

Informing Independent Voters of the Right to Vote in a Presidential Primary Election

Voting Rights Def. Project v. Depuis
(William Alsup, N.D. Cal. 3:16-cv-2739)

A federal complaint filed eighteen nights before a primary election accused election officials in two counties of not adequately informing independent voters of their rights to vote in some parties' presidential primary elections. A week later, the plaintiffs sought to shorten time on a motion for a preliminary injunction, but they did not file their injunction motion until the district judge brought the deficit to their attention. Six days before the election, the judge held a hearing and denied immediate relief. On the one hand, the plaintiffs waited too long to achieve effective relief. On the other hand, there was only a weak showing of federal jurisdiction.

Subject: Voting procedures. *Topics:* Matters for state courts; laches; primary election; party procedures; early voting; case assignment.

An organization supporting Bernie Sanders for President, the American Independent Party, and two voters filed a federal complaint in the Northern District of California against Alameda County and San Francisco election officials at 7:00 p.m. on Friday, May 20, 2016, claiming that independent voters were excessively ill-informed about their abilities to vote in the June 7 presidential primaries for the Democratic, American Independent, and Libertarian parties.¹ On the same day, the plaintiffs filed an amended complaint adding California's secretary of state as a defendant and substituting "American Independent Party" for "American Independence Party" as a plaintiff in the caption.²

One week later, the plaintiffs filed two motions to shorten time for a hearing on a motion for a preliminary injunction, but they did not file an injunction motion.³ That day, Judge William Alsup issued an order pointing out that the injunction motion was absent,⁴ and such a motion was filed that

1. Complaint, *Voting Rights Def. Project v. Depuis*, No. 3:16-cv-2739 (N.D. Cal. May 20, 2016), D.E. 1; Opinion at 6, *id.* (June 2, 2016), D.E. 46, 2016 WL 3092079; see Bob Egelko, *Sanders Backers Drop Suit Over Voter Assistance*, S.F. Chron., June 5, 2016, at C2 [hereinafter *Backers Drop Suit*] ("Only registered Republicans are allowed to vote in the GOP primary."); see also Bob Egelko, S.F. *Official Slams Suit by Sanders' Backers*, S.F. Chron., May 25, 2016, at D2; John Myers, *Sanders Backers Slam Voter Rules*, L.A. Times, May 23, 2016, at B1; Richel Swan, *Sanders Supporters, Independents Sue Over Voting*, S.F. Chron., May 23, 2016, at A8.

2. Amended Complaint, *Voting Rights Def. Project v. Padilla*, No. 3:16-cv-2739 (N.D. Cal. May 20, 2016), D.E. 2.

3. Order on Missing Motion, *id.* (May 27, 2016), D.E. 15; Motion, *id.* (May 27, 2016), D.E. 14; Motion, *id.* (May 27, 2016), D.E. 13.

4. Order on Missing Motion, *supra* note 3.

day.⁵ Judge Alsup set the case for hearing on June 1.⁶

Judge Alsup's first question at the hearing was what was the federal question?⁷ Later, he also asked about a remedy:

THE COURT: . . . Let me ask the Plaintiffs a question. Here we are, on June 1. You didn't even file this lawsuit until May 20. You didn't ask for any kind of relief on an emergency basis until May 27th, seven days later. So we set it up for as fast as we could possibly set up a hearing.

[COUNSEL]: (Nods head)

THE COURT: Now, give me one example of some relief that would be practical that a judge could issue between now and the election day that could actually be done. I frankly don't see anything, but maybe you have a better idea.⁸

At the end of the hearing, Judge Alsup denied the plaintiffs immediate relief:

THE COURT: . . . All relief is denied on preliminary injunction. Here are the basic reasons: Plaintiffs waited way too long before bringing this lawsuit, and waited way too long before asking for a preliminary injunction. So that, alone, is [a] show-stopper, period.

But there is more to it than that. Almost all of these claims are state-law claims. This is a Federal Court. We also have state courts. Most of this case should have been brought in state court, because that's the set of judges that know the state election code. And federal judges are not up to speed on it, but we don't have jurisdiction over that anyway.

. . .

With respect to the federal claims, the Court would have jurisdiction, but there's absolutely no showing of any federal violation, either under the equal protection clause or under the Voting Rights Act.

. . .

If time permits, I'll get out a memorandum opinion. But this order on the record of the Court will constitute the denial of the motion for preliminary injunction.⁹

Judge Alsup memorialized his conclusions in a seven-page opinion on the following day.¹⁰

According to the *San Francisco Chronicle*, "After a rebuff from a federal judge, backers of Sen. Bernie Sanders of Vermont say they'll drop their legal effort to require elections officials to give more help to nonaligned voters in

5. Motion, *Voting Rights Def. Project*, No. 3:16-cv-2739 (N.D. Cal. May 27, 2016), D.E. 17.

6. Scheduling Order, *id.* (May 27, 2016), D.E. 18.

7. Transcript at 4, *id.* (June 1, 2016, filed Aug. 20, 2016), D.E. 61.

8. *Id.* at 20–21; *see* Opinion, *supra* note 1, at 6 ("although the Court set a briefing and hearing schedule just three minutes after the motion was filed, plaintiffs' delays ensured that the motion could not be heard and decided until June 1, less than a week before the primary").

9. Transcript, *supra* note 7, at 32–34; *see* Bob Egelko, *U.S. Judge Rejects Suit by Sanders Supporters*, *S.F. Chron.*, June 2, 2016, at E1.

10. Opinion, *supra* note 1.

casting ballots for president in Tuesday's primary and instead will take their message to local registrars' offices."¹¹

On August 26, Judge Alsup granted the defendants' motion to dismiss the complaint as moot.¹² On April 13, 2017, the court of appeals granted a voluntary dismissal.¹³

11. Egelko, *Backers Drop Suit*, *supra* note 1.

12. Dismissal Order, *Voting Rights Def. Project*, No. 3:16-cv-2739 (N.D. Cal. Aug. 26, 2016), D.E. 74.

13. Order, *Voting Rights Def. Project v. Padilla*, No. 16-16717 (9th Cir. Apr. 13, 2017), D.E. 14.