

**BEFORE THE STATE ELECTION BOARD OF THE  
STATE OF OKLAHOMA**

IN THE MATTER OF CONTEST OF THE )  
CANDIDACY OF **JOSHUA LEE SETZER** )  
FOR THE OFFICE OF STATE ) CAUSE NO. 2016-12  
SENATOR, DISTRICT 27 )

**FINDINGS AND ORDER**

The above-styled cause was heard by the Election Board of the State of Oklahoma on April 25, 2016, meeting pursuant to lawful notice.

The following members of the State Election Board (“Board”) were present: Steve Curry, Chair; Tom Montgomery, Vice-Chair; and Dr. Tim Mauldin, Member. Also present were Paul Ziriaux, Secretary; and counsel for the State Election Board, Janis W. Preslar, Deputy Attorney General; and Jason T. Seay, Assistant Attorney General. Also present, but not participating were Jerry Buchanan, Alternate Member; and Debi Thompson, Alternate Member.

Petitioner Bryce Marlatt was present and represented by counsel, Glenn Coffee. Contestee Joshua Setzer was present and represented by counsel, Mark Hammons.

The Petition was filed and Notice of Hearing issued on April 19, 2016, at 2:30 p.m.

The Board received proof of personal service made on Mr. Setzer by the Texas County Sheriff on April 20, 2016, at 11:37 a.m., within 24 hours of setting the Petition for hearing, as required by 26 O.S. 2011, § 5-124.

Mr. Setzer answered the contest, and presented a cashier’s check in the amount of \$250.00, as prescribed in 26 O.S. 2011, § 5-129. Mr. Setzer also filed a written answer in the cause.

After considering all evidence and testimony offered and admitted, and after hearing arguments of counsel, the Board made the following findings of fact and conclusions of law:

1. Mr. Setzer filed with the Board a Declaration of Candidacy for the office of State Senator, District 27, during the filing period April 13-15, 2016.
2. Mr. Marlatt filed with the Board a Declaration of Candidacy for the office of State Senator, District 27, during the filing period April 13-15, 2016.
3. Mr. Marlatt challenges Mr. Setzer’s candidacy on the grounds that he does not meet the political affiliation requirements set forth in 26 O.S. 2011, § 5-105(A).
4. Section 5-105 in pertinent part states as follows:

To file as a candidate for nomination by a political party to any state or county office, a person must have been a registered voter of that party for the six-month period immediately preceding the first day of the filing period prescribed by law and, under oath, so state.

26 O.S. 2011, § 5-105(A).

5. The following exhibits were introduced into evidence at the hearing of this matter without objection by Mr. Marlatt:
  - a. “Marlett [*sic*] Exhibit 1” – Mr. Setzer’s Oklahoma Voter Registration Application dated October 28, 2015; and
  - b. “Marlett [*sic*] Exhibit 2” – Letter from the Texas County, Oklahoma, Election Board to Mr. Setzer dated November 13, 2015.
6. The following exhibits were introduced into evidence at the hearing of this matter without objection by Mr. Setzer:
  - a. “Setzer Exhibit 1” – Mr. Setzer’s Voter Identification Card issued November 20, 2015.
7. Mr. Setzer states in footnote two of his Answer that he does not concede that he has not been a registered Democrat for at least six months immediately preceding the first day of the filing period prescribed by law. However, at the hearing of this matter, Mr. Setzer’s attorney admitted that Mr. Setzer does not meet the party affiliation requirements set forth in 26 O.S. 2011, § 5-105(A).
8. “Marlett [*sic*] Exhibit 1” shows that Mr. Setzer registered as a Democrat on October 28, 2015, and said registration was effective November 18, 2015.
9. “Marlett [*sic*] Exhibit 2” shows that Mr. Setzer’s initial October 28, 2015, Voter Registration Application was incomplete and required Mr. Setzer’s current residence to be completed.
10. “Setzer Exhibit 1” shows Mr. Setzer has been registered to vote and has been affiliated with the Democratic Party since November 20, 2015.
11. The Board takes judicial notice of the fact that six months immediately preceding the first day of the filing period for State Senate, District 27, was October 13, 2015.
12. The Board finds by the weight of the evidence, that Mr. Setzer has not been a registered Democrat for at least six months immediately preceding the first day of the filing period prescribed by law. 26 O.S. 2011, § 5-105(A).

