

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

TENNESSEANS FOR SENSIBLE)	
ELECTION LAWS,)	
)	
Plaintiff,)	
)	
vs.)	No. 18-821-III
)	
TENNESSEE BUREAU OF ETHICS)	
AND CAMPAIGN FINANCE,)	
REGISTRY OF ELECTION FINANCE,)	
and DAVIDSON COUNTY DISTRICT)	
ATTORNEY GENERAL,)	
)	
Defendants.)	

**MEMORANDUM AND ORDER: (1) GRANTING PLAINTIFF’S COMPLAINT
FOR INJUNCTIVE AND DECLARATORY RELIEF AND
(2) SCHEDULING DISPOSITION OF ATTORNEYS FEES**

On September 26, 2018, a limited bench trial was convened to provide the State Defendants an opportunity to present evidence in defense of the constitutionality of a restriction on speech contained in Tenn. Code Ann. sections 2-10-117 and 121 as challenged by the Plaintiff.

Motions in limine filed by the Plaintiff and argued at the outset of the trial established that the State Defendants had inexplicably failed to comply with orders to give the Plaintiff fair notice of Defendants’ proof. The Court found that the State’s noncompliance with the orders prevented the Plaintiff a meaningful opportunity to engage in the trial. Normally a continuance and possibly a sanction of attorneys fees would be

appropriate, but a continuance was not possible in this case. The State had consented to an expedited bench trial given that the statutes in issue have a bearing on the upcoming November 6, 2018 election. The Court granted the Plaintiff's motions in limine which had the effect of the State not being permitted to present proof and the Plaintiff prevailing.

It is therefore ORDERED as follows.

1. The Plaintiff's First, Second, Third, and Fourth Motions in Limine are granted.

2. The State Defendants having failed to introduce any evidence at the trial of this matter, the Court finds that the State has insufficient facts of record to withstand the Plaintiff's claims. Thus, the Court concludes as follows from the September 26, 2018 bench trial.

a. The State Defendants failed to meet their burden of proof as to Tenn. Code Ann. § 2-10-117's and Tenn. Code Ann. § 2-10-121's constitutionality, and accordingly, judgment in favor of the Plaintiff is granted.

b. A declaratory judgment that Tenn. Code Ann. § 2-10-117 and Tenn. Code Ann. § 2-10-121, both facially and as applied, violate the First and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Tennessee Constitution is entered.

c. The Defendant Tennessee Bureau of Ethics and Campaign Finance, Registry of Election Finance is permanently enjoined from enforcing Tenn. Code Ann. § 2-10-117 and Tenn. Code Ann. § 2-10-121.

d. With respect to the standard of review that governs each of the Plaintiff's claims the Court concludes as follows.

- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's speaker-based discrimination is subject to strict scrutiny;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's temporal restriction on political speech is subject to *Buckley*'s "closely-drawn" test;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's discrimination based on political association is subject to strict scrutiny;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-121's discrimination based on political association is subject to strict scrutiny;
- The Plaintiff's challenge to Tenn. Code Ann. § 2-10-117's content discrimination is subject to strict scrutiny; and
- The Plaintiff's challenge to the statutes in issue under Tenn. Const. art. I, § 19 is subject to strict scrutiny.

3. The Defendant Davidson County District Attorney General is dismissed from this action without prejudice pending the conclusion of appellate review.

4. The Plaintiff shall file a petition for attorney's fees and discretionary costs by October 12, 2018.

5. The State Defendants shall respond to the Plaintiff's petition for attorney's fees and discretionary costs by October 24, 2018.

6. The Plaintiff's petition for attorney's fees and discretionary costs pursuant to 42 U.S.C. section 1988(b) shall be adjudicated by the Court on the papers and a final order entered at that time.

The findings and conclusions of law on which these rulings are based are as follows.

First, the transcript of the Court's ruling during the September 26, 2018 hearing and the arguments of Counsel therein is attached hereto as Exhibit A and is incorporated herein by reference as part of the findings of fact and conclusions of law.

In addition, the Court finds that during the Parties' July 31, 2018 hearing on the Plaintiff's Application for a Temporary Injunction, the State Defendants, through counsel, stated that they would not and did not need to present evidence in this matter. Accordingly, the parties mutually agreed to submit this case for immediate decision on the merits without additional evidence beyond the exhibits introduced into the record by the parties in advance of the July 31, 2018 hearing.

The Court accepted this agreement and began drafting the Order. In doing so, the Court came upon case law which indicated that an evidentiary hearing was required. It was the Court's conclusion that to decide the case on the record at the point of an application for an injunction by the Plaintiff and requested dismissal by the State Defendants without evidence as to the government risks at stake in restricting the speech would constitute an error and result in a remand. Accordingly, on August 24, 2018, the Court entered a *Rule 54.02 Order Revising In Part 8/1/18 Memorandum And Order To Schedule A Trial On Limited Fact Issues* and provided that, based on the Court's research, this case could not be decided without an evidentiary hearing.

“[I]n studying and researching the law to issue a final ruling in this case, the Court came upon law from which it has concluded that an evidentiary record on limited issues is needed to inform the questions of law. The case law

revealed to the Court that because the Statutes at issue restrict speech, the Defendants bear the burden of proof as to the constitutionality of the challenged Statutes and this burden can not be met by “mere speculation or conjecture” as to the government interests at stake in restricting the speech.

“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S., at 816, 120 S.Ct. 1878. Here, the Government seeks to carry that burden by arguing that the aggregate limits further the permissible objective of preventing *quid pro quo* corruption.

