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Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Parpart, Melissa

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

IDAHO DEMOCRATIC PARTY; BRADY HARRISON; and DEREK FARR, Plaintiffs, vs. LAWRENCE DENNEY, in his capacity as the Idaho Secretary of State; and KANYE WEST, Defendants.	Case No. CV01-20-14470 MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER

Having gained fame first as a rapper and later for a variety of other reasons, Defendant Kanye West now seeks the office of President of the United States. Defendant Lawrence Denney, who holds the office of Idaho Secretary of State, has certified West to Idaho's county clerks as an independent presidential candidate. Consequently, West is slated to appear on Idaho ballots this November. According to Plaintiffs—the Idaho Democratic Party and two registered voters with no declared preference for a political party, Brady Harrison and Derek Farr—West is ineligible to appear on Idaho ballots because, in registering to vote in the State of Wyoming, he designated himself a member of the Republican Party. Plaintiffs have applied for a temporary restraining order directing Denney to withdraw his certification of West as an independent presidential candidate and instruct Idaho's county clerks not to issue ballots listing West among the presidential candidates. The application was argued on September 15, 2020, and taken under advisement the next day, upon submission of the post-hearing briefs the Court authorized during the hearing. For the reasons that follow, the application is denied.

I.

BACKGROUND

On August 24, 2020, West and his running mate Michelle Tidball, who isn't a party to this action, filed with the office of the Idaho Secretary of State a declaration of candidacy for the offices of President and Vice President of the United States. (Hancock Decl. ¶ 4; Withroe Decl. Ex. A.) With the declaration of candidacy, West and Tidball submitted a petition signed by a sufficient number of Idahoans whose voter qualifications have been verified by Idaho county clerks. (*Id.*) The declaration of candidacy also included this certification: "We . . . declare that we are not affiliated with any political party and that we are offering ourselves as Independent candidates for the offices of President and Vice-President of the United States to be voted for at the General Election on the 3rd day of November 2020." (Withroe Decl. Ex. A.) With these submissions, West and Tidball facially complied with I.C. § 34-708A's requirements for being placed on Idaho ballots as an independent ticket in the November 2020 presidential election.

On September 4, 2020, Denney, the Idaho Secretary of State, certified West's and Tidball's candidacy and provided to Idaho's county clerks a sample general election ballot reflecting West and Tidball as independent candidates for President and Vice President. (Denney Decl. ¶ 3; Hancock Decl. ¶ 5.) To that point, no one had lodged with the office of the Idaho Secretary of State any complaint about their eligibility as an independent ticket. (Denney Decl. ¶ 4; Hancock Decl. ¶ 5.) Denney was first made aware of Plaintiffs' concern about West's eligibility on September 9, 2020. (Denney Decl. ¶ 4; Withroe Decl. Ex. D.)

Two days later, on September 11, 2020, Plaintiffs filed this action against Denney and West, asserting that West falsely certified in his declaration of candidacy that he isn't affiliated with any political party, as he designated himself as a member of the Republican Party in

registering to vote in the State of Wyoming. (Verif. Compl. & Pet. Writ Mandamus ¶ 12; *see also* Barela Decl. Exs. A–B.) Plaintiffs contend that West's status as a registered Republican in Wyoming disqualifies him from appearing on Idaho ballots as an independent presidential candidate. (Verif. Compl. & Pet. Writ Mandamus ¶ 14.) West neither admits nor denies being a registered Republican in Wyoming. He presents no evidence on that point. In any event, Plaintiffs seek the following relief: (1) a declaratory judgment that West isn't eligible to be an independent presidential candidate in Idaho and that Denney unlawfully certified his candidacy and must withdraw the certification; (2) a temporary restraining order and preliminary injunction requiring Denney to withdraw the certification and direct Idaho's county clerks not to issue ballots on which West's name appears; and (3) a writ of mandamus compelling Denney to do those same things. (Verif. Compl. & Pet. Writ Mandamus ¶¶ 32–33, 42–43, 49.) Along with their complaint, Plaintiffs filed an application for a temporary restraining order directing Denney to instruct Idaho's county clerks to issue no ballots that include the West-Tidball ticket and to withdraw his certification of their candidacy. (Appl. TRO 2.)

