

No. 08-6245

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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Rosalind Kurita,

*Plaintiff-Appellant*

v.

The State Primary Board of the Tennessee Democratic Party, *et al.*

*Defendants-Appellees*

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On Appeal from the United States District Court  
for the Middle District of Tennessee  
*The Honorable Robert L. Echols*

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**BRIEF OF APPELLANT**

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### **Corporate Disclosure Statement**

Pursuant to Fed. Rule of App. Proc. Rule 26.1, I hereby certify that Plaintiff-Appellant Rosalind Kurita is an individual, and therefore does not have a parent corporation.

/s/ James Bopp, Jr.  
James Bopp, Jr.

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### **Jurisdictional Statement**

The District Court's subject matter jurisdiction in this case rests on 28 U.S.C. §§ 1331 and 1343(a), because this is a civil action alleging that the actions of the State Primary Board and the statutes of Tennessee violate the Fourteenth Amendment of the U.S. Constitution. This Court has jurisdiction over this federal question, under 28 U.S.C. § 1291, to review the district court's final order and judgment denying Senator Kurita's Motion for Preliminary Injunction and Restraining Order, denying her requests for a declaratory judgment and permanent injunctive relief, granting Defendants' Motions to Dismiss under Rule 12(b)(6), and disposing of all parties' claims, entered October 14, 2008. Order, Record Entry No. 54.<sup>1</sup> Plaintiff-Appellant Rosalind Kurita appealed that judgment as of right, Fed. R. App. P. 4, filing her Notice of Appeal on October 15, 2008. Notice of Appeal, R. 56.

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<sup>1</sup>All references to the Record Entry Numbers ("R. \_\_\_\_") are references to the District Court's Record Entry Number as assigned on the District Court docket sheet. All District Court documents referenced in Appellant's Brief are also listed in the Addendum.

### **Statement of the Issues**

- I. Whether Senator Kurita has a protected property interest in the results of the primary election.
- II. Whether the actions of the State Primary Board constituted state action.
- III. Whether Tennessee Code Annotated § 2-17-104 is unconstitutional on its face.
- IV. Whether Senator Kurita was denied her due process rights.

### **Statement of the Case**

On September 24, 2008, Senator Kurita brought this suit in the United States District Court for the Middle District of Tennessee. Senator Kurita challenged the election contest proceedings in front of the State Primary Board and her removal from the general election ballot on Fourteenth Amendment due process grounds. On October 10, 2008, the District Court held a hearing on the merits of the case. Minute Entry, R. 48. On October 14, 2008, the court issued a final order, denying Senator Kurita's Motion for Preliminary Injunction and Restraining Order, denying her requests for a declaratory judgment and permanent injunctive relief, and granting Defendants' Motions to Dismiss under Rule 12(b)(6). Memorandum Opinion, R. 53; Order, R. 54. On October 15, 2008, Senator Kurita filed her Notice of Appeal. Notice of Appeal, R. 56.

On October 20, 2008, Senator Kurita filed an Emergency Motion for Injunction Pending Appeal with this Court, which was denied on October 24, 2008. On October 21, 2008, Senator Kurita filed an Emergency Motion for Expedited Appeal, which this Court denied on December 3, 2008.

### **Statement of Facts**

On August 7, 2008, the voters of Tennessee State Senate District 22 voted to have Senator Kurita represent them as their Democratic candidate in the November general election. Verified Complaint, R. 1, ¶ 21. Senator Kurita defeated her only opponent in this primary election, Tim Barnes (“Barnes”), by nineteen votes. *Id.* ¶ 23. On September 4, 2008, the Tennessee Coordinator of Elections certified the results of the primary election, showing Senator Kurita as the winner in the Democratic primary election. *Id.* ¶ 27, Ex. E.

Once the Coordinator of Elections certified the results of the primary election, Senator Kurita was the Democratic nominee for District 22. T.C.A. § 2-8-113(a). After certification, Tennessee law mandates certain acts be performed by state officials, which would inexorably lead to Senator Kurita’s name being placed on the general election ballot. First, the Coordinator of Elections is required to certify the names of political party nominees to the appropriate county election commissions. T.C.A. § 2-8-115. The certification makes the candidates “qualified”

to be placed on the general election ballot. T.C.A. § 2-5-105. Next, the county election commissions are obligated to place each “qualified candidate’s name” on the general election ballot, T.C.A. § 2-5-204(a), which they are responsible for preparing. T.C.A. § 2-5-202.

However, the statutory entitlement of the primary election winner to be placed on the general election ballot can be divested through an election contest. T.C.A. § 2-17-104 (“Contest Statute”).<sup>2</sup> Tennessee election law designates the executive committees of the political parties as “state primary boards,” and authorizes them to “perform the duties and exercise the powers required by” Tennessee law. T.C.A. § 2-13-102(b). One duty of the state primary boards is to

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<sup>2</sup>In its entirety, the Contest Statute, T.C.A. § 2-17-104, states:

- (a) Any candidate may contest the primary election of the candidate’s party for the office for which that person was a candidate.
- (b) To institute a contest, the candidate shall, within five (5) days after the certification of results by the county election commission, file a written notice of contest with the state primary board of the candidate’s party and with all other candidates who might be adversely affected by the contest. In the notice the candidate shall state fully the grounds of the contest.
- (c) The state primary board shall hear and determine the contest and make the disposition of the contest which justice and fairness require, including setting aside the election if necessary.

conduct any elections contests in primary elections, pursuant to the Contest Statute.

