(B) of the Code of Virginia.

The "Commonwealth" refers to all Appellants with the exception of Sen. Emmett Hanger

The "Commonwealth's Brief" means the Brief of All Appellees, Dkt. No. 41.

"LDC" means Appellant 24th Senatorial District Republican Committee.

"Moxley" means Appellant Daniel Moxley.

The "Plan" means the Plan of Organization of the RPV, as amended March 22, 2014.

The "RPV" or the "Party" means the Republican Party of Virginia.

TABLE OF AUTHORITIES

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ARGUMENT

The district court erred in holding that Appellant Moxley lacks standing to assert his equal protection claim.

I. Moxley's claim is not derived from, or dependent upon, the Party Plan.

Moxley has standing to challenge Va. Code § 24.2-509(B) (the "Incumbent Protection Act") quite apart from the standing of the Legislative District Committee ("LDC"). Moxley's standing is not derivative, or based on Party rules or freedom of association. Instead, he claims the statute's unequivocal assignment of the right to select the nomination method to the incumbent state legislator violates his right to equal protection of the laws. Moxley Br. at 12. *See Miller v. Cunningham*, 512 F.3d 98, 103-04 (4th Cir. 2007)(Wilkinson, J., dissenting from denial of rehearing en banc)("[Election laws that *facially* discriminate in *favor* of incumbents are unconstitutional").

The district court concluded the LDC lacks standing because the Party Plan ("Plan") of the Republican Party of Virginia ("RPV") acceded to assignment of the right to select the nomination method to incumbent legislators, and that Moxley thus also necessarily lacks standing. JA 369-370. That conclusion is erroneous.

The Act itself, by its very terms, denies Moxley's right to equal protection. *Miller*, 512 F.3d at 103. The Act's effect cannot somehow be

modified by the RPV's action. Further, the Party cannot cooperate with the Commonwealth to deny Moxley's constitutional rights. See, e.g., *Smith v. Allwright*, 321 U.S. 649, 664 (1944); *Rice v. Elmore*, 165 F. 2d 387 (4th Cir 1947). Moxley has standing to challenge the Act regardless of Party action. The Act delegates nomination method selection to incumbent legislators, leaving nothing further to be done by anyone but the incumbent, regardless of the Plan's language. Va. Code. § 24.2-509(B).

II. Moxley's standing does not depend on showing he has an absolute right to select nomination methods.

The Commonwealth's argument that Moxley lacks standing because he has no right to determine nomination methods is wrong for two reasons. First, the Commonwealth mischaracterizes Moxley's claim, which is that the statute unconstitutionally discriminates against challengers because it grants incumbents, similarly situated to challengers, the exclusive right to select nomination methods. Moxley Br. at 12. Moxley does not and need not claim he has an absolute right to select the nomination method under state law or Party rules. He merely claims the classification established by the Act violates the Equal Protection Clause. *Id*. *See Village of Willowbrook v. Olech*, 528 US 562, 565 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff … has been intentionally treated differently from others similarly situated and

… there is no rational basis for the difference….”). Second, the Commonwealth’s argument begs the legal question Moxley raised in his complaint in intervention. Moxley has a right to assert his claim that the Act assigns the choice of nomination methods to a single individual among others seeking nomination, in violation of the Equal Protection Clause. See *Miller*, 512 F.3d at 104. The Commonwealth’s argument is merely a bald assertion that Moxley has no right of action – the very issue to be resolved in this litigation on the merits. Com. Br. at 29. He has standing to pursue that substantive, constitutional claim.

III. Moxley’s constitutional claim cannot be waived by others.

Moxley has a right to challenge the Act independent of the LDC or RPV, which cannot be waived by the Party or any other person. *Lake James Fire Dept., Inc. v. Burke County, N.C.*, 149 F. 3d 277 , 280 (4th Cir. 1998) (“The contractual waiver of a constitutional right must be a knowing waiver, … voluntarily given….”). The Commonwealth argues the Party’s “acquiescence” in the Act’s assignment of nomination method selection to incumbents is not a waiver. Com. Br. at 18. That argument assumes the Party may delegate the prerogative to select nomination methods to an incumbent legislator, which the Party itself disclaims. RPV Amicus Br. at 13. The Party lacks unbridled discretion to prescribe nomination methods, as

the Commonwealth concedes. Com. Br. at 18. By its terms, the Act plainly limits the Party's discretion when an incumbent seeks renomination.

