THE UNIVERSITY OF KANSAS STUDENT COURT OF APPEALS

Mady Womack OneKU Presidential Candidate	)	April 9, 2017
Jonathan L. Ehrlich OneKU School of Law Candidate	)	Case Number: xxxx
Chance Maginness Onward Presidential Candidate	)	
Tomas Green KUnited Presidential Candidate	)	
Petitioners	)	
VERSUS	)	
Harrison Baker Elections Commission Compliance Chair	)	

PETITION FOR WRIT OF CERTIORARI

Petitioners Mady Womack, Jonathan Ehrlich, Change Maginness and Tomas Green requests that a writ of certiorari be granted to review the Elections Commission's decision to bar 38 University of Kansas students (hereinafter "the candidates") from running in the Student Senate Spring General Election. Given that the Elections Commission (hereinafter "the Commission") chose to implement a new procedure for checking signatures on the Petition of Candidacy forms, without notifying coalitions or independent candidates prior to doing so, the Court of Appeals must determine if the Commission had the authority to remove so many students off of the ballot using under their current reasoning . Furthermore, the Court must examine whether the Commission is truly serving their charge to ensure an equitable election by preventing so many students from participating in the process. The Petitioners request that the Court answer the following questions:

1. Has the Commission deprived University of Kansas candidates of their procedural Due Process rights under the 14th Amendment of the Constitution of the United States when it disqualified them from running in the Spring 2017 Student Senate election without: (a) individual notice of claims against them, (b) a hearing, (c) the opportunity to examine the evidence against them, (d) the opportunity to question witnesses making claims against

them, and (e) providing each disqualified student-candidate with a fact-specific, written copy of the decision against them to review for purposes of appeal?

2. Has the Commission deprived University of Kansas candidates of their substantive Due Process rights under the 14th Amendment of the Constitution of the United States when it disqualified them from running in the Spring 2017 Student Senate election based on as yet unknown methodology and reasoning?
3. Has the Commission unfairly punished candidates who relied on an established interpretation of the election rules by dramatically changing its interpretation of Student Senate election rules to require a strict examination of candidates' signature sheets?
4. Has the Commission violated the election rules by wholly disqualifying candidates who filed with coalitions rather than reclassifying them as independent candidates?
5. Has the Commission failed to consider and balance the considerable harms to candidates and the University of Kansas when it disqualified nearly four dozen candidates from participating in the 2017 Student Senate Spring General Election?

STATEMENT OF THE CASE

38 senatorial candidates were barred from the elections process for having "invalid" signatures on their Petition of Candidacy form. Seeing as the Elections Commission offered candidates no method to confirm that a signature was valid or not, the candidates had to assume that students signing their petition were telling the truth when they claimed that they qualified to sign for that division. The following hypothetical may assist the Court in better understanding the facts of this case. A potential candidate for School of Business Senator is asking a fellow student to sign their petition, so long as they are a student enrolled in the Business School. The student answers affirmatively, and signs the petition. Unbeknownst to the candidate, that student was actually classified only as a Pre-Business student by the University Registrar's Office. Yet, the candidate expected that may occur a few times, so they get upwards of 30 signatures, but it turns out enough were Pre-Business to land them under the 25 required.

The Commission notified the coalitions on Monday, April 3rd at 12:29 P.M. that these candidates will be ineligible for the upcoming election, and provided no remedy for the candidates, despite the fact that there is a clear remedy in SSRR. April 3rd is one week after the filing deadline of Monday, April 27th. The Commission refused to allow any grace period to submit more

signatures and become eligible. Under SSRR 7.5.9.10, these same candidates could have filed more signatures by Monday, April 3rd, and would have been allowed to run as independent candidates, but the coalitions were not made aware of any disqualifications until that same day, April 3rd. The Commission made no effort to notify each individual senator that they were disqualified or to explain the reason for their disqualification. Some of the coalitions let the individuals know, and they were instructed to email the Commission and request this information. Through this process, the Commission found that 2 of the "disqualifications" were in error after being contacted and asked to review their candidacies. This revelation threw the integrity of their entire process into question. It would appear this system may have flaws, and that the Commission should reexamine it, but not at the expense of candidates who made a good-faith effort to comply with the requirements listed in SSRR.

Despite their requests, the disqualified candidates were not granted a hearing to explain themselves and have the Commission determine if perhaps they had been unreasonably strict in their requirements. Previous Elections Commissions have "spot-checked" candidate petitions, ensuring that they were pursuing signatures of students from their division. Never before in recent history has there been such a strict process of vetting every last signature a candidate garners, nor does SSRR call for that level of strict scrutiny. Furthermore, the Commission did not make students aware that they would be making such an unprecedented change to their procedure, demonstrating that they were not acting in the interest of fairness for all students pursuing office in Student Senate.