* * *

And—importantly—we “have never accepted mere conjecture as adequate to carry a First Amendment burden.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014). Moreover, the case law establishes that when a temporal ban is involved, as in this case, and unlike the apparent corruption with a certain dollar amount, the Government must show “evidence of actual corruption or its appearance” and “sufficient,” “specific,” “distinct” evidence to justify the temporal limitation. *Zimmerman v. City of Austin, Texas*, 881 F.3d 378 (5th Cir. 2018) (temporal restriction, prohibiting all contributions before the six months leading up to an election, struck down, in part, as unconstitutional).

Rule 54.02 Order Revising In Part 8/1/18 Memorandum And Order To Schedule A Trial On Limited Fact Issues, pp. 3-4 (Aug. 24, 2018). Based upon this law, the Court vacated its previous ruling that the case would be decided on the papers alone without presentation of evidence by the State Defendants and proposed an expedited schedule to complete a bench trial.

However, in the August 24, 2018 *Memorandum And Order*, the Court specifically provided each party with an opportunity to seek modification of the proposed expedited schedule.

Lastly, in providing the above proposed expedited schedule, it is the Court's impression from the July 31, 2018 temporary injunction hearing that both parties, in consenting to have the entire case decided on the temporary injunction record alone, wanted this matter decided in an expeditious manner. ***If, however, now that the parties know that the Court cannot decide the case on the temporary injunction record alone, the parties may have a different perspective as to the timing and disposition of this case. It is therefore ORDERED that if any party seeks a modification of the schedule proposed above, it shall file a Notice by Friday, August 31, 2018 stating its position on the timing and/or disposition of this case and any relief they request.***

Rule 54.02 Order Revising In Part 8/1/18 Memorandum And Order To Schedule A Trial On Limited Fact Issues, pp. 10 (Aug. 24, 2018) (emphasis added).

Following this ruling, the State Defendants did not seek to modify the Court's schedule. Rather, in response to the Plaintiff's request for the Court to decide this case on the merits instead of a bench trial, the State Defendants responded that the Court's decision to require an evidentiary record in this type of case was "consistent with federal court precedent" and that the State was "fully prepared to go forward with the proposed schedule set forth in the August 24, 2018 Order."

This Court did not give any such 'clear and unambiguous notice' that it intends to consolidate the injunction hearing with a trial on the merits. Instead, it has done the exact opposite and determined that a brief trial on limited fact issues is necessary to resolve the legal issues – a determination that is consistent with federal court precedent. The issue in this case is whether Tenn. Code Ann. § 2-10-117 is an unconstitutional campaign finance restriction. The United States Supreme Court, in evaluating the constitutionality of campaign finance restrictions, has typically relied upon a full evidentiary record developed in the trial court to determine whether the law served a compelling governmental objective. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (finding Vermont's contributions limits to be too restrictive based on the District Court record); *McConnell v. Federal Election Com'n*, 540 U.S. 93, 147-154 (2003) (upholding federal restrictions on soft money by drawing on an extensive District Court record); *Federal*

Election Com'n v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 457-465 (2001) (upholding federal limits on coordinated expenditures between parties and candidates on the basis of a summary judgment record); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 (2000) (upholding Missouri's contribution limits on the basis of the lower court record).

Given this Court's determination that there is a need to have a fully-developed evidentiary record, Defendants should be allowed every opportunity to present evidence in support of the constitutionality of Tenn. Code Ann. § 2-10-117.

* * *

This Court was well within its authority under Rule 54.02 to revise its own order to reflect the Court's determination that an evidentiary trial on limited issues is necessary in order to rule on the legal issues.

* * *

For these reasons, Defendants respectfully request that this Court deny Plaintiff's request that it reinstate the August 1, 2018 order in full. While Defendants have no objection to rescheduling the September 10, 2018 scheduling conference, Defendants are otherwise fully prepared to go forward with the proposed schedule set forth in the August 24, 2018 Order.

Defendants' Response To Plaintiff's Notice Seeking Modification Of August 24, 2018 Order, pp. 6-7; 8; 9 (Aug. 31, 2018).

The Order providing the parties with an opportunity to seek modification of the Court's proposed expedited schedule was filed over 30 days before the trial date set for September 26, 2018. At no time did the State Defendants ever seek to modify and/or change the expedited schedule.

It was not until oral argument in defense of the Plaintiff's multiple *Motions In Limine* that the State Defendants argued for the first time that certain witness testimony was impossible to present in court because of (1) the expedited schedule in this case; (2)

the various schedules of their witnesses' and (3) the distance for which some of the State's witnesses would have to travel. None of these arguments were ever raised with the Court or opposing Counsel prior to the September 26, 2018 trial date despite the previous *Memorandum and Order* – over 30 days earlier – providing the State Defendants with an opportunity to seek modification of the proposed expedited schedule or any other relief a party needed.

Upon review of the Plaintiff's Motions in Limine filed in advance of the September 26, 2018 bench trial, and after considering the arguments of counsel regarding the Plaintiff's Motions in Limine, the Court finds that the State Defendants inexplicably failed to comply with the measures that the Court included in its September 4, 2018 Order to regulate and provide structure and fair notice in advance of the September 26, 2018 bench trial.

The Court finds that the State Defendants did not comply with the Court's September 4, 2018 Order and the Local Rules of Court. The Defendants did not provide a description of the testimony that would be given by their witnesses at trial, and they did not timely provide the Plaintiff the State Defendants' trial exhibits.

