

CASE NO CIV-12-119-D

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA**

LIBERTARIAN PARTY OF OKLAHOMA, et al.,

Plaintiffs,

vs.

PAUL ZIRIAX,et al.,

Defendants.

DEFENDANTS' CLOSING ARGUMENT

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A preliminary injunction is an extraordinary remedy. Plaintiffs must prove clearly and unequivocally that: (1) LPO will suffer irreparable injury unless granted an injunction; (2) the threatened injury to LPO outweighs whatever damage the proposed injunction may cause the Defendants; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. Plaintiffs' evidence failed to clearly and unequivocally establish any of the four elements.

On March 1, 2012, the LPO submitted 57,137 signatures. To establish irreparable harm, Plaintiffs must establish clearly and unequivocally that less than 51,739 valid signatures were submitted. Robert Murphy testified LPO had on more than one occasion purchased the Oklahoma voter registration list. With that list, Plaintiffs could and should have themselves determined signature validity before paying the signature gatherers. They chose not to do so, and thus did not present clear and unequivocal evidence. Instead, Mr. Murphy conducted an unscientific "sampling" in February, 2012, from which the LPO speculates whether sufficient signatures were submitted

"Clear and unequivocal evidence" is a higher burden of proof than "probably" or "preponderance of the evidence". Thus, even if Mr. Murphy's "sampling" were sufficient to establish that the LPO "probably" did not submit sufficient signatures, LPO still has not met its burden of "clear and unequivocal" evidence. The LPO will be recognized as a political party if on March 1, 2012, LPO submitted 51,739 valid signatures. Paul Ziriaux Affidavit at ¶ 25. Under such circumstances, Plaintiffs did not establish that it is certain,

clear and unequivocal that LPO has been injured.

Plaintiffs also did not submit evidence of a substantial likelihood of success on the merits. The question before the Court is not whether the LPO finds it difficult to get on the ballot, but whether the challenged statute forecloses minor parties from accessing the ballot. The State need not remove every barrier to ballot access. *See Am. Party of Texas v. White*, 415 U.S. 767, 794 (1974) (noting that the States need not “finance the efforts of every nascent political group seeking to organize itself”). Although minor party candidates may face numerous problems in obtaining political office, there is no duty on the state to ameliorate those problems. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366-68 (1997). The state’s legislation “may, in practice, favor the traditional two-party system”. *Id.* at 367. The state is not required to increase the likelihood that an unpopular candidate will gain ballot access. *Munro v. Socialist Workers Party*, 479 U.S. 189, 198 (1986).

It was undisputed that minor parties have been on the ballot ten times since 1974 when the signature requirement was established at 5% of the vote in the last general election, Dfts. Ex. 37, and that of the LPO’s nine ballot signature drives, it achieved ballot access five times -- six times if the 1984 default judgment is included. Dfts. Ex. 34. Restrictions which do not affect a political party’s ability to perform its primary functions of organizing, developing or recruiting supporters, choosing a candidate, or voting for that candidate in a general election have been held to not impose a severe burden.

It is not the Oklahoma ballot access statute which prevents the LPO from performing its primary functions, but rather, it is LPO itself which fails to organize, develop or recruit

supporters, choose candidates, or vote for that candidate in a general elections. The LPO does not have a ballot access issue, they have an internal organization and campaigning issue. They are unable to generate public interest in their party. After forty years in Oklahoma, only fifteen members showed up for the LPO March 10, 2012 state convention. They do not run many candidates for office. Dfts. Ex. 36. They receive a very low percentage of the vote, Dfts. Ex. 35, and keep having to repeatedly attempt to qualify for the ballot, whereas if they achieved 10% of the vote they would remain on the ballot. Okla. Stat. tit. 26, § 1-109. They are underfunded and do not use inexpensive social media to attract new members. Dfts. Ex. 44. The website for the Libertarian Party of Oklahoma (oklp.org) does not include links to Facebook or Twitter. The only event listed under the “events” tab on the website, is the March 10, 2012 State Convention.