The Court became aware of this action and Plaintiffs' application for a temporary restraining order late in the afternoon on September 11, which was a Friday. After reviewing Plaintiffs' filings, the Court was skeptical that West is ineligible for the ballot. So, in its discretion, the Court decided to give Denney and West notice and an opportunity to be heard before the application is decided. The Court directed the clerk to set a hearing for the afternoon of Tuesday, September 15—still three days before the deadline for Idaho's county clerks to mail absentee ballots to Idahoans living or serving overseas, I.C. § 34-1003(8)(a), though one day after the deadline Denney has imposed on Idaho's county clerks to print the absentee ballots, (Hancock Decl. Ex. A).

On the morning of September 15, Denney and West filed separate opposition briefs, Denney's was accompanied by supporting declarations. Part of Denney's showing is a hearsay statement that 133,000 ballots have been printed already and reprinting them to exclude the West-Tidball ticket would cost nearly $50,000. (Hancock Decl. ¶ 9.)

As already noted, Plaintiffs' application for a temporary restraining order was argued on September 15. Plaintiffs filed two declarations shortly beforehand. During the hearing, West moved to strike the declaration of Dawn R. Barela and paragraph 3 of the declaration of Plaintiffs' counsel. These are Plaintiffs' sources of evidence that West is a registered Republican in Wyoming. The motion to strike the Barela declaration is based on her not mentioning Idaho's perjury laws in certifying the truth of her testimony under penalty of perjury. West says her declaration is invalid under I.C. § 9-1406 as a result. The Court concludes, however, that the declaration is in substantially the form required by section 9-1406, despite not mentioning Idaho's perjury laws. The face of the declaration makes evident its planned submission to an Idaho court, subjecting Barela to prosecution under I.C. §§ 18-5401 and 18-5402 if her testimony is knowingly false. So, West's motion to strike the Barela declaration is denied. That outcome renders moot West's motion to strike paragraph 3 of the declaration of Plaintiffs' counsel, which presents essentially the same evidence as the Barela declaration.

One other noteworthy development happened during the hearing: the Court inquired whether Plaintiffs have standing to pursue this action, an issue not addressed in the parties' briefs: The parties were granted until 9:00 a.m. on September 16, 2020, to file briefs on that issue. The application was taken under advisement upon submission of those briefs, which the Court has received and reviewed. The application is ready for decision.

II.

LEGAL STANDARD

Plaintiffs seek a temporary restraining order. Where, as here, the trial court defers its ruling on an application for a temporary restraining order until after the nonmovant has been afforded notice of the application and an opportunity to be heard, however, the application is "properly characterized as a motion for a preliminary injunction." *Gordon v. U.S. Bank Nat'l Ass'n*, 166 Idaho 105, 455 P.3d 374, 384 (2019); *see also* 11A Mary K. Kane, *Federal Practice and Procedure* § 2951 (3d ed.), Westlaw (database updated Apr. 2020) ("When the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that on an application for a preliminary injunction and the proceeding is not subject to any special requirements."). Accordingly, Plaintiffs' motion will be treated as one seeking a preliminary injunction.

The trial court determines in its discretion whether to grant a preliminary injunction. *Gordon*, 166 Idaho at 115, 455 P.3d at 384). The movant's burden is to prove the right to one. *Id.* Each of Rule 65(e)'s five subparts describes a circumstance in which a preliminary injunction "may be granted." I.R.C.P. 65(e). No "or" separates any of the five subparts from another. Nevertheless, the most natural reading of the rule is a disjunctive one, in which the presence of any of the five circumstances warrants a preliminary injunction. Indeed, subpart (5) allows a counterclaimant to obtain "affirmative relief upon any of the grounds mentioned above." I.R.C.P. 65(e)(5) (emphasis added).

