

DANIEL T. LEWIS, PATRICIA GILMORE,
BONNIE L. TYNDALL, and
LIBERTARIAN PARTY OF TENNESSEE,

V.

....Defendants.

Case 3:14-cv-01565 Document 11 Filed 08/19/14 Page 1 of 12 PageID #: 36

The Tennessee election laws which specifically cause the foregoing unconstitutional result and which are in question herein are as follows:

T.C.A. § 2-1-104. Title definitions.

(a) In this title, unless a different meaning is clearly intended:

(14) “Political party” means an organization which nominates candidates for public office;

T.C.A. § 2-1-104. Title definitions.

(a) In this title, unless a different meaning is clearly intended:

(24) “Recognized minor party” means any group or association that has successfully petitioned by filing with the coordinator of elections a petition which shall conform to requirements established by the coordinator of elections, but which must at a minimum bear the signatures of registered voters equal to at least two and one-half percent (2.5%) of the total number of votes cast for gubernatorial candidates in the most recent election of governor, and on each page of the petition, state its purpose, state its name, and contain the names of registered voters from a single county;

T.C.A. § 2-1-104. Title definitions.

(a) In this title, unless a different meaning is clearly intended:

(31) “Statewide political party” means:

(A) A political party at least one (1) of whose candidates for an office to be elected by voters of the entire state in the past four (4) calendar years has received a number of votes equal to at least five percent (5%) of the total number of votes cast for gubernatorial candidates in the most recent election of governor.

T.C.A. § 2-1-114. Requisites for political parties.

No political party may have nominees on a ballot or exercise any of the rights of political parties under this title until its officers have filed on its behalf with the secretary of state and with the coordinator of elections:

(1) An affidavit under oath that it does not advocate the overthrow of local, state or national government by force or violence and that it is not affiliated with any organization which does advocate such a policy; and

(2) A copy of the rules under which the party and its subdivisions operate. Copies of amendments or additions to the rules shall be filed with the secretary of state and with the coordinator of elections within thirty (30) days after they are adopted and shall be of no effect until ten (10) days after they are filed.

T.C.A. § 2-5-208. Arrangement of material on ballots.

(d)(1) Notwithstanding any other provision of this chapter or this title, on general election ballots, the name of each political party having nominees on the ballot shall be listed in the following order: majority party, minority party, and recognized minor party, if any. The names of the political party candidates shall be alphabetically listed underneath the appropriate column for the candidate's party. A column for independent candidates shall follow the recognized minor party, or if there is not a recognized minor party on the ballot, shall follow the minority party, with the listing of the candidates' names alphabetically underneath.

T.C.A. § 2-13-107. Recognition as a minor party.

(a)(2) To be recognized as a minor party for purposes of a general election, a petition as required in § 2-1-104 must be filed in the office of the coordinator of elections no later than twelve o'clock (12:00) noon, prevailing time, ninety (90) days prior to the date on which the general election is to be held. The petition shall be accompanied by the name and address of the person or the names and addresses of the members of the group or association filing the petition to form the recognized minor political party.

* * * *

(c) Upon filing the required petition, candidates seeking to represent the minor party in a primary election must file nominating petitions as any other candidate for the desired office no later than twelve o'clock (12:00) noon, prevailing time, on the appropriate qualifying deadline as established in § 2-5-101(a). If the coordinator of elections determines the petition meets the statutory requirements to be declared a recognized minor party, the candidates seeking to represent such minor party shall be placed on the appropriate primary ballot for such minor party. If the coordinator of elections determines the petition fails to meet the statutory requirements to be declared a recognized minor party, the candidates seeking to represent such minor party shall be placed on the appropriate general election ballot as independent candidates.

* * * *

(e)(2) A recognized minor party must satisfy the requirements of § 2-1-114 no later than September 1 after the primary elections are held pursuant to § 2-13-202

in order for its candidates to appear on the regular November general election ballot. If a recognized minor party fails to satisfy the requirements of § 2-1-114 by the required deadline, its candidates shall appear on the regular November general election ballot as independent candidates.

T.C.A. § 2-13-201. Conditions for name being shown on ballot.

(a) No person's name may be shown on a ballot as the nominee of a political party for the offices named in § 2-13-202 or for any office to be voted on by the voters of a county, unless the political party:

- (1) Is a statewide political party or a recognized minor party; and
- (2) Has nominated the person substantially in compliance with this chapter.

