

**UNITED STATE DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

ROSALIND KURITA,)	
)	
Plaintiff,)	
)	
v.)	Case No. _____
)	
THE STATE PRIMARY BOARD)	
OF THE TENNESSEE)	
DEMOCRATIC PARTY, <i>et al.</i>,)	
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER**

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Introduction

Under the Fourteenth Amendment, citizens are afforded due process rights, including the right not to be deprived of a property interest without due process of law. Plaintiff will demonstrate that, in multiple instances, the State Primary Board of the Tennessee Democratic Party deprived Plaintiff of her due process rights.

Specifically, Plaintiff Rosalind Kurita won a close primary election over her opponent, Defendant Tim Barnes. Defendant Barnes filed an election contest with the State Primary Board, contesting the results of the election on multiple grounds. Without any standards to guide them, without providing proper notice to Plaintiff, without making any findings on the record, and without any right to appeal, the State Primary Board of the Democratic Party declared the results of the election “incurably uncertain.” Subsequently, Defendant Barnes was declared the winner of the primary election, contrary to the expressed will of the voters and in violation of Plaintiff Kurita’s Fourteenth Amendment due process rights.

Facts

The facts of this case are set out in the *Verified Complaint* and are briefly restated here.

Plaintiff Rosalind Kurita (“Senator Kurita”) and Defendant Tim Barnes (“Barnes”) were both candidates for the 22nd Senatorial District seat in the August 7, 2008 Democratic primary election. Senator Kurita won the August 2008 Democratic primary election, by a margin of nineteen votes. On September 4, 2008, the Coordinator of Elections for the State of Tennessee certified Senator Kurita as the victor in the August 2008 Democratic primary election.

On August 25, 2008, pursuant to Tennessee Code Annotated § 2-17-104 (“Contest Statute”), Barnes filed a “Contest of Primary Election” with one of the Defendants, the State Primary Board of the Tennessee Democratic Party (“State Primary Board”). Senator Kurita then filed her “Response of Senator Rosalind Kurita to Contest of Primary Election by Tim Barnes,” and the State Primary Board set September 13, 2008 as the date when they would hear and determine the election contest.

Although the Contest Statute requires the State Primary Board to hear any primary election contests, when Barnes filed his “Contest of Primary Election,” the State Primary Board did not have any rules to govern such contests. Thus, sometime between the time that Barnes filed his “Contest of Primary Election” and the September 13th hearing, the State Primary Board drafted rules governing the contest (“Rules of Procedure”). The Rules of Procedure were adopted the morning of the contested election hearing. Senator Kurita was not provided with a finalized copy of these rules until just before the September 13th hearing. Because she was provided with the finalized rules so late, Senator Kurita did not have a chance to properly prepare for the hearing or to properly defend the results of the August 2008 Democratic primary election.

Argument

I. Plaintiff Raises a Valid Article III Claim That Is Fully Justiciable by This Court.

This Court has jurisdiction over Plaintiff's claims. She has standing, the case is ripe, and there are no grounds for abstention.

A. Plaintiff Has Standing to Bring Her Claims.

The Supreme Court has articulated a three part standard to establish standing:

First, the Plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest, which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely" as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); *Ctr. for Biological Diversity v. Lueckel*, 417 F.3d 532 (6th Cir. 2005).

First, Plaintiff has already suffered a concrete and particularized injury in fact: she has had the certified election results overturned by the Democratic State Primary Board. She will not appear on the general election ballot, despite the expressed will of the primary voters to have her placed on the general election ballot as the candidate for the Democratic party.

Second, a causal connection exists between the claimed injury and Defendants' conduct. The Democratic State Primary Board made the decision to overrule the will of the primary voters, and chose to place Plaintiff's opponent on the general election ballot despite the expressed will of the voters to have Plaintiff placed on the general election ballot as the Democratic candidate.

Finally, Plaintiff's injury can be redressed by a favorable decision from this Court. By finding the Contest Statute unconstitutional and enjoining Defendants from enforcing the Contest Statute, the Court can redress Plaintiff's injury by returning her to the general election ballot.

Plaintiff meets all three prongs of the standing tests. For this reason, this Court should hear the merits of the Plaintiff's claims.

B. Plaintiff's Claim Is Ripe.

"One of the fundamental axioms of American jurisprudence is that a federal court may consider only actual cases or controversies." *N. Am. Natural Res., Inc. v. Strand*, 252 F.3d 808, 812 (6th Cir. 2001). Specifically, "[t]he difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test. The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between the parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Strand*, 252 F.3d at 812 (quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 297-98 (1979)) (internal citations omitted).