The Court finds that the State Defendants never came forward and asked for any additional time or measures in which to put their evidence on before the Court.

The Court finds that the way that the State has proceeded, it has the effect of a trial by ambush, and it does not provide a fair opportunity for the Plaintiff to defend against the proof that the Defendants seek to offer.

For these reasons, and for the additional reasons set forth in the Plaintiff's Motions in Limine and advanced by Plaintiff's counsel during oral argument on the Plaintiff's Motions in Limine, the transcript of which is incorporated herein by reference, the Court has issued the above rulings.

With respect to the reasoning and authorities for the ruling stated in paragraph 2(d) above on the standards of review, the Court adopts pages 6-15 of the *Plaintiff's Pre-Trial Brief and Memorandum in Support of Plaintiff's Motion for Summary Judgment*, filed September 21, 2018.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, email, or efile as applicable to:

Daniel A. Horwitz
Jamie R. Hollin
Janet M. Kleinfelter
Erin Merrick
Kelley Groover

EXHIBIT A

TENNESSEANS FOR SENSIBLE ELEC. LAWS

VS.

TN BUR. OF ETHICS & CAMPAIGN FI., et al.

TRANSCRIPT OF PROCEEDINGS

September 26, 2018



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IN THE CHANCERY COURT OF DAVIDSON COUNTY
STATE OF TENNESSEE

TENNESSEANS FOR SENSIBLE
ELECTION LAWS,

Plaintiff,

vs.

Case No.
18-821-II

TENNESSEE BUREAU OF
ETHICS AND CAMPAIGN
FINANCE and DAVIDSON
COUNTY DISTRICT ATTORNEY
GENERALS,

Defendants.

BE IT REMEMBERED that the
above-captioned cause came on for hearing, on
this, the 26th day of September, 2018 before
Chancellor Ellen Hobbs Lyle, when and where the
following proceedings were had, to wit:

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A P P E A R A N C E S

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I N D E X

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(WHEREUPON, the following proceedings
came before the Court to be heard, as follows:)

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09:08:01
09:08:01
09:08:02
09:08:03
09:08:07
09:08:10
09:08:12
09:08:12

THE COURT: Good morning.

MS. KLEINFELTER: Good morning, Your
Honor.

THE COURT: We are here this morning
on a limited bench trial that had been
convened, scheduled by the Court. The Court
has received four motions in limine that were
filed by the plaintiff, and so we're going to
start with arguments on those.

And let me ask the plaintiff if you
will, please, present all your motions in
limine and then let me have the State respond
to all of those and then we'll have a reply.
Thank you.

MR. HORWITZ: Morning, Your Honor.

THE COURT: Good morning.

MR. HORWITZ: Daniel Horwitz on
behalf of the plaintiff, with my co-counsel
Jamie Hollin.

Plaintiff's first motion in limine
has to do with non-compliance with the Court's

1 order that the defendants disclose witnesses 09:08:13
2 with a brief description as to what the 09:08:16
3 defendants expect the witnesses will testify 09:08:18
4 about at trial. 09:08:20

5 The defendants disclosed one witness, 09:08:22
6 Mr. Rawlins. They did not comply with the 09:08:25
7 requirement that they provide a brief 09:08:27
8 description as to what Mr. Rawlins would 09:08:29
9 testify about at trial. As a result of 09:08:32
10 non-compliance with this Court's order, I 09:08:35
11 respectfully ask that this Court exclude his 09:08:38
12 testimony. 09:08:43

13 Plaintiff's second motion in limine 09:08:43
14 is based on hearsay. Witnesses cannot testify 09:08:46
15 by affidavit; must be subject to 09:08:50
16 cross-examination. Hearsay is an out-of-court 09:08:54
17 statement used for the truth of the matter 09:08:57
18 asserted. It does not matter whether it is 09:08:59
19 sworn or not. The important thing is that it 09:09:01
20 is out of court and not subject to 09:09:03
21 cross-examination. 09:09:11

22 The defendants have asked for several 09:09:11
23 witnesses not disclosed as witnesses to be 09:09:12
24 permitted to testify by affidavit. We 09:09:12
25 respectfully submit that they should be 09:09:15

1 excluded from being able to testify by 09:09:18
2 affidavit under rule of evidence 801c. 09:09:21

3 Plaintiff's third motion in limine is 09:09:24
4 a conditional relevance objection. Your Honor, 09:09:29
5 the crux of this case is going to come down to 09:09:32
6 whether or not the statutes that have been 09:09:35
7 challenged are narrowly tailored to achieve 09:09:38
8 their purpose. There are approximately two 09:09:42
9 dozen exhibits, many of which concern matters 09:09:46
10 that occurred recently well after the statute 09:09:48
11 went into effect. 09:09:51

12 And regardless of the interest they 09:09:52
13 support, I respectfully submit, Your Honor, 09:09:54
14 they are not relevant unless and until the 09:09:57
15 defendants are able to demonstrate that the 09:10:00
16 statutes are narrowly tailored to their 09:10:01
17 purpose. 09:10:06

18 The fourth motion in limine was filed 09:10:07
19 yesterday, Your Honor. We had asked for 09:10:11
20 disclosure of the exhibits that defendants were 09:10:13
21 planning to introduce in this trial. Local 09:10:16
22 rules require that disclosure be 72 hours in 09:10:18
23 advance. By Monday evening we requested those 09:10:21
24 exhibits. They were not forthcoming until 09:10:24
25 yesterday afternoon, I believe at about 09:10:27