The Commonwealth insists the Party has not waived Moxley's right to equal protection because the Plan simply defers to incumbents' choice of nomination method. Com. Br. at 18. This argument is squarely at odds with the Plan language on which the Commonwealth relies. The Party rejects the proposition adopted by the district court and urged by the Commonwealth, that the Plan surrenders the Party's associational rights in Article V, D(1)(a). RPV Amicus Br. at 9. If the court concludes the Party has deferred, it is to "Virginia law" – not to the incumbent's choice. Assuming *arguendo* that the Plan does defer to "Virginia law" and surrenders the Party's associational rights, it still cannot surrender Moxley's right to challenge the Act on equal protection grounds. *Lake James Fire Dept., Inc.*, 149 F. 3d at 280.

IV. The Commonwealth mischaracterizes the Act as a mandate to nominate by primary.

The Commonwealth attempts to negate the equal protection claim by insisting erroneously the Act mandates primaries. Com. Br. at 38. Merely reading the statute confirms the error. Rather, the statute grants incumbents the right to select by which method the nominee of the party is chosen. Code of Virginia § 24.2-509(B).

V. Moxley's injury is substantial.

The Commonwealth contends Moxley's claim was properly dismissed below because he has not shown denial of any opportunity to appear on the general election ballot. Com. Br. at 32. In other words, the Commonwealth argues, in effect, that Moxley had no opportunity to secure his Party's nomination regardless of the method selected. Yet, the Commonwealth concedes there is a significant difference between a primary and a convention. Com. Br. at 41 n. 14. *See N.Y. St. Bd. of Elections v. Lopez Torres,* 552 U.S. 196 (2008). (Unlike the situation here, the primary there favored insurgents, while the convention system favored party leaders.). With a convention, Moxley's chances would have been greatly enhanced.

Pointing to factors of cost and convenience, the Commonwealth concludes that participation in conventions is substantially lower than primaries. J.A. 234-236. It ignores more important differences between the methods. In a primary, nominees may be selected by a plurality of voters if more than two candidates compete. Va. Code § 24.2-535. In a convention, by contrast, rules have historically required nominees to secure a majority of voters. JA 174 (Party Plan Art. VIII.J.4); Roberts' Rules of Order Art. VIII, Section 46;[1] and Article XI, Section 66.[2]

[1] http://www.robertsrules.org/rror-08.htm#46

Once an incumbent selects a primary when there are multiple challengers, the challengers' supporters will likely lose intensity, knowing the challengers will split the vote of those opposed to the incumbent and there is no runoff where the incumbent's opposition can coalesce behind a single challenger, as a convention allows. The incumbent's advantage under the Act is significant as incumbents can choose the method that maximizes turnout of their supporters and suppresses opposition turnout. *See Miller*, 512 F.3d. at 103-04.

The Commonwealth misrepresents the teaching of *American Party of Texas v. White,* 415 U.S. 767 (1974). The Court there did not adopt the rational basis test, which the Commonwealth claims should be decisive here. Com. Br. at 36-37. Rather, it adopted the balancing test established for election cases implicating equal protection in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), *citing American Party.* The *American Party* Court did not suggest "litigants must show a lack of opportunity to appear on the ballot" to assert an equal protection claim, as the Commonwealth maintains. Com. Br. at 32. The issue was specifically ballot access, and the Court never indicated that ballot access is the only election restriction implicating equal protection analysis.

[2] http://www.robertsrules.lrg/rror-11.htm#66

Finally, this case is factually distinguishable from *American Party* because the statute at issue there mandated the nomination method, whereas the Act delegates to incumbents the right to select one of several nomination methods.

The Commonwealth also misrepresents the *Lopez Torres* decision. There, in a free association claim, plaintiffs complained the state-mandated convention denied them a "fair shot" at the nomination. *Lopez Torres*, 552 U.S. at 205. The Court concluded: "What constitutes a 'fair shot' is a reasonable enough question for legislative judgment…. But it is hardly a manageable constitutional question for judges…." *Id.* at 205-06. Here, Moxley raises an equal protection issue that is appropriate for judicial determination and that is commonly decided where the plaintiff can show he and a specially advantaged person are similarly situated. *Baker v. Carr*, 369 US 186, 237 (1962) ("allegations of a denial of equal protection present a justiciable constitutional cause of action").