On August 25, 2008, Barnes filed an election contest with the State Primary Board. Verified Complaint, R. 1, ¶ 24. Senator Kurita filed a written response to Barnes's election contest, and the State Primary Board set a hearing to adjudicate the contest for September 13, 2008. *Id.* ¶¶ 24, 28. Despite being required to adjudicate election contests under Tennessee law, when Barnes filed his election contest, the State Primary Board did not have any rules to govern such contests. *Id.* ¶ 32. Indeed, the State Primary Board did not even adopt any such governing rules until the morning of the election contest hearing, when they finalized and adopted a set of rules ("Rules"). *Id.* ¶¶ 29-32, Ex. D. Senator Kurita received the finalized Rules just before the election contest hearing began, preventing her from properly preparing for the hearing. *Id.* ¶ 33.

Neither the Contest Statute nor the Rules set definitive, substantive standards to adjudicate an election contest. The Contest Statute only requires the state primary boards to "determine the contest and make the disposition of the contest which justice and fairness require." Similarly, the Rules only suggest a method for determining an election contest. *Id.* Ex. D, ¶ 11 ("In making a determination on the Notice of Contest, the State Primary Board *may* decide the

following, *in addition to any other relevant questions.*”) (emphasis added).

At the election contest hearing, the State Primary Board declared the results of the primary election “incurably uncertain,” but made no findings on the record of any reasons for this decision. Verified Complaint, R. 1, ¶¶ 35, 36; *see also* Contest Hearing Transcript, R. 42. On September 17, 2008, per the recommendation of the State Primary Board, the Democratic Executive Committees for the three counties in District 22 selected Barnes as the Democratic nominee for District 22. Verified Complaint, R. 1, ¶ 37. Barnes was placed on the general election ballot, on which no Republican appeared for District 22. Senator Kurita qualified as a write-in candidate for District 22. On November 4, 2008, the voters of District 22 elected Barnes as their State Senator.

### **Standard of Review**

A review of a Motion to Dismiss “under Federal Rule[] of Civil Procedure . . . 12(b)(6) [is] generally subject to a *de novo* standard of review.” *Simon v. Pfizer Inc.*, 398 F.3d 765, 772 (6th Cir. 2005); *Genord v. Blue Cross Blue Shield of Mich.*, 440 F.3d 802, 805 (6th Cir. 2006). Thus, this Court should review the District Court’s dismissal for failure to state a claim *de novo*.

Review of declaratory judgments requires the Court to look to policy factors in its review:



We apply the following general principles in determining whether a declaratory ruling is appropriate: “The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed.”

. . . We thus consider the following factors: (1) whether the declaratory action would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying legal relations in issue; (3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for res judicata;” (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy which is better or more effective.

*Grand Trunk W. R.R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984)

(citation omitted) (quoting E. Borchard, *Declaratory Judgments* § 299 (2d ed. 1941)).

### **Summary of the Argument**

Tennessee State Senator Rosalind Kurita (“Senator Kurita”) asks this Court to grant her protection for her constitutionally protected due process rights. In the August primary election, the Democratic voters of State Senate District 22 (“District 22”) chose Senator Kurita to represent them as their nominee on the general election ballot. However, when Senator Kurita’s opponent filed a contest challenging the primary election results, the State Primary Board of the Tennessee

Democratic Party (“State Primary Board”), the body responsible for adjudicating election contests, failed to give Senator Kurita the due process protections required by the Fourteenth Amendment to the United States Constitution when it conducted its election contest hearing. Instead, the State Primary Board declared the primary election “incurably uncertain,” and selected her opponent to be placed on the general election ballot without so much as providing any reason for its decision. Senator Kurita did not appear on the general election ballot as the Democratic nominee for District 22, and her opponent won the election to the State Senate.

Tennessee law has a statutory scheme whereby Senator Kurita had a property right to appear on the general election ballot after her primary election victory. The only method whereby the State, or a state actor (in this case, the State Primary Board) could divest Senator Kurita of this property right was to conduct an adjudication subject to proper due process protections. However, they failed to do so. Because of these actions, Senator Kurita requests this Court order a special election for District 22, to remedy the actions of the State Primary Board.

