

MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

State of Missouri ex rel.)	
ROBERT HILGEMANN, et al.,)	
)	
Relators,)	
)	
v.)	No. 1422-CC09982
)	Div. 18
JENNIFER FLORIDA, et al.,)	
)	
Respondents.)	

MEMORANDUM, ORDER AND JUDGMENT

The Democratic Central Committee of the City of St. Louis, through two of its members, seeks a preliminary injunction to suppress the distribution of respondents' campaign literature which identifies respondent Florida as an "independent Democrat." In particular, relators complain about a flyer labeled with the donkey symbol and the heading "OFFICIAL Sample Ballot." Respondents oppose injunctive relief and move to dismiss.

There is no dispute about the pertinent facts. Defendant Florida today appears on the general election ballot in the City of St. Louis as an independent candidate for the office of Recorder of Deeds. Ms. Florida is not the duly nominated Democratic candidate, albeit she has held office as a Democrat and could hardly be characterized as anything but a Democrat in her political career. In furtherance of her campaign, Ms. Florida has distributed different forms of literature, including yard signs, mailers, and sample ballots. Pl.Ex. 1, 3-6. All of her campaign literature identifies her as "the independent Democrat."

It is customary in St. Louis for ward organizations affiliated with the political parties to distribute "sample ballots," identifying the candidates endorsed by the ward organization at the general election. Interestingly, these ward organizations do not consistently utilize a particular symbol to denote their party. The donkey is generally recognized as the symbol of the Democratic Party, Pl.Ex. 2, but the party's affiliates have also utilized the Statute of Liberty as the party's symbol. See Pl.Ex. 7. As noted above, Ms. Florida is utilizing the donkey symbol on the "sample ballot" being distributed by her campaign.

Just as there is no dispute about the form of the literature being disseminated by respondents, there is no dispute that the individual relators are members of the Democratic Central Committee, and that the Democratic Party is an "established political party" in the state of Missouri. The petition alleges that the donkey has been certified as the emblem of the Democratic Party since 2004.¹ Certainly there is no dispute that, for purposes of the 2014 general election, the donkey is the certified emblem of the Democratic Party. The petition further alleges, and respondents have presented no contrary evidence, that neither the Central Committee nor any other authorized Democratic Party organization has granted respondents permission to use the donkey symbol.

¹ On a motion to dismiss, well-pleaded allegations of fact are taken as true. Further, on hearing a motion for preliminary injunction, the Court is entitled to consider the allegations of the verified petition, otherwise un rebutted.

The crux of this case is relators' claims that the use of the donkey symbol and the phrase "independent Democrat" are illegal, false and deceptive.

Missouri statutes enact a comprehensive scheme for the regulation of elections. Ch. 115, RSMo 2000 & Supp. As the court reads the petition, relators place their chief reliance on § 115.309 and the comprehensive regulation of independent candidates, §§ 115.321-.325, 115.347. Section 115.309 provides that "no political party hereafter organized and no persons hereafter seeking to nominate any candidate by petition shall use any portion of the name of any existing political party." The other statutes quite clearly provide for the manner in which independent candidates are placed on the general election ballot. Relators also allude to §115.391, regarding "sample official ballots"--but that statute quite clearly applies to primary elections only.

In argument at the hearing on the pending motions, and in their motion to dismiss, respondents contend that the relief sought by relators would amount to an unconstitutional prior restraint on speech, that the petition fails to state a claim for relief, and that relators cannot show a likelihood of irreparable harm.

Relators seek to enjoin the production and distribution of any advertisements, campaign literature, or sample ballots by respondents "which contain the use of a portion of the Democrat Party name, or a donkey emblem, or both" or which identify respondent Florida "as anything other than as an 'Independent Candidate.'"

Time does not permit an extensive exegesis of the law of freedom of speech and the press in connection with distribution of campaign literature. Suffice it to say that the Court agrees with respondents that an injunction suppressing the distribution of political literature is a prior restraint that can be justified, if at all, only by the most compelling circumstances. See *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995). Moreover, even when relief may be authorized, it must be narrowly tailored to address the precise harm at issue. Cf. *Burson v. Freeman*, 504 U.S. 191 (1992). However, in this case, the Court is not obliged to rest its decision on constitutional grounds as such.

