

**NO. 08-6245**

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

**ROSALIND KURITA**

**Plaintiff/Appellant**

**v.**

**THE STATE PRIMARY BOARD OF THE TENNESSEE DEMOCRATIC  
PARTY, ET AL.**

**Defendants/Appellees**

**ON APPEAL FROM THE  
UNITED STATES DISTRICT COURT FOR THE  
MIDDLE DISTRICT OF TENNESSEE AT TENNESSEE  
[DISTRICT COURT NO. 08-0948]**

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**JOINT BRIEF OF THE DEFENDANTS/APPELLEES**

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ROBERT E. COOPER, JR.  
Attorney General and Reporter  
JANET M. KLEINFELTER  
Senior Counsel  
Special Litigation Division  
Office of Tennessee Attorney General  
P.O. Box 20207  
Nashville, TN 37202-0207  
(615) 741-7403  
[Janet.kleinfelter@ag.tn.gov](mailto:Janet.kleinfelter@ag.tn.gov)

W. Brantley Phillips, Jr.  
Jeffrey P. Yarbro  
BASS BERRY & SIMS PLC  
315 Deaderick Street, Ste. 2700  
Nashville, TN 37238  
(615) 742-6200  
[bphillips@bassberry.com](mailto:bphillips@bassberry.com)

George E. Barrett  
Douglas S. Johnston, Jr.  
Edmund L. Carey  
217 Second Avenue North  
Nashville, TN 37201  
(615)-244-2202  
gbarrett@barrettjohnston.com  
[djohnston@barrettjohnston.com](mailto:djohnston@barrettjohnston.com)  
[tcarey@barrettjohnston.com](mailto:tcarey@barrettjohnston.com)

James S. Stranch  
Michael Wall  
BRANSTETTER STRANCH  
JENNINGS  
227 Second Avenue North, 4<sup>th</sup> Floor  
Nashville, TN 37201  
(615)-254-8801  
[jgs@branstetterlaw.com](mailto:jgs@branstetterlaw.com)  
[mwall@bransterrlaw.com](mailto:mwall@bransterrlaw.com)

*Attorneys for Defendants-Appellees*

***(ORAL ARGUMENT REQUESTED)***



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**STATEMENT RE: SIXTH CIRCUIT RULE 26**

Pursuant to Rule 26.1(a), because the Defendants/Appellees Robert E. Cooper, Jr., Attorney General of the State of Tennessee; Riley Darnell, Secretary of State of Tennessee; Brook K. Thompson, Coordinator of Elections of the State of Tennessee; Vickie Koelman, Montgomery County Administrator of Elections; Sandy Cherry, Cheatham County Administrator of Elections; and Gay Robinson, Houston County Administrator of Elections, are officials of the State of Tennessee and its political subdivisions, no corporate affiliate/financial interest disclosure statement is required.

Pursuant to Rule 26.1(a), I hereby certify that the Tennessee Democratic Party and the State Primary Board of the Tennessee Democratic Party are private, not-for-profit associations. Accordingly, they do not have any parent corporation.

/s/ W. Brantley Phillips  
W. Brantley Phillips

Pursuant to Rule 26.1(a), I hereby certify that Defendant-Appellee Tim Barnes is an individual and therefore does not have a parent corporation.

/s/ George E. Barrett  
George E. Barrett

## **STATEMENT OF JURISDICTION**

The Plaintiff Kurita brought this lawsuit in the United States District Court for the Middle District of Tennessee at Nashville under 42 U.S.C. § 1983 alleging that the actions of the State Primary Board of the State Democratic Party and the statutes of Tennessee violated her due process rights under the Fourteenth Amendment. The district court dismissed Plaintiff's complaint finding that it failed to state a claim upon which relief can be granted because there was no state action involved and Plaintiff lacked a protected property interest. The district court further found that Plaintiff had failed to demonstrate that the Tennessee primary election contest statute was facially unconstitutional. This Court has appellate jurisdiction to review a final judgment entered by the district court under 28 U.S.C. § 1291.

## **STATEMENT REGARDING ORAL ARGUMENT**

The Defendants/Appellants respectfully submit that, because this case presents a number of constitutional issues, oral argument will assist the Court in the resolution of the issues presented for review.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. Whether the District Court erred in finding that Tennessee election law properly allows the political party to determine which candidate is best suited to represent the party in the general election for a specific public office.<sup>1</sup>
- II. Whether Plaintiff Kurita has a protected property interest in the certification of the results of the primary election.
- III. Whether the actions of the State Primary Board of the Tennessee Democratic Party in deciding the primary election contest constituted state action.
- IV. Whether Tennessee Code Annotated § 2-17-104 is unconstitutional on its face.
- V. Whether Plaintiff Kurita was denied her due process rights.

