

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBERT L. SCHULTZ, JAMES CONDIT,
JR., JENNIFER MAKI, PAM WAGNER,
TROY D. REHA, GINGER CORBETT,
ROGER LEAHY, and WALTER REDDY,

Plaintiffs,

vs.

STATE OF IOWA, STATE AUDITOR
DAVID A. VAUDT, STORY COUNTY,
COMMISSIONER OF ELECTIONS
MARY MOISMAN, IOWA REPUBLICAN
PARTY, RAY HOFFMAN AS
CHAIRMAN,

Defendants.

No. 4:07-cv-00350 -JEG

O R D E R

This matter is before the Court on Plaintiffs' August 9, 2007 Verified Complaint, which includes a request for a Temporary Restraining Order. Currently, the record demonstrates that Defendant Mary Moisman, Defendant Ray Hoffman, and Defendant David A. Vaudt were served with notice of the above captioned cause of action in the morning of August 10, 2007. Hearing was held on the matter at 1:30 p.m. on August 10, 2007. All Plaintiffs, except for Ginger Corbett, were present at the hearing, proceeding in their pro se capacity. Attorney Matthew McDermott appeared on behalf of the Iowa Republican Party. The remaining Defendants were not present or represented at the hearing. The matter is now fully submitted for review. For the reasons set forth by the

Court at the conclusion of the hearing, discussed more fully below, Plaintiff's Motion for Preliminary Injunction must be **denied**.

SUMMARY OF MATERIAL FACTS

The statewide Iowa Straw Poll hosted by the Iowa Republican Party is scheduled to take place on Saturday, August 11, 2007 in Ames, Iowa. In order to participate in the activities at the Iowa Straw Poll, such as voting, an individual must first purchase a ticket from The Republican Party of Iowa ("Iowa GOP"), at a cost of \$35.00.¹ In addition, prior to casting a ballot at the straw poll, the Iowa GOP requires an individual to present a valid Iowa drivers license or photo I.D. and only Iowans are allowed to cast a ballot at the event.² The ballot contains the names of eleven Republicans who have either formally announced their intention to run for President in the 2008 Presidential election, or have otherwise expressed an interest in running in the 2008 Presidential election.³ The results of the Iowa Straw Poll are not binding, a fact Plaintiffs acknowledge in their Verified Complaint.

Plaintiffs Jennifer Maki, Pam Wagner, Troy Reha, Ginger Corbett, and Roger Leahy have each stated that they are a citizen of the state of Iowa and a registered voter.

¹The Republican Party offers a free Iowa Straw Poll ticket to any individual who volunteers to work a shift at the Iowa Straw Poll on Saturday, August 11.

²The Republican Party will permit any Iowa resident who will be 18 years old on or before November 4, 2008, to vote in the Iowa Straw Poll.

³According to the materials attached to the Verified Complaint, the ballot will contain the following candidates: Sam Brownback, John Cox, Rudy Giuliani, Mike Huckabee, Duncan Hunter, John McCain, Ron Paul, Mitt Romney, Tom Tancredo, Fred Thompson, and Tommy Thompson.

Maki, Wagner, Reha and Leahy have each purchased a ticket to the Iowa Straw Poll. Corbett states she does not have the \$35.00 required to purchase a ticket to the Iowa Straw Poll. Plaintiffs Robert Schulz, James Condit, and Walter Reddy are registered voters, but are not citizens of the state of Iowa. The Verified Complaint states that Schulz, Condit, and Reddy have each purchased a ticket to the Iowa Straw Poll. Because Schulz, Condit, and Reddy have purchased the requisite ticket, they may attend the Iowa Straw Poll activities, but because they are not citizens of the state of Iowa, they are not qualified to cast a ballot at the Iowa Straw Poll.

Late in the day on Thursday, August 9, 2007, Plaintiffs filed a Verified Complaint alleging various perceived deficiencies with the procedures that would govern the voting process and ballot counting at the straw poll. Within this Verified Complaint were requests for a temporary restraining order, preliminary and permanent injunctions.⁴ Plaintiffs are proceeding pro se, therefore the Court will deem the Verified Complaint currently as a request for a temporary restraining order.

