

## Ballot Access for Minor Parties in Tennessee

*Tomasik v. Goins*

(*William J. Haynes, Jr., M.D. Tenn., 3:13-cv-1118*)

A federal complaint filed on October 9, 2013, alleged that ballot access rules were so onerous that the Libertarian Party was unable to qualify for a November 21 special election for a state house seat. After an October 31 hearing, the district judge granted the plaintiffs relief, based in part on his rulings in previous related cases. He awarded the plaintiffs \$26,091 in attorney fees and costs.

*Subject:* Getting on the ballot. *Topics:* Getting on the ballot; case assignment; attorney fees; early voting.

On October 9, 2013, the Libertarian Party filed a federal complaint in the Middle District of Tennessee’s Nashville courthouse alleging that Tennessee’s ballot access rules were so unconstitutionally onerous that the party’s candidate was unable to qualify for a November 21 special election to fill a state house seat.<sup>1</sup> The Green Party and the Constitution Party filed a related complaint on October 10, seeking preservation of their status as established minor parties.<sup>2</sup> Both cases were transferred to Judge William J. Haynes, Jr., who had presided over related 2008 and 2011 cases.<sup>3</sup>

The 2008 case was filed on January 23 by the Libertarian Party, the Green Party, the Constitution Party, and three voters; it alleged that because of unconstitutional ballot-access requirements, “it has been 40 years since a new political party was recognized by the State of Tennessee.”<sup>4</sup> In awarding the plaintiffs summary judgment on September 20, 2010, Judge Haynes agreed that “the requirement of 2.5% of the total vote in the last gubernatorial election for recognition as a statewide political party and the Defendants’ policy setting a deadline for party recognition petitions of 120 days before the primary election, effectively bar minor political parties from ballot access in Tennessee elections.”<sup>5</sup> “Given the Plaintiffs’ failure to seek preliminary injunctive relief

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1. Complaint, *Tomasik v. Goins*, No. 3:13-cv-1118 (M.D. Tenn. Oct. 9, 2013), D.E. 1; *see* Amended Complaint, *id.* (Oct. 24, 2013), D.E. 17.

2. Complaint, *Green Party of Tenn. v. Hargett*, No. 3:13-cv-1128 (M.D. Tenn. Oct. 10, 2013), D.E. 1; *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 690 (6th Cir. 2015).

3. Transfer Order, *Tomasik*, No. 3:13-cv-1118 (M.D. Tenn. Oct. 22, 2013), D.E. 13; Transfer Order, *Green Party of Tenn.*, No. 3:13-cv-1128 (M.D. Tenn. Oct. 11, 2013), D.E. 5.

4. Complaint at 8, *Libertarian Party v. Thompson*, No. 3:08-cv-63 (M.D. Tenn. Jan. 23, 2008), D.E. 1; *see* *Libertarian Party v. Goins*, 793 F. Supp. 2d 1064, 1067 (M.D. Tenn. 2010) (“Plaintiffs did not seek any preliminary injunctive relief, nor did Plaintiffs request an expedited ruling.”).

5. *Libertarian Party*, 793 F. Supp. 2d at 1067, 1089–90.

or an expedited ruling, this injunction obtains after the upcoming 2010 elections.”<sup>6</sup> Tennessee did not appeal.<sup>7</sup>

The Green Party and the Constitution Party filed an action challenging the constitutionality of Tennessee’s ballot-access rules for minor parties on July 20, 2011.<sup>8</sup> The court assigned the case to Judge John T. Nixon, who agreed to transfer it to Judge Haynes as related to the 2008 case.<sup>9</sup> Among the constitutional infirmities found by Judge Haynes on February 3, 2012, was that “Tennessee’s 2.5% requirement and 119 day deadline for ballot access as a ‘Recognized minor party’ and its candidates violate Plaintiffs’ First Amendment rights to associate and Tennessee voters’ rights to vote for such parties’ candidates.”<sup>10</sup>