## Argument

### **I. The District Court Made a Fundamental Error in Finding That the State Primary Boards Allow the Political Parties to Determine the Candidate to Represent the Party in the General Election.**

In concluding that Tennessee’s laws , through their designation of state party executive committees as “state primary boards,” “allow[] the political party . . . to determine which candidate the party deems best suited to represent the party in the general election,” Memorandum Opinion, R. 53, 10-11, the District Court made a fundamental error. This error was decisive at each step of the District Court’s analysis of Senator Kurita’s due process claim: that Senator Kurita had no property right flowing from her primary election victory, *id.* at 25 (the results of the primary were subject to “the Democratic Party’s finalization of its nominee to represent the party in the general election”); that the state primary boards are not state actors, *id.* at 16 (“The Tennessee General Assembly expressly disclaimed any role of the state government in resolving party nomination contests and instead reserved power exclusively to the political party to choose the nominee”); and that the Contest Statute was constitutional on its face, *id.* at 36 (through the Contest Statute, “the state legislature has granted broad power and authority to that party body to select the party’s nominee in the general election”). The District Court’s conclusion, however, is contrary to both Tennessee’s statutory scheme for the

selection of political party nominees for the General Assembly, and to the nature of primary election contests under Tennessee law. Further, contrary to the District Court's finding, the conclusion is not required in order to protect the First Amendment associational rights of political parties.

**A. The District Court's Findings Are Contrary to Tennessee's Statutory Scheme for the Selection of Candidates.**

Under the Tennessee election code, candidates for certain offices, including “[m]embers of the general assembly,” must be selected by means of a primary election. T.C.A. § 2-13-202. The political parties, on the other hand, maintain control of the selection process of nominees for all other offices not specifically named in the statute. T.C.A. § 2-13-203(a). This results in a bifurcated system for the selection of political party nominees, where some nominees are selected by party rules, and some nominees are selected pursuant to state election laws.

The purpose of requiring a primary election for members of the General Assembly is readily apparent from the definition of “primary election” itself: “[A]n election held for a political party for the purpose of allowing members of that party to select a nominee or nominees to appear on the general election ballot.” T.C.A. § 2-1-104(19). The state-mandated primary removes the selection of certain party nominees from the “party bosses” and entrusts the party members

with the power and responsibility to select their nominees “for” the political party. T.C.A. § 2-13-202. The District Court’s interpretation, however, vitiates this stated purpose of holding primary elections, since the District Court would permit “party bosses” to set aside a primary election result and select a new candidate, at their complete discretion, to be placed on the general election ballot under the rubric of a “contest.” The bifurcated system of nominations under Tennessee law was intended to prevent this result.

In *Inman v. Brock*, 622 S.W.2d 36 (Tenn. 1981), the Tennessee Supreme Court recognized the distinction between these two selection processes, and the legal consequences flowing from them: “[W]here the nominations are held under rules and regulations promulgated by the party organization and are not governed by statutory proceedings . . . purely political rights” are involved. *Id.* at 42 (quoting 25 Am. Jur. 2d *Elections* § 127 (1966)). Regarding nominations left entirely to the political parties, such as nominations to the Tennessee Supreme Court, for example, the courts will not “pass upon the method used by the Democratic Party in the selection of its nominees.” *Taylor v. Tennessee State Democratic Executive Comm.*, 574 S.W.2d 716, 718 (Tenn. 1978); *Inman*, 622 S.W.2d at 42-43 (finding that courts will not interfere to determine disputes regarding “unregulated” nominations by political parties). Nor will the Tennessee

courts interfere with the selection of nominees when the dispute involves an election to offices of the political party itself, such as elections for the party executive committee. *Heiskell v. Ledgerwood*, 234 S.W. 1001 (Tenn. 1921). In these instances, where the political party is solely responsible for the nomination of a candidate, the decisions of the political parties are conclusive. *Id.* at 1001.

In contrast, when the nomination of a candidate is required to be made by primary election, pursuant to T.C.A. § 2-13-202, the selection process is not governed by party rules, but “by statutory proceedings.” Such is the case here, where Senator Kurita’s nomination was required to be made by primary election, party rules do not govern, and “purely political rights” are not involved.

Even though Tennessee law entrusts the adjudication of primary election contests to the state primary boards, this does not convert the statutorily mandated primary nomination process into an “unregulated” nomination process “held under rules and regulations promulgated by the party organization,” such that the nomination is left to the party’s discretion alone. *Inman*, 622 S.W.2d at 42. There may be legitimate policy reasons to select political party machinery to adjudicate primary contests, rather than entrusting the adjudication to the courts, as many other states do. *Taylor*, 574 S.W.2d at 717-18 (finding that political parties are better suited to resolve “intra-party squabbles” with speed and finality). But

Tennessee's choice to empower the state primary boards to adjudicate election contests does not remove the state primary boards from the statutory scheme that created and empowered them, and their decisions are not mere political party decisions.

**B. The District Court's Findings Are Contrary to the Nature of Election Contests in Tennessee.**

The District Court's view that an adjudication of a primary contest gives *carte blanche* power to the party to select their nominee, regardless of the actual result of the primary election, perverts the nature of election contests. The purpose of an election contest is to determine the validity of an election. *Hatcher v. Bell*, 521 S.W.2d 799, 801-03 (Tenn. 1974). This involves "[t]he ascertaining of the will of the community," as expressed in the election, so that "[t]hose who did exercise their electoral rights can not be deprived of the fair results of the election." *Barry v. Lauck*, 45 Tenn. 588, \*3 (1868). Therefore, an election can only be overturned if "proof of actual fraud," "violations of statutory safeguards," or "a combination of the two," "compel the conclusion that the election did not express the free and fair will of the qualified voters." *Emery v. Robertson County Election Comm'n*, 586 S.W.2d 103, 109 (Tenn. 1979). Thus, the adjudication of an election contest by the State Primary Board must focus on the validity of the

primary election, instead of being a broad mandate to “allow[] the political party . . . to determine which candidate the party deems best suited to represent the party in the general election,” as the District Court erroneously held. Mem. Op. 10-11.

