

United States District Court
District of Kansas

Robert Dool, Julie Brown, Donald D. Rosenow, and Thomas C. Schermuly,
Plaintiffs,

v.

Anne E. Burke, in her official capacity as Chairman of the Kansas Supreme Court Nominating Commission; **Kerry E McQueen, Patricia E. Riley, Matthew D. Keenan, and Jay F. Fowler**, in their official capacities as Attorney Members of the Kansas Supreme Court Nominating Commission; **Carol Gilliam Green**, in her official capacity as Clerk of the Kansas Supreme Court,
Defendants.

Case No. 10-1286-MLB-KMH

Verified Complaint for Declaratory and Injunctive Relief

Plaintiffs Robert Dool, Julie Brown, Donald D. Rosenow, and Thomas C. Schermuly complain against Defendants as follows:

1. This is a facial and as-applied challenge to the constitutionality of the Kansas Constitution, Article III, Section 5(e), and to Kansas Statutes Sections 20-119 through 20-123, under the Fourteenth Amendment to the Constitution of the United States.

2. Plaintiffs challenge Kan. Const. art. III, § 5(e) and Kan. Stat. §§ 20-119 to -123 because the system they establish excludes Kansas voters from participation in the election of the Chairman and Attorney Members of the Kansas Supreme Court Nominating Commission and, therefore, denies Kansas voters the right to equal participation in the selection of the Justices of the Kansas Supreme Court and denies them the right to vote for these officials.

3. Plaintiffs challenge the system for selecting Supreme Court Justices in Kansas with respect to the composition of the Kansas Supreme Court Nominating Commission. The Commission is given the power to select the nominees for vacant positions on the Kansas Supreme Court, as well as on the Court of Appeals. Kan. Const. art. III, § 5(a); Kan. Stat. §§ 20-132, 30-3004. The Governor must select one of the Commission's three nominees to fill a vacancy. Kan. Const. art. III, § 5(a). If the Governor fails to make an appointment from the Commission's list, the chief justice of the Kansas Supreme Court is given the power to make the appointment from the list. *Id.* § 5(b). Invariably, one of the three nominees selected by the Commission will become a justice or judge in Kansas, so that the Commission determines the composition of the judiciary in Kansas. Five of the nine members of the Commission are elected exclusively by the members of the bar of Kansas. Kan. Stat. §§ 20-119, -120. This restricted election denies the citizens of Kansas the right to vote and the right to participate equally in the selection of justices and judges in Kansas.

Jurisdiction and Venue

4. This action arises under Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, and the Fourteenth Amendment to the Constitution of the United States.

5. The jurisdiction of this Court over the claims arising under 42 U.S.C. § 1983 is based on 28 U.S.C. § 1343(a). The jurisdiction of this Court over the claims arising under the Fourteenth Amendment rests on 28 U.S.C. §§ 1331 and 1343(a).

6. Venue is proper under 28 U.S.C. § 1391(b) because the principal defendants, the Members of the Kansas Supreme Court Nominating Commission in their official capacities, reside in the District of Kansas.

Parties

7. Plaintiff Robert Dool is a citizen and registered voter of the State of Kansas. He resides in Wichita, Sedgwick County, Kansas.

8. Plaintiff Julie Brown is a citizen and registered voter of the State of Kansas. She resides in Olathe, Johnson County, Kansas.

9. Plaintiff Donald D. Rosenow is a citizen and registered voter of the State of Kansas. He resides in Clay Center, Clay County, Kansas.

10. Plaintiff Thomas C. Schemuly is a citizen and registered voter of the State of Kansas. He resides in Wichita, Sedgwick County, Kansas.

11. Defendant Anne E. Burke is the current Chairman of the Kansas Supreme Court Nominating Commission.

12. The Chairman is selected through an election limited to the members of the bar of Kansas who are residents of and licensed to practice law in Kansas. Kan. Const. art. III, § 5(e); Kan. Stat. § 20-119.