As to the appropriate relief, based upon the precedents in *Blackwell*, the Court deems any deadline in excess of sixty (60) days prior to the August primary for the filing of petitions for recognition as a political party is unenforceable. As to the number of signatures required for recognition as a political party, given the State’s acceptance of 25 signatures for candidates for Governor and 275 signatures for President of the United States, the Court deems [the Green Party’s] past electoral support of almost [20,000] votes and [the Constitution Party’s] almost 10,000 signatories to constitute a significant showing of support to justify their recognition as political parties and to have their parties’ names next to their candidates on the general election ballot. The Defendants shall be required to conduct a public random drawing for the order of placement of the political parties’ candidates’ names on the general election ballot.

The Defendants are enjoined from enforcement of the state statutes requiring Plaintiffs to select their nominees by primary, awarding ballot preference to the majority party and [proscribing] the use of “Independent or Nonpartisan” in a political party’s name. The Defendants must revise the

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6. Order, *Libertarian Party*, No. 3:08-cv-63 (M.D. Tenn. Sept. 20, 2010), D.E. 44; see *3rd Parties Win More Access to TN Ballots*, Nashville Tennessean, Sept. 23, 2010.

Judge Haynes awarded the plaintiffs \$28,105.69 in attorney fees and expenses, Order, *id.* (Nov. 29, 2010), D.E. 51, and the court awarded the plaintiffs \$1,101.65 in costs, Bill of Costs, *id.* (Nov. 4, 2010), D.E. 50.

7. *Green Party v. Hargett*, 882 F. Supp. 2d 959, 966 (M.D. Tenn. 2012).

8. Complaint, *Green Party v. Hargett*, No. 3:11-cv-692 (M.D. Tenn. July 20, 2011), D.E. 1; *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 540 (6th Cir. 2014); *Green Party v. Hargett*, 953 F. Supp. 2d 816, 819 (M.D. Tenn. 2013); see Amended Complaint, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Nov. 29, 2014), D.E. 116; see also *Parties Sue Over Ballot Access*, Nashville Tennessean, July 28, 2011 (“Only one minor party, George Wallace’s American Party, has appeared on ballots in Tennessee since the law was enacted—most recently in 1972.”).

9. Order, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Aug. 25, 2011), D.E. 9.

10. *Green Party*, 882 F. Supp. 2d at 1019; see *Green Party of Tenn.*, 767 F.3d at 540.

“Under these requirements, a minor party would have had to submit a petition containing at least 40,039 valid signatures by April 5, 2012 in order to qualify for Tennessee’s November 2012 general-election ballot. *Green Party v. Hargett*, 700 F.3d 816, 820 (6th Cir. 2012).

“Nomination Petition” to delete the reference that the signatory is a member of the party.<sup>11</sup>

While the case was on appeal, Tennessee’s legislature amended its election statutes to provide an alternative method for minor parties to get on the ballot: if they used methods other than a primary to select their nominees, they could submit their 2.5% petitions as late as 90 days before the general election.<sup>12</sup>

On August 9, approximately two weeks after the appeal was argued, the court of appeals stayed the random-order requirement.<sup>13</sup> “The record in the present case contains no state-specific evidence as to whether Tennessee’s party-order provision creates an impermissible ‘voting cue.’”<sup>14</sup> In resolving the appeal, the court decided that a facial challenge to the order provision failed because the plaintiffs had not presented sufficient Tennessee-specific evidence of impermissible cuing.<sup>15</sup>

The court declined to stay a different part of Judge Haynes’s injunction: “we find that the State has not met its burden with respect to the part of the district court’s judgment ordering the placement of the plaintiffs’ names next to their respective candidates on the November 2012 ballot . . . .”<sup>16</sup>

On November 30, the court of appeals reversed Judge Haynes’s decision in light of the statutory amendment.<sup>17</sup> The court also concluded that the parties did not have standing to challenge the proscription on the use of the words “independent” or “nonpartisan” in their names, because they had no intention to do so.<sup>18</sup>