Plaintiff and Defendants already have a real, substantial controversy. Based on the results of the primary election, Plaintiff should appear on the general election ballot. However, Defendants have thwarted the will of the voters by placing Defendant Barnes, instead of Plaintiff Kurita, on the general election ballot as the Democratic nominee, even though he did not win the primary election. Thus, Plaintiff's claim is ripe for this Court's review.

C. Abstention Is Inappropriate.

Four types of abstention exist. *Younger* abstention is triggered when a parallel state proceeding is ongoing and requires federal courts to abstain so that the state has an opportunity to

first address the issue. *Younger v. Harris*, 401 U.S. 37, 41 (1971). *Colorado River* abstention considers whether the claim before the federal court will be mooted by a state proceeding and is inapplicable when the State is a party. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976). *Buford* abstention requires federal courts to defer to state administrative proceedings and is rarely used. *Buford v. Sun Oil Co.*, 319 U.S. 315, 333-34 (1943). Finally, *Pullman* abstention is appropriate when the case before the federal court can be disposed of upon a question of state law. *R.R. Com. of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941).

No parallel or administrative proceedings are ongoing in the Tennessee state courts that will moot out this Court's decision in this case. Nor is this a question of state law, as federal constitutional issues are raised. Moreover, the decision of the State Primary Board is considered final and unreviewable. *Heiskell v. Ledgerwood et al.*, 144 Tenn. 666, 234 S.W. 1001, 1002 (Tenn. 1921). Consequently, it would be inappropriate for the Court to abstain from hearing this matter.

II. Plaintiff Satisfies the Preliminary Injunction Requirements.

“[I]n considering a request for a preliminary injunction, the district court should consider (i) whether the movant is likely to succeed on the merits; (ii) whether the movant will suffer irreparable injury in the absence of an injunction; (iii) whether the injunction will cause substantial harm to others; and (iv) whether the injunction would serve the public interest.” *See Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994); *Capobianco v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004).

Similarly, a temporary restraining order is only granted when the “specific facts in an

affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition”

F.R.C.P. 65(b)(1)(A).

Plaintiff meets these requirements. Thus, a temporary restraining order and preliminary injunctive relief should be granted.

A. Plaintiff Has a Reasonable Probability of Success on the Merits.

1. The Contest Statute Does Not Provide Proper Due Process Protections to Plaintiff.

A state may not deprive any person of a property interest without due process of law. U.S. Const. amend. XIV, § 1. It is a “truism that ‘due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.’” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). “Due process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Because of the shifting nature of what due process may require, a three part test has been established to determine whether the procedures provided are adequate to satisfy due process under the Fourteenth Amendment: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.*

a. Plaintiff Has a Protected Property Interest in the Certified Results of the August 7, 2008 Election That Has Been Affected by the Official Action of the State Primary Board.

A person has a protected property interest in the certified results of a primary election. *Taylor v. Nealon*, 120 S.W.2d 586, 587 (Tex. 1938) (“[I]n a primary election the person receiving a majority of the votes on the face of the election returns is entitled to the nomination, together with all its attendant statutory rights, unless it can and shall be finally adjudged otherwise by some tribunal authorized so to do. Also, such right is a valuable vested property right, and if there is a contest of such valuable vested property right, such contest must be fully and finally completed before the time comes for the posting of the names of the certified names . . .”); *Rowe ex rel. Schwarts v. Lloyd*, 36 A.2d 317, 319 (Pa. 1944) (“As to a nomination being a ‘vested’ right, it is a right subject to reasonable regulations imposed by the Legislature.”).

When conducting a contest to a primary election, the State Primary Board is a state actor, and as a state actor, the State Primary Board must afford due process protections to the candidates appearing before it. *See Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Smith v. Allwright*, 321 U.S. 649, 663 (1944). Further, when conducting a hearing on the contest of an election, the State Primary Board acts in a quasi-judicial or judicial manner. *See Boyd v. Garrison*, 19 So.2d 385, 388 (Ala. 1944).

Thus, Plaintiff has a property right in the results of the election, and she may not be deprived of the fruits of her primary election victory, unless she is afforded due process.

b. The Contest Statute and Procedures Used by the State Primary Board Risk the Erroneous Deprivation of Plaintiff’s Interest in the Certified Election Results.

In four instances, the statute and procedures used by the State Primary Board were not

sufficient to meet its due process burden and failed to provide adequate means to protect Plaintiff's due process interest. First, the statute and Rules of Procedure adopted by the State Primary Board do not provide any standards for making a decision in a contested primary election and therefore provide no notice to those who are subject to contested elections as to how a decision on their case will be made. Second, the State Primary Board did not afford Plaintiff proper due process protections prior to the hearing by notifying Plaintiff ahead of time what the rules for the hearing were. Third, the State Primary Board did not provide a written justification on why they were setting aside the election.. Finally, the decision of the State Primary Board is final and not reviewable.