Here, the Court categorically rejects relators' claim that respondent Florida may not describe herself as an "independent Democrat." Nothing in the statutes cited by relators forbids this conduct. It is elementary that statutes must be construed, where possible, to avoid constitutional issues. In this case, given that "core political speech" is at stake, the Court is compelled to construe § 115.309 narrowly so as not to trench on fundamental rights. The Court has no difficulty in doing so. Section 115.309 literally applies only to "persons . . . seeking to nominate any candidate by petition." The plain language of the statute, therefore, forbids *petitioners* from using the name of a political party in the nominating petition process. The statute has nothing to say about how an independent candidate can identify himself during the election.

Even if §115.309 could be construed to extend to respondents' literature, it does not follow that respondents have violated the

statute. Whatever else the phrase "independent Democrat" may connote, it does not signify that she is the regularly nominated candidate of the Democratic Party at the general election. While it may seek to capitalize on her affiliation with the Democratic Party, the Court is unable to discern how §115.309 prohibits any citizen from identifying himself by any party affiliation he chooses, even when running for office as an independent. Indeed, it seems to the Court that it serves the truth to allow candidates to inform voters that an "independent" candidacy does not constitute a promise that the candidate will not be a partisan officeholder if elected.

More troubling in this case is the use of the donkey symbol coupled with the title "official sample ballot" on Pl.Ex. 1. The Court notes, however, what the "official sample ballot" does not do: it does not purport to be distributed by the official organs of the Democratic Party; it does not purport to be distributed by the election authorities; and it does not declare Florida as the duly nominated Democratic candidate. On this record, the Court is unable to perceive how the pertinent statutes warrant the relief demanded here.

It is often overlooked that injunctive relief is not a matter of right, but is granted in the court's discretion. The extraordinary nature of injunctive relief is all the more evident when preliminary relief is sought. Relators were obliged to show a probability of success on the merits, a likelihood of irreparable harm, a balance of hardships in their favor, and lack of injury to the public interest. On the record before the Court, they have not carried their burden.

Denial of the motion for preliminary injunction does not end the matter; for, in addition to failing to establish a right to preliminary relief, respondents also fail to state any claim for relief. While the Court would hold that relators have standing to seek injunctive relief on behalf of the City Democratic Party in a proper case, the Court is unable to discern anything in Ch. 115 that creates a private right of action to enforce its provisions. On the contrary, the General Assembly has been at pains to enact comprehensive criminal statutes addressing violations of Ch. 115 and election misconduct. In particular, §115.637 addresses relators' claims by expressly prohibiting the printing or circulation of false and fraudulent sample ballots which are "designed as a fraud upon voters" or which are "intended to mislead the voter." Such conduct is a class 4 election offense. §115.637(2)-(3).

In light of the express criminal provisions mentioned above, and the absence of any indicated legislative intention to create a private right of action to enforce Ch. 115 in whole or in part, see *R.L. Nichols Insurance, Inc. v. Home Insurance Co.*, 865 S.W.2d 665 (Mo.banc 1993), the Court concludes that relators' action must be dismissed.

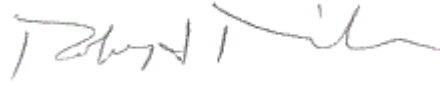
ORDER AND JUDGMENT

In light of the foregoing, it is

ORDERED that relators' motion for preliminary injunction be and the same is hereby denied and respondents' motion to dismiss be and the same is hereby granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that relators' petition be and the same is hereby dismissed with prejudice at relators' cost.

SO ORDERED:

A handwritten signature in dark ink, appearing to read "Robert H. Dierker", written over a horizontal line.

Robert H. Dierker
Circuit Judge

Dated: November 4, 2014
cc: Counsel/parties pro se