AMPLIFICATION OF THE CASE

Not providing these candidates with any notice of the charges against that resulted in disqualification violated their due process rights. They were presented with no timely or formal opportunity to review these charges and question the Commission, and its methods, over them. The decision to remove someone from a ballot is one of great seriousness, therefore ensuring Due Process was carried out should have been a top priority of the Commission. By not granting any requests to have a hearing over the alleged ineligible signatures, the Commission violated their 14th Amendment rights to Due Process. Before depriving the students of anything, there must be a procedure for doing so. The Commission did not satisfy Due Process when it disqualified nearly four dozen candidates from participating in the Student Senate election.

Candidates had significant property interests in their candidacies, and were arbitrarily deprived of those interests through a disciplinary action by the Commission without process appropriate for each of their interests. Property interests as they are defined today establish that any state actor cannot deny a citizen access to any right other citizens have without due process.

Accordingly, the Court should reverse the Commission's decision. A relevant example of a due process case is:

> A student admitted to the University of Kansas School of Law has a significant property interest in his enrollment because he was admitted and allowed to participate fully. *See Brown v. Univ. of Kansas*, 16 F. Supp. 3d 1275 (D. Kan. 2014), aff'd, 599 F. App'x 833 (10th Cir. 2015).

"'The root requirement' of the due process clause is that an individual be afforded 'an opportunity for a hearing before he is deprived of any significant property interest.' The interpretation and application of the Due Process Clause are intensely practical matters and the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Brown*. "With regard to school decisions, different standards are used depending on whether the school makes an academic judgment or a disciplinary determination." *Id*. Therefore, the Court must use a higher standard for resolving due process in a disciplinary case, which places the burden on the Commission to prove Due Process rights were respected.

A student who is admitted to and attends a state law school is disciplined if dismissed for having made false statements on his application. *Id*. That student is due process appropriate to the what he stands to lose. Disciplinary actions require "that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id*. The Commission's decision was disciplinary in the same nature as the case above in that it deprived the candidates of their property in their respective candidacies as punishment for non-compliance with election rules as interpreted by the Commission. The Commission has stated that it is absolved of having hearings because it is not a Court. Surely the Court would agree that any time a government-related body acts it must ensure due process. Government agencies are required to uphold Due Process, so why would the Commission be exempt?

Not providing these candidates with the option to run as independent candidates with a later deadline, is evidence of misconduct on the part of the Commission. The intent of SSRR is to provide students with low barriers of entry to run in a Student Senate election, and SSRR 7.5.9.10.1 clearly states that the impacted students would have been able to run as independent candidates had they individually been given proper notice. Instead, the Commission waited until less than 5 hours before the filing deadline for independents to notify the coalitions, rather than the individual students, of the numerous disqualifications. This left students scrambling on their own to determine if perhaps the Commission had made a mistake (it had in two instances) rather than being able to look into the possibility of running as an independent. In the days immediately following their decision to stop almost 50 students from appearing on the ballot, the Commission never went through with any effort to extend any sort of relief to the impacted students by extending the deadline for independent candidates. Doing so would have allowed the students to garner the few signatures that most needed to at least appear on the ballot, albeit not running under a coalition name. The ability to run as an independent, with one's name appearing directly on the ballot, offers a significant advantage over have to run as a "write-in candidate," given the ease of being able to vote for that student directly.

Allowing the Commission to remove this many people from the process with impunity sets a dangerous precedent. Peer institutions, such as Kansas State University, do not have any requirement for signatures for students to become candidates. The signature requirement was not designed to be a barrier to the ballot, rather it was designed to merely see if potential candidates could do outreach in their division and had a small amount of support, as well as to protect against blatant fraud by potential candidates. Never before have the Petition of Candidacy forms been used in this manner to prevent students in such large numbers from participating in a Student Senate Election. The Commission is not concerned by this sheer number of students denied the opportunity to participate, as the Petitioners asked them to reconsider, and the Commission refused. Hence, the Court must make a ruling on this issue.

Finally, we urge the Court to keep in mind that campaigning had to be delayed this year due to the fact that the Elections Commission was appointed late, a fact of which the Court is surely well-aware. Due to this unfortunate situation, there was less time to confirm students at Senatorial Caucuses, and bring them into the process. The start date to begin campaigning was moved back, but none of the filing deadlines nor the election date were moved. There should be

reasonable accommodations made for students due to the unusual circumstances surrounding this General Election. Thus, the Petitioners are requesting that the Court find all of the senators are eligible in this election and may campaign as candidates of their respective coalitions, due to a gross violation of their rights and Commission misconduct. Candidates made a good faith effort to comply with the requirement of 25 signatures, and should not be punished due to the Commission's decision to upend their standard practices.

APPLICABLE RULES AND LAW

Jurisdiction

SSRR 4.1.1 JUDICIAL REVIEW - The court will have the authority to overrule Senate as to the interpretation of the text of the Student Senate Rules and Regulations. This authority will apply to procedural and substantive decisions made at any level of Senate. This includes but is not limited to general session, committees, fee boards, and the Student Senate Executive Committee.