**C. The District Court’s Findings Are Unnecessary to Preserve Any Associational Rights.**

Finally, the District Court claims support for its interpretation of the Contest Statute from the right of political parties to “select[] a standard bearer who best represents the party’s ideologies and preferences.” Mem. Op. 17. This claim, however, is entirely unrelated to the function of reviewing an election contest to determine which contestant won the election, or ensuring that the election was not void because of fraud or other illegality. *Forbes v. Bell*, 816 S.W.2d 716, 719 (Tenn. 1991). Under Tennessee law, these are the only two situations when an election result may be overturned in an election contest. *Id.* Ensuring that the primary election result yields a candidate who represents the party’s “ideologies and preferences” is not a power given to the state primary boards, because this is not a legitimate basis for contesting an election under Tennessee law. Indeed, ensuring that the primary election yields a candidate who represents the party’s “ideologies and preferences,” as expressed by the votes of the electorate, is the purpose of the primary itself.



Nothing in this case requires a choice between the constitutional rights of one party against the other. Senator Kurita does not contest the jurisdiction of the State Primary Board to decide election contests, or the freedom of the Tennessee Democratic Party to ensure that its nominee represents the party. But this jurisdiction and this right are distinct roles that the party must handle in different manners under Tennessee law. The State empowers the state primary boards to adjudicate elections contests under the Contest Statute. The ability of the political parties to choose a candidate who reflects their party's ideologies and preferences, on the other hand, is controlled by another, entirely distinct set of statutes, which afford political parties ample opportunity to ensure that all party candidates reflect such ideologies and preferences.

Under Tennessee law, “[a]ll candidates . . . for membership in the general assembly shall be bona fide members of the political party whose election they seek.” T.C.A. § 2-13-104. The party has the obligation to ensure that those who appear on the primary election ballot are approved by the party. T.C.A. § 2-5-204. Furthermore, Tennessee has a primary system in which a person must either be a bona fide member of the party in question, or declare allegiance to that party, in order to vote in that party's primary. T.C.A. § 2-7-115(b). Any person's eligibility to vote in a primary election may be challenged, to ensure that only eligible

persons select the nominee. T.C.A. § 2-7-126. Multiple statutory provisions under Tennessee law exist to ensure that the primary election results reflect the interests and policies of the party. Thus, the District Court's finding that the associational right of the party is threatened by Senator Kurita's claim that due process must be afforded when adjudicating a primary election contest is completely unfounded.

It is "too plain for argument" that "a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (internal quotation marks and citation omitted). States choose to use primary elections "more to benefit the voters than the candidates," *Bullock v. Carter*, 405 U.S. 134, 148 (1972), because primary elections "allow the general party membership a voice in the nominating process," *Nader v. Schaffer*, 417 F. Supp. 837, 843 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976). But the District Court's interpretation of the Contest Statute vitiates the Tennessee General Assembly's choice to require primary elections for certain offices and returns the selection of the parties' nominees to a "smoke-filled room," *id.*, "dominated by officeholders and office seekers," whose views on candidates may "diverge[] significantly from the views of the Party's rank and file," *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting).

Thus, the adjudication of primary election contests by the state primary boards does not convert Tennessee's primary election requirement into a private intra-party affair conducted under party rules where, as the District Court stated, the party has complete discretion "to determine which candidate the party deems best suited to represent the party in the general election." Memorandum Opinion, R. 53, 11-12. Rather, the primary election is a state statutory procedure that confers a statutory entitlement on the victor to have her name placed on the general election ballot.

## **II. Senator Kurita Has a Protected Property Interest in the Result of the Primary Election.**

As set forth above, the fundamental error made by the District Court was its finding that all political party nominations in the State of Tennessee are subject to the complete control and discretion of the party and are thus purely political rights, which are not subject to due process requirements. Memorandum Opinion, R. 53 at 10-11. It is this error that led to the District Court's faulty conclusion that Senator Kurita has no protected property interest at stake in this case. Contrary to the findings of the District Court, however, the State of Tennessee has set up a statutory scheme that removes the selection of nominees for certain offices from the control and discretion of the political parties, and makes the certified

nominations to such offices statutory entitlements, that can only be divested after an adjudication in which due process is afforded.

Additionally, the purpose of a primary election, as defined by Tennessee law, shows that the legal rights of the primary winner are not contingent on a primary election contest. Under Tennessee law, a “primary election” is defined as: “[A]n election held for a political party for the purpose of allowing members of that party to select a nominee or nominees to appear on the general election ballot.” T.C.A. § 2-1-104(19). This statute recognizes the legal effect of a primary election, which is that the results of the primary election confer on the nominee the right “to appear on the general election ballot.” *Id.* To effectuate this purpose, state officials are required to take certain steps that lead inexorably to the name of the primary winner being placed on the general election ballot. These rights are vested immediately, and can be divested by an adjudication conducted with adequate due process protections.

