

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

CITIZENS IN CHARGE, MICHAEL
GROENE, and DONALD SLUTI,

Plaintiffs,

v.

JOHN A. GALE, in his official capacity as
Secretary of State of the State of Nebraska,

Defendant.

CIVIL ACTION NO. 09-_____

COMPLAINT

NATURE OF THE CASE

1. This is an action to enforce rights that lie at the core of protected political speech. At issue are three provisions of Nebraska law: Neb. Rev. Stat. § 32-618(2)(a), Neb. Rev. Stat. § 32-629(2), and Neb. Rev. Stat. § 32-628(4). The first sets out a signature-distribution requirement for would-be independent candidates, requiring them to obtain at least 50 signatures from at least one-third of Nebraska’s counties on a candidacy petition before they may appear on the ballot. The second requires petition circulators to be “electors” of the State of Nebraska. The third requires all petitions to contain certain language in large, red type. The plaintiffs claim that these provisions violate various rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983, and they ask this Court for declaratory and injunctive relief prohibiting state officials from enforcing the unconstitutional statutes now and in the future.

JURISDICTION AND VENUE

2. This action arises under the First and Fourteenth Amendments to the United States Constitution. This Court therefore has subject-matter jurisdiction under 28 U.S.C. § 1331 (providing for jurisdiction over federal questions).

3. The Court also has subject-matter jurisdiction under 28 U.S.C. §§ 1343(a)(3) and (4) (providing for jurisdiction over suits involving civil rights and the elective franchise), because this is an action to redress the deprivation of federal civil rights and rights guaranteed by the Equal Protection Clause.

4. For purposes of jurisdiction under 28 U.S.C. § 1343, this suit is “authorized” by 42 U.S.C. § 1983.

5. This Court has authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

6. The defendant resides within the boundaries of the District of Nebraska. Venue is therefore proper in the District of Nebraska under 28 U.S.C. § 1391(b).

PARTIES

7. Plaintiff Citizens in Charge is an educational non-profit organization dedicated to protecting and expanding the ballot initiative and referendum process in Nebraska and other states. The organization has members in Nebraska and other states who have participated in securing signatures for ballot initiatives in Nebraska in the past and who would like to do so in the future. The organization itself would also like to participate directly in Nebraska’s initiative process in the future by sponsoring or coordinating a petition drive.

8. Plaintiff Michael Groene is a Nebraska resident and registered voter. He has participated in securing petition signatures for ballot initiatives in Nebraska in the past and intends to do so in the future.

9. Plaintiff Donald Sluti is a Nebraska resident and registered voter. He wishes to run as an independent candidate for the office of Secretary of State of the State of Nebraska, but he believes that the statutes at issue in this case would render futile any attempt for him to gather signatures in order to appear on the ballot.

10. Defendant John A. Gale is the Secretary of State of the State of Nebraska. He is the State's chief election officer. He is charged with enforcing the election law and verifying petition signatures for independent candidates for national, state and other offices. He is sued in his official capacity only.

FACTUAL BACKGROUND

The Distribution Requirement

11. On March 1, 2007, Nebraska's Unicameral Legislature passed Legislative Bill 298 by a vote of 29-0-20.

12. Nebraska's Governor signed Legislative Bill 298 into law on March 7, 2007.

13. Among other things, Legislative Bill 298 amended Section 32-618(2)(a) of the Revised Statutes of Nebraska to increase the number of petition signatures required for the voters to place an independent candidate's name on the general-election ballot for a statewide partisan office from 2,000 signatures to 4,000 signatures, and to add a distribution requirement for those signatures.

14. As a result of the 2007 amendment, Section 32-618(2)(a) now provides as follows: "For each partisan office to be filled by the registered voters of the entire state, at least

four thousand, and at least fifty signatures shall be obtained in each of one-third of the counties in the state.”

15. Nebraska has 93 counties.

16. Nebraska’s counties range in total population from 463,585 (Douglas County) to 444 (Arthur County), according to the 2000 Census.

