

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

Roque De La Fuente,)	
)	
Plaintiff,)	Case No. 3:16-cv-00189
v.)	Judge Aleta A. Trauger
)	
Democratic Party of Tennessee, et. al,)	
)	
Defendants.)	
)	
)	

**DEFENDANT TENNESSEE DEMOCRATIC PARTY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

On February 5, 2015, Plaintiff Roque De La Fuente (“Plaintiff”) filed his original complaint in this matter seeking placement of his name on the March 1, 2016 ballot (the “Ballot”) for Tennessee’s Democratic Presidential Preference Primary Election (the “Primary Election”). Following the filing of two motions to dismiss, Plaintiff filed an amended complaint that for the first time asserted a claim for nominal and compensatory damages as a result of his name being left off of the Ballot. (Dkt. No. 14.) The Defendant, the Tennessee Democratic Party (the “TNDP”), hereby files this memorandum of law in support of its motion to dismiss.

FACTUAL BACKGROUND

Plaintiff alleges that he was denied access to the Ballot by Tre Hargett, Secretary of State of Tennessee (“Secretary Hargett”). (Amended Complaint ¶¶ 10-11.) Plaintiff alleges that he sought placement of his name on the Ballot in November 23, 2015 by sending a letter to Secretary Hargett purporting to show that he was “generally [] recognized as candidates in national news media throughout the United States” as a candidate in the Primary Election. (Amended Complaint ¶¶ 6 and 8 and Ex. A.)

Secretary Hargett, however, did not include Plaintiff's name on the Ballot, instead only listing Hillary Clinton, Bernie Sanders, and Martin O'Malley on the Ballot. (Amended Complaint ¶ 10 and Ex. B.)¹ The Amended Complaint, like Plaintiff's original Complaint, principally alleges that Secretary Hargett violated state and federal law by failing to include Plaintiff's name on the Ballot. (*See generally* Amended Complaint.)

In order to cure some of the deficiencies in his original Complaint relating to the TNDP, the Amended Complaint added an allegation that "upon information and belief" the "[TNDP] provided a recommendation to Secretary Hargett which influence [*sic*] his decision not to include Plaintiff on the [Ballot]". (Amended Complaint ¶ 9.) Other than also mentioning that the TNDP is "one of two major political parties in Tennessee and is the official representative entity of the Democratic National Committee in Tennessee, and is responsible for ...promulgating delegate selection rules for Tennessee for the 2016 Democratic National Convention," the Complaint is bereft of other factual allegations concerning the TNDP's actions or inactions that give rise to Plaintiff's purported claims. (Amended Complaint ¶¶ 4 and 9.)

Although not mentioned in his complaint, the Court is well aware that on March 1, 2016, the Primary Election occurred, and that former Secretary of State Hillary Rodham Clinton won the Primary Election. The court should take judicial notice of these facts, which are not subject to reasonable dispute.²

¹ Secretary Hargett's selection of Mr. O'Malley occurred prior to Mr. O'Malley formally ending his campaign for President of the United States.

² Under Fed. R. Civ. P. 201(b)(1), a court may take judicial notice of a fact that is not subject to reasonable dispute because it is "generally known within the trial court's territorial jurisdiction" of where it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Civ. P. 201(c) also authorizes the court to judicial notice of facts on its own or upon request when a party supplies the court with the necessary information. Courts commonly take judicial notice of the fact of an election, the identities of candidates, and the political affiliation of candidates, among other types of election-related information, because

STANDARD OF REVIEW

The TNDP moves this Court to dismiss this case under both Rule 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim).

In determining whether to grant a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court is to determine “whether the complaint alleges facts on its face which, if taken as true, would be sufficient to invoke the district court’s jurisdiction.” *FOCUS v. Allegheny Cnty. Ct. of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996). The plaintiff bears the burden of establishing the existence of subject matter jurisdiction. *Id.*

To survive a motion to dismiss under Rule 12(b)(6), Plaintiff’s amended complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Villegas v. Metro. Gov’t of Davidson Cnty.*, 2009 WL 4015975, at *2 (M.D. Tenn. Nov. 19, 2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This standard “requires more than labels and conclusions, and a formulaic recitation on the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. The *Twombly* standard applies to all civil cases, and a plaintiff must allege enough facts to allow the fact finder to draw a “reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (emphasis added). Thus, a complaint must proffer sufficient factual support to bring the plaintiff’s claim “above the speculative level.” *Twombly*, 550 U.S. at 555.

that information is sufficiently “notorious in the community” to permit judicial notice under Rule 201. *See City of Dayton v. Reynolds*, Case No. C-3-84-145, 1990 U.S. Dist. LEXIS 20951, at *9-11 (S.D. Ohio Oct. 2, 1990) (collecting cases); *see also Sincok v. Gately*, 262 F. Supp. 739, 804 (1967) (taking judicial notice of the City of Wilmington election results); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1307 n.36 (S.D. Fla. 2002) (taking judicial notice of election results posted on Florida Department of State website). Here, the information is well known in the local community, the March 1, 2016 Democratic Primary Election results are publicly available on the tn.gov website at <http://elections.tn.gov/results.php> (last accessed March 3, 2016), and the substance of those results are not subject to reasonable dispute.