Tennessee law sets forth only a limited number of offices, including the State General Assembly, for which parties are required to hold primary elections. T.C.A. § 2-13-202. These primary elections are mandated by the state, governed by state statutes, and conducted by the state—not by the parties under political party rules. The certified nominations for these offices, and the statutory

entitlements which flow therefrom, inexorably lead to the certified nominee's name being placed on the general election ballot. All of this is required by statute, and creates a property right that cannot be taken away without due process.

All other nominations are conducted under the authority of political party rules and give rise to purely political rights (which are not subject to due process protections). T.C.A. § 2-13-203. If the District Court was correct in its ruling, then the selection of nominees for those offices for which a primary election is required would revert to the complete discretion of the "party bosses" whenever a contest of a primary election is brought. Under the District Court's reasoning, primary election results are meaningless, because nothing prevents the State Primary Board from setting aside any primary result, no matter how wide the margin, for any reason. Indeed, the entire statutory scheme for primary elections is rendered meaningless by the District Court's decision.

Thus, while the State Primary Board undoubtedly has jurisdiction to adjudicate primary election contests pursuant to the Contest Statute, it does not and cannot have the authority to set aside primary elections and select nominees at its discretion. Tennessee law requires candidates for the General Assembly to be selected by means of a primary election and sets forth the manner in which these primary elections are to take place; Senator Kurita's property right flows from

these statutory provisions. T.C.A. § 2-13-202. The primary election is to be conducted by the state at the regular August election. *Id.* On the third Thursday following the primary election, the results of the primary election are to be publicly calculated and certified by the Coordinator of Elections, and the candidates who received the highest number of votes are declared the nominees. T.C.A. § 2-8-113. The Coordinator of Elections must then certify the names of the nominees to the County Election Commissions by the third Thursday of the third month before the general election. T.C.A. §§ 2-8-115, 2-5-101(a). The County Election Commissions are then responsible for the production and maintenance of the ballots, T.C.A. § 2-5-202, and the name of each qualified candidate must appear on the ballots prepared for the general election. T.C.A. § 2-5-204. Nominees become qualified candidates by the certification of their names by the Coordinator of Elections. T.C.A. § 2-5-105.

Here, the certification of results had been issued by the Coordinator of Elections at the time of the election contest, and showed that Senator Kurita had received the most votes and had been certified the winner of the primary. Verified Complaint, R. 1, ¶ 23 & Ex. A. By statute, Senator Kurita is declared the nominee. T.C.A. § 2-8-113. Declaration as the nominee entitles Senator Kurita to receive the privilege of being qualified to appear on the general election ballot. T.C.A. §§ 2-8-

115; 2-5-105; 2-5-204. This process, however, was suspended and ultimately terminated by the improper actions of Defendants-Appellees. This termination should not have taken place without affording Senator Kurita due process protections.

While it is true that there is no property interest in a public office itself, there are rights for “one who was elected to the office.” *Taylor v. Beckham*, 178 U.S. 548, 572 (1900). While the State may create an office, the rights associated with the office “may be protected by any provision of the Federal Constitution.” *Id.* Senator Kurita’s right derives from the statutory scheme adopted by Tennessee, as described above. The Fourteenth Amendment’s due process protection of “property” includes “statutory entitlements.” *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972). Tennessee law entitles the winner of a primary election to the privilege of being placed on the general election ballot.<sup>3</sup> Benefits such as this “are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights.” *Goldberg v. Kelly*, 397

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<sup>3</sup>Indeed, several state supreme courts have recognized that success in a primary election gives the victor a statutory right. *See, e.g., Taylor v. Nealon*, 120 S.W.2d 586, 587 (Tex. 1938); *Rowe ex rel. Schwarts v. Lloyd*, 36 A.2d 317, 319 (Pa. 1944); *Boyd v. Garrison*, 19 So.2d 385, 387 (Ala. 1944) (“A certificate of nomination in a primary gives to its holder a quasi office with limited effect in value and in time. But it is a valuable right of the same sort as a certificate of election to an office which is more lasting and permanent”).

U.S. 254, 262 (1970). “This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a ‘right’ or a ‘privilege.’” *Bell v. Burson*, 402 U.S. 535, 539 (1971).

Thus, by statute, certain procedures are required for the conduct of primary elections and certain entitlements and steps must follow when a candidate, such as Senator Kurita, has received the highest number of votes in a primary election and is certified as a nominee. This is not to say that the result of the primary cannot be contested or set aside, but to do so, the State and state primary boards must afford Senator Kurita due process protections during the election contest. As set forth below, such due process protections were not afforded Senator Kurita, and this Court should set aside the actions of the State Primary Board and order a special election to remedy this violation.