Under subpart (1), a preliminary injunction may be granted "when it appears . . . that the plaintiff is entitled to the relief demanded, and that relief . . . consists of restraining the commission or continuance of the acts complained of." I.R.C.P. 65(e)(1). Under subpart (2),

one may be granted "when it appears . . . that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff." I.R.C.P. 65(e)(2). And under subpart (3), one may be granted "when it appears during the litigation that the defendant is doing, . . . or is about to do, some act in violation of the plaintiff's rights, . . . and the action may make the requested judgment ineffectual." I.R.C.P. 65(e)(3). Subpart (4) isn't relevant here. It's not much of a simplification to say that subpart (1) is satisfied if the movant seems likely to win an injunction as part of a final judgment in the case, subpart (2) is satisfied if the movant seems likely to suffer serious harm without a preliminary injunction, and subpart (3) is satisfied if both of these things are true. So, while a disjunctive reading appears to have been intended, these three subparts are at once overlapping and duplicative, obscuring their meaning.

The Idaho Supreme Court requires both a likelihood of success on the merits and the prospect of irreparable harm as justification for granting a preliminary injunction: "A district court should grant a preliminary injunction 'only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.'"[1] *Gordon*, 166 Idaho at 115,

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[1] The Idaho Supreme Court formerly applied this demanding standard only to cases in which the preliminary injunction sought is "mandatory" in nature. *E.g.*, *Harris v. Cassia Cty.*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (quoting *Evans v. Dist. Ct. of the Fifth Jud. Dist.*, 47 Idaho 267, 270, 275 P. 99, 100 (1929)). A "mandatory" injunction orders a party to do something, in contrast to a "prohibitory" injunction, which orders a party not to do something. *See, e.g.*, 11A Mary K. Kane et al., *Federal Practice and Procedure* § 2948.2 (3d ed.), Westlaw (database updated Apr. 2020). Some courts have required a stronger showing to issue a "mandatory" preliminary injunction, on the thinking that being ordered to do something is more burdensome than being ordered not to do something. *Id.* As Denney points out, (Def. Denney's Opp'n Pls.' Appl. TRO 6), Plaintiffs seek a "mandatory" injunction, perhaps justifying greater caution in granting them they relief they seek than if they had sought a "prohibitory" injunction. The distinction, though, isn't critical to this case because Plaintiffs haven't shown the substantial likelihood of success on the merits that the Court considers requisite to any grant of a preliminary injunction. *See* footnote 2, *infra*.

455 P.3d at 384 (emphasis added) (quoting *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997); *see also, e.g.*, *Idaho Cty. Prop. Owners Ass'n, Inc. v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 315, 805 P.2d 1233, 1239 (1991) ("A preliminary injunction could have been issued . . . . Plaintiffs had shown the clear right they had for relief and the irreparable injury necessary for the issuance of an injunction.") (emphasis added). This holding has the effect—a beneficial one, in this Court's judgment—of collapsing subparts (1), (2), and (3) into one unified requirement for proof that the movant is likely to win on the merits and that a preliminary injunction is needed to avoid irreparable harm to the movant.

Both these things must be shown in the federal courts. *E.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."). And for good reason. Courts grant relief as "a function of the validity of the applicant's claim." 11A Mary K. Kane, *Federal Practice and Procedure* § 2948.3 (3d ed.), Westlaw (database updated Apr. 2020). They don't hand out undeserved victories to litigants pursuing invalid claims. For that reason, requiring proof of a likelihood of success on the merits is imperative. Equally imperative is proof of irreparable harm, as "[o]nly when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." *Id.* § 2948.1.

