

CASE NO: 12-5271

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREEN PARTY OF TENNESSEE,)	
CONSTITUTION PARTY OF TENNESSEE)	
Plaintiffs-Appellees)	On Appeal from the U.S.
)	District for the Middle
Vs.)	District of Tennessee
)	Case No.: 3:11-00692
TRE HARGETT in his official capacity)	
as Tennessee Secretary of State, and MARK)	
GOINS, in his official capacity as Coordinator)	
of Elections for the State of Tennessee)	
Defendants-Appellants)	
_____)	

APPELLEES’ MOTION TO SUPPLEMENT PLEADINGS AND RECORD

COME NOW, Appellees, GREEN PARTY OF TENNESSEE and CONSTITUTION PARTY OF TENNESSEE, and file this Motion to Supplement the Pleadings and Record and say:

- 1 In the Order on appeal, the District Court held that TCA §2-5-208(d)(1) is unconstitutional because it automatic gives the candidate of the majority party in the General Assembly the top position on the ballot.
- 2 On reaching this conclusion, the District Court relied on numerous court decisions and studies that have shown that the top listed candidate enjoys a significant advantage attributable to his (or her) position on the ballot.
- 3 In their Motion to Stay and in their Initial Brief on appeal, Appellants argued that the studies relied on by the District Court were not relevant because (a) they were based on studies involving the use of an “office block” ballot and (b) Tennessee uses a “party block” form of ballot.
- 4 With the 2012 general election under way, it is now apparent that, at least in some counties, an “office block” ballot **IS** used in Tennessee. Specifically, the sample ballot for Washington County, Tennessee, a copy of which is attached hereto and incorporated

herein by reference, shown that Washington County uses an “office block” ballot to which the authorities relied on by the District Court are directly applicable.

5 WHEREFORE, Appellees request that the Court allow Appellees to supplement the record with Exhibit A and the argument presented below.

ARGUMENT:

Before addressing the significance of difference between “office block” and “party block” ballots, and the implications of these differences, it is necessary to understand exactly how these ballot forms differ.

An *office* block ballot takes the following form and lists the candidates for an office on a column under the identified office. In this form of ballot, any number of parties can have candidates on the ballot without any problem of presentation

<u>OFFICE X:</u>
Candidate A, Nominee Party 1.
Candidate B, Nominee Party 2.
Candidate C, Nominee Party 3.
Candidate D, Independent
Candidate E, Independent

<u>OFFICE Y:</u>
Candidate A, Nominee Party 1.
Candidate B, Nominee Party 2.
Candidate C, Nominee Party 3.
Candidate D, Independent
Candidate E, Independent

A *party* block takes the following form and has different columns for each party with the candidates listed horizontally opposite the designation of the office.

	<u>Party 1</u>	<u>Party 2</u>	<u>Party 3</u>	<u>Independents</u>
<u>OFFICE X:</u>	Candidate A	Candidate B	Candidate C	Candidate D
<u>OFFICE Y:</u>	Candidate A	Candidate B	Candidate C	Candidate D

This form of ballot presents numerous problems when a large number of parties have candidates for an office because the number of columns may be so excessive as to require very small print on the ballot. This form of ballot has the potential to, as Appellants have argued, create voter

confusion what many parties have candidates for only a few offices—which would mean that many columns for parties other than the major parties are blank.

The statute challenged by Appellee’s, TCA §2-5-208(d)(1), provides that:

“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.”

NOTE: The legislative intent of this statute is inherently ambiguous for several reasons. Specifically, on providing that “[t]he names of the *political party* candidates shall be alphabetically listed underneath the appropriate column for the candidate’s party.” The statute is apparently intended to apply to *primary* elections because a political party cannot have more than one candidate for an office in the general election. On the other hand, in *primary* elections, *only the candidates of one party can be on the ballot*, so there is no significance to the provisions of the statute requiring different columns for different parties. Appellees have not, however, raised a “constitutional vagueness” challenge to this statute, so a determination of the General Assembly’s intent must wait for another day.