13. The Chairman acts under color of law and is sued in her official capacity as a member member of the Commission.

14. Defendants Kerry E. McQueen, Patricia E. Riley, Matthew D. Keenan, and Jay F. Fowler are the four attorney members of the Kansas Supreme Court Nominating Commission.

15. The four attorney members are selected from each congressional district in Kansas through an election limited to the members of the bar of Kansas who are residents of the relevant congressional district and licensed to practice law in Kansas. Kan. Const. art. III, § 5(e); Kan. Stat. § 20-120.

16. The four Attorney Members of the Commission act under color of law and are sued in their official capacities.

17. The Chairman, Attorney, and Non-attorney Members of the Commission all serve four-year terms. Kan. Const. art. III, § 5(f); Kan. Stat. § 20-125.

18. The Kansas Constitution empowers the Defendants who are members of the Commission, acting by a majority of the Commission, to nominate three persons from among whom the Governor must select to fill a vacancy on the Kansas Supreme Court. Kan. Const. art. III, § 5(a); Kan. Stat. §§ 20-119, -120, -132.

19. Carol Gilliam Green is the current Clerk of the Kansas Supreme Court.

20. The Clerk of the Kansas Supreme Court acts under the color of law and is sued in her official capacity.

21. The Kansas Statutes empower the Clerk to conduct the elections of the chairman and the attorney members of the Nominating Commission. Kan. Stat. §§ 20-119 to -123.

Facts

22. The Kansas Supreme Court Nominating Commission is empowered to select the nominees for vacancies on the Kansas Supreme Court and Court of Appeals. Kan. Const. art. III, § 5(a); Kan. Stat. Ann. §§ 20-132, 30-3004.

23. The composition of the Commission is set forth in the Kansas Constitution as follows:

One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each

congressional district, appointed by the governor from among the residents of each such district.

24. The Kansas Constitution confers upon the Commission, as an entity created by the Constitution, the power “to nominate and submit to the governor the names of persons for appointment to fill vacancies in the office of any justice of the supreme court.” Kan. Const. art. III, § 5(d); *see also The Federalist No. 41*, at 223 (James Madison) (Clinton Rossiter ed., 1999) (stating that the purpose of a constitution is to establish “the particular structure of the government and the distribution of this power among its several branches”).

25. At all times, provided there are no existing vacancies, five of the nine members of the Commission are members of the Kansas bar. Kan. Stat. § 20-127.

26. The five bar members exercise majority control over the selection of nominees for vacant positions on the state courts of Kansas.

27. Five members of the Commission, that is, the Chairman and four Attorney Members are elected exclusively by the members of the bar in Kansas. Kan. Const. art. III, § 5(e), Kan. Stat. Ann. §§ 20-119, -120.

28. The Chairman and all Commission Members, both appointed and elected, serve four year terms. Kan. Stat. § 20-125. Terms begin on July 1. *See id.* at § 20-119.

29. In March of any year in which the chairman or an attorney member is to be elected, the Clerk of the Supreme Court sends out notice of the impending vacancy to the relevant bar members and calls for nominations. *Id.* at § 20-119, 20-120. Nominations are received by the Clerk, who then sends out ballots to the bar members. *Id.* After receiving and counting the votes, the Clerk records the result of the election and notifies the new members of the Commission of

their election. *Id.* at §§ 20-119, 20-120, 20-123. Only bar members may participate in these elections.

30. Plaintiffs, because they are not attorneys, have no say whatsoever in the selection of the five bar members of the Commission.

31. The election of these five members to positions on the Commission is not confirmed or ratified in any way by the state legislature. *See id.*

32. Chief Justice Robert E. Davis retired from the Kansas Supreme Court on August 3, 2010, and passed away on August 4, 2010.

33. The Kansas Supreme Court Nominating Commission has begun the process of selecting nominees to fill the vacancy created by the retirement of Chief Justice Davis. Applications will be accepted until September 1, 2010. By law, the Commission must review these applications and submit the names of three nominees to the Governor no later than sixty days from the creation of the vacancy. Kan. Stat. § 20-132. This means the Commission must submit nominees no later than October 3, 2010.