Each of these deficiencies in the due process afforded Plaintiff will be addressed in turn.

(1) The Contest Statute and Rules of Procedure Adopted by the State Primary Board Do Not Provide Any Standards for Making a Decision in a Contested Election as to How a Decision on the Case Will Be Made.

Section C of the Contest Statute states: "The state primary board shall hear and determine the contest and make the disposition of the contest *which justice and fairness require*, including setting aside the election if necessary." TCA § 2-17-104 (emphasis added). By use of the phrase "which justice and fairness require," the Contest Statute fails to provide a definite and concrete standard by which an election contest is to be judged.

In addition, the Democratic State Primary Board has adopted Rules of Procedure. Rule of Procedure 11 states:

In making a determination on the Notice of Contest, the State Primary Board *may decide the following, in addition to any other relevant question*:

- a. whether more probably than not the number of votes placed in question as a result of the improper, illegal and/or fraudulent acts complained of, if true, exceeded the margin between the total number of votes cast for the Contestee and the total number of votes for the Contestant;
- b. whether more probably than not is there sufficient evidence of improper, illegal and/or fraudulent acts which so permeated the Primary Election as to render the outcome of the election incurably uncertain even though it cannot be shown to a mathematical certainty that the result might have been different.

(emphasis added). By the use of the terms “may” and “in addition to any other relevant question,” the Rules of Procedure fail to provide any definite and concrete standards by which election contests are to be judged.

However, because a property right was at stake before the State Primary Board, the disposition of the contest could not be left to the mere discretion of the Board. *See, e.g., Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 847 (1986). Furthermore, the decision made by the State Primary Board as to the election involves an adjudication that requires the State Primary Board to make a determination of disputed factual issues as to Plaintiff’s individual rights, subject to a complete and proper application of law and policy. *Tenn. Cable Television Ass’n v. Tenn. Pub. Serv. Comm’n*, 844 S.W.2d 151, 161 (Tenn. App. 1992). In contrast, unlike the arbitrary discretion employed by the State Primary Board, Tennessee state courts apply clear standards when resolving general election contests. *Forbes v. Bell*, 816 S.W.2d 716, 719 (Tenn. 1991).

Neither Tennessee law nor the Rules of Procedure adopted by the State Primary Board provide any standards that can be used to determine the correct result in a primary election contest, as required by the Fourteenth Amendment, and therefore Plaintiff Kurita was denied due

process of law.

(2) The State Primary Board Did Not Afford Plaintiff Due Process Protections Prior to the Hearing by Properly Adopting Rules Governing the Hearing and by Properly Notifying Plaintiff What the Rules for the Hearing Were Going to Be.

As set forth above, when conducting a hearing pursuant to the Contest Statute, the State Primary Board is a state actor acting in a quasi-judicial or judicial manner when it makes decisions as to contested primary elections. Because of the quasi-judicial or judicial nature of the hearing, Plaintiff is afforded certain Fourteenth Amendment due process rights, including the right to know how the hearing will be conducted and what rules will govern the hearing before the hearing takes place. *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

Furthermore, under Tennessee law, an administrative agency must base the exercise of its rulemaking or adjudicative authority on state law, and must follow statutory procedural requirements when adopting rules implementing its enabling statute. *Tenn. Cable Television Ass'n*, 844 S.W.2d at 161. However, the Rules of Procedure for the State Primary Board hearing were adopted ad hoc and without any formal rulemaking procedure.

Senator Kurita was not provided with the rules that would govern the hearing until just before the hearing itself. Because she was not provided with the rules, she did not know how the hearing would be conducted, what she would be allowed to do at the hearing, and she was unable to properly prepare for the hearing. Furthermore, the Rules were not adopted pursuant to any established rulemaking procedure and were thus ad hoc. Plaintiff was therefore denied due process of law.

(3) The State Primary Board Did Not Provide a Written Justification on Why They Were Setting Aside the Election and Thus Did Not Afford Plaintiff Proper Due Process Protections After the Hearing.

An additional right that must be afforded Plaintiff in a quasi-judicial or judicial hearing, pursuant to the Fourteenth Amendment, is the right to have the reasons for the decision made at the hearing put on the record. *Thomas v. Cohen*, 304 F.3d 563, n.10 (6th Cir. 2002); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

The State Primary Board did not state its reasons for its decision on the record; it merely recorded the votes of those present. Because the State Primary Board failed to state the reasons for its decisions on the record, either at or immediately after the September 13, 2008 meeting, Plaintiff's due process rights were violated.

