

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

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U.S. DISTRICT COURT
MID. DIST. TENN.

ROQUE "ROCKY" DE LA FUENTE,

PLAINTIFF,

v.

DEMOCRATIC PARTY OF TENNESSEE;
and TRE HARGETT, SECRETARY OF STATE
OF TENNESSEE,

DEFENDANT(S).

CASE NO.: 3:16-cv-00189

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT TRE HARGETT,
SECRETARY OF STATE OF TENNESSEE'S MOTION TO DISMISS**

INTRODUCTION

Plaintiff, Roque "Rocky" De La Fuente, has filed an Amended Complaint which renders Defendant Tennessee Secretary of State Tre Hargett's Motion to Dismiss moot. However, as a precautionary action, Plaintiff submits this Response in Opposition which will be moot upon the acceptance of Plaintiff's Amended Complaint.

ARGUMENT

**A. Plaintiff Sufficiently States His Claim That Tenn. Code Ann. § 2-5-205 is
Unconstitutionally Vague**

Plaintiff has sufficiently stated that Tenn. Code Ann. § 2-5-205 cannot withstand constitutional challenge because it is unduly vague.

A statute may be found void for vagueness if a reasonable person must necessarily guess at its meaning. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976). There are three potentially fatal infirmities. First, the applicable coverage of the statute may be unclear. Second, the statute may fail to specify what those within its reach are required to do in order to comply. Third, the statute may permit public officials to exercise unreviewable discretion in their enforcement of the statute because of a lack of standards. *Id.* at 621-22. All three infirmities are present in this case.

With respect to the first *Hynes* infirmity, the provision does not provide any meaningful criteria. Tennessee Code Section 2-5-205 does not define “generally advocated or recognized as candidates in the national news media.” The language fails to specify by which type or source of news media a candidate must be recognized, and further fails to specify what it means to be “generally acknowledged or recognized.” Therefore, a candidate cannot discern whether he or she will be among the chosen few. *Kay v. Mills*, 490 F.Supp. 844, 852 (E.D.Ky.1980).

Regarding the second *Hynes* infirmity, the provision fails to specify what a candidate must do in order to comply, and in attempting to comply, a candidate must necessarily guess at its meaning. *Id.* How many news sources must a candidate show to prove that he is “generally advocated or recognized?” Would it be sufficient to show that the candidate has been covered by tens of stations? Hundreds of stations? What if he has been extensively covered by Spanish-speaking news stations? A candidate could never determine if he had met the standard required by the Tennessee Secretary of State.

Finally, Tennessee Code Section 2-5-205 permits the Secretary of State to exercise unreviewable discretion in its determination of Plaintiff's candidacy. “The fact that an unduly

vague law deprives a court of the ability to review potentially arbitrary or discriminatory decisions of public officials, is one of the principal reasons for the void-for-vagueness doctrine.”

Kay v. Mills, 490 F.Supp. at 852. *See also Duke v. Connell*, 790 F. Supp. 50 (D.R.I. 1992).

Accordingly, this Court should deny Defendant Secretary of State Hargett’s motion to dismiss.

B. Plaintiff Sufficiently States His Claim for De Facto Discrimination under the Civil Rights Act of 1964

The Court should find that Plaintiff has sufficiently stated a claim that his exclusion by Defendant Tennessee Secretary of State creates de facto discrimination. A primary election allows voters to choose one candidate to represent their party, but “it is essential that the choice of candidates not be limited to those arbitrarily selected by persons whose motives may be of a partisan political nature.” *Kay v. Mills*, 490 F.Supp. at 853. The Tennessee statute allows the Defendants to narrow the field of candidates for whom the public would be allowed to vote in the primary, thereby depriving voters of the opportunity to effectively exercise their voting rights. The Supreme Court outlawed this practice in 1944 stating:

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the

election. Constitutional rights would be of little value if they could thus be indirectly denied. *Smith v. Allwright*, 321 U.S. 649, 662, 64 S.Ct. 757 (1944).

Allowing the Defendants to make preliminary decisions in these matters corrupts the democratic process. There was no rational basis for Defendant Hargett to have treated Plaintiff differently from any other serious candidate. The only proper method of ballot access is one that establishes a level playing field for all candidates and leaves the ultimate decision to the voters. *Duke v. Connell*, 790 F. Supp. 50 (D.R.I. 1992).

C. Plaintiff Requests Leave to Amend the Complaint to Include Nominal and Compensatory Damages

Plaintiff requests leave to amend his complaint to address any alleged deficiencies raised by Defendant Hargett and Defendant Tennessee Democratic Party in their motions to dismiss.

In support of his request, Plaintiff shows the Court that none of the two defendants have filed an Answer to Plaintiff's original complaint. The only actions taken by the Defendants to respond to this action were the Motions to Dismiss filed by both Defendants.

The U.S. Supreme Court determined that "[i]n the absence of . . . undue delay, bad faith or dilatory motive . . . undue prejudice . . . futility of amendment, etc.--the leave sought should . . . be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Sixth Circuit applies a balancing test of these factors, which turns on *substantial prejudice* to the opposing party. *See, e.g., Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100*, 698 F.2d 250, 256 (6th Cir. 1983); *Hageman v. Signal L.P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973). As an Amended Complaint would merely add damages and address the alleged deficiencies raised by both

Defendants' Motions to Dismiss, Plaintiff is unable to discern any possible prejudice to the Defendants if leave to amend is allowed.

For the above-mentioned reasons, Plaintiff respectfully requests that his request for leave to amend his Complaint be allowed.

CONCLUSION

Plaintiff has sufficiently stated claims that Tenn. Code Ann. § 2-5-205 is unconstitutionally vague and that the Defendants' actions constituted de facto discrimination under the Civil Rights Act of 1964. Further, Plaintiff seeks leave to amend the Complaint to cure any alleged deficiencies raised by Defendants' Motions to Dismiss. Therefore, Plaintiff respectfully requests that this Honorable Court deny Defendant Hargett's Motion to Dismiss and enter an order granting Plaintiff leave to file an amended complaint and accepting and filing the proposed Amended Complaint accompanying this Motion.

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I declare under penalty of perjury that to my knowledge the foregoing is true and correct.

Signed this 29th day of March, 2016.

By: 

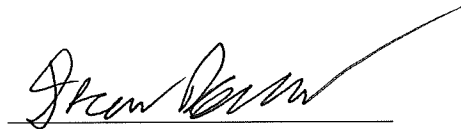
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CERTIFICATE OF SERVICE

I, Drew Rosell, hereby certify that a true copy of the foregoing ***Plaintiff's Response In Opposition To Defendant Tre Hargett, Secretary Of State Of Tennessee's Motion To Dismiss*** was served on Janet M. Kleinfelter attorney for Defendant Tre Hargett, Tennessee Secretary of State, by causing a copy of same to be deposited in the United States Mail, postage prepaid, this 29th day of March, 2016, addressed as follows:

Janet M. Kleinfelter
Tennessee Attorney General's Office
P O Box 20207
Nashville, TN 37202-0207

By: _____



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