13. Mr. Setzer claimed the application of 26 O.S. 2011, §§ 5-105(A) (stating the party affiliation requirements) and 5-118 (permitting candidates for office to challenge the candidacy of other candidates for the same office) are unconstitutional as applied to Mr. Setzer in this contest. The facts Mr. Setzer asserted in support are: (1) Mr. Setzer is a registered Democrat; (2) Mr. Marlatt is a registered Republican; (3) only Mr. Marlatt challenged Mr. Setzer's candidacy; (4) Mr. Setzer is the candidate for the office of State Senator, District 27, endorsed by the Democratic Party of Oklahoma.
14. Mr. Setzer presented no evidence to the Board establishing he is the candidate for State Senator, District 27, "endorsed" by the Democratic Party of Oklahoma. Assuming evidence was introduced to support this assertion, it is irrelevant. A political party's associational rights do not confer any additional associational rights upon individual candidates. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203-04 (2008) ("Respondents are in no position to rely on the right that the First Amendment confers on political parties to structure their internal party processes and to select the candidate of the party's choosing."). The Democratic Party of Oklahoma is not a party to this proceeding. Mr. Setzer may not assert the party's associational rights as his own. *Id.*
15. Mr. Marlatt requested the Board recess the hearing of this matter to allow him time to analyze and respond to Mr. Setzer's constitutional challenge. The Board denied Mr. Marlatt's request.
16. The Board is authorized to consider and rule upon Mr. Setzer's "as-applied" constitutional challenge to 26 O.S. 2011, §§ 5-105(A) and 5-118. The Board is a constitutional agency created by Okla. Const. art. III, § 2. It is "part of the executive department of the state, charged with the duty of the execution of all laws in force in the state relating to the holding of elections." *Montgomery v. St. Election Bd.*, 27 Okla. 324, ¶ 5, 111 P. 447, 448 (1910).
17. The Board possesses the statutory authority to decide contests of candidacy. The process begins with a candidate filing a contest of candidacy. 26 O.S. 2011, § 5-118. In the petition for a contest of candidacy, the petitioner must allege facts establishing the contestee is not "qualified by law" to become a candidate for the office at issue. 26 O.S. 2011, § 5-120. Upon the filing of a contest of candidacy, the Board may issue subpoenas, receive testimony and evidence, and it is required to "render its decision and the vote of individual members in writing. The decision of . . . [the] [B]oard shall in all cases be final." 26 O.S. § 2011, § 5-126. In doing so, the Board is authorized to consider and rule upon issues of law. It is tasked to determine if a potential candidate is "qualified by law" to be placed on the ballot as a candidate for office. *Darst v. Election Bd. of Craig Cty.*, 194 Okla. 469, 152 P.2d 912 (1944); 26 O.S. 2011, §§ 5-120, 5-126.
18. Under this statutory regime, "there are no common law pre-election remedies to challenge the qualification of a candidate for public office. *Coleman v. Sequoyah Cty.*

*Election Bd.*, 1988 OK 96, 762 P.2d 935, 936. 26 O.S. 2011, § 5-118 is “the exclusive method for a candidate to contest the candidacy of any other candidate.” *Id.*; *see also* Okla. A.G. Opin. 01-33.

19. When hearing contests of candidacy, the Board is vested with judicial authority. Okla. Const. Art. VII, § 1; *see Robinson v. Fairview Fellowship Home for Senior Citizens, Inc.*, 2016 OK 42, ¶¶ 7-11, --- P.3d ---- (decided April 19, 2016) (holding the Oklahoma Workers’ Compensation Commission possesses judicial authority under Okla. Const. art. VII, § 1 when conducting individual proceedings). This constitutional authority includes the ability to rule upon issues of fact and law when – as here – an agency is authorized by statute to do so. This authority necessarily includes the authority to consider and rule upon “a constitutional question raised by the interpretation and application of a particular” statute applicable to contests of candidacy. *Robinson*, 2016 OK 42 at ¶ 9, --- P.3d ----. As such, the Board is authorized to consider “as-applied” constitutional challenges to statutes applicable to contests of candidacy. *See also id.* at ¶¶ 10-11 (observing the practical benefits of administrative agencies considering as-applied constitutional challenges to statutes falling within the agency’s purview). It may consider Mr. Setzer’s “as-applied” constitutional challenge to Sections 5-105(A) and 5-118.
20. Although “[s]evere burdens on association rights must be narrowly tailored to serve a compelling state interest[,]” “when regulations impose lesser burdens, a state’s important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Clingman v. Beaver*, 544 U.S. 581, 586-87 (2005); *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that strict scrutiny does not automatically apply to challenges to election laws); *Sharp v. Tulsa County Election Bd.*, 1994 OK 104, 890 P.2d 836 (applying *Burdick* to constitutional question of state election laws); *Lopez Torres*, 552 U.S. 196 (2008) (applying *Burdick* analysis to constitutional challenge to state ballot access statutes). The level of scrutiny applied depends upon the burden imposed.
21. Section 5-105 has been ruled constitutional. *Davis v. St. Election Bd. Of Okla.*, 1988 OK 95, 762 P.2d 932. In general, political party affiliation statutes, like Section 5-105, have been ruled as constitutional. *See e.g. Storer v. Brown*, 415 U.S. 724 (1974); *Van Susteren v. Jones*, 331 F.3d 1024 (9th Cir. 2003); *Jolivette v. Husted*, 694 F.3d 760 (6th Cir. 2012).
22. Section 5-105(A) “does not regulate political parties’ internal affairs . . . [I]t is aimed at protecting parties from disruption by outsiders.” *Van Susteren v. Jones*, 331 F.3d at 1026 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986)). Section 5-105(A) does not prohibit Mr. Setzer’s “ability [to] freely . . . write, speak, organize campaigns, or promote any set of political beliefs that he wishes.” *Jolivette*, 694 F.3d at 769 (citing *Jenness v. Fortson*, 403 U.S. 431, 438 (1971)). Rather, it “is a means of restricting the candidates who may appear on the ballot . . .” *Id.* Section § 5-105(A) “preserv[es] the integrity of the various means of getting on the ballot . . .”