On June 18, 2013, on remand, Judge Haynes again awarded the plaintiffs summary judgment:

[A]lthough the 2012 amendments create an alternative for a minority party’s recognition petition within 90 days of the general election, Tennessee retains the 2.5% signature requirement based upon the most recent gubernatorial election. The effect of this retention imposes an unjustified and unduly burdensome requirement that violates Plaintiffs’ First Amendment right to associate as a political party and Tennessee voters’ rights of the opportunity to vote for such parties. For the same reasons, the Court again concludes that

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11. *Green Party*, 882 F. Supp. 2d at 1019–20 (citing *Libertarian Party v. Blackwell*, 462 F.3d 579 (6th Cir. 2006)).

On November 14, Judge Haynes awarded the plaintiffs \$65,180.91 in attorney fees and costs. Opinion, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Nov. 14, 2012), D.E. 65, 2011 WL 5511224.

12. *Green Party*, 700 F.3d at 822; *Green Party of Tenn.*, 767 F.3d at 541.

13. *Green Party v. Hargett*, 493 F. App’x. 686, 687, 690–91 (6th Cir. 2012).

14. *Id.* at 690.

15. *Green Party*, 700 F.3d at 826–27.

16. *Green Party*, 493 F. App’x. at 689.

17. *Green Party*, 700 F.3d at 822–24; *Green Party of Tenn.*, 767 F.3d at 538, 541–42.

18. *Green Party*, 700 F.3d at 827–29.

the same signature requirement for the 2012 amendment's 90 day filing deadline before a general election violates Plaintiffs' First Amendment rights and Tennessee voters' rights of the opportunity to vote for such parties.<sup>19</sup>

As to ballot order, Judge Haynes considered additional evidence and again concluded that always listing the legislature's controlling party first violated equal protection.<sup>20</sup>

Six days after filing its 2013 complaint, the Libertarian Party moved for a preliminary injunction.<sup>21</sup> On October 23, eight days later, the party informed Judge Haynes that "early ballots have not yet been printed, but that early voting will begin in one week."<sup>22</sup> On the following day, Judge Haynes set the case for hearing on October 31.<sup>23</sup>

At the conclusion of the October 31 hearing, Judge Haynes announced a ruling in the plaintiffs' favor: "Given the Court's prior findings that the state statutes that are challenged here violate minor political parties' First Amendment right to ballot access, the Court believes that the plaintiff has shown a likelihood of success on the merits here."<sup>24</sup> Judge Haynes issued an order on November 5 placing the Libertarian Party's candidate on the November 21 special-election ballot as a Libertarian Party candidate.<sup>25</sup>

Another candidate won the election with 89% of the vote.<sup>26</sup> On January 27, 2014, Judge Haynes awarded the Libertarian Party plaintiffs \$26,091 in attorney fees and costs.<sup>27</sup>

Judge Haynes awarded the Green Party and the Constitution Party summary judgment in their 2013 action on March 14, 2014,<sup>28</sup> "Because Plaintiffs' candidates did not receive at least 5% of the total vote in the 2012 election to qualify as 'Statewide political party', Plaintiffs lost their right to continued ballot access."<sup>29</sup> Judge Haynes held this result unconstitutional and ordered ballot

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19. *Green Party v. Hargett*, 953 F. Supp. 2d 816, 854–55 (M.D. Tenn. 2013); see *Green Party of Tenn.*, 767 F.3d at 538–39.

20. *Green Party*, 953 F. Supp. 2d at 855–60.

Judge Haynes also awarded the plaintiffs an additional \$15,587.50 in attorney fees and costs. Order, *Green Party v. Hargett*, No. 3:11-cv-692 (M.D. Tenn. Aug. 26, 2013), D.E. 106, 2013 WL 4510803.