When they have attempted to achieve ballot access, they lacked diligence and effort. Dfts. Ex. 46 at Interrogatory 13, and Ex. 47 *Clingman* transcript. Neither Mr. Murphy nor Mr. Duffe, Plaintiffs in this case and two of the few remaining Oklahoma Libertarians, gathered more than a few petition signatures. Neither seemed to know who was actually gathering the signatures. There seems be little effort to actually function as an organization or a party. Minor parties other than the LPO generally perform better than the LPO in elections. Dfts. Ex. 39. This all indicates that LPO’s difficulty in either getting on the ballot or staying on the ballot is not caused by Oklahoma’s ballot access laws.

Oklahoma’s statute falls within the outer permissible limits established in *Jenness v. Fortson*. *Jenness* upheld 5% of registered voters, whereas Oklahoma only requires 5% of

the vote in the last general election, a much lower number. *Jeness* upheld a six month circulation period to obtain signatures, whereas Oklahoma permits a maximum of twelve months (ten in 2012), longer times than approved in *Jeness*. Dfts. Ex. 42. And to remain on the ballot, only 10% of the vote is required, whereas *Jeness* approved 20%. *Id.* The Reform Party met that retention requirement in 1996. *Id.*

The openness of Oklahoma's system, that is, evidence that the LPO is not foreclosed from ballot access, is also established by: petition signers need not be members of LPO, they need not promise to vote for LPO, they may sign multiple petitions for parties and candidates, they need not be first time voters, and they need not change party registration to sign. *Id.*

All of the above establish that LPO and minor parties are not excluded from ballot access in Oklahoma by Oklahoma's ballot access laws. In fact, Americans Elect has submitted 89,062 signatures seeking to be recognized in 2012.

Because the burden placed on LPO by Oklahoma's statute is not severe, because LPO's problems are not caused by the State, the restrictions in the challenged statute need only be justified by Oklahoma's important regulatory interests. *See* Dfts. Ex. 43. "Not every electoral law that burdens associational rights is subject to strict scrutiny." *Clingman v. Beaver*, 544 U.S. 581, 582 (2005). States are permitted to require parties to show substantial support and to set petition filing deadlines in order to get on the ballot because: it protects the integrity of elections, prevents waste, and confusion caused by frivolous candidates; it avoids disruption and disarray in the ballot preparation and election process; the rights of 8,368 to 4,847 absentee, military and overseas voters (Dfts. Ex. 29) and the 229,070

Independent voters (Defs. Ex. 21) are protected; and it permits Oklahoma to comply with its MOVE Act duties under the Elections and Supremacy Clauses of the Constitution.

Although the LPO claims it wants to be recognized as an Oklahoma party, it seeks to avoid the constitutionally required party Primary Election on June 26, 2012, in which it authorized 229,070 Independent voters to vote. *See Okla.Const. Art. 3, § 3; Exhibit 15.* Should this Court grant relief over Defendants' objections, it is preferable that all parties be treated equally, and that the Court not disenfranchise Independent registered voters. If the LPO becomes recognized as a party, the Plaintiffs have no control over who may file to seek office under the LPO label. In another form of requested relief, the LPO seeks to extend its signature gathering period to May 1, 2012, leaving Oklahoma only a few days for the State to count all the signatures, prepare and print ballots, and then on May 11, 2012, mail absentee ballots under the MOVE Act. Such relief would disenfranchise military and overseas voters and should not be granted. Although Defendants object to any relief being granted to the Plaintiffs, the requested relief least harmful to Defendants, provided it is not construed under *Blomquist* as an admission, would be for the Court to refuse to extend the deadline beyond March 1, but providing for a one-time pro rata allowance for there being ten months rather than twelve months in 2012 alone to obtain signatures.

In conclusion, the test is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity. *Anderson v. Celebrezze* at 793. The LPO has not been unfairly or unnecessarily burdened. All requested relief should be denied.

Respectfully submitted,

s/ Martha R. Kulmacz

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CERTIFICATE OF SERVICE

I certify that on March 13, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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