34. One of the three nominees selected by the Commission will invariably become a justice or judge on the Kansas Supreme Court because the Governor must fill the vacancy by choosing one of the nominees. Kan. Const. art. III, § 5(a)-(b).

35. The nominations from the Commission cannot be rejected by the Governor or the legislature. *See* Kan. Const. art. III, § 5(a)-(b).

36. The appointment of a nominee to fill the vacancy is not subject to any kind of confirmation by the legislature. *See* Kan. Const. art. III, § 5(a)-(b).

37. Upon receiving the nominations, the Governor has sixty days to make a selection to fill the vacancy. Kan. Const. art. III, § 5(b).

38. If the Governor fails to make an appointment within sixty days, the current Chief Justice of the Kansas Supreme Court will do so. *Id.*

39. The Commission also makes the nominations for vacancies on the Kansas Court of Appeals in the same manner. Kan. Stat. § 30-3004.

40. The Nominating Commission determines the composition of the judicial branch of government in Kansas.

41. Plaintiffs, as citizens of Kansas, are subject to the decisions of the Kansas Supreme Court and Court of Appeals and to the laws of Kansas as interpreted by the Kansas Supreme Court.

Count 1

The Selection of Judges in Kansas Violates the Fourteenth Amendment to the U.S. Constitution by Denying Plaintiffs the Right to Equal Participation in the Selection of Judicial Officials.

42. Plaintiffs re-allege and incorporate by reference all allegations contained in paragraphs one through forty-one set forth above.

43. The Fourteenth Amendment to the United States Constitution provides that, “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

44. The Equal Protection Clause guarantees to every citizen “the right to vote in elections without having his vote wrongfully denied, debased, or diluted.” *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970).

45. The right to vote is preservative of the fundamental right to self-governance, because that “[a]ny unjustified discrimination in determining who may participate . . . in the selection of public officials undermines the legitimacy of representative government.” *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969).

46. An arrangement that restricts an election to a certain group of citizens is subject to strict scrutiny. This “is required because some resident citizens are permitted to participate and some are not.” *Kramer*, 395 U.S. at 629.

47. Accordingly, “if a challenged statute grants the right to vote in a limited purpose election to some otherwise qualified voters and denies it to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’” *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969) (quoting *Kramer*, 395 U.S. at 627).

48. While the United States Supreme Court has approved basic residency, age, and citizenship requirements to participate in an election, “[p]resumptively, when all citizens are affected [by an election], the Constitution does not permit . . . the exclusion of otherwise qualified citizens from the franchise.” *Phoenix v. Kolodziecki*, 399 U.S. 204, 209 (1970).

49. If an entity performs a traditional government function that affects every citizen, all otherwise qualified citizens must be included in the election for that entity. *See Hellebust v. Brownback*, 42 F.3d 1331, 1334-35 (10th Cir. 1994).

50. Selectively giving a certain group of citizens more electoral influence and granting the franchise on a selective basis always poses “the danger of denying some citizens any effective voice in governmental affairs which substantially affect their lives.” *Kramer*, 395 U.S. at 627.

51. Public officials may be selected by election or through appointment. *Id.* at 629. But the Equal Protection Clause must be respected regardless of how an official is selected. While the appointment of officials may make the influence of each voter *indirect*, this is constitutional when the official making the appointment is “elected consistent with the commands of the Equal Protection Clause,” thereby ensuring that each voter’s influence is *equal* to that of other citizens. *Id.* at 627 n.7. Ultimately, each citizen must be given an equal voice in the selection of government officials, however indirect that voice might be.