Federal courts, including this Court in the context of election related disputes, routinely grant motions to dismiss at the pleading stage, where the complaint fails to state a claim on which relief may be granted. *See, e.g., Kurita v. State Primary Bd. of the Tenn. Democratic Party*, Case No. 3:08-0948, 2008 U.S. Dist. LEXIS 88071 (M.D. Tenn. Oct. 14, 2008) (granting Rule 12(b)(6) motions to dismiss); *Fair Elections Ohio v. Husted*, Case No. 2:12-cv-763, 2013 U.S. Dist. LEXIS 86393 (June 19, 2013) (granting Rule 12(b)(6) motion on grounds of mootness).

ARGUMENT

Plaintiff has failed to state a claim upon which relief can be granted because: 1) the Primary Election has occurred, and therefore any claim that Plaintiff had that he should have been included on the Ballot is moot; and 2) Secretary Hargett has the sole discretion, in this instance, to determine who appears on the Ballot, and therefore the TNDP is not a proper party to the action.

I. The Case Is Moot And Should Be Dismissed For Lack of Subject Matter Jurisdiction Under Rule 12(b)(1).

The Court has “no power to adjudicate disputes which are moot.” *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997). “The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.” *Id.* (internal citations and quotations omitted).

Although Plaintiff originally sought inclusion on the Ballot (a claim that is clearly mooted), his Amended Complaint seeks to cure this defect by seeking declaratory relief that Tenn. Code Ann. § 2-5-205 is vague and therefore unconstitutional. However, like Plaintiff’s original claim for injunctive relief, his present claim for declaratory relief (Count I of his Amended Complaint) is also moot. This claim became moot the day after the March 1, 2016

election. Again, in a case directly on point from the Tennessee Court of Appeals, that court held that a person seeking access to a presidential preference primary ballot could only maintain a suit prior to the election upon in which she sought to appear on the ballot. *LaRouche v. Crowell*, 709 S.W.2d 585, 587 (Tenn. Ct. App. 1985). In that case, the trial court had granted defendant's motion to dismiss for mootness and held that "the 1984 primary election has already been conducted and all questions relating to that election are moot. Whether [the candidate] will attempt to be placed on the ballot in 1988...are matters of pure conjecture and speculation, not appropriate for declaratory judgment." *Id.* The Tennessee Court of Appeals fully upheld this reasoning as it relates to a candidate's attempts to sue for access to a presidential preference primary ballot after conclusion of that election.

This Court should follow the Tennessee Court of Appeals' lead and dismiss this case on the basis of mootness. *Id.* The Amended Complaint is utterly bereft of any allegation that the declaratory relief requested could affect any election other than the one that has passed. *Id.* Count I should be denied on this basis alone.³

II. Secretary Hargett, In This Instance, Has Control Over Who Appears On The Ballot Under Tenn. Code Ann. § 2-5-205.

In relevant part, Tenn. Code Ann. § 2-5-205 states as follows:

a) The names of candidates for president of the United States shall be printed on the ballot for the presidential preference primary only if they are:

(1) The names of persons whom the secretary of state, *in the secretary of state's sole discretion*, has determined are generally

³ Count II is also subject to dismissal on this ground as well to the extent it only seeks nominal damages. *See Freedom From Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1029 (E.D. Wis. 2008) ("Looking at the issue afresh, it seems unlikely that a claim of nominal damages by itself would support Article III jurisdiction. The courts have long held that "nominal damages, of which \$1 is the norm, are an appropriate means of vindicating rights whose deprivation has not caused actual, provable injury.")

advocated or recognized as candidates in national news media throughout the United States....

Tenn. Code Ann. § 2-5-205(a)(1) (emphasis added). In other words, under Tennessee law the initial decision as to whether a candidate can appear on a presidential preference ballot as a “recognized” candidate is within the sole discretion of Secretary Hargett. Tennessee election law provides no role, no discretion, and no function for the TNDP to allow a person to appear on the Ballot simply by virtue of being a nationally recognized candidate.⁴ Since Plaintiff sought only to qualify for the Ballot under Tenn. Code Ann. § 2-5-205(a)(1), and to the extent he was improperly left off the Ballot, his claim is strictly against Secretary Hargett. (Complaint ¶¶ 15-16 and Ex. A.)