21. Preliminary Injunction Motion, *Tomasik v. Goins*, No. 3:13-cv-1118 (M.D. Tenn. Oct. 15, 2013), D.E. 11.

22. Motion to Ascertain Status of Case, *id.* (Oct. 23, 2013), D.E. 14.

23. Order, *id.* (Oct. 24, 2013), D.E. 16.

24. Transcript at 5, *id.* (Oct. 31, 2013, filed Nov. 1, 2013), D.E. 26.

25. Order, *id.* (Nov. 5, 2013), D.E. 30; see *Candidate May Be ID'd as Libertarian*, Nashville Tennessean, Nov. 1, 2013, at B2.

On December 13, the court awarded the plaintiffs \$475 in costs. Order, *Tomasik*, No. 3:13-cv-1118 (M.D. Tenn. Dec. 13, 2013), D.E. 38.

26. See Samantha Bryson, *Akbari wins in Dist. 91*, Memphis Commercial Appeal, Nov. 22, 2013, at 1.

27. Order, *Tomasik*, No. 3:13-cv-1118 (M.D. Tenn. Jan. 27, 2014), D.E. 42.

28. *Green Party of Tenn. v. Hargett*, 7 F. Supp. 3d 772 (M.D. Tenn. 2014), *aff'd*, 791 F.3d 684 (6th Cir. 2015).

29. *Id.* at 779.

positions for the parties “for at least three calendar years from the November 2012 election.”<sup>30</sup>

The court of appeals resolved appeals in the 2011 case on August 22, 2014, by vacating the award to plaintiffs of summary judgment and remanding the case for more factual development.<sup>31</sup>

Under Tennessee’s new laws, a minor party must still obtain signatures before the primary election, but it is no longer required to complete its petitioning process months before the general election. By setting a later deadline, Tennessee has alleviated the burden of its ballot-access requirements to at least some extent, but we cannot say how much. . . .

...

As a final point, we agree with the district court that the defendants have not, at least at this point, put forth compelling interests to support a signature requirement of 2.5%, rather than something lower.<sup>32</sup>

With respect to the ballot-ordering claim, “Given that this case is at the summary judgment stage, the district court erred in reaching its conclusion on the basis of conflicting evidence and cases from other jurisdictions.”<sup>33</sup>

The court of appeals affirmed Judge Haynes’s summary judgment award to the Green Party and the Constitution Party in their 2013 case on July 2, 2015: Tennessee’s ballot access rules violated minor parties equal protection rights, an unenforced requirement that minor parties disclaim the violent overthrow of the government violated First Amendment rights, and an award of attorney fees was within Judge Haynes’s discretion.<sup>34</sup>

On January 20, 2016, Judge Haynes consolidated the Green Party and Constitution Party’s 2011 and 2013 cases with a 2014 Green Party challenge to voter photo identification requirements.<sup>35</sup> The 2014 case was filed on June 9<sup>36</sup> and transferred to Judge Haynes as related to the minor party status cases.<sup>37</sup> On July 23, 2014, Judge Haynes determined that the Middle District identification challenge was not barred by an unsuccessful Eastern District identification challenge filed in 2013.<sup>38</sup> Judge Haynes determined that because Eastern

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30. Order, *Green Party of Tenn. v. Hargett*, No. 3:13-cv-1128 (M.D. Tenn. Mar. 14, 2014), D.E. 31.

Judge Haynes awarded the plaintiffs \$15,925 in attorney fees and \$625 in costs. Order, *id.* (Apr. 10, 2014), D.E. 35.

31. *Green Party of Tenn. v. Hargett*, 767 F.3d 533 (6th Cir. 2014).

32. *Id.* at 548–49.

33. *Id.* at 551.

The court of appeals also remanded the case for a recalculation of the award of attorney fees. *Id.* at 551–54.

34. *Green Party of Tenn. v. Hargett*, 791 F.3d 684 (6th Cir. 2015).

