

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE HONORABLE RICK PERRY,

Plaintiff,

v.

CHARLES JUDD, KIMBERLY BOWERS, and DON PALMER, members of the Virginia State Board of Elections, in their official capacities, and PAT MULLINS, in his official capacity as Chairman of the Republican Party of Virginia,

Defendants.

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Civil No. 3:11-cv-856

PLAINTIFF'S RESPONSE TO DEFENDANT PAT MULLINS' MOTION TO DISMISS

NOW COMES PLAINTIFF, HONORABLE RICK PERRY, and in response to Defendant Pat Mullins' Motion to Dismiss states:

- 1. Both the State Board of Elections (the "Board") and Pat Mullins, in his official capacity as Chairman of the Republic Party of Virginia have misread and misapplied Va. Code Ann. § 24.2-545(B) to be mandatory and not permissive. That section of the Virginia Code reads:

Any person seeking the nomination of the national political party for the office of President of the United States, or any group organized in this Commonwealth on behalf of, and with the consent of such person, may file with the State Board petitions signed by at least 10,000 qualified voters, including at least 400 qualified voters from each congressional district in the Commonwealth, who attest that they intend to participate in the primary of the same political party as the candidate for whom the petitions are filed. Such petitions shall be filed with the State Board by the primary filing deadline. The petitions shall be on a form prescribed by the State Board and shall be sealed in one or more containers to which is attached a written statement giving the name of the presidential candidate and the number of signatures on the petitions contained in the containers.

Such person or group shall also attach a list of the names of persons who would be elected delegates and alternate delegates to the political party's national convention if the person wins the primary and the party has determined that its delegates will be selected pursuant to the primary. The slate of delegates and alternates shall comply with the rules of the national and state party.

The State Board shall transmit the material so filed to the state chairman of the party of the candidate immediately after the primary filing deadline. The sealed containers containing the petitions for a candidate may be opened only by the state chairman of the party of the candidate. The state chairman of the party shall, by the deadline set by the State Board, furnish to the State Board the names of all candidates who have satisfied the requirements of this section. Whenever only one candidate for a party's nomination for President of the United States has met the requirements to have his name on the ballot, he will be declared the winner and no presidential primary for that party will be held.

2. Despite the clear wording of the statute that the filing of petition signatures is permissive, *Zinone v. Lee's Crossing Homeowner's Assn.*, 282 Va. 30, 714 S.E.2d 922, 925 (VA. Sup. Ct. 2011), Defendants have misapplied the statute and, under color of state law, have wrongfully and unlawfully deprived Governor Perry a position on the ballot for office of President of the United States in the Republican Primary.
3. On May 25, 2011, the State Board of elections adopted "Deadlines, Duties and Ballot Access Requirements", a copy of which is attached hereto as Exhibit A. Under the category of "Ballot Access Requirements", the Board stated: "Candidates wishing to participate in the presidential primary must follow the procedures outlined below." The Board, under the category of "Petition Requirements", then made this statement:

"Must be signed by not less than 10,000 qualified voters in Virginia, including at least 400 qualified voters from each of Virginia's eleven congressional districts, who attest that they intend to participate in the primary of the same political party as the candidate named on the petition.

Because many people who are not registered to vote will sign a petition, it is recommended that 15,000-20,000 signatures be obtained with at least 700 signatures from each congressional district.”

4. The “Deadlines, Duties and Ballot Access Requirements” document, to the extent it altered the requirements to be on the primary ballot in Virginia, was required to have been, but was not pre-cleared by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act.
5. Defendant, Pat Mullins, in his capacity as Chairman of the Republican Party of Virginia, issued on the Party’s website (www.rpv.org) an open undated letter establishing guidelines for all candidates seeking a position on the Republican Presidential and Senatorial primaries. (Exhibit B). In his letter, Defendant Pat Mullins wrote:

“Under the Code of Virginia, any candidate who wants to have their name placed on the March 1, 2012 Republican Presidential Ballot or the June 12, 2012 U.S. Senate Primary must collect the signatures of 10,000 registered voters statewide, with at least 400 signatures of registered voters from each of Virginia’s eleven Congressional Districts”.

6. In the next paragraph of Exhibit B, Defendant Pat Mullins creates a “safe-harbor” for candidates who submit 15,000 signatures of registered voters with at least 600 from each Congressional District. The statute, of course, does not have this safe harbor provision.
7. Exhibit B was not pre-cleared by the Republican Party of Virginia with the U.S. Department of Justice pursuant to Section 5 of the Voting Rights Act.
8. The Defendants jointly, and specifically Defendant Pat Mullins in reliance upon the actions of the Board, may not enforce a change in voting process or procedures without first obtaining pre-clearance pursuant to the Voting Rights Act. The failure to pre-clear Exhibits A and B, to the extent they create petition signature requirements the statute does not, means

there is no petition signature requirement to be on the primary ballot for the office of President of the United States.

9. Finally, neither Defendant can state a constitutionally justifiable state interest in requiring petition circulators to be eligible to vote in Virginia or in the extraordinary number of required petition signatures of qualified voters. Plaintiff adopts and relies upon the arguments set out in its Brief to the Court filed on January 6, 2012 in support of this response.

WHEREFORE, premises considered, Plaintiff Governor Rick Perry prays the Motion to Dismiss of Defendant, Pat Mullins, be denied.

January 6, 2012

Respectfully Submitted,

THE HONORABLE RICK PERRY

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, I will electronically file the foregoing document with the Clerk of the Court using the CM/ECF System, which will then send a notification of such filing (NEF) to all counsel of record:

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