1 2 o'clock, 2:30 p.m. 09:10:29

2 I'm not trying to be unreasonable, 09:10:31
3 Your Honor. I'm happy to withdraw that motion 09:10:33
4 if there is some reason why those exhibits had 09:10:35
5 to be provided for the first time on the eve of 09:10:38
6 trial, not in compliance with local rules. If 09:10:43
7 there was some basis for that, we'll withdraw 09:10:45
8 the objection, but I'm certainly not aware of 09:10:48
9 any. 09:10:51

10 Thank you, Your Honor. 09:10:51

11 THE COURT: Let me ask you this 09:10:52
12 question. And if you want to wait until you've 09:10:54
13 heard from the State and answer the question 09:10:56
14 and the reply, you may do so. 09:11:01

15 If the Court were to grant the 09:11:04
16 motions in limine, then that would eliminate 09:11:08
17 any proof in the record, and under that -- 09:11:12
18 under that outcome, then the Court would be 09:11:19
19 required to rule in the plaintiff's favor 09:11:24
20 because there is no evidence. 09:11:26

21 On appeal when this is reviewed, it's 09:11:30
22 a matter of discretion on these motions in 09:11:33
23 limine. And so, you're taking quite a risk if 09:11:39
24 the Court grants the motions in limine that an 09:11:42
25 appellate court would take a different view of 09:11:46

1 that and say, No, that was not a proper 09:11:48
2 exercise of discretion. 09:11:50

3 So the alternative would be for you 09:11:55
4 to seek a continuance. If the Court granted 09:11:58
5 that, then the matter would not go up before 09:12:00
6 the November election. And I know it was 09:12:05
7 important to your client to have this matter 09:12:07
8 determined in this court prior to the November 09:12:09
9 election, and that was part of the rationale 09:12:12
10 for proceeding with an expedited hearing, which 09:12:17
11 the State had agreed to. 09:12:21

12 So I put this choice to you, because 09:12:24
13 it's really a decision for you to make on 09:12:29
14 behalf of your client whether you want to 09:12:32
15 proceed with the motions in limine. If the 09:12:33
16 Court grants them, then you run the risk of a 09:12:36
17 remand on appeal. Or do you want a continuance 09:12:39
18 in the case? 09:12:42

19 MR. HORWITZ: Your Honor, if you're 09:12:43
20 amenable to it, I have a -- a different 09:12:44
21 potential solution here. 09:12:47

22 THE COURT: And I'm not necessarily 09:12:49
23 looking for solutions. 09:12:51

24 MR. HORWITZ: Sure. 09:12:52

25 THE COURT: I just want to be very 09:12:52

1 clear of what the risk is. 09:12:54

2 Proceed, Mr. Horwitz. 09:12:57

3 MR. HORWITZ: I understand. 09:12:57

4 THE COURT: I know that you had 09:12:58

5 filed a summary judgment, and the reason that 09:13:00

6 the Court did not proceed with the summary 09:13:03

7 judgment is I think that's even more of a risk 09:13:05

8 on appeal, because there were no statements of 09:13:08

9 undisputed material fact. A rushed-up summary 09:13:10

10 judgment is probably more -- or less 09:13:15

11 informative to a court of appeal than what 09:13:18

12 we're doing here, which is convening a limited 09:13:21

13 bench trial and motions in limine, et cetera. 09:13:25

14 So that's why the Court did not go that route. 09:13:28

15 So, yeah, go ahead. 09:13:32

16 MR. HORWITZ: Your Honor, we would 09:13:34

17 like to proceed with the motions in limine, but 09:13:35

18 I would ask that this Court permit the State 09:13:38

19 to make an offer of proof as to what they 09:13:41

20 intended to introduce. It's our position that 09:13:43

21 if this trial moved forward, they won't have 09:13:47

22 sufficient evidence to overcome the standard 09:13:50

23 anyway. But we do ask those motions in limine 09:13:52

24 be granted. 09:13:55

25 I respectfully submit, Your Honor, 09:13:56

1 that this will not prejudice the defendants. 09:13:59
2 It, in fact, just restores them to the position 09:14:01
3 that they previously took, which is that they 09:14:03
4 don't need evidence and they don't have to 09:14:05
5 introduce evidence and they wouldn't be 09:14:07
6 introducing evidence. 09:14:09
7 So I do not want to continue this. 09:14:10
8 We still do want to proceed on an expedited 09:14:11
9 basis, but we ask that those motions in limine 09:14:14
10 be granted and, again, that the State be 09:14:18
11 allowed to make an offer of proof and allow us 09:14:21
12 to proceed today. 09:14:23
13 THE COURT: And the Court had thought 09:14:24
14 about that, that if the motions in limine were 09:14:25
15 granted, that the State should be permitted to 09:14:26
16 make an offer of proof and how that would 09:14:29
17 proceed. 09:14:31
18 I do not listen to offers of proof. 09:14:33
19 You-all would stay in the courtroom. They 09:14:37
20 would present their matters and put it on the 09:14:39
21 record for the court reporter. So that's how 09:14:42
22 we would handle that. 09:14:44
23 But they -- I think, looks like we 09:14:45
24 have a notebook up here, so they do have -- 09:14:46
25 this could be filed in the record. And then 09:14:50

1 any questions they wanted to ask of their 09:14:52
2 witness and any cross-examination could 09:14:53
3 proceed. 09:14:56