Moxley's injury is the necessary effect of the Act's plain language – the incumbent, the sole member of the Act's "favored class" – unilaterally selects the method best suited to his renomination. Moxley, and all other challengers, are disfavored. The Act is thus a blanket denial of equal protection.

VI. The Party Plan does not accede to Va. Code § 24.2-509(B).

Concluding that Moxley lacks standing, the district court relied on its construction of Article V, § D(1)(a) of the Plan as an acceptance of the effect of the Act [J.A. 369-370]. Thus the validity of that conclusion must be examined.

The district court's application of the plain meaning rule is unpersuasive. The relevant provisions, read together as they must be, can be construed to mean the Party reserves the right to challenge laws violating its associational rights. Art. II, ¶ 24 and Art. V, § D(1)(a). The language of the former provision was not given appropriate consideration by the district court. If there is a plain meaning in these combined provisions, it must be that the Party has not acceded to the Act. At minimum, these two provisions create an ambiguity. The district court erred, therefore, in concluding the plain meaning of the Plan accepts the Act.

The district court did not end its analysis with the plain meaning rule. It then misapplied rules of construction, which can be considered only if the language in question is ambiguous. *Hitachi Credit America Corp. v. Signet Bank*, 166 F. 3d 614, 624-25 (4th Cir. 1999). The Commonwealth gives Art II, ¶ 24 scarce attention and then construes it to mean what it obviously does not. Com. Br. at 16. The definition in ¶ 24 clearly reserves

the Party's right to challenge any Virginia election laws "to the extent that any provisions of such laws conflict with this Plan, infringe … freedom of association, or are otherwise invalid." It is unreasonable to construe that language as the Commonwealth has to mean the Party surrendered the right to challenge any law involving a primary, including the Act, which the Party contends infringes freedom of association. Com. Br. at 27.

VII. The applicable test is a balancing test, not "rational basis."

Contrary to the Commonwealth's contention, the test in an equal protection challenge in election case is – if the court finds no fundamental right implicating strict scrutiny – the balancing test of *Anderson v. Celebrezze*,460 U.S. 780 (1983), not the more deferential rational basis test. *See Wood v. Meadows*, *207 F. 3d 708, 710 (*4th Cir. 2000*), Schrader v. Blackwell*, 241 F.3d 783 (6th Cir. 2001); *Constitution Party of Kansas v. Biggs,* 813 F.Supp.2d 1274, 1277 (D. Kan. 2011); *Green Party of N.Y. v. Weiner*, 216 F.Supp.2d 176, 186 (S.D.N.Y. 2002). To determine whether the Act's creation of a favored class of incumbent legislators violates the Equal Protection Clause, the district court was required to examine the character of that classification, the importance of Moxley's interests at stake, and the specific interests asserted by the Commonwealth supporting the classification. *Illinois St. Bd. of Elections v. Socialist Workers Party*, 440

U.S. 173, 183 (1979). The justification for the classification must be based on precise interests, not suppositions. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). The Commonwealth's proffered justification is contrived, is unrelated to what the statute actually provides, and does not satisfy the balancing test. The Commonwealth argues, implausibly, that where the Act *results in a primary*, it serves important state interests and has a reasonable basis. Com. Br. at 36. But the statute does not mandate primaries. It grants incumbents exclusive rights to decide which of several nomination methods is selected. Va. Code. § 24.2-509 (B). That fails even the deferential rational basis test. In the equal protection context, the Commonwealth must justify the disparate treatment of candidates, not a mandated primary.

Conclusion

Wherefore, Plaintiff/Intervenor respectfully requests this Court to find the Act unconstitutional or, in the alternative, to hold that Moxley has standing to challenge the Act and remand to the district court for further proceedings.

Respectfully submitted,

Daniel Moxley
By Counsel

Date: August 25, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2015 I transmitted the foregoing document to the named parties' email addresses by means of an electronic filing pursuant to the ECF system.

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