### **III. The Actions of the State Primary Board Constituted State Action.**

To trigger due process, an action must be “fairly attributable to the state,” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 932-37 (1982). To determine whether an action is fairly attributable to the state, courts apply one of three tests: (1) the public function test; (2) the symbiotic relationship test (or nexus test); and (3) the state compulsion test. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992).



Here, the actions of the State Primary Board constituted state action under both the “public function” and “symbiotic relationship” tests.

Under the “public function” test, a private party acts under color of state law when it exercises a power “traditionally exclusively reserved to the State.”

*Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). While internal party activities are not considered state actions, “the conduct of elections” can be a state action when entrusted to the parties. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). While this doctrine does not embrace all forms of private political activity associated with elections, it includes “elections conducted by organizations which in practice produce the uncontested choice of public officials.” *Id.* (internal quotations omitted). If the private body has “effectively performed the entire public function of selecting public officials,” then the private body is a state actor under the public function test. *Id.* at 59. Because there was no Republican candidate running in the District 22 general election, the State Primary Board’s selection at the election contest hearing “effectively performed the entire public function” of selecting the State Senator for District 22.

As explained above, Tennessee law mandates a primary election to select nominees for the general assembly and regulates the primary elections. The conduct and resolution of a primary election becomes state action “[w]here the

primary is by law made an integral part of the election machinery.” *United States v. Classic*, 313 U.S. 299, 318 (1941). Here, the State Primary Board performed a critical function integral to the conduct of the primary election: adjudication of a contest regarding the validity of the primary election. Furthermore, according to the Tennessee Supreme Court, the state primary boards are the exclusive and final authority for the resolution of primary contests. Memorandum Opinion, R. 53, 16; *see also Taylor*, 574 S.W.2d at 718. Tennessee law empowers the state primary boards to conduct functions integral to the State’s primary election scheme, which is a power traditionally reserved to the state, and the State Primary Board’s actions in adjudicating an election contest are thus state actions under the public function test.

In addition, the State of Tennessee was so intimately involved in the conduct of the State Primary Board that, under the symbiotic relationship or nexus test, it is a state actor. The state primary boards are created by statute, perform duties and exercise powers required by the Tennessee election code, and their composition, meetings, and deliberations are governed by and subject to state law, T.C.A. §§ 2-13-102, 2-13-103, 2-13-108(a), 2-13-106. The authority of the state primary boards to adjudicate primary contests is conferred by state law. T.C.A. § 2-17-104. The state primary boards are empowered by state law to set aside state

primary elections, T.C.A. § 2-17-104(c). The state officials who prepare the general election ballots complied with the decision of the State Primary Board by placing Barnes on the general election ballot, rather than Senator Kurita, who was certified as the winner of the election. Verified Complaint, R. 1, ¶ 27, Ex. A. This was not a “mere acquiescence” in private action, which would not constitute a state action. *Flagg Bros.*, 436 U.S. at 164. Without state empowerment through the Contest Statute, the state primary boards have no inherent authority to adjudicate primary election contests. Without empowerment through the Contest Statute, the State would reserve the power to adjudicate election contests. Indeed, far from merely recognizing an inherent power already possessed by the state primary boards (which would not exist but for creation by state statute), the Contest Statute only gives the state primary boards limited statutory authority. If the state had wanted to give the state primary boards *de jure* authority to select the parties’ nominees after a primary, the state would have done so explicitly, rather than through the artifice of adjudicating an election contest, which it must.

#### **IV. The Contest Statute Is Unconstitutional on Its Face.**

Due process requires that an authorized tribunal act in accordance with previously established standards and procedures. *See, e.g., Kilbourn v. Thompson*, 103 U.S. 168, 182 (1880). The Contest Statute, however, does not contain

definitive standards to resolve a contest or adequate procedures to be followed in an election contest.<sup>4</sup> Furthermore, the Contest Statute does not require the State Primary Board to establish any standards or procedures to deal with an election contest. This is true in each and every application of the Contest Statute, and is a violation of due process.

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<sup>4</sup>This is unlike the majority of other states, which provide extensive statutory provisions guiding the resolution of primary election contests in accordance with due process, and/or provide for initial review of primary election contests in the Courts, thus ensuring due process. *See, e.g.*, Ala. Code §§ 17-13-70 to -89 (2008); Alaska Stat. § 15.20.550 (2007); Ark. Code Ann. §§ 7-5-801 to -810 (2008); Cal. Elec. Code § 16421 (2008); Colo. Rev. Stat. § 1-11-203 (2008); Conn. Gen. Stat. § 9-324 (2008); Fla. Stat. § 102.168 (2008); Ga. Code Ann. §§ 21-2-520 to -529 (2008); Haw. Rev. Stat. § 11-173.5 (2007); Idaho Code Ann. § 34-2123 (2008); Ill. Comp. Stat. 5/23-1.1 (2008); Ind. Code §§ 3-12-11-1 to -25 (2008); Ky. Rev. Stat. Ann. § 120.055 (2008); La. Rev. Stat. Ann. § 18:44 (2008); Md. Code Ann. Election Law §§ 12-201 to -204 (2008); Minn. Stat. § 209.10 (2008); Miss. Code Ann. §§ 23-15-921 to -941 (2008); Mo. Ann. Stat. §§ 115.527 to .551 (2008); Mont. Code Ann. § 13-36-102 (2008); N.M. Stat. § 1-14-3 (2008); N.C. Gen. Stat. Ann. §§ 163-127.1 to .6 (2008); N.D. Cent. Code § 16.1-16-06 (2008); Ohio Rev. Code Ann. § 3515.08 (2008); Okla. Stat. tit. 26, § 26-5-118 (2007); Or. Rev. Stat. § 258.036 (2007); 25 Pa. Cons. Stat. § 3157 (2008); Tex. Elec. Code Ann. §§ 221.001-231.009 (2008); Utah Code Ann. § 20A-4-403 (2008); Wash. Rev. Code § 29A.68.050 (2008); W. Va. Code § 3-5-20 (2008).

