

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

JILL BORAK and CHARLES EPES,)
)
Plaintiffs,)
)
v.)
)
NANCY RODRIGUES, in her official)
capacity of Secretary, Virginia State Board of)
Elections, JEAN CUNNINGHAM, in her)
official capacity as Chair, Virginia State)
Board of Elections, HAROLD PYON, in his)
official capacity as Vice-Chair, Virginia State)
Board of Elections, KIRK SHOWALTER, in)
her official capacity as General Registrar of)
the City of Richmond, Virginia, and ROKEY)
W. SULEMAN, II, in his official capacity as)
General Registrar of Fairfax County, Virginia,)
)
Defendants.)
)
)
_____)

Civil No. _____

COMPLAINT

Preliminary Statement

1. This action is a First Amendment challenge under 42 U.S.C. § 1983 to a new policy of the Virginia State Board of Elections (SBE) that needlessly targets political expression for censorship and suppression by prohibiting voters from wearing campaign buttons, stickers, t-shirts, or similar apparel to the polls on Election Day. The policy, a misguided attempt to interpret a Virginia statute barring electioneering at polling places, bears no relation to the Commonwealth's legitimate interest in maintaining safe, orderly, and fair polling places, and serves only to severely infringe upon the fundamental right of citizens to engage in silent, passive, non-disruptive political expression. Such political expression is wholly consistent with

the nature and purpose of polling places, which are set aside and dedicated for citizens in a democracy make the ultimate expression of political choice. The SBE's policy violates the principle that the protection of free expression is the first object of government. The plaintiffs seek an injunction prohibiting further enforcement of the policy and requiring its repeal.

Jurisdiction

2. This action arises under the Constitution of the United States and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to Article III of the United States Constitution and 28 U.S.C. § 1331, and has supplemental jurisdiction over the plaintiffs' state law claim pursuant to 28 U.S.C. § 1367 (a). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202. Venue in this Court is proper under 28 U.S.C. § 1391(b) as all the Defendants are residents of Virginia and reside within the Eastern District of Virginia, and the events giving rise to the plaintiffs' claims have and continue to take place within the Eastern District of Virginia.

Parties

3. Plaintiff Jill Borak is a registered voter in Fairfax County, Virginia.

4. Plaintiff Charles Epes is a registered voter in Richmond, Virginia.

5. Defendants Nancy Rodrigues, Jean Cunningham, and Harold Pyon are the members of the SBE. Collectively, they have the authority to "supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections," and to "make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws." Va. Code § 24.2-103(A). They are sued in their official capacities.

6. Defendants Kirk Showalter and Rokey W. Suleman, II are the general registrars of the City of Richmond and Fairfax County, respectively. As such, they are responsible for enforcing the SBE policy challenged herein.

Factual Allegations

7. Section 24.2-604(A) of the Virginia Code states:

During the times the polls are open and ballots are being counted, it shall be unlawful for any person (i) to loiter or congregate within 40 feet of any entrance of any polling place; (ii) within such distance to give, tender, or exhibit any ballot, ticket, or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote; or (iii) to hinder or delay a qualified voter in entering or leaving a polling place.

8. Any violation of Virginia Code § 24.2-604(A) is a Class 1 misdemeanor, punishable by up to a year in jail, a fine of up to \$2,500 or both. Va. Code § 24.2-604(E).

9. Prior to October 2008, the general registrars in the various Virginia localities had differing opinions as to whether this statute prohibited voters from wearing campaign buttons, t-shirts, and other apparel to the polls. As a result, some of those registrars prohibited voters from wearing such apparel, and others did not.

10. To the best of plaintiffs' knowledge, in those localities where political apparel was allowed, such apparel did not cause any disruption at the polls, nor did it cause other voters to be intimidated or unduly influenced.

11. On October 14, 2008, the SBE adopted Policy 2008-007, purporting to interpret Virginia Code § 24.2-103(A). Policy 2008-007 provides, in relevant part:

The phrase, "it shall be unlawful for any person... to...exhibit... other campaign material" within the Code of Virginia, § 24.2-604 shall be interpreted as:

No person shall be allowed to show, display, or exhibit any material, object, item, advertisement, or piece of apparel, which has the purpose of expressly advocating the election or defeat of a clearly identified candidate.

12. Following the adoption of Policy 2008-007, the SBE sent guidelines for administering the policy to local general registrars. According to the guidelines, if a voter wears items or apparel prohibited by Policy 2008-007 to the polls, an election official should ask him to remove it or cover it up. If the voter refuses to comply, the election official is to complete an “incident report” to be forwarded to the local Commonwealth’s Attorney.

13. On Tuesday, November 4, 2008, plaintiff Jill Borak went to her local polling place, a high school in Fairfax County Virginia to vote in federal and local elections. She wore a sticker that said “Obama ’08.”