**I. STATEMENT OF THE CASE AND HISTORY OF PERTINENT CHANGES
IN TENNESSEE BALLOT ACCESS LAW**

This proceeding seeks a judgment declaring the aforesaid Tennessee election laws as applied to the Plaintiffs for the 2014 Tennessee General Election for Governor on November 4, 2014, and all subsequent general elections in the State of Tennessee and the facts and circumstances relating thereto, unconstitutional in that they violate in their application to the Plaintiffs herein for the aforesaid 2014 Tennessee General Election, and all subsequent Tennessee General Elections, the First and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. § 1983. Plaintiffs request a preliminary injunction against Defendants placing Daniel T. Lewis's name on the General Election ballot as a Libertarian, rather than an Independent, candidate for Governor.

This Court has previously held in several cases the number of petition signatures required to form a new political party when combined with an unconstitutionally early deadline, to be unconstitutional, even after subsequent revisions and modifications by the Tennessee legislature. *Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064 (M.D. Tenn. 2010); *Green Party of Tennessee v. Hargett*, 882 F.Supp.2d 959 (M.D. Tenn. 2012), rev'd., *Green Party of Tennessee v.*

Hargett, 700 F.3d 816 (6th Cir. 2012), and decided again after remand in Case No. 3:11-cv-00692 on June 18, 2013, *Green Party of Tennessee v. Hargett*, 953 F.Supp.2d 816 (M.D. Tenn. 2013), and again appealed to the U.S. Court of Appeals for the Sixth Circuit, with oral argument having been conducted before the Sixth Circuit on August 7, 2014.

Whatever should be decided by the Sixth Circuit in the latest appeal, the State legislature has only partially responded to this Court's former rulings by providing a means for minor parties to nominate candidates for partisan office by means other than a primary election, but with the minor party still required to obtain an excessively high petition signature number when combined with an unconstitutionally early petition filing deadline in order to achieve minor party status by petitioning. However, no minor political party has successfully petitioned for party status in Tennessee for approximately 46 years. Thus, minor party candidates are forced to appear on the ballot as Independent candidates—unless Court-ordered relief is granted--and Tennessee voters are denied valuable information in trying to cast their votes effectively.

II. STANDARD OF REVIEW

In deciding whether or not to grant Plaintiffs' Motion for Preliminary Injunction filed herein, the Trial Court must consider both the standard of review to be applied to a preliminary injunction request as well as the standard of review required in a ballot access case. In order to demonstrate entitlement to a preliminary injunction, four criteria must be considered by the Court: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *McGlone v. Bell*, 681 F.3d 718, at 735-736 (6th Cir. 2012), citing *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir. 2001)(quoting *Rock & Roll Hall of Fame v.*

Gentile Prods., 134 F.3d 749, 753 (6th Cir. 1998). Also see, *Hunter v. Hamilton County Bd. Of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). These factors are to be balanced and do not receive rigid application or an assignment of equal weight. *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1992); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1480 (6th Cir. 1995)(“those four considerations are, however, ‘factors to be balanced, not prerequisites that must be met. Accordingly, the degree of likelihood of success required may depend on the strength of the other factors.’”) (citation omitted). For the likelihood of success factor, “it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics Holding Corp., II v. Cafcomp Sys.*, 119 F.3d 393, 402 (6th Cir. 1997) (affirming grant of preliminary injunction)(citation omitted). *Planned Parenthood Greater Memphis v. Dreyzehner*, 853 F.Supp.2d 724, 733 (M.D.Tenn. 2012).

Because the Plaintiffs would suffer irreparable injury if they were not able to gain ballot access for Mr. Lewis as a Libertarian candidate for the Tennessee General Election ballot on November 4, 2014, for Governor, and, voters would have to cast their votes less effectively because they would not have a fully informed labeling of Mr. Lewis when compared to his opponents, there is no possible constitutionally recognized injury to the Defendants which would be greater than the grave injury to the fundamental rights which Plaintiffs would suffer in the case at bar, and issuance of the proposed preliminary injunction would be in the public interest rather than adverse to the public interest. In deciding whether or not to grant Plaintiffs’ request for a preliminary injunction, the Trial Court should concentrate primarily on the issue of whether or not the Plaintiffs are likely to prevail on the merits in the instant case. Thus, the Court should

next look to the standard of review in judging ballot access laws which impact small political parties seeking state recognition.