**V. Senator Kurita Was Denied Her Due Process Rights.**

**A. The Contest Statute and Rules of Procedure Adopted by the State Primary Board Do Not Provide Any Standards for Making a Decision in a Contested Election.**

Section C of the Contest Statute states: “The state primary board shall hear and determine the contest and make the disposition of the contest *which justice and fairness require*, including setting aside the election if necessary.” T.C.A. § 2-17-104 (emphasis added). The phrase “which justice and fairness require” fails to provide a definite and concrete standard by which an election contest is to be judged. Indeed, because the decision of the State Primary Board is unreviewable, as set forth below, “which justice and fairness require” is subject entirely to the interpretation of the State Primary Board, without someone appearing in front of the Board being able to later challenge even the most egregious violations of justice and fairness imaginable.

As set forth in the Facts section above, the Democratic State Primary Board adopted Rules to govern the election contest hearing at hand. Rule 11 states:

In making a determination on the Notice of Contest, the State Primary Board *may decide the following, in addition to any other relevant question*:

- a. whether more probably than not the number of votes placed in question as a result of the improper, illegal and/or fraudulent acts complained of, if true, exceeded the margin between the total

number of votes cast for the Contestee and the total number of votes for the Contestant;

b. whether more probably than not is there sufficient evidence of improper, illegal and/or fraudulent acts which so permeated the Primary Election as to render the outcome of the election incurably uncertain even though it cannot be shown to a mathematical certainty that the result might have been different.

(emphasis added). By the use of the terms “may” and “in addition to any other relevant question,” the Rules fail to provide any definite and concrete standards by which election contests are to be judged. Here again, the inability to review the decisions of the State Primary Board means that which is “relevant” is subject entirely to the interpretation of the State Primary Board.

In contrast, unlike the arbitrary discretion employed by the State Primary Board, Tennessee state courts apply clear standards when resolving general election contests. *Forbes*, 816 S.W.2d at 719. In *Forbes*, the Tennessee Supreme Court stated:

Under Tennessee law, there are only two grounds upon which an election contest may be predicated. . . . The contestant may assert that the election is valid and that if the outcome is properly determined by the court, it will be apparent that the contestant rather than the contestee actually won the election. The proper relief in this event is a judgment declaring the contestant to be the winner. Alternatively, the contestant may claim that the election was null and void for some valid reason or reasons. The proper relief in that case is to order a new election.

*Id.* at 719. Unlike the arbitrary guidelines adopted by the State Primary Board,

Tennessee law only allows for two specific grounds to overturn an election.

**B. The State Primary Board Failed to Adopt Rules Governing the Hearing Prior to the Day of the Hearing.**

When conducting a hearing on the contest of an election, the State Primary Board acts in a quasi-judicial or judicial manner. *See Boyd v. Garrison*, 19 So.2d 385, 388 (Ala. 1944). Because of the quasi-judicial or judicial nature of the election contest hearing, Senator Kurita should have been afforded certain due process rights during the hearing, including the right to know how the hearing would be conducted and what rules would govern the hearing, prior to the hearing taking place. *Fuentes*, 407 U.S. at 80-81. However, Senator Kurita was not provided with the rules that would govern the hearing until just before the hearing itself; she did not know how the hearing would be conducted, or what she would be allowed to do at the hearing; and she was unable to properly prepare for the hearing because of this due process failure.<sup>5</sup>

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<sup>5</sup>Although Senator Kurita's counsel discussed the rules that would govern the election contest hearing in the days leading up to the hearing, the discussed rules were not adopted until the morning of the hearing itself. Indeed, the rules could have been changed up until the day of the hearing. Moreover, Senator Kurita never agreed to the rules that were adopted. Her counsel expressly refused to agree to the Rules, and requested that this objection be made known to the members of the State Primary Board. (*See* Response in Opposition to Plaintiff's Motion for Preliminary Injunction, R. 33, Exhibit 1 at 8 ("I cannot agree to the rules . . . ."; "Please distribute this correspondence to the Board members as an explanation for my refusal to agree to the rules").