In the Verified Complaint, Plaintiffs assert that on August 3, 2007, the Secretary of State for California decertified the primary Diebold voting machines in use in 39 counties in the state of California. Plaintiffs allege that Story County Iowa, the location of the Iowa Straw Poll, uses the same Diebold machines that have allegedly been decertified by California. Plaintiff Schulz, in a letter that was submitted to the Court along with the

⁴Plaintiffs used the terms “preliminary injunction” and “temporary restraining order” interchangeably.

Verified Complaint, asserts that the Plaintiffs were “finally moved to act following the sudden announcement on August 3, 2007 of the results of the comprehensive study commissioned by the State of California, and the resultant decertification of Diebold machines currently in use in 39 California counties – the same machines that will be used on the Iowa Straw Poll on August 11, 2007.”

Plaintiffs challenge the constitutionality of the voting process that is to be used during the Iowa Straw Poll. Plaintiffs argue that the process currently used to conduct the straw poll unnecessarily and unreasonably heightens the possibility of confusion, deception, frustration and fraud. Plaintiffs assert that a failure to provide the voters with a verifiable “chain of custody” and the manual allocation and count of all ballots in full public view, at each voting station, before those ballots are ever removed from public view, violates their voting rights. Plaintiffs also contend that the process involves what appears to be a constitutionally challenged “poll tax”, because in order to participate in the straw poll, an individual must purchase a \$35 ticket to attend the event, and that the voting process and ballot counting procedures that will be used is a breach of the contract they entered into with Defendants when they purchased their tickets to the Iowa Straw Poll.

STANDING

“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Warth v. Seldin, 422 U.S. 490, 498 (1975).

To establish standing, a plaintiff is required to show that he or she had “ ‘suffered an injury in fact, meaning that the injury is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.’ Second, the injury must be traceable to the defendant's challenged action. Third, it must be ‘likely’ rather than ‘speculative’ that a favorable decision will redress the injury.” South Dakota Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 591 (8th Cir.2003) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)), cert. denied, 541 U.S. 1037, 124 S.Ct. 2095, 158 L.Ed.2d 723 (2004).

Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006). A “concrete and particularized” interest is one that “affect[s] the plaintiff in a personal and individual way.” Lujan, 504 U.S. at 560 n.1. A “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens” is generally insufficient to confer standing. Warth, 422 U.S. at 499. Plaintiffs assert they have standing based on their right to vote and to have their votes be counted, and based upon their purchase of tickets to the straw poll, as Plaintiffs claim these tickets constitute a contract that triggers standing under the Contract Clause of the United States Constitution. Plaintiffs have done little to sustain their burden of demonstrating an injury beyond that generally shared by all citizens interested in this portion of the political process; and while the contract claim may provide a basis for standing for some plaintiffs, that basis appears weak. The record before the Court is murky at best regarding the basis for standing, however, since the issue currently before the Court is solely the valid issuance of a temporary restraining order, the Court will proceed to the further appropriate considerations.

APPLICABLE LAW

Federal Rule of Civil Procedure 65(b) addresses the procedure for a temporary restraining order in the absence of defendants. Some reasonable effort to provide notice to effected parties is required by the rule. Service upon the Defendants the morning before the hearing and the day before an event that has been scheduled for some time appears inadequate to meet the import of the rule that some opportunity to be heard be provided. The Iowa Republican Party did appear and was heard. While in any event the essential standard for consideration of a temporary restraining order is the same as that for a preliminary injunction, see Four Rivers Investments, Inc. v. United States, 2007 WL 2193884, *2 (Fed. Cl. 2007), Northeast Ohio Coalition for Homeless and Service Employees Int'l Union, Local 1199 v. Blackwell, 467 F.3d 999, 1009 (6th Cir. 2006), S. B. McLaughlin & Co. v. Tudor Oaks Condo Project, 877 F.2d 707, 708 (8th Cir. 1989), the presence of the Iowa Republican Party certainly converts the analysis to that of a preliminary injunction.

PRELIMINARY INJUNCTION STANDARD

Plaintiffs' preliminary injunction motion is governed by Fed. R. Civ. P. 65.

In deciding a motion for a preliminary injunction, a district court balances four factors: (1) the likelihood of the movant's success on the merits; (2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to the other litigants; and (4) the public interest.

Watkins Inc. v. Lewis, 346 F.3d 841, 844 (8th Cir. 2003) (citing Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981)). "A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant." Id. Denial of a motion for preliminary injunction is reviewed for an abuse of discretion. Id.