De Novo Review

Petitioners request that the Court to adopt a *de novo* standard of review for four reasons. (1) Questions of statutory interpretation are reviewed *de novo*. *See Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011); *see also Vega v. Holder*, 611 F.3d 1168, 1170 (9th Cir. 2010) (reviewing de novo Board of Immigration Appeals' interpretation of statute, but explaining that "[i]f, however, Congress has not directly addressed the exact issue in question, a reviewing court must defer to the agency's construction of the statute so long as it is reasonable.") (2) The Election Commission's (the Commission) decision in this case is not reasonable and fits an exception that federal courts use when not giving an agency deference. (3) Even if this Court decides not to use the analogy for that exception, the Commission is not sufficiently like a federal agency to receive deference in the way that an agency would. (4) The Commission did not hold hearings for individuals it disqualified, and accordingly, has not build a sufficient record for the court to rely on and give deference to.

(1) Certain questions are categorically reviewed *de novo*. Questions of statutory interpretation are reviewed *de novo*. *See Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011); *see also Vega v. Holder*, 611 F.3d 1168, 1170 (9th Cir. 2010) (reviewing de novo Board of Immigration Appeals' interpretation of statute, but explaining that "[i]f, however, Congress

has not directly addressed the exact issue in question, a reviewing court must defer to the agency's construction of the statute so long as it is reasonable."

(2) If the Court chooses not to follow the federal court practice of categorically reviewing questions of statutory interpretation *de novo*, the court should adopt a similar standard selection method as a federal court would use when a question does not fall into a *de novo* category. First, a federal court would look for any existing statutorily mandated standard of review. If there was no statutory standard of the review, the court would generally give deference to the agency interpretation. That is generally, with certain exceptions.

This Court is not bound to a standard by any Student Senate rules. Therefore this Court should give deference to the Commission barring any exception. However, here the Commission's decision fits an exception.

The exception is: courts give no deference to agency decisions where there are "radically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public..." *Pfaff v. United States Dep't of Housing & Urban Dev*., 88 F.3d 739, 748 (9th Cir. 1996). The Commission ordered a strict review of student signatures that resulted in nearly four dozen students being removed from ballots. The review was a "radically inconsistent" interpretation of Student Senate rules, which had up until the Commission's decision been interpreted only to require a "spot-check" review of signatures. Because the Commission's decision was "radically inconsistent" with how the rules had been interpreted in all elections of recent history, and students wishing to become candidates surely relied on that recent history, this Court should grant the Commission no deference. Candidates had good-faith that the Commission would operate as it always had, as the Commission gave no indication to the contrary.

(3) Even if the Court believes that the Commission's interpretation was not radical, the Court should not give the Commission deference because the Commission is dramatically distinct from a federal agency such that the two should not be treated the same. The most obvious distinction is that the University of Kansas students who staff the Commission are not yet highly-trained and experienced subject-matter experts. The primary reason federal agencies are given deference by federal courts is that they are considered to have superior expertise resulting from years of training and experience. Though they are surely well-meaning, they are simply not equipped like federal agency employees. Even if one or more were slightly more expert than the average KU student, the Commission is not collectively expert to the same degree

as a federal agency. Accordingly, the Commission should not be given deference because it does not qualify in the ways that agencies do to earn the deference courts give them.

(4) This Court should review *de novo* because the Commission failed to build a sufficient record to rely upon. The Commission (a) did not give individual notice to student-candidates it disqualified, (b) did not give student-candidates it disqualified opportunity to cross-examine the evidence against them or the witnesses who presented that evidence, (c) has not provided the evidence, or methodology relied upon to create that evidence, to any non-Commission party to consider, and (d) has not released a written version of its decision to concerned parties to examine for facts, fairness, and sound reasoning.

Election Law

See SSRR Article VII: Elections

7.5.7.1.2 Filing Requirements for Senatorial Candidates. Each candidate must submit, along with their declaration of candidacy form, a petition with twenty-five (25) signatures from students that are eligible to vote for said candidate in the General Election.

> 7.5.9.8 The filing deadline for Senatorial candidates running in a coalition shall be 5:00pm on the Monday that is two (2) calendar weeks prior to the week of the General Election.
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> 7.5.9.10 The filing deadline for all independent Senatorial candidates (candidates not running under a coalition name) shall be 5:00pm the Monday of the week before the General Election.

Due Process

(1) **"**No State shall...deprive any person of life, liberty, or property, without due process of law…" U.S. Const. amend. XIV.

(2) Appropriate amount and procedures of due process. *Brown v. Univ. of Kansas*, 16 F. Supp. 3d 1275 (D. Kan. 2014), aff'd, 599 F. App'x 833 (10th Cir. 2015).

(3) Fact pattern and reasons demonstrating where substantive due process was not violative. *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016), cert. denied, No. 16-1035, 2017 WL 843965 (U.S. Apr. 3, 2017).

Respectfully submitted,

/s/

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