(4) The Decision of the State Primary Board Is Final and Unreviewable and Does Not Afford Plaintiff Proper Due Process Protections.

In its entirety, the Contest Statute states:

(a) Any candidate may contest the primary election of the candidate's party for the office for which that person was a candidate.

(b) To institute a contest, the candidate shall, within five (5) days after the certification of results by the county election commission, file a written notice of contest with the state primary board of the candidate's party and with all other candidates who might be adversely affected by the contest. In the notice the candidate shall state fully the grounds of the contest.

(c) The state primary board shall hear and determine the contest and make the disposition of the contest which justice and fairness require, including setting aside the election if necessary.

In Tennessee, the state primary boards have exclusive jurisdiction to dispose of primary

election contests. *Taylor v. Tenn. State Democratic Executive Comm.*, 574 S.W.2d 716, 717 (Tenn. 1978). Despite this quasi-judicial role, the decision of the State Primary Boards in contested primaries are conclusive and unreviewable by courts of law. *Heiskell*, 234 S.W. at 1002; *see also Taylor*, 574 S.W.2d at 717-18. However, under the Fourteenth Amendment, the availability of an appeal from a quasi-judicial or judicial decision that involves constitutional rights is required. *Stupak-Thrall v. United States*, 70 F.3d 881, 884 (6th Cir. 1995) (“Constitutionality of administrative agency’s action is subject to plenary review.”). Because judicial review is not afforded to Plaintiff, she is deprived of due process of law.

(5) The Contest Statute Does Not Provide Proper Due Process Protection Because It Does Not Provide a Procedure for the State Primary Board to Use in Selecting a Candidate.

Section C of the Contest statute states: “The state primary board shall hear and determine the contest and make the disposition of the contest which justice and fairness require, including setting aside the election if necessary.”

As set forth above, because a property right was at stake here, the disposition of the contest could not be left to the mere discretion of the Board, and required clear standards to be used when resolving the contest. *See, e.g., Ng Fung Ho*, 259 U.S. at 284-85; *Schor*, 478 U.S. 833, 847 (1986); *Forbes*, 816 S.W.2d at 719. Here, the Contest Statute has failed to provide for a procedure to be used by the State Primary Board to select a candidate. Thus, the State Primary Board is allowed to select a candidate by whatever method they desire, rendering the method of selection arbitrary and capricious and failing to provide proper due process protection.

c. The Government's Interest in Proper Election Outcomes Is Paramount.

The government has a fundamental interest in ensuring a correct and fair outcome to elections and ensuring that all voters are able to exercise their fundamental right to vote. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667-68 (1966). By failing to guarantee due process for those who are subject to contested elections, the government does not uphold this fundamental interest. The cost to the government in taking the extra steps to ensure due process is provided are negligible, yet the harms if due process is not guaranteed are great.

B. Plaintiff Will Suffer Irreparable Injury in the Absence of an Injunction.

Plaintiff has the constitutional right to due process under the Fourteenth Amendment. Plaintiff has not been afforded such due process, and her opportunity to be elected is seriously compromised, if she does not appear as a candidate on the general election ballot. Without immediate relief, ballots will be printed and sent, and votes will be cast. As a result, she will suffer irreparable injury.

C. The Injunction Will Not Cause Substantial Harm to Others.

While Plaintiff will be irreparably harmed if the general election proceeds with Barnes as the Democratic candidate on the general election ballot, the converse is not true. Barnes is not legitimately entitled to have his name placed on the general election ballot.

D. The Injunction Will Serve the Public Interest.

The public has a great interest in fair elections, which requires that the results of the primary election be honored.

III. A Temporary Restraining Order Is Appropriate.

The upcoming election on November 4, 2008 and voting deadlines related to the election make imperative the need for immediate injunctive relief. The early voting period begins on October 15, 2008. All requests for absentee ballots must be received by October 28, 2008. Indeed, ballots for military and overseas citizens were required to have been mailed on September 19, 2008.

Because of the upcoming deadlines, Plaintiff will suffer further and immediate, irreparable injury if ballots listing Barnes as the candidate for the November election are allowed to be sent. Plaintiff requests this Court issue a temporary restraining order, so that further consideration of the case can be had prior to anyone being allowed to cast a ballot in the general election on an incorrect ballot.

Conclusion

Tennessee's procedures for a primary election contest violates Plaintiff's Fourteenth Amendment right to due process and she was in fact denied due process here when she was replaced as the Democratic nominee for State Senate in the 22nd District. All the required elements for preliminary injunctive relief are met. This Court should expeditiously grant the requested injunctive relief and order Plaintiff Kurita's name to be placed on the general election ballot.

Dated: September 25, 2008

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