In ballot access cases involving a burden on fundamental rights, the appropriate standard of review is strict scrutiny. *Anderson v. Celebrezze*, 460 U.S. 780 (1983); and *Williams v. Rhodes*, 393 U.S. 23 (1968). Since the case at bar involves ballot access restrictions that do burden minority political parties, and the corresponding constitutional right of individuals to political expression and association, the appropriate standard of review which is required by this Court is strict scrutiny, so that State laws cannot stand unless they “further compelling State interests . . . that cannot be served equally well in significantly less burdensome ways.” *American Party of Texas v. White*, 415 U.S. 767, at 780-781. More specifically, the appropriate standard of review is the analytical test applied by the United States Supreme Court in *Anderson v. Celebrezze*, *Id.*. In *Anderson* the United States Supreme Court set forth a standard to be used in determining whether election laws are unconstitutionally oppressive of potential voter's rights. The Supreme Court held that such constitutional challenges to specific provisions of a state's election laws cannot be resolved by litmus-paper tests that will separate valid from invalid restrictions, but rather that the Trial Court “. . . must resolve such a challenge by an analytical process that parallels its work in ordinary litigation.” *Anderson v. Celebrezze*, 460 U.S. at 789. The Supreme Court then set forth three criteria which the Trial Court is expected to follow:

It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rules. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the Plaintiff's rights. Only after weighing all these facts is the reviewing Court in a position to decide whether the challenged provision is unconstitutional. *Anderson v. Celebrezze*, 460 U.S. at 789.

Thus, the Supreme Court has set forth the standard which the Trial Court is to use in analyzing specific provisions of ballot access laws as are involved in the instant action. The Court further stressed that ". . . because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson v. Celebrezze*, 460 U.S. at 793, n. 16.

III. ARGUMENTS AND AUTHORITIES

Tennessee's ballot access laws, as argued above, have previously been declared unconstitutional by this Court, most recently on June 18, 2013, in *Green Party of Tennessee v. Hargett*, *Id.* The Tennessee legislature has tried to remedy these Constitutional deficiencies by changing the laws for new and minor parties, but has failed to satisfy this Court by continuing to have an unconstitutionally early deadline requiring petitioning well before the 90 day before the General Election petition deadline coupled with a high petition signature requirement as specifically condemned as unconstitutional in this Court's decision in *Green Party of Tennessee v. Hargett*, 953 F.Supp.2d at 846-855. It is undisputed that restrictions on access to the election ballot burden two distinct and fundamental rights, ". . . the right of individuals to associates for the advancement of political beliefs, the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. at 30. "The freedom to associate as a political party, a right we have recognized as fundamental [*Williams v. Rhodes*, 393 U.S. at 30-31], has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, 'Voters can assert their preferences only through candidates or parties or both,' *Lubin v. Panish*, 415 U.S.

709, 716 (1974); “*Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, at 184 (1979).

When these fundamental, constitutionally protected rights are unreasonably or unfairly limited or denied, relief is available to set aside restrictions or denial in an action such as the instant case. It is the contention of the Plaintiffs urging this lawsuit that the State of Tennessee has gone too far in infringing the Plaintiffs’ rights to political association and ballot access for special general elections. The teaching of the United States Supreme Court is that:

“even when pursuing a legitimate interest, a state may not choose means that **unnecessarily restrict** constitutionally protected liberty,” *Kusper v. Pontikes*, 414 U.S. 51 (1973), and we have required that states adopt the **least drastic means** to achieve their end. *Lubin v. Panish*, 415 U.S. at 716 . . . ; *Williams v. Rhodes*, 393 U.S. at 31-33 **This requirement is particularly important where restrictions on access to the ballot are involved.** The states’ interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the development of the nation. [emphasis added] *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 185.

