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Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1972

—
No. 58 Original
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THE AMERICAN PARTY, ET AL.,
PLAINTIFFS,

v.

STATE OF NEW YORK, ET AL.,
DEFENDANTS.

—
ON MOTION FOR LEAVE TO FILE COMPLAINT

—
BRIEF FOR DEFENDANT
COMMONWEALTH OF MASSACHUSETTS
IN OPPOSITION TO MOTION
FOR LEAVE TO FILE COMPLAINT
—

ROBERT H. QUINN,
Attorney General,
WALTER H. MAYO III,
Assistant Attorney General,
LAWRENCE T. BENCH,
Assistant Attorney General,
373 State House
Boston, Massachusetts 02133

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Jurisdiction

The plaintiffs invoke the original jurisdiction of this Court under Article III, Section 2 of the Constitution, and assert that a controversy exists among the several States named as defendants. For the reasons elaborated within, the defendant Commonwealth of Massachusetts

denies that any controversy exists between it and any other State named as a defendant, and asserts that this Court lacks original jurisdiction under 28 U.S.C. § 1251. The Commonwealth further asserts that any justiciable controversy which might be presented by the Complaint is one between the Commonwealth and citizens of another State, and consequently this action is barred by the Eleventh Amendment to the Constitution.

Questions Presented

1. Whether the Complaint sets forth a case or controversy of which this Court has original jurisdiction.
2. Whether the Complaint sets forth a case of which a Federal court has jurisdiction under the Eleventh Amendment.
3. Whether the Complaint states a claim upon which relief can be granted.

Constitutional and Statutory Provisions Involved

United States Constitution, Article II, § 1, cl. 2:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or profit under the United States, shall be appointed an Elector.

United States Constitution, Article III, § 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the

Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction . . .

United States Constitution, Amendment XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1251:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

. . .

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

. . .

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

42 U.S.C. § 1971(a):

(2) No person acting under color of law shall—

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election

Mass. Gen. Laws, c. 50, §1; c. 53, §§1, 6, 8; c. 54, §§78, 78A:

The pertinent provisions of the Massachusetts election laws are set forth in the Appendix.

Statement

The plaintiffs, the American Party and its local affiliates, seek leave to file this Complaint in order to obtain an order placing the Party's candidates for President and Vice-President of the United States on the ballots in Massachusetts, sixteen other States and the District of Columbia for the 1972 presidential election. (Complaint, p. 36.) The Complaint alleges that the Party qualified under Massachusetts General Laws, c. 50 (and 53) to have its candidate placed on the ballot for the 1968 presidential

election, but that the 1972 filing date of "July 5" for a petition for ballot position (to be accompanied by voter signatures equalling in number 3 percent of the last vote for governor) was "prior to any scheduled National Convention of any political party." (Complaint, p. 26.) The Complaint asserts that the Massachusetts election code violates the First and Fourteenth Amendments (Complaint, pp. 22-23) and the 1965 Voting Rights Act, 42 U.S.C. § 1971(a)(2)(A), (B) (Complaint, p. 34), and requests an injunction restraining Massachusetts officials "from excluding the States [*sic*] of electors pledged to the nominees for President and Vice-President of the United States by the AMERICAN PARTY from the General Election Ballot in November, 1972." (Complaint, p. 36.)

Argument

I. THIS ACTION DOES NOT FALL WITHIN THE ORIGINAL JURISDICTION OF THIS COURT BECAUSE THE PLAINTIFFS ARE NOT STATES AND HAVE ALLEGED NO CONTROVERSY AMONG THE DEFENDANT STATES.

Under 28 U.S.C. § 1251, this Court has original jurisdiction of "[a]ll controversies between two or more States" ((a)(1)), and "[a]ll actions or proceedings by a State against the citizens of another State or against aliens" ((b)(3)). This case falls into neither category. The plaintiffs are private citizens of unspecified residence against whom no action has been brought by Massachusetts under § 1251(b)(3). The suit is manifestly one brought against Massachusetts by citizens of another State, and is thus barred from the jurisdiction of the Federal courts by the Eleventh Amendment to the Constitution:

“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

The principles which led to the adoption of the Eleventh Amendment would bar this suit even if it is assumed that the plaintiffs are citizens of Massachusetts. *Hans v. Louisiana*, 134 U.S. 1; *Parde v. Terminal Ry.*, 377 U.S. 184, 186.