Furthermore, under Tennessee law, an administrative agency must base the exercise of its rulemaking or adjudicative authority on state law, and must follow statutory procedural requirements when adopting rules implementing its enabling statute. *Tenn. Cable Television Ass'n*, 844 S.W.2d at 161. The Rules were not adopted pursuant to any established rulemaking procedure and were thus *ad hoc*, in violation of Tennessee law.

**C. The Contest Statute Fails to Provide a Procedure for the State Primary Board to Use in Selecting a Candidate.**

Section C of the Contest Statute states: “The state primary board shall hear and determine the contest and make the disposition of the contest which justice and fairness require, including setting aside the election if necessary.”

Because a property right was at stake in the election contest hearing, the disposition of the contest could not be left to the mere discretion of the State Primary Board, and required the State Primary Board to use clear standards when resolving the contest. *See, e.g., Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986); *Forbes*, 816 S.W.2d at 719. The Contest Statute fails to provide a procedure to be used by the State Primary Board in governing an election contest hearing. Thus, the State Primary Board is allowed to select a candidate by whatever method



desired, rendering the method of selection arbitrary and capricious, and failing to provide proper due process protection.

**D. The State Primary Board Did Not Provide Any Justification as to Why They Were Setting Aside the Election.**

In a quasi-judicial or judicial hearing, Senator Kurita had the right to have the reasons for the decision made at the hearing put on the record. *Thomas v. Cohen*, 304 F.3d 563, n.10 (6th Cir. 2002); *Goldberg*, 397 U.S. at 271. The State Primary Board did not state its reasons for its decision on the record; it merely recorded the votes of those present, and thus violated Senator Kurita's due process rights.

Furthermore, because the decision made by the State Primary Board as to the election involves an adjudication, the State Primary Board was required to make a determination of disputed factual issues as to Senator Kurita's individual rights, subject to a complete and proper application of law and policy. *Tenn. Cable Television Ass'n v. Tenn. Pub. Serv. Comm'n*, 844 S.W.2d 151, 161 (Tenn. App. 1992). The State Primary Board did not make any such determination.

**E. The Decision of the State Primary Board Cannot Be Final and Unreviewable.**

In Tennessee, the State empowers the state primary boards with exclusive jurisdiction to dispose of primary election contests. *Taylor*, 574 S.W.2d at 717.

Despite their quasi-judicial role, the decisions of the state primary boards in contested primaries are conclusive and unreviewable by courts of law. *Heiskell*, 234 S.W. at 1002; *see also Taylor*, 574 S.W.2d at 717-18. While there are situations where the presumption of a right to appeal an administrative adjudication may be overcome, the denial of review by legislative intent is subject to constitutional restraint. An administrative body, such as the State Primary Board, cannot be left to adjudicate constitutional property interests at its discretion and without having to afford due process without available review by a court. *See, United States v. Nourse*, 34 U.S. 8, 8-9 (1835); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Stupak-Thrall v. United States*, 70 F.3d 881, 884 (6th Cir. 1995); *NLRB v. Empire Furniture Corp.*, 107 F.2d 92, 95 (6th Cir. 1939).

#### **VI. This Court Has the Equitable Power to Order a Special Election.**

This Court has broad powers to order equitable relief. “In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests . . . .” *Lemon v. Kurtzman*, 411 U.S. 192, 201 (1973). “Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.” *Id.* at 200.

Federal courts are empowered to order special elections, even in state elections. In *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978), the U.S. Court of Appeals for the First Circuit affirmed the decision of a district court to order a second primary election for a city council seat, which “had the virtue of giving the voters a further chance, in a fair election, to express their views.” *See also, Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) (“If a district court finds a constitutional violation, it will have authority to order a special election, whether or not it is able to determine what the results would have been in the absence of that violation”).

Thus, this Court has the power to order the equitable remedy of a new election for District 22 with Senator Kurita listed as the Democratic candidate for the Tennessee Senate.

### **Conclusion**

For the reasons set forth above, this Court should grant Senator Kurita’s request for declaratory judgment and order a special election for Tennessee State Senate District 22.

Senator Kurita also requests that this Court hear oral argument on the issues presented to the Court.

Dated: February 18, 2009

Respectfully Submitted,

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**Addendum**

| <b>District Court Document Referenced in Appellant's Brief</b>                      | <b>District Court Record Entry Number</b> |
|---|---|
| Verified Complaint  | R. 1                                      |
| Response in Opposition to Plaintiff's Motion for Preliminary Injunction             | R. 33                                     |
| Contest Hearing Transcript - Transcript for October 10, 2008 District Court Hearing | R. 42                                     |
| Minute Entry - Minute Entry for October 10, 2008 District Court Hearing             | R. 48                                     |
| Memorandum Opinion - Opinion of District Court                                      | R. 53                                     |
| Order - Final Order of District Court   | R. 54                                     |
| Notice of Appeal  | R. 56                                     |

### **Certificate of Compliance**

I hereby certify that this brief contains 7,633 words, in compliance with Fed.  
Rule of App. Proc. Rule 32(a)(7).

/s/ James Bopp, Jr.  
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## CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of February, 2009, a true and correct copy of the foregoing was served electronically upon the following attorneys via the Court's electronic filing system:

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