*Van Susteren*, 331 F.3d at 1026. The mere fact that a Republican candidate challenges Mr. Setzer's candidacy, and no other Democratic candidate filed for the same office, does not establish that Section 5-105(A) has been unconstitutionally applied to him.

23. Section 5-105(A) serves regulatory interests. See *Van Susteren*, 331 F.3d at 1026 (citing *Storer*, 415 U.S. at 733, 736); *Jolivette*, 694 F.3d at 769 (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)); *Schrader v. Blackwell*, 241 F.3d 783, 789 (6th Cir. 2001) (quoting *Jenness*, 403 U.S. at 442). It does so within the framework of the Oklahoma Constitution. *Bradshaw v. Okla. St. Election Bd.*, 2004 OK 69, 98 P.3d 1092, 1095-96 (Kauger, J., dissenting). The fact that a Republican candidate challenges Mr. Setzer's candidacy, and no other Democratic candidate filed for the same office, fails to show how these regulatory interests are not being furthered in this case.
24. As such, the facts do not support Mr. Setzer's claim that he has been treated so differently from other candidates by Sections 5-105(A) and 5-118 as to render their application to this contest of candidacy unconstitutional.
25. Mr. Setzer claimed in his Answer that Section 5-105 and 5-118 are facially unconstitutional. This Board is required to follow the Oklahoma Supreme Court's rulings regarding the constitutionality of statutes of their face. The Oklahoma Supreme Court has ruled Section 5-105 constitutional. *Davis*, 1988 OK 95, 762 P.2d 932. This Board lacks the authority to conclude otherwise. See *Robinson*, 2016 OK 42 at ¶ 12 ("The Legislature may not confer upon the Commission the power to determine the facial constitutionality of a statute, and the Commission may not assume that power – such power reside in the judiciary alone.").
26. The Oklahoma Supreme Court has not addressed the constitutionality of Section 5-118. "A legislative act is presumed to be constitutional and . . . [e]very presumption is to be indulged in favor of the constitutionality of a statute. *Dani v. Miller*, 2016 OK 35, ¶ 26, --- P.3d ----. This Board may not presume otherwise.
27. Mr. Setzer also claimed Section 5-118 is an impermissible delegation of "governmental authority to private persons." 26 O.S. 2011, § 5-118 does not delegate authority to decide a contest of candidacy to anyone. It permits a candidate to file a petition to contest the candidacy of another candidate for the same office. The authority to decide whether a challenged candidate is legally qualified to be placed on the ballot rests exclusively with this Board, not private persons or entities.
28. Mr. Marlatt's petition is therefore granted and Mr. Setzer's name will not appear on the ballot as a candidate for the office of State Senate, District 27.
29. Costs are assessed against Mr. Setzer, pursuant to 26 O.S. 2011, § 5-131.

Done this 25th day of April, 2016, by a vote of 2 (Curry, Chairman; Montgomery,

Member) to 1 (Dr. Mauldin, Member) of the Election Board of the State of Oklahoma.

OKLAHOMA STATE ELECTION BOARD

  
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STEVE CURRY, Chairman