4 All right. Anything further in 09:14:57
5 response to that question? 09:14:59

6 MR. HORWITZ: Just very briefly, Your 09:15:00
7 Honor, I wanted to clarify. The plaintiff did 09:15:02
8 file a statement of undisputed material facts 09:15:04
9 submitted with motion for summary judgment. I 09:15:08
10 understand that probably doesn't affect 09:15:08
11 anything, but if this Court hadn't seen it I 09:15:09
12 wanted to mention it. 09:15:13

13 THE COURT: I did see that, but the 09:15:14
14 time to respond is the problem. 09:15:16

15 MR. HORWITZ: Yes, ma'am. 09:15:19

16 THE COURT: It would have been on an 09:15:19
17 expedited basis. And then if they -- they have 09:15:20
18 the opportunity to submit statements of 09:15:20
19 undisputed material fact in response, and there 09:15:23
20 just would not be enough time to do that. We'd 09:15:26
21 have to compress it so much. 09:15:28

22 MR. HORWITZ: I understand and I 09:15:31
23 agree. 09:15:32

24 THE COURT: Thank you. All right, at 09:15:33
25 this time the Court will hear the State's 09:15:37

1 response to the motions in limine. 09:15:41

2 MS. KLEINFELTER: Thank you, Your 09:15:43
3 Honor. Janet Kleinfelter with the Attorney 09:15:44
4 General's Office here on behalf of the 09:15:49
5 defendant, Your Honor. 09:15:50

6 And, Your Honor, in your question to 09:15:52
7 counsel, plaintiff's counsel has identified and 09:15:53
8 specifically comes from, that the Court of 09:15:55
9 Appeals identified in the case of Duran and 09:15:58
10 Honda Motor American, Inc. The cite for that 09:16:01
11 case is 271 Southwest 3rd, 178. That's a 2008 09:16:03
12 decision. 09:16:06

13 And in that case the Court said that 09:16:06
14 a motion in limine is not the proper vehicle to 09:16:09
15 use to attempt to preclude a claim or a 09:16:12
16 defense. A motion in limine should not be used 09:16:15
17 to, quote, Choke off a party's entire claim or 09:16:18
18 defense. Rather, the purpose of a motion in 09:16:22
19 limine is to enable a Court prior to trial to 09:16:25
20 exclude anticipated evidence that would be 09:16:29
21 clearly inadmissible for any purpose at trial. 09:16:31

22 And, Your Honor, when you apply that 09:16:35
23 standard to the four motions in limine which 09:16:37
24 plaintiff has filed, they don't meet that 09:16:39
25 standard in any form or fashion. 09:16:41

1 With respect to the first motion in 09:16:45
2 limine, the entire basis for excluding the 09:16:47
3 testimony of Mr. Rawlins is the assertion that 09:16:49
4 our identification of Mr. Rawlins did not 09:16:53
5 provide a brief description as to what he was 09:16:55
6 expected to testify. Mr. Rawlins was 09:16:57
7 specifically identified as the Executive 09:16:59
8 Director of the Registry of Election Finance. 09:17:01
9 I think it's -- it's safe to say that's pretty 09:17:07
10 obvious as to what he was going to testify is 09:17:08
11 the actions of the Registry of Election 09:17:09
12 Finance. 09:17:11

13 Regardless, plaintiff had that 09:17:12
14 information since September 14th, Your Honor, 09:17:14
15 and waited until the 21st to even raise it as 09:17:17
16 an issue as to why that testimony should be 09:17:23
17 excluded. 09:17:25

18 With respect to the second motion in 09:17:26
19 limine to exclude the testimony of witnesses by 09:17:29
20 affidavit, Your Honor, there the problem with 09:17:31
21 that is, once again, counsel had that 09:17:35
22 information as of September 14th. As this 09:17:39
23 Court noted in its order, if counsel felt the 09:17:42
24 need to inquire about testimony of witnesses, 09:17:45
25 they could have asked for a continuance in 09:17:49

1 order to depose those witnesses. No such 09:17:52
2 request has been made. No request is being 09:17:57
3 made today. 09:18:00

4 And, Your Honor, with respect to at 09:18:00
5 least two of the witnesses, because of the 09:18:03
6 expedited basis of this trial, there was no way 09:18:04
7 that we could have these witnesses available 09:18:07
8 today. Two of the witnesses are more than a 09:18:09
9 hundred miles outside -- one of the witnesses 09:18:12
10 is in California at the moment. Another 09:18:13
11 witness is located in Hardeman County, which is 09:18:15
12 170 miles from Davidson County. Two more of 09:18:18
13 the witnesses are administrators of election 09:18:21
14 for -- one for Davidson County, the other one 09:18:24
15 for Montgomery County. Your Honor, they are 09:18:27
16 extremely busy at this moment preparing for the 09:18:31
17 November elections. One of the other witnesses 09:18:35
18 was just elected vice-mayor. In addition, he 09:18:38
19 has a full-time job. 09:18:42

20 We were not able to insure that those 09:18:43
21 witnesses were going to be able to be available 09:18:46
22 for this trial given the expedited basis. Your 09:18:48
23 Honor, we would have made them available, 09:18:52
24 however, had counsel requested the opportunity 09:18:54
25 to depose them and asked for a continuance. We 09:18:56