ANALYSIS OF THE PRELIMINARY INJUNCTION FACTORS

Likelihood of Success on the Merits

Plaintiffs contend they have a strong likelihood of success on the merits of their constitutional claims, arguing that only a manual count of the ballots that have not been out of public view will provide 100% assurance that all voters have cast an effective vote, and that all votes have been properly and legally counted. Plaintiffs have failed to provide any authority for the proposition that a non-binding straw poll conducted by a political party rises to the level of a constitutionally protected election, and the Court can find none.

“Courts generally and consistently have been reluctant to interfere with the internal operations of a political party.” Blank v. Heineman, 771 F.Supp.1013, 1018 (D.Neb. 1991) (citing Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119, 120 (8th Cir.1968)).

Plaintiffs claim the state is cooperating and partnering with the Iowa GOP in conducting the straw poll, including sharing expenses, using state property, using Story County's voting machines, and staffing the event with Story County election officials. There is no evidence of shared expenses. Even if the GOP is using county-owned voting machines, they are not being used in a public election and there is no evidence public funds are being used to operate the machines or to pay any of the individuals staffing the event; in fact, Iowa GOP literature Plaintiffs have attached to their Verified Complaint indicates the county election officials are serving in a volunteer capacity and are not conducting the straw poll on the government's watch.

Plaintiffs concede the results of the Iowa Straw Poll are non-binding and do not affect who may participate in the Iowa caucuses or primary elections. Although the Iowa Straw Poll is one step in a campaign process that will ultimately result in a candidate for President of the United States, it is but one small, early step in the nominating process of one political party, and in fact is a rally and fund-raiser for the Iowa Republican Party. Plaintiffs cannot “transform actions relating solely to the internal activity of a political party into activity which constitutes state action.” Blank, 771 F. Supp at 1018 (finding no conspiracy to infringe First Amendment rights of plaintiffs, who claimed they were removed from a political party’s leadership based on their religion).

The Court is aware of no constitutional right to participate in the details of a non-binding poll hosted by a private political party, and Plaintiffs have failed to establish the state of Iowa’s participation in the Iowa Straw Poll is such that the straw poll has been transformed into or otherwise can be deemed a public affair. Plaintiffs have not demonstrated that the voting to take place at the Iowa Straw Poll rises beyond the level of “intra-party deliberations,” see Rogers v. Corbett, 468 F.3d 188 (3d Cir. 2006), and infringes on their right of access to the ballot box. Plaintiffs have failed to establish a likelihood of success on the merits of their constitutional claim.

The \$35.00 purchase price of the ticket buys the right to attend the Iowa Straw Poll festivities (such as listening to the speakers scheduled to attend) as well as the opportunity to vote in the Iowa Straw Poll, if the purchaser of the ticket meets the qualifications set forth by the Republican Party. The Plaintiffs have failed to demonstrate that the purchase

price to attend an event hosted by a private political party, in which individuals in attendance can participate in a vote that has no binding effect on a public affair (such as an election) constitutes a “poll tax”.

Plaintiffs have also failed to establish a likelihood of success on the merits of their breach of contract claim. Plaintiffs argue that the purchase of an Iowa Straw Poll ticket is the execution of a contract between Defendants, the organizers of the Iowa Straw Poll, and those participating as ticket holders. Assuming, *arguendo*, that the purchase of the ticket constitutes a contract, Plaintiffs have not demonstrated any breach of that contract. Plaintiffs claim the contract includes (for the Iowa plaintiffs) the right to vote in the straw poll and the right to have those votes counted accurately. Plaintiffs have presented nothing more than a disagreement with the method chosen by the Republican Party of Iowa to count those votes. Further, it appears the Iowa GOP has disclosed the method of voting and tabulation, as evidenced by Iowa GOP materials Plaintiffs attached to their Verified Complaint. If the Plaintiffs entered into this alleged contract knowing the terms of the contract, they cannot now claim the contract has been breached merely because they find some terms of the contract distasteful.

Irreparable Harm

“For a court to enter a preliminary injunction, it must find that the moving party would be irreparably harmed absent an injunction.” Mid-America Real Estate Co. v. Iowa Realty Co., Inc., 406 F.3d 969, 977 (8th Cir. 2005) (citing United Healthcare Ins. Co. v. AdvancePCS, 316 F.3d 737, 740 (8th Cir. 2002)). “Failure to show irreparable harm is an

independently sufficient ground upon which to deny a preliminary injunction.” Watkins Inc., 346 F.3d at 844.