17. The average total population of Nebraska’s 93 counties is 18, 401, according to the 2000 Census.

18. The distribution requirement imposed by Legislative Bill 298 discriminates against residents of Nebraska’s heavily populated counties and in favor of residents of Nebraska’s sparsely populated counties by allocating equal power over the candidate-nomination process to counties of unequal population.

The Residency Requirement

19. On February 6, 2008, Nebraska’s Unicameral Legislature adopted Legislative Bill 39 by a vote of 31-14-4.

20. On February 19, 2008, by a vote of 30-17-2, Legislative Bill 39 became law notwithstanding the objections of the Governor.

21. Among other things, Legislative Bill 39 amended Section 32-629(2) of the Revised Statutes of Nebraska to provide that “only an elector of the State of Nebraska may qualify as a valid circulator of a petition and may circulate petitions under the Election Act.”

22. Section 32-110 of the Revised Statutes of Nebraska defines “elector” as “a citizen of the United States whose residence is within the state and who is at least eighteen years of age or is seventeen years of age and will attain the age of eighteen years on or before” the November election day of that calendar year.”

23. In light of Nebraska's definition of "elector," Legislative Bill 39 had the effect of imposing a residency requirement for petition circulators.

24. One of the purposes of Legislative Bill 39 was to prohibit the circulation of petitions in Nebraska by individuals from out of state.

25. The residency requirement imposed by Legislative Bill 39 applies to candidacy petitions and to initiative or referendum petitions.

26. The penalty for violating the residency requirement is that any petitions circulated by a non-resident will be declared invalid.

27. The circulation of petitions is core political speech.

28. The residency requirement imposed by Legislative Bill 39 reduces the pool of circulators available to support candidates or issue campaigns.

29. The residency requirement imposed by Legislative Bill 39 places a severe burden on the plaintiffs' First Amendment rights by making it more difficult for candidates and issue campaigns to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purposes of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidacies which can be implicit in a solicitor's efforts to gather signatures on the candidates' behalf.

30. The residency requirement imposed by Legislative Bill 39 is not justified by a sufficiently weighty state interest.

31. The residency requirement imposed by Legislative Bill 39 is not narrowly tailored to advance a compelling state interest.

The “Scarlet Letter” Provision

32. Section 32-628 of the Revised Statutes of Nebraska sets out some of the required contents of petitions prepared under Nebraska’s Election Act.

33. Subsection 4 of Section 32-628 (hereinafter the “Scarlet Letter” provision) provides as follows: “Each sheet of a petition shall have upon its face and in plain view of persons who sign the petition a statement in letters not smaller than sixteen-point type in red print on the petition. If the petition is circulated by a paid circulator, the statement shall be as follows: This petition is circulated by a paid circulator. If the petition is circulated by a circulator who is not being paid, the statement shall be as follows: This petition is circulated by a volunteer circulator.”

34. The statement required by the Scarlet Letter provision is the only part of Election-Act petitions that is required to appear in red type.

35. The statement required by the Scarlet Letter provision is the only part of Election-Act petitions required to appear in sixteen point type.

36. As a practical matter, the statement required by the Scarlet Letter provision will usually be the largest and most prominent text on petitions prepared under the Election Act.

37. The type-size and color requirement of the Scarlet Letter provision is designed to direct the voter’s attention to the Scarlet-Letter statement.

38. All petitions for candidates seeking access to Nebraska’s ballots by petition must contain the statement required by the Scarlet Letter provision.

39. All initiative and referendum petitions must contain the statement required by the Scarlet Letter provision.

40. Election-Act petitions submitted without the statement required by the Scarlet Letter provision will be declared invalid, and any signatures on such petitions will not be counted.

41. The statement required by the Scarlet Letter provision conveys the State's view that the paid or unpaid status of a petition-circulator is an important issue that Nebraska voters should consider in deciding whether or not to sign the petition.

42. The Scarlet-Letter statement "This petition is circulated by a paid circulator," is intended to be derogatory or pejorative.