Significantly, the current version on TCA §2-5-208(d)(1) does not mention “columns.” Rather, it discusses only the “*order*” of ballot listing. This fact is significant because the prior version of TCA §2-5-208(d)(1) read, in relevant part:

“On general election ballots, the name of each statewide political party having nominees on the ballot shall be listed at the top of the columns, with the listing of the candidates’ names underneath.”

That is, the prior version of TCA §2-5-208(d)(1) effectively mandated the use of a “party block” ballot, but the current version of TCA §2-5-208(d)(1) does not mandate the use of a “party block” ballot. In fact, as the attached sample ballot shows, the “office block” form of ballot is being used.

The District Court’s ruling was based on evidence relating to the positional effect of priority placement on an “office block” ballot. Appellants argued that the authorities relied on by the District Court are not applicable because Tennessee uses a “party block” ballot. While that may have been true under the *prior* version on TCA §2-5-208(d)(1), it is no longer true.

Evidence of the manner in which TCA §2-5-208(d)(1) is being applied, and the fact that ballots for the 2012 general election are using the “office block” format was not available prior to the publication of ballots for the 2012 general election. Accordingly, it is appropriate for this Court to consider the ballot attached hereto and consider arguments addressing this evidence.

____s/s Alan. P. Woodruff_____
Alan P. Woodruff, Esq.
Counsel for Green Party of Tennessee and the
Constitution Party of Tennessee
106 Tangency Drive
Gray, Tennessee 37615
(423) 207-0688.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing Response to Motion for Partial Stay has been served on Darrell L. Castle, Esq, (Local Counsel for Plaintiffs), 4515 Poplar Avenue, Suite 510, Memphis, Tennessee 38117 and Janet M. Kleinfelter, Esq, (Counsel for Defendants), Office of Tennessee Attorney General, P.O. Box 20207, Nashville, Tennessee 37202 via the Court’s CM/ECF e-mail notification system on this 20th day of October, 2012.

____s/s/ Alan P. Woodruff_____
Alan P. Woodruff, Esq.

**OFFICIAL BALLOT
GENERAL ELECTION**

**WASHINGTON COUNTY, TENNESSEE
NOVEMBER 6, 2012**

**PRESIDENT OF THE
UNITED STATES**

Vote for One (1)

Electors For
MITT ROMNEY
For President and
PAUL RYAN
for Vice President
Republican Party Nominee

Electors For
BARACK OBAMA
For President and
JOE BIDEN
for Vice President
Democratic Party Nominee

Electors For
VIRGIL GOODE
For President and
JIM CLYMER
for Vice President
Constitution Party Nominee

UNITED STATES SENATE

Vote for One (1)

BOB CORKER
Republican Party Nominee

MARK E. CLAYTON
Democratic Party Nominee

KERMIT STECK
Constitution Party Nominee

MARTIN PLEASANT
Green Party Nominee

SHAUN E. CROWELL
Independent Candidate

DAVID GATCHELL
Independent Candidate

JAMES HIGDON
Independent Candidate

MICHEL JOSEPH LONG
Independent Candidate

TROY STEPHEN SCOGGIN
Independent Candidate

WRITE-IN

Electors For
JILL STEIN
For President and
CHERI HONKALA
for Vice President
Green Party Nominee

Electors For
ROSS C. "ROCKY" ANDERSON
For President and
LUIS J. RODRIGUEZ
for Vice President
Independent Candidate

Electors For
GARY JOHNSON
For President and
JAMES P. GRAY
for Vice President
Independent Candidate

Electors For
MERLIN MILLER
For President and
VIRGINIA D. ABERNETHY
for Vice President
Independent Candidate

WRITE-IN

**UNITED STATES HOUSE OF
REPRESENTATIVES**

1st CONGRESSIONAL DISTRICT

Vote for One (1)

PHIL ROE
Republican Party Nominee

ALAN WOODRUFF
Democratic Party Nominee

ROBERT N. SMITH
Green Party Nominee

KAREN SHERRY BRACKETT
Independent Candidate

MICHAEL D. SALYER
Independent Candidate

WRITE-IN

**TENNESSEE HOUSE OF
REPRESENTATIVES**

6th REPRESENTATIVE DISTRICT

Vote for One (1)