35. Order, *Green Party v. Hargett*, No. 3:11-cv-692 (M.D. Tenn. Jan. 20, 2016), D.E. 188; see Docket Sheet, *Green Party v. Hargett*, No. 3:14-cv-1274 (M.D. Tenn. June 9, 2014); Docket Sheet, *Green Party of Tenn. v. Hargett*, No. 3:13-cv-1128 (M.D. Tenn. Oct. 10, 2013).

36. Complaint, *Green Party*, No. 3:14-cv-1274 (M.D. Tenn. June 9, 2014), D.E. 1.

37. Order, *id.* (June 12, 2014), D.E. 8.

38. Opinion, *id.* (July 23, 2014), D.E. 29 [hereinafter *Res Judicata Opinion*], 2014 WL 3672127; see Order, *id.* (Jan. 19, 2016), D.E. 88 (determining that the case was not suitable for summary judgment).

District Judge J. Ronnie Greer found that the Green Party did not have standing to pursue many of its claims, Judge Greer's negative statements about the merits of those claims were not binding on later litigation.<sup>39</sup> On February 3, 2016, in light of representations that pending legislation could resolve issues remaining in the older cases, Judge Haynes closed them.<sup>40</sup>

Judge Haynes, who had assumed senior status on December 1, 2014,<sup>41</sup> recused himself from the 2014 case on March 28, 2016,<sup>42</sup> and the court assigned the case to Judge Todd J. Campbell.<sup>43</sup> The court reassigned all three pending cases to Judge Waverly D. Crenshaw, Jr., in April and May, 2016;<sup>44</sup> Judge Crenshaw joined the bench on April 12.<sup>45</sup>

On June 8, Judge Crenshaw denied a motion to reopen the 2013 case by the Green Party and the Constitution Party in light of recent statutory enactments.<sup>46</sup> On August 17, following a two-day bench trial,<sup>47</sup> Judge Crenshaw ruled against the parties in their 2011 case,<sup>48</sup> a decision that the court of appeals affirmed on May 11, 2017.<sup>49</sup>

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39. Res Judicata Opinion, *supra* note 38; *see* Opinion, *Green Party v. Hargett*, No. 2:13-cv-224 (E.D. Tenn. Feb. 20, 2014), D.E. 18.

40. Order, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Feb. 3, 2016), D.E. 202.

41. Federal Judicial Center Biographical Directory of Federal Judges, [www.fjc.gov/history/judges](http://www.fjc.gov/history/judges).

42. Order, *Green Party*, No. 3:14-cv-1274 (M.D. Tenn. Mar. 28, 2016), D.E. 97.

43. Order, *id.* (Mar. 28, 2016), D.E. 98.

44. Order, *Green Party of Tenn. v. Hargett*, No. 3:13-cv-1128 (M.D. Tenn. May 5, 2016), D.E. 47; Order, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Apr. 20, 2016), D.E. 205; Order, *Green Party*, No. 3:14-cv-1274 (M.D. Tenn. Apr. 12, 2016), D.E. 102; *see* Motion, *id.* (June 9, 2016), D.E. 120 (defendant's summary judgment motion).

45. Federal Judicial Center Biographical Directory of Federal Judges, *supra* note 41.

46. Order, *Green Party*, No. 3:13-cv-1128 (M.D. Tenn. June 8, 2016), D.E. 51; *see* Opinion at 9, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Aug. 17, 2016), D.E. 265, 2016 WL 4379150 [hereinafter Verdict Opinion in 2011 Case].

47. Transcript, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. July 12–13, 2016, filed July 25, 2016), D.E. 261.

48. Verdict Opinion in 2011 Case, *supra* note 46.

On March 17, 2017, Judge Crenshaw awarded the parties \$59,773.49 in attorney fees and costs for their partial successes in the litigation. Opinion, *Green Party*, No. 3:11-cv-692 (M.D. Tenn. Mar. 17, 2017), D.E. 276.

49. *Green Party of Tenn. v. Hargett*, \_\_\_ F. App'x \_\_\_, 2017 WL 4011854 (6th Cir. 2017) (opinion filed at 6th Cir. No. 16-6299, D.E. 31).