52. In order to justify limiting an election to a certain group, the state must show that the elected official does not exercise normal government power and that the group is disproportionately interested in and affected by the powers exercised by the official. *Hellebust*, 42 F.3d at 1333-35. This disproportion must be substantial, such that there is a compelling reason to restrict the franchise to that group. *Cipriano*, 395 U.S. at 704; *Kolodziecki*, 399 U.S. at 209 (holding that the differences between the interest of the included group and the interests of all citizens must be “sufficiently substantial to justify excluding the latter from the franchise.”).

53. The state must then show that all citizens are “in fact substantially less interested or affected than those . . . included.” *Cipriano*, 395 U.S. at 704. Otherwise, the state law is not narrowly tailored to meet the compelling government interest.

54. The four Non-attorney Members of the Kansas Supreme Court Nominating Commission are appointed by the Governor, who is selected through an election in which no qualified citizen’s vote is denied or diluted. *See* Kan. Const. art. I, § 1.

55. Plaintiffs are granted the franchise to vote for the Governor, and their vote is not diluted. Kan. Const. art V.

56. The Chairman and the four Attorney Members of the Commission are selected through an election in which only resident members of the Kansas State Bar may participate. Kan. Const. art. III, § 5(e). All citizens who are not members of the bar are excluded from these elections.

57. Plaintiffs Robert Dool, Julie Brown, Donald D. Rosenow, and Thomas C. Schermuly are excluded from voting for the Chairman or any of the four Attorney Members of the Commission.

58. Compared to the members of the bar in Kansas, Plaintiffs Robert Dool, Julie Brown, Donald D. Rosenow, and Thomas C. Schermuly have substantially less influence over who is nominated to become a Kansas Supreme Court justice.

59. The nomination of judges is a traditional government function. U.S. Const. art. II, § 2.

60. Plaintiffs have a substantial interest in, and are significantly affected by, the justices and judges of Kansas's courts because "state court judges possess the power to 'make' common law . . . [and] have immense power to shape the States' constitutions as well." *Republican Party of Minnesota v. White*, 536 U.S. 765, 784 (2002).

61. Because the members of the Commission exercise a traditional government function that has an effect on all citizens of Kansas, the election of all members must be open to all citizens of Kansas who are qualified to vote.

62. The Supreme Court has recognized a "significant exception" where the selection of government officials can be restricted to a certain group of qualified citizens, but this case does not satisfy the exception. *Ball v. James*, 451 U.S. 355, 360 (1981).

63. The franchise may be restricted to a specific group of voters, while excluding other qualified citizens, when the official or government entity elected has a “special limited purpose” and its activities have a “disproportionate effect” on the specific group. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-28 (1973).

64. The duties of certain government officials and entities may be “so far removed and so disproportionately affect different groups that a popular election in compliance with [the Equal Protection Clause] might not be required.” *Hadley*, 397 U.S. at 56. But this exception does not apply in situations where the official or entity exercises general government power and performs a vital government function. *Id.*; *Ball*, 451 U.S. at 366.

65. To fall under this special limited purpose exception, the government entity, in this case the Kansas Supreme Court Nominating Commission, must serve a narrow, nominally governmental function and the members of the Kansas State Bar must be shown to have a disproportionate relationship with that function. *Id.* at 357.

66. A government entity has a narrow function that qualifies for the “special limited purpose” exception when it does not administer normal functions of government, has merely a nominal public character, and its duties are not a traditional element of governmental sovereignty such that it must answer to the people as a whole. *Id.* at 366-68.

67. The Members of the Commission are given the power to select nominees to fill vacant positions on Kansas’s courts, including the supreme court. The Governor must select one of the nominees, so that the Commission decides who will sit in judgment over the citizens of Kansas.

68. The nomination of justices and judges is a traditional function of government. The Commission has the power to nominate members of the judiciary, and therefore to determine the

composition of the third branch of government in the State of Kansas. *See* Kan. Const. art. III, § 5(a).

69. The aspect of the limited purpose of a government entity that would justify a restricted franchise is “the disproportionate relationship the [entity’s] functions bear to the specific class of people whom the system makes eligible to vote.” *Id.* at 370. The question is “whether the effect of the entity’s operations . . . [is] disproportionately greater than the effect on those seeking the vote.” *Id.* at 371.