So, the Court will grant a preliminary injunction only if Plaintiffs have proved that they are likely to succeed on the merits[2] and that a preliminary injunction would avoid irreparable harm, despite that Rule 65(e)'s language is satisfied by proof of either. This reading of the rule accords with not only *Gordon* but also good sense, as already explained. A reading of a court rule guided, as this one is, by the rule's purpose isn't foreclosed by some ill-considered mandate for a slavishly literal reading prone to producing unjust outcomes. There is no such mandate. *See State v. Montgomery*, 163 Idaho 40, 44, 408 P.3d 38, 42 (2017) ("[W]hile the interpretation of a court rule must always begin with the plain, ordinary meaning of the rule's language it may be tempered by the rule's purpose. We will not interpret a rule in a way that would produce an absurd result."). To the contrary, the rules must be construed "to secure the just, speedy and inexpensive determination of every action and proceeding." I.R.C.P. 1(b). It's hard to see the justice in granting a preliminary injunction to movants who can't prove both that they are likely to win in the end and that they will suffer irreparable harm without one.

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[2] Specifically, the Court will require proof of a "substantial likelihood of success," which, according to the Idaho Supreme Court, "cannot exist where complex issues of law or fact exist which are not free from doubt." *Gordon*, 166 Idaho at 115, 455 P.3d at 384 (quoting *Harris*, 106 Idaho at 518, 681 P.2d at 993). That said, the Court notes that whether an outcome has a "substantial likelihood" of occurring and whether its occurrence is "not free from doubt" are greatly different as a matter of plain English. The "not free from doubt" gloss on the "substantial likelihood" standard, if applied rigorously, is unduly difficult to satisfy, as it seems to require the movant to show that its ultimate victory on the merits is not merely substantially likely but nearly inevitable. Idaho's decisional law related to preliminary injunctions needs reevaluation for this reason, as well as to resolve the already-noted uncertainty about whether the movant must show both a substantial likelihood of success on the merits and the prospect of irreparable harm, despite that Rule 65(e)'s literal language suggests otherwise.

III.

ANALYSIS

As already noted, to obtain a preliminary injunction, Plaintiffs must show both a substantial likelihood of success on the merits and that the preliminary injunction is needed to avoid irreparable harm they would suffer without one. One might reasonably wonder whether Plaintiffs will suffer irreparable harm as a result of West's inclusion on the ballot, even assuming it to be unlawful. They present no evidence that West can be expected to draw a meaningful share of the vote—large enough to either win Idaho's electoral votes or swing them from, say, President Donald Trump to his Democratic challenger, Joe Biden, whom the Idaho Democratic Party supports, (Verif. Compl. & Pet. Writ Mandamus ¶ 21). One might wonder about the alleged irreparable harm to Harrison and Farr in particular, whose interest in whether West is included on the ballot appears to be no different from that of any Idahoan intending to vote for someone other than West in the upcoming presidential election. (*See id.* ¶¶ 22–23.) Regardless, the Court makes no ruling on whether the requested injunction would avoid irreparable harm and, instead, focuses on Plaintiffs' obligation to show a substantial likelihood of success.

Persons wanting to appear on Idaho ballots as an independent presidential ticket must file declarations of candidacy by August 25 of the election year. I.C. § 34-708A. The declarations of candidacy must be accompanied by a petition signed by one thousand Idahoans who are certified as qualified voters by Idaho county clerks. *Id.* Additionally, the declarations of candidacy "must state that such persons are offering themselves as independent candidates and must declare that they have no political party affiliation." *Id.* West and Tidball so certified in their timely declaration of candidacy. (Withroe Decl. Ex. A.) West's certification is false, Plaintiffs say, because he's a registered Republican in Wyoming. (Barela Decl. Ex. A.)