Although Plaintiff’s Amended Complaint gives lip service to the fact that the TNDP’s “Delegate Selection Plan” does not define “nationally recognized candidate,” this is wholly immaterial to the present suit. As Tenn. Code Ann. § 2-5-205(a)(1) it is not the TNDP’s “Delegate Selection Plan” that determines who is qualified to appear on the Ballot as a “nationally recognized candidate,” but rather the sole discretion of the Secretary Hargett.

Moreover, the Amended Complaint’s unfounded allegation that the TNDP “provided a recommendation to Secretary Hargett which influence[d] his decision” is simply not enough to state a claim against the TNDP. (Amended Complaint ¶ 9.) Even assuming this allegation is true, to believe this raises a claim against the TNDP would require that every person or entity that somehow influenced Mr. Hargett’s decision is a proper party to this suit. Such a list could possibly include members of the media, members of the state legislature, the Governor, or

⁴ This is not to say that the TNDP cannot in a different scenario have a say as to who may or may not appear on a presidential preference ballot. This is only limited to the present circumstance when a potential candidate attempted to qualify for a presidential preference primary ballot under the “nationally recognized candidate” prong of Tenn. Code Ann. § 2-5-205(a)(1) and was denied such access by the Tennessee Secretary of State.

Secretary Hagget's wife to the extent that he sought any of their advise on who to include and not to include on the Ballot. In short, regardless of who may or may not have influenced Secretary Hagget's decision to withhold Plaintiff's name from the Ballot, under Tennessee law this decision – at the initial stage – was solely Mr. Hagget's. Tenn. Code Ann. § 2-5-205(a)(1).

Accordingly, even assuming *arguendo* that Plaintiff qualified as a nationally recognized candidate and Secretary Hargett improperly left his name off of the Ballot, Plaintiff's claim is solely and exclusively against Secretary Hargett and Plaintiff has failed to state a claim against the TNDP.

III. The Plaintiff Has Failed To State A Claim For Monetary Relief Against The TNDP

Although Plaintiff's Amended Complaint still suffers the same flaws as his initial complaint, his attempts to cure these defects by adding a claim for nominal and compensatory damages fails. (*See* Amended Complaint, Count II, ¶¶ 23-28.) At the outset, it is utterly unclear what is the basis for nominal or compensatory damages against the TNDP, because Plaintiff has failed to identify any basis to assert such a claim against the TNDP. (*See id.*) His Amended Complaint cites no statute, cause of action, or any other basis to assert a claim for damages against the TNDP.

Regardless, assuming *arguendo*, that Plaintiff has attempted to assert such a claim against the TNDP under Title VI of the Civil Rights Act of 1964, he has failed to state such a claim. (Amended Complaint ¶ 25.)⁵, “Title VI prohibits discrimination in any program receiving federal financial assistance:” *Neighborhood Action Coalition v. Canton*, 882 F.2d 1012, 1014 (6th Cir. Ohio 1989). “Title VI was intended to halt federal funding of entities that violate a

⁵ A review of the plain language of this allegation reveals that it is only alleged against Secretary Hargett, not the TNDP.

prohibition of racial discrimination similar to that of the Constitution." *Id.* (internal quotations and citations omitted). At the most basic level several problems exist with Plaintiff's attempts to invoke Title VI.

First, Plaintiff has made no allegation that there is any program receiving federal funds at issue in this litigation. Second, he makes no claim that the reason why he was left off the ballot had anything to do with discrimination on the basis of "race, color, or national origin." Third, compensatory damages are not available under Title VI in this circumstance where there is no intentional discriminatory conduct alleged. *See Guardians Ass'n v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 594 (1983) *interpreted by Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1015 (6th Cir. 1989) *and Horner ex rel. Horner v. Kentucky High Sch. Ath. Ass'n*, 206 F.3d 685, 702 (6th Cir. Ky. 2000).

Accordingly, Plaintiff has failed to state a claim against the TNDP for nominal or compensatory damages.⁶

CONCLUSION

For the stated reasons, Defendants respectfully request that the Court dismiss the TNDP from this lawsuit.

Submitted this 15th day of April, 2016.

By: /s/ J. Gerard Stranch, IV
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⁶ To the extent that Plaintiff's claims for nominal and compensatory damages could also be construed as a claim for damages under 42 U.S.C. § 1983, that claim is barred against the TNDP because the TNDP is not a state actor. *Kurita v. State Primary Bd. of Tenn. Democratic Party*, No. 3:08-0948, 2008 WL 4601574, at *5, 2008 U.S. Dist. LEXIS 8871 (M.D.Tenn. Oct.14, 2008) *aff'd by Kurita v. State Primary Bd. of Tennessee Democratic Party*, 472 F. App'x 398 (6th Cir. 2012).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via U.S. Mail and the Court's CM/ECF system, on April 15, 2016, upon:

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/s/ J. Gerard Stranch, IV
J. Gerard Stranch, IV