70. In order to satisfy the limited purpose exception, not only must the effect of the Commission’s operations on the members of the Kansas State Bar be disproportionately greater than upon the Plaintiffs and all other qualified voters, *id.*, but Plaintiffs and all other qualified voters must be “in fact substantially less interested or affected” than the bar members, *Cipriano*, 395 U.S. at 704.

71. Plaintiffs are subject to the jurisdiction and decisions of the justices and judges of Kansas’s courts.

72. Plaintiffs are subject to the laws and constitution of the State of Kansas, which are interpreted and applied by the justices and judges of Kansas’s courts. *See, e.g., State v. Nelson*, 502 P.2d 841, 846 (Kan. 1972).

73. The Kansas Supreme Court determines the rights of Kansas’s citizens, including the rights of the Plaintiffs, under the constitution and laws of the State. *See, e.g., Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541, 549-50 (Kan. 1990).

74. Plaintiffs are legitimately and substantially interested in the composition of the third branch of their own government.

75. The selection and nomination of justices and judges substantially affects all of Kansas's citizens because of the power and authority entrusted to justices and judges.

76. While the members of the Kansas State Bar may have *different* interests in who the justices and judges are in Kansas, this interest is not substantially *greater* than the interest of all citizens of Kansas. *See Kolodziejski*, 399 U.S. at 212.

77. The government cannot show that the restriction of the election of Chairman and Attorney Members of the Commission, which nominates justices and judges and determines the composition of the Kansas judiciary, is narrowly tailored to a compelling government interest.

78. Nor does the selection of the Commission members qualify for the "special limited purpose" exception, because the Commission performs a normal function of government, does not have a merely nominal public character, and does not disproportionately affect the members of the Kansas State Bar compared to the rest of Kansas's citizens, including Plaintiffs.

79. Therefore, Kansas's system for selecting its supreme court justices violates Plaintiffs' Equal Protection rights and should be permanently enjoined and declared unconstitutional.

Count 2

The Election of the Chairman and Attorney Members of the Kansas Supreme Court Nominating Commission Violates the Fourteenth Amendment to the U.S. Constitution by Denying Plaintiffs the Right to Vote.

80. Plaintiffs re-allege and incorporate by reference all allegations contained in paragraphs one through seventy-nine set forth above.

81. Plaintiffs have the right to vote for officials who exercise government power affecting them. *See Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Hellebust*, 42 F.3d at 1333.

82. The State of Kansas excludes all citizens who are not bar members from participating in the elections for the Chairman and Attorney Members of the Kansas Supreme Court Nominating Commission, even though those officials exercise a traditional governmental function, namely, the nomination of judges. U.S. Const. art. II, § 2.

83. The State of Kansas must show a compelling interest for this voter qualification and that the classification is narrowly tailored to that interest. *Cipriano*, 395 U.S. at 704.

84. Because all Kansas citizens, and not just a single occupation, are substantially interested in and affected by the power to nominate justices to the Kansas Supreme Court, the election of members of the Nominating Commission must be open to all otherwise qualified voters, and cannot be restricted based upon occupation. *See Hellebust*, 42 F.3d at 1334-35.

85. Because the Commission exercises a traditional government function, and attorneys are not disproportionately affected by that function, Kansas does not have a compelling interest in limiting the election of the members of the Commission by occupation. *Salyer*, 410 U.S. at 727-28.

86. Because all Kansas citizens are substantially interested in and affected by the nomination of Kansas Supreme Court justices, the restriction of the elections of certain members of the Nominating Commission based upon occupation is not narrowly tailored to any purported state interest.

87. Therefore, the elections of the Chairman and the Attorney Members of the Nominating Commission violate the Equal Protection Clause because they deny Plaintiffs and all non-bar member Kansas citizens the right to vote in an election that affects them. *Kolodziecki*,

399 U.S. at 209. And so, these elections should be declared unconstitutional and permanently enjoined because of their unconstitutional qualifications.