In order to avoid the lack of jurisdiction in the Federal courts, the plaintiffs make the singular assertion that “a controversy exists among the several Defendant States.” (Brief on Motion, p. 7.) However, no State has joined as a plaintiff, and Massachusetts has no dispute with the other defendant States regarding their election laws. Massachusetts is content to let the other States determine, pursuant to Article II, Section 1, clause 2 of the Constitution, the manner in which they shall appoint electors for President. Massachusetts has suffered no wrong through the action of any other State, nor does it assert any right against them, *Massachusetts v. Missouri*, 308 U.S. 1, 15, and there is therefore no controversy of which this Court has jurisdiction.

II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE MASSACHUSETTS’ BALLOT QUALIFICATION REQUIREMENTS ARE CONSTITUTIONAL.

Under Massachusetts law, candidates for state or national office can be placed on the ballot in one of two ways: pursuant to Massachusetts General Laws, c. 53, § 1, by nomination of a “political party” (defined by c. 50, § 1,

as a party which polled at least 3 percent of the vote for governor at the preceding biennial state election); or pursuant to c. 53, § 6, by nomination papers signed by a number of voters equal to not less than 3 percent of the last vote for governor.¹ Certificates of nomination or nomination papers for presidential electors must be filed with the Secretary of the Commonwealth by the seventeenth Tuesday preceding the election (July 11, 1972, not July 5 as alleged in the Complaint, p. 26). Mass. Gen. Laws, c. 53, § 10, as amended by Mass. Acts 1971, c. 920, § 2. The surnames of the candidates for President and Vice-President shall be added to the political designation of the candidates for presidential electors and filed with the Secretary of the Commonwealth no later than the second Tuesday of September. Mass. Gen. Laws, c. 53, § 8, as amended by Mass. Acts 1971, c. 202. There is also provision in Mass. Gen. Laws, c. 54, §§ 78, 78A, for write-in votes for presidential electors who have filed their names with the Secretary sixty days prior to the election.

The foregoing provisions for ballot qualification clearly pass constitutional muster. In *Jenness v. Fortson*, 403 U.S. 431, this Court upheld the more stringent requirements for qualification imposed by Georgia, which required nomination by a party which received 20 percent of the vote at the last gubernatorial or presidential election, or a petition signed by a number of voters equal to 5 percent of the voters *eligible* to vote in the last election for the office in question. A 180-day limit on circulation of petitions for signatures was imposed, and the filing deadline was the second Wednesday in June. This Court

¹ A third alternative method of nomination by certain "minor" political parties which received 1/10 of 1 percent of the vote in three preceding elections was struck down by a three-judge court in *Baird v. Davoren*, 346 F. Supp. 515 (D. Mass. 1972). Also invalidated was the requirement that no more than one-third of the signatures on nomination petitions be from any one county.

held that the Georgia ballot-qualification requirements did not violate the rights of free speech and association guaranteed by the First and Fourteenth Amendments, nor did they violate the Equal Protection Clause of the Fourteenth Amendment. The Court stated :

“There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization and its candidates on the ballot — the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.”

403 U.S. at 442. The 3 percent Massachusetts requirement has since been held constitutional by a three-judge District Court. *Baird v. Davoren*, 346 F. Supp. 515 (D. Mass. 1972). The Complaint sought to be filed in the instant case clearly presents no claim against Massachusetts for which relief can be granted.

Conclusion

For the foregoing reasons, the Commonwealth of Massachusetts respectfully requests that the Motion for Leave to File the Complaint be denied.

ROBERT H. QUINN,
Attorney General,
 WALTER H. MAYO III,
Assistant Attorney General,
 LAWRENCE T. BENCH,
Assistant Attorney General,
 373 State House
 Boston, Massachusetts 02133

November, 1972

APPENDIX

MASSACHUSETTS GENERAL LAWS

CHAPTER 50

§ 1.

. . .

Political Party.— “Political party” shall apply to a party which at the preceding biennial state election polled for governor at least three per cent of the entire vote cast in the commonwealth for that office; but when a candidate for governor receives two or more nominations for that office “political party” shall apply only to a party which made a nomination at the preceding state primary and which in said primary polled at least three per cent of the entire vote for nomination for governor therein cast in the commonwealth. With reference to municipal elections and primaries and caucuses for the nomination of city and town officers, “political party” shall include a municipal party. A political party, as used in this section, shall not include any organization which has been adjudicated subversive under section eighteen of chapter two hundred and sixty-four, nor shall it include the Communist Party.

CHAPTER 53

§ 1.

At any primary, caucus or convention held under this chapter, each party having the right to participate in or hold the same may nominate as many candidates for each office for which it has the right to make nominations therein as there are persons to be elected to that office, and no more. A party which has not polled at the preceding state or municipal election the vote required to make it a political or municipal party as defined in section one of chapter fifty, but which at the three preceding biennial elections has polled in the commonwealth, or in any dis-

trict, county, city, town or ward, respectively, a number of votes for governor equal to one-tenth of one per cent of the total number of ballots cast, may hold a caucus or convention and make a nomination for the offices so to be filled. A party which makes one or more nominations shall be entitled to have the name of each of its candidates printed on the ballot to be used at the ensuing election; but, unless the nomination is made by direct plurality vote in a primary or in several caucuses held in more than one ward or in more than one precinct or group of precincts, a certificate of nomination must be filed as provided in section five.