1 would have made them available for depositions. 09:18:59

2 That request never came. 09:19:01

3 With respect to the third motion, 09:19:04

4 Your Honor, the third motion says that the 09:19:06

5 basis for excluding, conditionally excluding 09:19:08

6 irrelevant exhibits, Your Honor, first of all, 09:19:12

7 I think it's the Court that decides whether or 09:19:15

8 not a particular exhibit is relevant, not 09:19:18

9 opposing counsel. 09:19:20

10 But regardless, the basis that they 09:19:23

11 provide for excluding it is because it's 09:19:25

12 inadequately described. And the example they 09:19:28

13 give is the legislative history from the 99th 09:19:31

14 Session of the Tennessee General Assembly for 09:19:35

15 House Bill 89 and Senate Bill 79. 09:19:38

16 Your Honor, I don't know how else to 09:19:40

17 describe legislative history. The legislative 09:19:42

18 history is the history -- it's the recorded 09:19:45

19 history of what the legislature did. I'm not 09:19:47

20 sure how else to describe that. And if counsel 09:19:50

21 is not aware of what the legislative history 09:19:59

22 is, I'm not sure if there's a definition out 09:20:02

23 there to provide them. 09:20:05

24 But regardless, Your Honor, I don't 09:20:06

25 think there's any basis for excluding all of 09:20:08

1 the exhibits simply because counsel believes 09:20:10
2 that they're not relevant to the issue. 09:20:12

3 The final motion, Your Honor, with 09:20:14
4 respect to excluding an exchange of exhibits, 09:20:16
5 so if we're going to play the game of the local 09:20:20
6 rules, Your Honor, and argue that our exhibits 09:20:23
7 should be excluded because we didn't comply 09:20:25
8 with the local rule, well, counsel's motion 09:20:28
9 doesn't comply with the local rule, because 09:20:30
10 Local Rule 30 says that that motion in limine 09:20:33
11 is supposed to be filed five days before the 09:20:37
12 trial. 09:20:38

13 But we're not going to play that 09:20:39
14 game, Your Honor. The simple matter of the 09:20:40
15 fact is that all of the exhibits, the 09:20:41
16 documentary exhibits that we listed on 09:20:44
17 September 14th and provided to counsel on 09:20:46
18 September 14th are public records that could 09:20:49
19 have been obtained at any time by plaintiff's 09:20:51
20 counsel without obtaining them from us. We 09:20:54
21 provided specific sites to where newspaper 09:20:57
22 articles could be found. To the extent that 09:21:02
23 they could not be downloaded off the internet, 09:21:04
24 they were available at the State library and 09:21:07
25 archives. They were all public records. 09:21:11

1 With respect to the affidavits, Your 09:21:14
2 Honor, we were still in the process of getting 09:21:17
3 executed affidavits, and two of the affidavits 09:21:19
4 were not actually executed until yesterday. We 09:21:21
5 went ahead and actually provided those 09:21:24
6 affidavits to plaintiff's counsel, even though 09:21:25
7 we were not required to do so under the local 09:21:29
8 rules. 09:21:32

9 The simple matter of fact is, Your 09:21:32
10 Honor, counsel wants to exclude all of our 09:21:36
11 evidence because they happen to believe that we 09:21:38
12 have to demonstrate that it's narrowly 09:21:41
13 tailored. That's the issue still for the Court 09:21:45
14 to determine based upon the pre-trial briefs, 09:21:45
15 what's the appropriate standard of review. 09:21:45

16 But their position is that unless we 09:21:47
17 demonstrate that it's narrowly tailored, the 09:21:50
18 Court should exclude all of our evidence. Your 09:21:54
19 Honor, that kind of begs the question, how do 09:21:56
20 you demonstrate that something is narrowly 09:21:59
21 tailored without the evidence? That's exactly 09:22:03
22 what the Court said in its previous order. 09:22:03
23 That's why this Court ordered an evidentiary 09:22:04
24 hearing. 09:22:06

25 We would respectfully request that 09:22:06

1 the Court deny all of the motions in limine. 09:22:09
2 We fully expect if the motions were granted 09:22:11
3 that we would find ourselves back here in a 09:22:14
4 couple of months after the Court of Appeals 09:22:17
5 reverses and remands. Thank you. 09:22:18

6 THE COURT: Thank you. Anything 09:22:21
7 else? 09:22:23

8 MR. HORWITZ: Very briefly, Your 09:22:24
9 Honor. 09:22:25

10 As to the first motion in limine, 09:22:26
11 this is not about inquiring into his testimony. 09:22:29
12 It's simply about fair notice, Your Honor. I 09:22:35
13 would respectfully submit this Court has 09:22:37
14 significant discretion to control the evidence 09:22:40
15 that gets admitted, and non-compliance with 09:22:41
16 this Court's orders is a legitimate basis for 09:22:44
17 excluding evidence. 09:22:49

18 As to the hearsay affidavits, Your 09:22:51
19 Honor, I also submit that not deposing a 09:22:53
20 witness does not entitle the defendants to 09:22:56
21 introduce hearsay. The rules of evidence apply 09:22:59
22 whether or not the plaintiffs wanted to depose 09:23:03
23 witnesses or not. 09:23:06

24 As for waiting to raise this 09:23:08
25 objection, it was raised within seven days of 09:23:10

1 the disclosures being made, and I believe the 09:23:12
2 fact that I was out of town during this 09:23:16
3 process was previously introduced into the 09:23:18
4 record. 09:23:22

5 Legislative history, Your Honor, can 09:23:23
6 include many, many, many things: committee 09:23:26
7 reports, floor statements, committee 09:23:29
8 statements, newspaper articles from the time. 09:23:31
9 There is a vast quantity of information that 09:23:33
10 can be shoehorned into the category of 09:23:36
11 legislative history. Simply saying we're going 09:23:41
12 to introduce legislative history does not 09:23:43
13 provide fair notice. 09:23:47