Prayer for Relief

Wherefore, Plaintiffs pray for the following relief:

1. A declaratory judgment declaring Kansas Const. art. III, § 5(e) and Kansas Stat. §§ 20-119 and 20-120 facially unconstitutional.
2. In the alternative, a declaratory judgment declaring Kansas Const. art. III, § 5(e) and Kansas Stat. §§ 20-119 and 20-120 unconstitutional as applied to the nomination to fill the current vacancy on the Kansas Supreme Court.
3. A preliminary and permanent injunction enjoining Defendants Anne E. Burke, Kerry E McQueen, Patricia E. Riley, Matthew D. Keenan, and Jay F. Fowler, the Chairman and Attorney Members of the Kansas Supreme Court Nominating Commission, from exercising any powers under Kansas Const. art. III, § 5(e) and Kansas Stat. §§ 20-119 to -134 and from taking part in any deliberations and voting for nominees to fill the current vacancy created by the retirement and death of Chief Justice Robert E. Davis.
4. A preliminary and permanent injunction enjoining Defendant Carol Gilliam Green from performing any actions under Kan. Stat. §§ 20-119 to -123 and administering any future elections of the chairman or attorney members of the Kansas Supreme Court Nominating Commission.
5. Costs and attorneys fees pursuant to any applicable statute or authority; and
6. Any other relief this Court in its discretion deems just and appropriate.

August 25, 2010

Respectfully submitted,

James Bopp Jr., Ind. #2838-84
Josiah Neeley, Tex. #24046514
Joseph A. Vanderhulst, Ind. #28106-20
Attorneys for All Plaintiffs
JAMES MADISON CENTER FOR FREE SPEECH
1 South Sixth Street
Terre Haute, Indiana 47807
Tel: 812.232.2434
Fax: 812.235.3685

s/ Richard A. Macias
Richard A. Macias
Bar Number 12192
Attorney for All Plaintiffs
LAW OFFICES OF RICHARD MACIAS
901 N. Broadway
Wichita, Kansas 67214
Tel: 316-265-5245
Fax: 316-265-3953

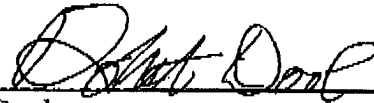
VERIFICATION

I, Robert Dool, declare as follows:

1. I have personal knowledge of myself and my activities, including those set out in the foregoing *Complaint*, and if called upon to testify I would competently testify as to the matters stated herein.

2. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning myself and my activities are true and correct.

Executed on August 20, 2010



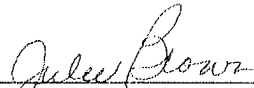
Robert Dool

VERIFICATION

I, Julie Brown, declare as follows:

1. I have personal knowledge of myself and my activities, including those set out in the foregoing *Complaint*, and if called upon to testify I would competently testify as to the matters stated herein.
2. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning myself and my activities are true and correct.

Executed on 8/23/2010



Julie Brown

VERIFICATION

I, Donald D. Rosenow, declare as follows:

1. I have personal knowledge of myself and my activities, including those set out in the foregoing *Complaint*, and if called upon to testify I would competently testify as to the matters stated herein.
2. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning myself and my activities are true and correct.

Executed on August 24, 2010

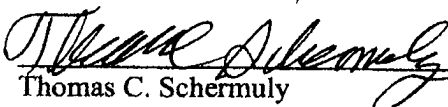
Donald D. Rosenow
Donald D. Rosenow

VERIFICATION

I, Thomas C. Schermuly, declare as follows:

1. I have personal knowledge of myself and my activities, including those set out in the foregoing *Complaint*, and if called upon to testify I would competently testify as to the matters stated herein.
2. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this *Complaint* concerning myself and my activities are true and correct.

Executed on Aug 20, 2010
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Thomas C. Schermuly