14. Ms. Borak wore the sticker in order to express her pride in her choice of candidate. She did not intend or expect the sticker to influence any other voters in their choices.

15. Ms. Borak’s sticker did not cause any kind of disruption at the polls and did not invade the privacy of any other person at the polling place.

16. At the entrance to the school cafeteria, where the voting was taking place, a poll worker stopped Ms. Borak and told her to remove her sticker. Ms. Borak asked if she had to remove it, and the poll worker said yes, that it was illegal to wear such items while voting. Ms. Borak asked if this was a new law, and the poll worker said yes, it was new this year. Ms. Borak took off her sticker and put it in her pocket.

17. Ms. Borak was greatly distressed that she was not allowed to engage in silent, passive, personal expression at her polling place, and that her two young children, who accompanied her, had to hear a government official telling her that such expression was illegal. Her son asked her repeatedly why she had to take the sticker off and why it was “illegal.”

18. On Tuesday, November 4, 2008, plaintiff Charles Epes went to his local polling place to vote in federal and local elections. He wore a button on which was written “Obama/Biden.”

19. When he presented himself at the check-in table, a poll worker told him that he had to remove the button. When he asked why, he was told that no campaigning was allowed in the polling place. He responded that he was not campaigning, but was told that it was the law and that he had to remove the button. When he asked what would happen if he did not take off the button, the poll worker said that he would not be allowed to vote. At that point, another poll worker suggested that he cover up the button, and he was given a paper hospital smock. He was then allowed to vote.

20. Mr. Epes wore the button in order to express his pride in his choice of candidate. He did not intend or expect the button to influence any other voters in their choices.

21. Mr. Epes’ button did not cause any kind of disruption at the polls, other than the delay caused by his conversation with the poll workers, and did not invade the privacy of any other person at the polling place.

22. The plaintiffs intend to wear buttons, stickers, t-shirts or other apparel supporting their candidates in future elections.

23. Besides infringing on the plaintiffs’ freedom of expression, the SBE policy prohibiting campaign apparel is vague, and its enforcement is in the hands of poll workers who are not familiar with legal terms of art such as “express advocacy” and are given no guidance for determining whether apparel “clearly identifies” a “candidate or issue.” As a result, the policy is arbitrarily and capriciously enforced.

24. For example, registrars and poll workers in some jurisdictions chose to ignore the regulation altogether. Conversely, an election official in Goochland County announced that that locality would prohibit apparel that contained “implied” as well as “express” advocacy.

25. The vagueness of Policy 2008-007 also allows poll workers to selectively suppress political expression with which they disagree in violation of the First Amendment’s prohibition on viewpoint discrimination.

Causes of Action

COUNT I Violation of Virginia Law

26. Under Virginia law, the SBE may only issue rules, regulations, and policies that are consistent with and further the policies of the elections laws enacted by the General Assembly of Virginia.

27. Policy 2008-007 is invalid as it is in conflict and inconsistent with the legislative policy established by Va. Code § 24.2-604(A). On its face and by fair construction, Va. Code § 24.2-604(A) is intended to restrict only active, disruptive electioneering in polling places and is not intended to authorize the SBE to promulgate a policy or rule that prohibits passive, undistruptive political speech.

COUNT II Violation of the First Amendment

28. The area within a forty-foot radius of a polling place constitute a limited public forum in that polling places are areas established by tradition and by government policy and practice as places for the expression of political choice and preferences.

29. SBE Policy 2008-007's prohibition on campaign apparel violates the First Amendment because it is a content-based restriction on speech that is not narrowly tailored to serve any compelling governmental interest.

30. Policy 2008-007 violates the First Amendment because it is vague, indefinite and without sufficient standards to guide officials charged with its enforcement thereby creating a grave danger that political expression will be censored and suppressed on the basis of viewpoint.

31. Alternatively, the SBE prohibition on campaign apparel is not reasonably related to any legitimate governmental interest, but is based upon an undifferentiated and unsupported fear of disruption. Polling places are public places and their dedication to use for particular purpose is not inconsistent with the exercise of passive, undisruptive political speech.

32. The prohibition on campaign apparel imposed by Policy 2008-007, on its face and as applied to the plaintiffs, violates the plaintiffs' right to freedom of speech under the First Amendment to the United States Constitution.

Request for Relief

Plaintiffs respectfully request the following relief:

- A. A declaration that the SBE prohibition on campaign apparel violates the First Amendment;
- B. An injunction prohibiting any enforcement of the SBE policy and requiring its repeal;
- C. Plaintiffs' reasonable costs and attorneys' fees, pursuant to 42 U.S.C. § 1983;
- D. Such other relief as the Court deems just and proper.

Respectfully submitted,

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