14 More importantly, that's not the 09:23:47
15 basis for the objection anyway. The objection 09:23:48
16 is a conditional relevance objection. Assuming 09:23:51
17 for the sake of argument that the interests 09:23:56
18 that they have alleged are compelling, the 09:23:58
19 problem is they are still not narrowly 09:23:59
20 tailored. And failing to be able to 09:24:03
21 demonstrate that fact makes the balance of the 09:24:06
22 evidence irrelevant. 09:24:09

23 As to whether yesterday's motion in 09:24:10
24 limine should have been filed five days ago, I 09:24:14
25 respectfully submit they were not in violation 09:24:15

1 five days ago. The local rule provides that 09:24:17
2 the exhibits need to be disclosed within 09:24:19
3 72 hours; that period came and went. Monday we 09:24:22
4 asked for them; came and went. They weren't 09:24:25
5 provided until late yesterday afternoon. 09:24:27

6 As for the fact that these are public 09:24:30
7 records, Your Honor, they are not. The 09:24:32
8 affidavits are not public records. There was 09:24:34
9 no way for me to be able to get access to those 09:24:36
10 absent the defendants providing them. And if 09:24:39
11 they had a -- had difficulty getting their 09:24:42
12 witnesses to this trial, that was their 09:24:45
13 obligation, not mine. This is their burden of 09:24:47
14 proof, not the plaintiff's. 09:24:50

15 If their witnesses were unavailable, 09:24:53
16 they could have asked to move this trial date. 09:24:56
17 They did not. They simply are attempting to 09:24:58
18 get their witnesses to testify by affidavit. 09:24:59
19 That is not permitted under the rules of 09:25:02
20 evidence. 09:25:03

21 I submit that these motions in limine 09:25:04
22 should be granted. I would not be opposed to 09:25:06
23 this Court holding a determination as to those 09:25:08
24 motions in abeyance pending the trial that 09:25:11
25 proceeds today for purpose of expediting this. 09:25:14

1 Thank you. 09:25:17

2 THE COURT: Is there any proof that 09:25:17

3 the -- if the Court granted the motions in 09:25:19

4 limine, then is there any proof that the 09:25:21

5 plaintiff has to offer in this case? 09:25:24

6 MR. HORWITZ: It was my 09:25:27

7 understanding, Your Honor, that this limited 09:25:28

8 bench trial was noticed on the defendants' 09:25:30

9 defenses. 09:25:33

10 THE COURT: Yes. 09:25:33

11 MR. HORWITZ: So that's why we're 09:25:35

12 here today. No, Your Honor. 09:25:37

13 THE COURT: All right. Thank you. 09:25:38

14 Anything else, General Kleinfelter? 09:25:40

15 MS. KLEINFELTER: No, Your Honor. 09:25:43

16 THE COURT: The Court grants the 09:25:49

17 motions in limine for the reasons stated in the 09:25:51

18 plaintiff's oral arguments and in their 09:25:55

19 briefing, including but not limited to, that 09:25:59

20 the State failed to comply with measures that 09:26:02

21 this Court had put in its order to regulate and 09:26:07

22 provide structure and fair notice when we were 09:26:10

23 having a bench trial on an expedited basis. 09:26:15

24 The Court was careful and thoughtful 09:26:20

25 in crafting regulations so that the trial of 09:26:24

1 this case would be fair, even though it was 09:26:26
2 expedited, and the State has not complied with 09:26:29
3 the Court's order. The State did not provide a 09:26:33
4 description of the testimony that would be 09:26:37
5 given by its witness. 09:26:40

6 The Court had also put in footnote 1 09:26:41
7 of its order that if there were difficulties or 09:26:45
8 problems complying with the deadlines, that 09:26:49
9 relief should be sought from the Court, and the 09:26:55
10 Court anticipated or acknowledged that that was 09:26:59
11 a possibility. The State never came forward 09:27:03
12 and asked for any additional time or measures 09:27:06
13 in which to put their evidence on before the 09:27:11
14 Court, other than the limited bench trial that 09:27:16
15 the Court had set up. These are in addition 09:27:18
16 to the reasons that are stated by the 09:27:23
17 plaintiff in their oral argument and their 09:27:26
18 briefing. 09:27:29

19 The Court concludes that the way 09:27:30
20 that the State has proceeded, it has the 09:27:33
21 effect of a trial by ambush, and it doesn't 09:27:36
22 provide an opportunity for the other side to 09:27:41
23 defend against the proof that the plaintiff 09:27:46
24 seeks -- that the defendant, the State, seeks 09:27:49
25 to offer. 09:27:52

1 So for all of these reasons, the 09:27:53
2 Court grants the motions in limine. The Court 09:27:55
3 directs plaintiff's counsel to prepare the 09:28:00
4 order granting the motions in limine and submit 09:28:03
5 that stating the Court's reasoning. And to the 09:28:06
6 extent that it's not all in there, I will add 09:28:10
7 to it, but use what you stated in oral 09:28:13
8 arguments and in your briefing and then what 09:28:16
9 you've heard the Court state on the record here 09:28:20
10 today. If it's not exactly like I want it, 09:28:22
11 then I will change it up. 09:28:25

12 The reason I'm having you prepare the 09:28:27
13 order is that the Court has a number of matters 09:28:29
14 this week, and for us to get the order done in 09:28:32
15 time it would be next week or week after before 09:28:36
16 I could do it. 09:28:39

17 Where that leaves us with respect to 09:28:40
18 the case is that having granted the motions in 09:28:42
19 limine, the State has insufficient facts of 09:28:45
20 record to withstand the plaintiff's claim, and 09:28:50
21 so judgment is granted in favor of the 09:28:52
22 plaintiff, and the plaintiff shall prepare the 09:28:55
23 order of judgment on that as well and submit it 09:28:57
24 to the Court. 09:29:01

25 In terms of the State, of course, 09:29:03

1 there is the three-day holding period that we 09:29:05
2 have in the clerk and master's office. And to 09:29:07
3 the extent that the State disagrees with the 09:29:12
4 orders that have been submitted, they may 09:29:14
5 submit an opposing or competing order. 09:29:16

6 As to preparing a record on appeal, 09:29:18
7 I'm going to have Mr. Seamon mark the notebook 09:29:22
8 that General Kleinfelter had provided before 09:29:27
9 today's proceedings for identification only. 09:29:31
10 So that will be in the record. And then if 09:29:35
11 there is any offer of proof that the State 09:29:38
12 seeks to make with their witness, they may do 09:29:43
13 so in the courtroom here with the court 09:29:46
14 reporter and opposing counsel, and you-all may 09:29:49
15 put that questioning on the record. 09:29:52

16 Let me ask if there are any questions 09:29:57
17 about the Court's ruling? 09:29:59

18 MS. KLEINFELTER: Yes, Your Honor. 09:30:02
19 The State intends to file a notice of appeal, 09:30:03
20 and we are we requesting a stay of the Court's 09:30:06
21 order. 09:30:08

22 Do I need to go ahead and file that 09:30:09
23 motion, or will the Court entertain an oral 09:30:11
24 motion? 09:30:13

25 THE COURT: You would need to file a 09:30:14

1 motion. 09:30:16

2 MS. KLEINFELTER: We'll get that 09:30:16
3 motion and notice filed today, Your Honor. 09:30:18

4 THE COURT: Okay. Any other 09:30:20
5 questions, General Kleinfelter, about the 09:30:22
6 Court's ruling? Any other questions? 09:30:26

7 MS. KLEINFELTER: Your Honor, do we 09:30:28
8 have the opportunity in making our offer of 09:30:29
9 proof of explaining the exhibits, because there 09:30:32
10 was going to be explanation provided when we 09:30:34
11 presented them in the record? 09:30:37

12 THE COURT: Absolutely. Put anything 09:30:39
13 on the record that you think you need to put on 09:30:41
14 there. 09:30:43

15 MS. KLEINFELTER: Thank you. 09:30:43

16 THE COURT: Any questions of 09:30:45
17 plaintiff? 09:30:47

18 MR. HORWITZ: Very briefly, Your 09:30:47
19 Honor. 09:30:49

20 Would it be permissible to integrate 09:30:49
21 the transcript of this proceeding into the 09:30:51
22 proposed order that is filed. 09:30:53

23 THE COURT: Yes. There are a couple 09:30:54
24 ways you can do it. Either you can prepare 09:30:57
25 the order and paraphrase what I've said, or you 09:30:59

1 can attach the transcript to the order and just
2 provide that it's incorporated by reference.

09:31:03
09:31:08

3 And if you need to put other
4 provisions in the order, you may do so, but
5 just attach the transcript. So any form is
6 fine as long as we get the substance of the
7 Court's ruling so it can be adequately reviewed
8 on appeal.

09:31:10
09:31:12
09:31:15
09:31:18
09:31:20
09:31:23

9 MR. HORWITZ: Thank you, Your Honor.

09:31:24

10 THE COURT: Any other questions? Any
11 other questions?

09:31:25
09:31:29

12 (No response.)

09:31:29

13 THE COURT: All right. At this time,
14 Mr. Seamon, I'm going to ask you to mark that.

09:31:31
09:31:33

15 (WHEREUPON, the above-mentioned
16 documents were marked for Identification only
17 as Exhibit No. 1, Exhibit No. 2, Exhibit No. 3,
18 Exhibit No. 4, Exhibit No. 5, Exhibit No. 6,
19 Exhibit No. 7, Exhibit No. 8, Exhibit No. 9,
20 Exhibit No. 10, Exhibit No. 11, Exhibit No. 12,
21 Exhibit No. 13, Exhibit No. 14, Exhibit No. 15,
22 Exhibit No. 16, Exhibit No. 17, Exhibit No. 18,
23 Exhibit No. 19, Exhibit No. 20, Exhibit No. 21,
24 Exhibit No. 22, Exhibit No. 23, and Exhibit No.
25 24.)

09:31:37

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THE COURT: And we will adjourn

court.

(WHEREUPON, court was adjourned at
9:31 a.m.)

09:31:37

09:31:39

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REPORTER'S CERTIFICATE

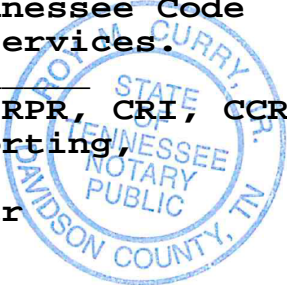
STATE OF TENNESSEE

COUNTY OF WILLIAMSON

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Licensed Court Reporter
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Certified Court Reporter, and
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State of Tennessee At Large



My Commission Expires: 6/26/2021
LCR #202 - Expires: 6/30/2020

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horwitz@gmail.
com** 2:12

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