Whether West's certification indeed is false depends on what it means to have "no political party affiliation." Does West's status as a registered Republican in Wyoming constitute a "political party affiliation" within the meaning of section 34-708A? Plaintiffs say so, citing the Idaho voter registration law under which voters may choose whether or not to affiliate with a political party, as they "may select on the registration application an affiliation with a political party . . . or may select to be designated as 'unaffiliated.'" I.C. § 34-404(2). Plaintiffs may be right on this point. The Court assumes as much for the sake of argument. In other words, for purposes of this decision, the Court assumes—without deciding—that West falsely certified that he has no political party affiliation. The question then becomes whether the false certification renders him ineligible to appear on Idaho ballots as an independent presidential candidate.

The Idaho Supreme Court addressed a similar question in *Henry v. Ysursa*, 148 Idaho 913, 231 P.3d 1010 (2008). That case concerned Rex Rammell's eligibility to appear on Idaho ballots as an independent candidate for the office of United States Senator. Though not the Republican Party's nominee, Rammell had been promoting himself as "the real Republican in the race" and "a Republican running as an independent." *Id.* at 915, 231 P.3d at 1012. The requirements for launching an independent senatorial candidacy are established by a different statute, I.C. § 34-708, than section 34-708A, which governs independent presidential candidacies. But that statute also requires persons filing as independent candidates to declare that they have "no political party affiliation." I.C. § 34-708(2). The Idaho Supreme Court held that Rammell met the candidacy requirements, obligating the Idaho Secretary of State to put him on the ballot, irrespective of the truth or falsity of his certification of "no political party affiliation." *Henry*, 148 Idaho at 916–18, 231 P.3d at 1013–1015. The court concluded that Idaho's election statutes contain "nothing indicating that [the Idaho Secretary of State] has the

inherent or implied power or duty to determine the truthfulness of the statements made in a declaration of candidacy as an independent candidate. The legislature has not given the Secretary of State that power or duty." *Id.* at 918, 231 P.3d at 1015. That last conclusion was based on not only the court's reading of section 34-708, which applied to Rammell's independent senatorial candidacy, but also its reading of section 34-708A, *id.*, which applies to West's independent presidential candidacy. And, although there are some minor factual distinctions between this case and *Henry*, none is substantial enough to justify a conclusion that *Henry* isn't controlling here.

The upshot of *Henry* is that an independent candidate's mere certification satisfies the statutory "no political party affiliation" requirement irrespective of any preexisting political party affiliation, as though the certification is a *de facto* withdrawal of any such affiliation. Indeed, the plain statutory language—used in both the statute at issue in *Henry* and the one applicable here—is that the candidate "must declare" that the candidate has "no political party affiliation," I.C. §§ 34-708(2), 34-708A, not that the candidate must actually have no political party affiliation. The distinction is significant given the Idaho Supreme Court's approach to statutory interpretation, which, absent an ambiguity, begins and ends with "the literal language of the statute."[3] *E.g.*, *Fell v. Fat Smitty's L.L.C.*, 167 Idaho 34, 467 P.3d 398, 402 (2020) (quoting *State v. Dunlap*, 155 Idaho 345, 361-62, 313 P.3d 1, 17-18 (2013)). Under section 34-708A's

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[3] The Idaho Supreme Court nevertheless sometimes departs from literal statutory language without finding an ambiguity. A recent example is *Eldridge v. West*, 166 Idaho 303, ___, 458 P.3d 172, 183 (2020) (treating Medicare write-downs as collateral sources under I.C. § 6-1606 on the theory that doing so is "necessary to give effect to the statute," despite acknowledging that Medicare write-downs "are not technically collateral sources under section 6-1606"). Even so, this Court isn't at liberty to employ a different mode of statutory interpretation than the one the Idaho Supreme Court prescribes.

unambiguous literal language, an independent presidential candidate satisfies the "no political party affiliation" requirement merely by certifying the absence of an affiliation. Were the Court to require—or to direct Denney to require—proof that the certification is true, the Court impermissibly would require more than the statute does.