§ 6.

Nominations of candidates for any offices to be filled at a state election may be made by nomination papers, stating the facts required by section eight and signed in the aggregate by not less than such number of voters as will equal three per cent of the entire vote cast for governor at the preceding biennial state election in the commonwealth at large or in the electoral district or division for which the officers are to be elected. In the case of offices to be filled by all the voters in the commonwealth, no more than one third of the required number of signatures shall be from any one county. Nominations of candidates for offices to be filled at a city or town election, except where city charters or general or special laws provide otherwise, may be made by like nomination papers, signed in the aggregate by not less than such number of voters as will equal one per cent of the entire vote cast for governor at the preceding biennial state election in the electoral district or division for which the officers are to be elected, but in no event by less than twenty voters in the case of an office to be filled at a town election; provided, however, that no more than fifty signatures of

voters shall be required on nomination papers for such town office. At a first election to be held in a newly established ward, the number of signatures of voters upon a nomination paper of a candidate who is to be voted for only in such ward shall be at least fifty.

§ 8.

All certificates of nomination and nomination papers shall, in addition to the names of candidates, specify as to each, (1) his residence, with street and number, if any, (2) the office for which he is nominated, and (3), except as otherwise provided in this section and in city charters, the party, if any, which he represents, expressed in not more than three words. Certificates of nomination made by convention or caucus shall also state what provision, if any, was made for filling vacancies caused by the death, withdrawal or ineligibility of candidates. The state committees of the respective political parties at a meeting called for the purpose shall nominate the presidential electors. The surnames of the candidates for president and vice president of the United States shall be added to the party or political designation of the candidates for presidential electors. Such surnames and a list of the persons nominated for presidential electors, together with an acceptance in writing signed by each candidate for presidential elector on a form to be provided by the state secretary, shall be filed by the state chairman of the respective political parties not later than the second Tuesday of September. Said acceptance form shall include a pledge by the presidential elector to vote for the candidate named in the filing. To the name of each candidate for alderman at large shall be added the number of the ward in which he resides. To the name of a candidate for a town office who is an elected incumbent thereof there may be added the words "Candidate for Re-election".

If a candidate is nominated otherwise than by a political party the name of a political party shall not be used in his political designation nor shall the name of any organization which has been adjudicated subversive under section eighteen of chapter two hundred and sixty-four be used in his political designation. Certificates of nomination and nomination papers for city or town offices need not include a designation of the party which the candidate represents. In the case of nomination papers of candidates for city offices, no nomination paper shall contain the name of more than one candidate. Such nomination papers for town offices may contain the names of candidates for any or all of the offices to be filled at the town election, but the number of names of candidates on such paper for any one office shall not exceed the number to be elected thereto.

CHAPTER 54

§ 78.

In order to vote for presidential electors, the voter shall make a cross (X) in the square at the right of the party or political designation appearing on the ballot at the right of the surnames of the candidates for president and vice president, to vote for whom such candidates for electors are nominated; and the making of a cross as aforesaid shall be deemed and taken as a vote for such candidates for presidential electors, except as provided in section thirty-three E. A vote by sticker or write-in in the blank space at the end of the list of names of presidential and vice presidential candidates may be cast for those candidates whose names are contained in lists filed with the state secretary under the provisions of section seventy-eight A and shall be deemed to be a vote for each of the candidates for presidential elector whose names are contained in the appropriate list so filed; provided, however,

that in such case the voter shall list only the surnames of the candidates for president and vice president, and shall make a cross (X) in the square at the right.

§ 78A.

In any year in which presidential electors are to be elected, not later than the sixtieth day prior to the date of the election, there may be filed with the secretary of the commonwealth, in a form to be prescribed by him, a list of names and addresses of candidates for such electors, containing the names and addresses of a candidate for president and for vice president to whom such electors shall be pledged in writing. Said list shall contain the written acceptance of each candidate for presidential elector, who shall be a voter of the commonwealth, and the written acceptance of the presidential and vice presidential candidates, who shall be candidates other than those whose names are to be printed upon the official ballot. Said secretary shall certify to all city and town clerks and election commissioners the names of the candidates designated by any such list for the offices of president and vice president and the form of write-in or sticker vote for such candidate which will be deemed acceptable under the provisions of section seventy-eight.