Plaintiffs assert that the Iowa Straw Poll voting procedures infringe on their constitutional right to vote because the balloting process is not manually verifiable or otherwise conducted “in the public eye” at all times. Plaintiffs contend that their harm will be immediate and irreparable because the voting is scheduled to take place on Saturday, August 11, 2007, without the 100% assurance that the votes will be accurately counted, and it would impossible to redo the vote.

The Iowa Straw Poll appears to be just that, an unofficial poll, it does not constitute either a public de facto primary, a public primary, a public caucus, or a public election. Further, the non-Iowa Plaintiffs have no constitutional right to participate in an event hosted by a private political party of another state. With the purchase of the ticket, they obtain the privilege to attend all associated straw poll activities, they simply cannot participate in the vote.

The Iowa Plaintiffs do not complain that they are being prevented from participating, rather, their complaint lies in the fact that they can not dictate the security and handling of the balloting procedure. This is not an injury the Court can remedy as the Court cannot direct the private functioning of a political party unless said functioning affects an public affair, such as an election.

“[T]o constitute irreparable injury, the injury must be both certain and great; it must be actual and not theoretical.” Knutson v. AG Processing, Inc., 302 F.Supp.2d 1023,

1037 (N.D. Iowa 2004) (quoting Packard Elevator v. I.C.C., 782 F.2d 112, 115 (8th Cir. 1986) *cert. denied*, 484 U.S. 828 (1987))(quotations omitted).

Balance of Hardships and the Public Interest

Plaintiffs argue the harm to Defendants if the temporary injunction is granted is virtually non-existent because under Plaintiffs' proposed ten-point program there is no need to redo any ballots and Plaintiffs have already purchased enough transparent containers for the receipt of all ballots at all 60 voting stations, and that the tables needed to count the ballots at each voting station are already available from Defendants, and if not, plaintiffs would voluntarily rent the necessary cafeteria style tables. Plaintiffs state they can foresee no net increase in cost to Defendants if they are ordered to abandon the Diebold machines, and that in fact, without the requirements for all the electric cabling and the demand for electric energy associated with the running of the machines for more than eight hours there would most likely be a net decrease in cost if the preliminary injunction was granted.

The Court has no specific evidence before it regarding the costs associated with the organization, advertising, and hosting of the Iowa Straw Poll. Presumably the costs associated with presenting such an event to the public are not minimal. Further, the public has an interest in being allowed to proceed with the Iowa Straw Poll as scheduled.

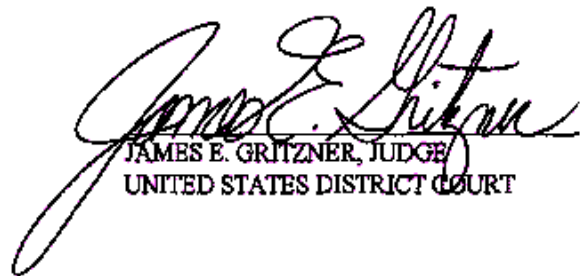
CONCLUSION

The Court finds the notice requirements of Fed. R. Civ. P. 65(b) have not been reasonably met under the circumstances. The Court further finds there is questionable

standing for these Plaintiffs. Most importantly for purposes of immediate relief, however, the Court finds the record does not support a conclusion the Plaintiffs will suffer an “immediate and irreparable injury, loss or damage.” Fed. R. Civ. P. 65(b). The Court finds no legal authority or factual basis upon which to conclude there is any likelihood of success on the merits. Plaintiffs bear the burden of proving all four Dataphase factors. Watkins, 346 F.3d at 844 (citing Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987)). “These factors are not a rigid formula. However, ‘[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.’” Bandag, Inc. v. Jack's Tire & Oil, Inc., 190 F.3d 924, 926 (8th Cir. 1999) (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959)). After considering the four factors relevant to considering a motion for temporary restraining order or preliminary injunction, the Court concludes Plaintiff’s request (Clerk’s No. 1) must be **denied**.

IT IS SO ORDERED.

Dated this 10th day of August, 2007.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT