

BEFORE THE ALABAMA REPUBLICAN PARTY
STATE EXECUTIVE COMMITTEE

CHARLES W. WHATLEY;)	
)	
GARY LEE HUNT,)	
)	
Contestants,)	
)	
vs.)	
JAY HOVEY,)	
)	
Contestee)	No. _____

CONTESTANTS OPPOSITION TO MOTION FOR RE-HEARING

Comes Now, Contestants by and through their counsel of record, in opposition to Contestee’s motion for a re-hearing of the **final** decision of the State Executive Committee of the Alabama Republican Party, and states as follows

- I. No New Evidence is actually being offered and the contents of the ALEA statement are consistent with the information provided at trial**

Contestee’s base the entirety of their motion on a press release issued by Alabama Law Enforcement Agency (ALEA) on Monday, June 26th, 2022. Said press release alleges a “thorough review” of the matter but fails to go in depth as to the process by which it conducted its review, the evidence that was reviewed, and which persons were interviewed to determine the results of its alleged “review”. Further, at no time was there any interview of the voter in question, Patsy Kenney, by ALEA or its investigators. A press release does not constitute new evidence, actual evidence constitutes new evidence.

Nevertheless, the information presented by the ALEA press release is all consistent with the evidence presented at trial and arguments presented by counsel for both parties. It is undisputed by all parties that Mrs. Kenney failed to complete her driver's license application due to an issue with her eyesight. Contestants submitted into evidence the actual doctors form issued by Officer Hightower at the DMV for Mrs. Kenney for her Doctor to fill out and return to ALEA. Said form is a printed form that includes Mrs. Kenney's information, the date she went to the DMV, and Officer Hightower's information. It was an ALEA issued form that was undisputed by both parties.

It is further undisputed that Patsy Kenney currently holds a current Georgia Driver's License. In her video deposition that was played before the Committee at the hearing, Kenney explicitly stated that she still currently held a Georgia Driver's License even though she was a resident of the State of Alabama. She further testified that she used her current Georgia license as a photo ID, along with a current bill and her current Alabama Voter Registration Card (also submitted into evidence at the trial) to participate and vote in the June 21, 2022 Alabama Republican Primary Runoff. Mrs. Kenney received her voter ID card on or about June 4, 2022 after it was mailed to her on June 3, 2022 and is currently considered to be an active Republican voter in the State of Alabama.

The ALEA press release presents no new evidence or information contrary to what was presented at trial, and intentionally fails to address the primary arguments made by Contestee's. Mrs. Kenney went to the DMV for the purpose of getting her Alabama Driver's License. She was asked by the ALEA officer, working in her official capacity, if she wanted to register to vote. The ALEA officer then took Mrs. Kenney's information and input it into the ALEA system. At no time was there any indication from the ALEA officer, much less an explicit

statement from that officer that Mrs. Kenney failed to complete any or all of the necessary requirements to register to vote. No law currently exists requiring a vision test to vote, and if any such law existed at any point in the history of the State of Alabama it would have been struck down as unconstitutional along with other frivolous Jim Crow era voting laws.

The law on this point is clear, Mrs. Kenney's ballot was wrongly rejected; her vote should have counted. See *Action NC v. Strach*, 216 F. Supp. 3d 597, 646 (M.D.N.C. 2016) (enjoining the North Carolina State Board of Elections director from rejecting the provisional ballots of unregistered, but otherwise eligible, voters who registered to vote in person at the DMV); see also *Montgomery v. Henry*, 39 So. 507, 508 (Ala. 1905) (holding that ballots should not be rejected where the voter is not at fault). Kenney has a clear legal right to have her provisional ballot, and the documentation related it, delivered to and considered by the State Executive Committee, so that her vote can be counted in the aforementioned election contest:

“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote ... and to have their votes counted....”

Waltman v. Rowell, 913 So. 2d 1083, 1089 (Ala. 2005) (emphasis added) (quoting *Eubanks v. Hale*, 752 So.2d at 1150 n. 18, quoting in turn *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964).

“[I]t is the responsibility of a party seeking to have a vote excluded to make a prima facie showing that the vote was illegally cast.” *Waltman*, 913 So. 2d, at 1089. “ ‘Where there is no

prima facie showing that a vote was illegally cast, that vote cannot be excluded.” Id. (quoting Eubanks, 752 So.2d at 1145).

The failure by the ALEA official in this matter does not constitute a failure by the voter, Mrs. Kenney to properly register. Opposing counsel directly argued all information potentially contained within the press statement of ALEA and their argument was assumedly rejected by the Committee. A press release containing their same arguments does not constitute “new evidence” necessitating a re-hearing on this matter.

II. A re-hearing of the case would be inconsistent with the adopted Rules for Contests of a Primary Election.

The adopted Rules for Contests of a Primary Election, as adopted by the Alabama Republican Executive Committee set forth the rules of this Contests and all parties were governed by them at all relevant times. Under said rules, parties were given a limited amount of time to develop evidence, subpoena documents, depose witnesses, and present their case. All parties had the same amount of time and opportunities to develop and present their case. In this particular matter there were multiple subpoenas of documents, depositions, and even a motion to compel testimony made by opposing counsel that was granted by the hearing officer.

To say that “new evidence” has come to light is a complete mis-categorization of opposing counsel’s case. At all relevant times opposing counsel had the right and opportunity to subpoena these documents and get what they say is the relevant information. They failed to do so not because of a limitation on time, but because they were afraid that the results would conclusively prove contestee’s case in chief. I refer you back to Section IV of our original brief,

attached herein, discussing the legality of opposing counsel cherry picking evidence. The new information does nothing to help or hurt either party's case, but is being relied upon by contestee for the sole purpose of confusing the issue.

The time of the trial has occurred, and the case has been decided. Section 18(a) of the Rules for Contests of a Primary Election clearly state that "neither Party shall be entitled to submit any additional evidence or briefing following the hearing." To continue trying this case, whether it be to the Committee, the press, or the public as a whole, does nothing towards re-unifying our party and moving forward towards our goal of electing republicans. The decision of the Committee was clear, this race is a tie and it is the will of the Committee to decide this race by virtue of a coin flip.

LET'S FLIP THE COIN.

Respectfully submitted this 29th day of June, 2022.

Respectfully Submitted,

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I hereby certify that I have served a copy of the foregoing pleading by electronic mail as follows:

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Done this date, June 29, 2022.

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Exhibit A

BEFORE THE ALABAMA REPUBLICAN PARTY STATE EXECUTIVE COMMITTEE

CHARLES W. WHATLEY;)
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BRIEF OF CONTESTANTS

I. The ALGOP Executive Committee Holds Plenary Authority to Name its Nominees.

As an initial, fundamental matter, Alabama law is well settled that in the context of a Primary Election, it is the participating political parties that hold the power to name their own nominees and settle primary election disputes. *McAdory v. Alabama Democratic Party* 729 So. 2d 310, 311 (Ala. 1999). Parties even have plenary authority to act extrajudicially in naming their nominees; they can refuse to issue certificates of nomination and even revoke them after the fact. *Bryan v. Hubbard*, 6 So. 3d 491 (Ala. 2008). “The only caveat to a state executive committee’s otherwise plenary power to make such a determination is that, in doing so, the committee cannot ‘run afoul of some statutory or constitutional provision.’” *Alabama Republican Party v. McGinley*, 893 So. 2d 337, 346 (Ala. 2004) (quoting *Ray v. Garner*, 257 Ala. 168, 171, 57 So.2d 824, 826 (1952)); *Harris v. Weatherford*, 459 So. 2d 876, 878–79 (Ala. 1984).

II. Under State and Federal Law The Provisional Ballot Cast by Mrs. Patsy Kenney Must Be Counted.

Under the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501 *et seq.* (“NVRA”), states – such as Alabama – are required to ensure compliance with certain voter registration procedures. *See* 52 U.S.C. §§ 20502(4), 20503. Among other things, the NVRA mandates that states provide a motor voter system, under which citizens can register to vote at local Department of Motor Vehicle offices when they apply for their drivers’ licenses. *See* 52 U.S.C. § 20503(a)(1). However, states have been slow to adapt to this federal mandate, and, at present, the Department of Justice has sought and obtained violations against 15 jurisdictions.

In 2015, with litigation from DOJ imminent, Alabama decided to negotiate a path into compliance with the NVRA, rather than fight in court. On November 12, 2015, Alabama, notably including the Secretary of ALEA, signed a Memorandum of Understanding (MOU) with the Civil Rights Division of the DOJ outlining its plan for achieving compliance. The MOU made clear the NVRA’s requirement that “[e]ach State motor vehicle driver’s license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal office unless

the applicant fails to sign the voter registration application.” 52 U.S.C. § 20504(a)(1). This provision also required that “[a]n application for voter registration submitted under [the provision] shall be considered as updating any previous voter registration by the applicant.” 52 U.S.C. § 20504(a)(2).

Additionally, the MOU committed the Alabama “Secretary of State and ALEA to develop and implement a mechanism to accept and transfer the voter registration component of an in-person application or renewal... to appropriate State election officials within the timelines established in the (NVRA), 52 U.S.C. Section 20504(e).” MOU, #41, page 7 of 22. Further, the MOU obligated ALEA to appoint an NVRA Coordinator, whose duties included, “[e]nsuring that... each completed voter registration application submitted... is transmitted to the appropriate State election officials under the timelines established in the Motor Voter provision of the NVRA, 52 U.S.C. Section 20504(e).

Finally, Alabama extended the voter registration procedures to apply to registrations for state elections, as well. Ala. Admin. Code r. 820-2-2-.03; .24 At present, completed voter registration applications accepted at a motor vehicle agency must be transmitted to the appropriate State election official no later than 10 days after acceptance (emphasis added). See DOJ website, National Voter Registration Act of 1993, Q&A, Question 6; see also 52 U.S.C. Section 20504(e).

These binding provisions are relevant to the situation concerning Mrs. Patsy Kenney, whose provisional ballot should be counted.

On April 28, 2022, Mrs. Kenney, a life-long Republican voter, entered the ALEA office in Opelika with her husband David in order that they may obtain new driver licenses. Officer Hightower of ALEA, acting as a desk clerk, helped them. She asked if they both wanted to register to vote through motor voter, they both replied yes, and Officer Hightower data-entered all their relevant information straight into her computer.

Officer Hightower informed David Kenney that his application for a drivers license was complete. However, she told Mrs. Kenney that in order to complete her drivers license application, she would need an eye exam form to be filled out by her doctor, as Mrs. Kenney has a long-term eye condition for which she receives medical care from a specialist. At no time did she inform either of them that Mrs. Kenney’s voter registration form was incomplete, nor did she offer to issue Mrs. Kenney a non-driver’s ID for voting purposes. Both of the Kenneys left ALEA thinking that they were both registered to vote.

The Kenneys went to vote on election day, May 24, 2022. Mrs. Kenney’s name wasn’t on the list at her precinct, so she cast a provisional ballot. One week later, on June 1, Mrs. Kenney’s provisional ballot was not included in the final count.

On June 3, Mrs. Kenney’s voter registration card was put in the mail to her. As far as anyone can tell, Mrs. Kenney’s voter registration application was completed and submitted on April 28, 2022. As noted above, ALEA had 10 days in which to transmit the application to the courthouse. Therefore ALEA was in violation of the law when it failed to send her information to the courthouse in a timely manner.

Whether Mrs. Kenney’s driver license application was complete is irrelevant under the Motor Voter provisions of the law. The law is clear that the voter registration application must be sent to the courthouse within 10 days of its completion.

“It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote,” *Reynolds v. Sims*, 377 U.S. 533, 554 (1964), and Mrs. Kenney did everything she was supposed to do as a prospective voter. She completed and signed a form before the deadline to do so had run. ALEA was responsible under the law for timely transmitting Mrs. Kenney’s voter application to the courthouse. ALEA failed to do so. Mrs. Kenney’s ballot would have been counted, but for ALEA’s mistake. Therefore, her provisional ballot must be counted.

III. Democratic Voters are NOT Republican Party Members Because They Don’t Meet Our Requirements, their Ballots Were Gained by Fraud, and Their Ballots Are Immediately Voidable by Legal Right by the ALGOP Executive Committee.

Ultimately, the United States Constitution recognizes a political party’s freedom of assembly, meaning they can determine their membership:

In cases where a voter has urged a right to vote in a party primary, the (United States) Supreme Court has stated that a nonmembers’ desire to vote in the party’s affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications.

Tashjian v. Republican Party of Conn., 479 U.S. 208, 215 n.6 (1986); *see also Duke v. Cleland*, 954 F.2d 1526, 1530-31 (11th Cir. 1992).

Alabama’s “Open Primary” isn’t wide open but instead does have one limiting requirement in state law: Alabama law states that only Party Members are entitled to vote in a Party’s primary. Ala. Code 1975, § 17-13-7(a). Party membership in Alabama can be evidenced upon signing a pledge statement, “By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election.” Ala. Code 1975, § 17-13-8. **To be clear: “No person shall be eligible to participate in the primary unless he or she signs the poll list and thereby certifies to the truth of the statement.”** Ala. Code 1975, § 17-13-7(b). Alabama law requires a voter to certify the truth of our pledge statement.

In Alabama, when a person signs a pledge knowing at the time he or she signed it that they have no intention of following it, that person is committing legal (as opposed to criminal) fraud. *See* Ala. Code § 6-5-101 (1975) (“Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud.”). Also, a person who signs but either never checks what they’re signing or actually thinks they are eligible but are not, commits the same fraud when the other party relies on their signature. Ala. Code 1975, § 6-5-104.

In order to vote in a Republican Primary, a voter must sign in to the poll. Whether each voter knows it or not, there is a pledge of loyalty to candidates and support of party ideals built in to our Primary system. Rabid Democrats who knowingly lie, and laugh or even publicly brag about it later, commit fraud by deceiving the ALGOP into giving them a ballot. Ala. Code 1975, § 6-5-101.

Any victim of fraud by deceit has an immediate right of action under Alabama law. Ala. Code 1975, § 6-5-103 (1975). And, the person committing the fraud is immediately liable to their victim for damages. Ala. Code 1975, § 6-5-104. Here, the ALGOP has an immediate right of

action, by operation of law, upon the giving of a ballot to a voter who lied when signing in. Equally, fraudulent voters are liable for their actions upon receiving the ballot.

In courts of law, the remedy in most legal fraud cases is measured in terms of dollar amounts. However, in cases of unique property, such as any piece of real estate, the remedy is typically specific performance: the order by a court of a return of the exact property that was defrauded. Here, ballots are certainly unique property, as their worth is more than simply the paper on which they are printed. The Committee already has an immediate legal right to take back the defrauded property, the ballot, and to reclaim it as of legal right.

We will attach data at the appropriate time detailing the exact Democrat voters, with identifying information, and we respectfully ask the committee to order their ballots reclaimed and void due to fraud.

IV. Hovey’s Legal Team Violated the Law by Matching Absentee Ballot Affidavits to those Voters’ Actual Ballots, and Those Violated Materials Therefore Must Be Excluded as Evidence.

Under clear Alabama law, “[t]he ballot of every voter shall be kept *secret and inviolate*.” Ala. Code 1975, § 17-13-10 (emphasis added). As an exception to the rule, Alabama law provides a path to breaking the secrecy of a ballot, and that path is with a court order, either from a circuit judge or the Party Chairman in the process of hearing an election contest. Ala. Code 1975, § 17-13-84. The Hovey legal team did not follow these provisions in this matter.

In Lee County, Hovey’s legal team used a master voter list containing the names, addresses and ballot ID numbers of all absentee voters to match absentee voter affidavits with their corresponding ballots. In this way, they connected the ballot back to its voter, without first seeking proper approval from any authority.

As a result, opposing counsel was able to cherry pick two ballots to target for destruction, neither of which of course voted for their client — a fact that opposing counsel never should have known in the first place, without proper court order.

By breaking the law, opposing counsel should now be estopped from benefitting from their behavior. Indeed, this is not the first time that this conduct has occurred, and even with the same counsel. In *McAdory v. Alabama Democratic Party*, 729 So. 2d 310 (Ala. 1999) – involving a primary election contest – the Alabama Supreme Court specifically quoted the following from the underlying order of the Democratic Executive Committee:

Algert S. Agricola, as attorney for Lawrence McAdory and without authority of this committee or a court of law obtained the absentee ballots in this election, opened the ballots, matched the ballots with the voters list kept by the poll workers and learned how citizens voted. From those voting for Priscilla Dunn, Algert S. Agricola compiled a list of citizens whose votes he contended should not have been counted. He submitted no potentially illegal votes cast for his client, Lawrence McAdory. It is undisputed that the identity of the voters who Algert S. Agricola contended might not be qualified to vote in this race could have been ascertained without him, ex parte ascertaining how these persons voted. The only purpose for ascertaining the way the persons voting absentee voted was to avoid subpoenaing or raising a question about voters who voted for Lawrence McAdory. The

committee believes in the right of voters to have a secret ballot which Algert S. Agricola, the attorney for Lawrence McAdory disputes. Nevertheless, it is the ruling of this committee that the right of our citizens to a secret ballot shall remain inviolate in the Democratic Primary until an election is contested and a committee duly appointed to hear such matter or a court hearing such matter declares a vote illegal. Then and only then shall anyone be allowed to ascertain how a citizen voted. Having violated this principle of citizens of Alabama having the right to a secret ballot until a ruling is made that such vote is illegal, it was the decision of this committee that Lawrence McAdory not be allowed to use or to introduce evidence as to any person whose ballot Algert S. Agricola inspected and matched by number with the voters list maintained at the polls....

McAdory, 729 So. 2d at 311. Most telling, the Supreme Court affirmed the decision of the Alabama Democratic Executive Committee to exclude all evidence that was violated, with a concurrence and a concurrence in the result — and no dissents. *Id.* at 311-14.

The present facts involving ballot matching, the legal background of a Primary Election Contest and the Supreme Court decision, taken together, make it clear that the ALGOP Steering Committee hearing this contest should exclude from evidence any ballots or materials tainted by ballot violations by opposing counsel.

Respectfully submitted this 23rd day of June, 2022.

Respectfully Submitted,

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