43. The Scarlet-Letter statement "This petition is circulated by a paid circulator," is derogatory or pejorative.

44. The Scarlet-Letter statement "This petition is circulated by a paid circulator," dissuades some voters from signing petitions containing that statement and makes it more difficult for a paid circulator to gather signatures.

45. The Scarlet-Letter statement "This petition is circulated by a volunteer circulator," is not intended to be derogatory or pejorative.

46. The Scarlet-Letter statement "This petition is circulated by a volunteer circulator," is not derogatory or pejorative.

47. The Scarlet-Letter statement "This petition is circulated by a volunteer circulator," does not dissuade voters from signing petitions containing that statement.

48. The Scarlet Letter provision favors candidates and issue campaigns that use volunteer circulators and disfavors candidates and issue campaigns that use paid circulators.

49. The Scarlet Letter provision disadvantages candidates and issue campaigns that use paid circulators and advantages candidates and issue campaigns that use volunteer circulators.

INJUNCTIVE AND DECLARATORY RELIEF IS NECESSARY

50. An actual and justiciable controversy exists as to which the plaintiffs require a declaration of their rights.

51. Unless the requested injunctive relief issues, the defendant will continue to infringe the constitutional rights of plaintiffs and other voters.

52. The plaintiffs have no adequate remedy at law for the defendant's violations of their rights.

53. The plaintiffs are suffering irreparable harm as a result of the defendant's violations of the law and Constitution and the harm will continue unless declared unlawful and enjoined by this Court.

COUNT ONE

Equal Protection and Due Process

54. The distribution requirement contained in Legislative Bill 298 (2007) and codified in Section 32-618(2)(a) of the Revised Statutes of Nebraska violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983.

COUNT TWO

First and Fourteenth Amendments

55. The residency requirement contained in Legislative Bill 39 (2008) and codified at Section 32-629(2) of the Revised Statutes of Nebraska violates the First Amendment to the

United States Constitution, as incorporated by the Fourteenth Amendment to the United States Constitution and enforced by 42 U.S.C. § 1983.

COUNT THREE

First and Fourteenth Amendments

56. The Scarlet Letter provision codified at Section 32-628(4) of the Revised Statutes of Nebraska violates the First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment to the United States Constitution and enforced by 42 U.S.C. § 1983.

COUNT FOUR

Equal Protection

57. The Scarlet Letter provision codified at Section 32-628(4) of the Revised Statutes of Nebraska violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as enforced by 42 U.S.C. § 1983.

REQUEST FOR RELIEF AS TO ALL COUNTS

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. enter a declaratory judgment that the distribution requirement contained in Legislative Bill 298 (2007) and codified in Section 32-618(2)(a) of the Revised Statutes of Nebraska violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution;
- b. enter a declaratory judgment that the residency requirement contained in Legislative Bill 39 (2008) and codified at Section 32-629(2) of the Revised Statutes of Nebraska and the Scarlet Letter provision codified at Section 32-628(4) of the Revised Statutes of Nebraska violate the First Amendment to the

United States Constitution, as incorporated by the Fourteenth Amendment to the United States Constitution;

- c. enter a declaratory judgment that the Scarlet Letter provision codified at Section 32-628(4) of the Revised Statutes of Nebraska violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
- d. enjoin the defendants from enforcing the distribution requirement, residency requirement, and Scarlet Letter provision;
- e. award the plaintiffs the cost of this action together with their reasonable attorneys' fees and expenses pursuant to 42 U.S.C. §§ 1973l(e) and 1988; and
- f. retain jurisdiction of this action and grant the plaintiffs such other relief which may in the determination of this Court be necessary and proper.

Dated: December 16, 2009

BRYAN SELLS
LAUGHLIN MCDONALD
American Civil Liberties Union Foundation, Inc.
230 Peachtree Street, NW
Suite 1440
Atlanta GA, 30303
(404) 523-2721
(404) 653-0331 (fax)

/s/ Amy A. Miller
AMY A. MILLER NSBA #21050
AC LU Nebraska Foundation
941 O Street #706
Lincoln NE, 68508
402-476-8091

ATTORNEYS FOR THE PLAINTIFFS