For that reason, just as Denney may not conduct an inquiry into the truthfulness of West's certification that he has "no political party affiliation," the Court may not do so either. If, as *Henry* holds, the Idaho legislature intended not to empower the Idaho Secretary of State—Idaho's "chief election officer," charged with maintaining "uniformity in the application, operation and interpretation of the election laws," I.C. § 34-201—to look behind independent candidates' certifications of "no political party affiliation," it must not have intended to empower Idaho's courts to look behind those certifications either. The election timetable leaves little time for such inquiries. Independent presidential candidates must file declarations of candidacy by August 25 of the election year, I.C. § 34-708A, and county clerks must mail ballots to Idahoans living and serving overseas forty-five days before election day, I.C. § 34-1003(8)(a), or in this instance by September 18. That's a total of twenty-four days for prospective litigants like Plaintiffs to scrutinize the certifications of "no political party affiliation" in declarations of independent candidacy and file lawsuits like this one, for courts to adjudicate those lawsuits, and for election officials to revise ballots to reflect litigation outcomes and then print and mail revised ballots. This election timetable is less hospitable to judicial policing of "no political party affiliation" certifications than to the Idaho Secretary of State policing them in the first instance. So, where the Idaho Supreme Court has held that the Idaho Secretary of State has no power to do the policing and the statute is silent as to any judicial power to do it, the Court has difficulty implying that judicial power into the statutory scheme.

In addition to the problems with Plaintiffs' case on the merits, there are substantial doubts about whether they have standing to pursue this challenge to West's ballot eligibility.

Harrison and Farr are registered voters, (Verif. Compl. & Pet. Writ Mandamus ¶¶ 22–23), with the same interest as other registered voters—indeed, as the public at large—in the upcoming presidential election being conducted lawfully. Litigants ordinarily lack standing to challenge governmental action or inaction when the injury it allegedly would cause, rather than being particular to them, is one shared by the public at large. *E.g.*, *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000). Because West's inclusion on the ballot, even if unlawful, seemingly wouldn't cause Harrison and Farr to suffer any injury not also suffered by the public at large, Plaintiffs haven't shown a substantial likelihood of establishing that Harrison and Farr have standing to pursue their claims.

The Idaho Democratic Party presumably exists in large part to advance the electoral prospects of persons running for office as Democrats. Not surprisingly, its preferred candidate in the upcoming presidential election is Joe Biden, the Democratic nominee. (Verif. Compl. & Pet. Writ Mandamus ¶ 21.) If West remains on the ballot, the Idaho Democratic Party allegedly will need to expend resources to help Biden compete for voters who might consider casting their ballots for West. (*Id.*) This alleged economic injury might support a conclusion that it has standing to pursue this challenge to West's ballot eligibility. *See Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). That said, the allegation is bare. No evidence has been presented as to any steps the Idaho Democratic Party may take—beyond filing this action—to deal with West's candidacy. The Court is left to wonder, then, whether there is anything to the allegation. So, while it is conceivable that the Idaho Democratic Party eventually could establish standing, its showing so far isn't compelling.

For these reasons, the Court concludes that Plaintiffs haven't shown a substantial likelihood of succeeding on the merits. As a result, they aren't entitled to the requested preliminary injunctive relief. The Court won't order Denney to instruct Idaho's county clerks to issue no ballots that include the West-Tidball ticket or to withdraw his certification of their independent candidacy for the offices of President and Vice President of the United States.

Accordingly,

IT IS ORDERED that West's motion to strike the Barela declaration is denied.

IT IS FURTHER ORDERED that West's motion to strike paragraph 3 of the Withroe declaration is deemed moot.

IT IS FURTHER ORDERED that Plaintiffs' application for a temporary restraining order is denied.

Jason D. Scott Signed: 9/16/2020 11:24 AM

Jason D. Scott
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on September 16, 2020, I served a copy of this document as follows:

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Clerk of the District Court

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