“As our past decisions have made clear, the significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest [citations omitted]. If the state has open to it a least drastic way of satisfying its legitimate interest, it may not choose a legislative scheme that broadly stifles the exercise of fundamental liberties. *Shelton v. Tucker*, 364 U.S. 479 [1960].” *Kusper v. Pontikes*, 414 U.S. at 58-59. In deciding what the “least drastic or restrictive means,” is, it is necessary for the Court to “. . . consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification.” *Storer v. Brown*, 415 U.S. 724, at 730 (1974), citing *Williams v. Rhodes*, *Id.*, and *Dunn v. Blumstein*, 405 U.S. 330 (1974). Also see, *Mandel v. Bradley*, 432 U.S. 173 (1977) and *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980). It is of

significance that Tennessee seems to be willing to encourage Independent candidates for general elections, but require a 90 day deadline for petition signatures to get a candidate on the general election ballot as a minor party candidate by successfully obtaining petition signatures of registered Tennessee voters equal to 2½ percent of the last gubernatorial vote.

Tennessee's unnecessarily early petition deadline coupled with the high petition signature requirement and a petitioning time distant from the general election is unconstitutional, lacks any compelling interest, and unequally and unfairly impacts in a discriminatory manner the rights of small, minor, unrecognized political parties in Tennessee. See, *Green Party of Tennessee v. Hargett*, *Id.*; and *Libertarian Party of Tennessee v. Goins*, *Id.* (both holding unconstitutional Tennessee's minor party petition deadline coupled with a 2½ percent petition requirement).¹

While Plaintiff Daniel T. Lewis will be on the ballot as an Independent candidate for Governor in the November 4, 2014 General Election, the United States Supreme Court has stated that "The political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown*, 415 U.S. at 745. It might well be wondered if Tennessee, . . . is willing to encourage minority political voices, but only if they are partially stripped of a legitimizing party label." *McLain v. Meier*, 637 F.2d at 1165, n.12. "A candidate who wishes to be a party candidate should not be compelled to

¹ Subsequently, the Tennessee Legislature after the *Goins* decision removed the party membership requirement for petition signers, kept the 2.5% petition requirement, and created a 119 day deadline before the primary election. This new law was declared unconstitutional on February 3, 2012, in the case of *Green Party of Tennessee v. Hargett*, 882 F.Supp.2d 959 (M.D. Tenn. 2012), with the Court ordering the minor political parties placed on the Tennessee ballot and stating—among other relief--that any deadline in excess of 60 days prior to the primary for the filing of petitions for recognition as a political party is unenforceable. While *Hargett* was subsequently reversed in part, 700 F.3d 816 (6th Cir. 2012), the case was decided again on remand, *Green Party of Tennessee v. Hargett*, 953 F.Supp.2d 816 (M.D. Tenn. 2013), the new law held unconstitutional, and again appealed to the Sixth Circuit Court of Appeals.

adopt Independent status in order to participate in the electoral process.” *McLain v. Meier*, 637 F.2d at 1165.

As the United States Supreme Court has stated in regard to ballot access laws:

A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity in competition in the marketplace of ideas. Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many other challenges to the status quo have in time made their way into the political mainstream. . . . In short, the primary values protected by the First Amendment--“a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, 376 U.S. 254, at 270 (1964)—are served when election campaigns are not monopolized by the existing political parties. *Anderson v. Celebrezze*, 460 U.S. at 793-794.

IV. CONCLUSION

Because of the unconstitutional petitioning deadline, along with the excessively high number of petition signatures required, and the history of lack of success of minor parties obtaining ballot status in Tennessee without Court intervention, the effect of the complained of laws is to force minor party candidates to petition and be listed as Independent candidates for General Elections. The Tennessee election laws complained of hereinabove and in Plaintiffs’ complaint filed herein are unconstitutional in their application to the Plaintiffs for the General Election for Governor to be held on November 4, 2014. In the case at bar, this Court should grant Plaintiff’s Motion for Preliminary Injunction and order Daniel T. Lewis’s name on the aforesaid General Election ballot for Governor to be listed on the ballot as a Libertarian, and such other and further relief as the Court finds equitable and just.

WHEREFORE, premises considered, the Plaintiffs herein pray that this Court will grant them the relief requested in their Complaint and grant Plaintiffs' Motion for Preliminary Injunction forthwith.

Respectfully submitted this 19th day of August, 2014.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that a true and exact copy of the foregoing has been served on all counsel of record via the Court's CM/ECF e-mail notification system on the 19th day of August, 2014. Additionally, I hereby certify that on this 19th day of August, 2014, a true and exact copy of the foregoing was e-mailed to Janet Kleinfelter, Senior Counsel, Office of Tennessee Attorney General at janet.kleinfelter@ag.tn.gov.

/s/ James C. Linger
James C. Linger