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<sup>1</sup> This issue is not included in Appellant's Statement of Issues Presented For Review; however, this issue is discussed in the Argument section of Appellant's brief.

## STATEMENT OF THE CASE

This case arises out of a primary election contest before the State Primary Board of the Tennessee Democratic Party pursuant to Tenn. Code Ann. § 2-17-104, which generally provides that contests of primary elections are to be conducted by the party's State Primary Board (which is the executive committee of the state party). On September 24, 2008, Plaintiff filed her complaint with the district court asserting both a facial and an as-applied challenge to the constitutionality of Tenn. Code Ann. § 2-17-104. (Record Entry No. 1, Complaint). Plaintiff sought an order from the district court declaring that she was entitled to be placed on the ballot for the November 2008 general election as the Democratic nominee for the office of State Senate District 22. (*Id.*)

On September 25, Plaintiff filed a motion seeking preliminary injunctive relief, as well as a motion seeking to have the hearing on the request for injunctive relief consolidated with the hearing on the merits and to have the consolidated hearing expedited. (Record Entry No. 5, Motion for Preliminary Injunction; Record Entry No. 7, Motion to Consolidate; Record Entry No. 8, Motion to Expedite). Plaintiff sought an "injunction prohibiting Defendants . . . from acting pursuant to TCA § 2-17-104 in the current election cycle and requiring them to place Plaintiff Kurita on the general election ballot for the 22<sup>nd</sup> Senatorial District as the Democratic nominee." (Record Entry No. 5, Motion for Preliminary

Injunction). In the alternative, Plaintiff requested that the district court exercise its “equitable powers” and order that the results of the general election to be held on November 4, 2008, be set aside and that a general election be held in which Plaintiff’s name appeared on the ballot as the Democratic nominee for the office of State Senate District 22. (*Id.*).

The Defendants all filed motions to dismiss Plaintiff’s complaint for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(1) and (6). (Record Entry No. 32, State Defendants’ Motion to Dismiss; Record Entry No. 36, Tennessee Democratic Party’s Motion to Dismiss; Record Entry No. 23, Defendant Tim Barnes’ Motion to Dismiss). A consolidated hearing on the merits of Plaintiff’s complaint and request for mandatory injunctive relief was held on October 10, 2008. (Record Entry No.48, Minutes of Hearing).

On October 14, 2008, the district court issued a memorandum opinion finding that Plaintiff could not “establish two prerequisites that are necessary in order to sustain the 42 U.S.C. § 1983 due process claims identified in her Verified Complaint: (A) state action by the State Primary Board of the Tennessee Democratic Party and (B) her possession of a protected property right in the certified results of votes cast in the primary election for State Senate District 22.” (Record Entry No. 53, Memorandum Opinion ). The district court further found that Tenn. Code Ann. § 2-17-104 was facially constitutional. (*Id.*) Accordingly,

the district court denied Plaintiff's request for mandatory injunctive relief and dismissed her complaint in its entirety. (Record Entry No. 54, Order).

Plaintiff filed a notice of appeal on October 15, 2008, and filed a motion for injunction pending appeal with the district court on October 16. (Record Entry No. 56, Notice of Appeal; Record Entry No. 57, Motion for Injunction Pending Appeal). The district court issued an order on October 17 denying the motion, finding that Plaintiff had not shown that she was likely to succeed on the merits of her claims and obtain a reversal in her favor on appeal. The district court also found that the granting of an injunction pending appeal would irreparably harm Defendants Tim Barnes and the Tennessee Democratic Party and State Primary Board, and that the public's compelling interest in the orderly administration of the general election, which determined political races for public offices beyond this particular race, outweighed the harm to the Plaintiff. (Record Entry No. 61, Order Denying Motion for Injunction Pending Appeal).

One week later, Plaintiff filed an emergency motion for injunction pending appeal with this Court asking that this Court place her name on the November general election ballot as the Democratic nominee for State Senate District 22, or alternatively, order a special election for State Senate District 22 to be conducted by January 13, 2009, when the State Senate reconvened. The Defendants filed responses in opposition to the motion, asserting that Plaintiff could not

demonstrate a likelihood of reversal on appeal, and, therefore, that this Court should not grant temporary relief which would in actuality dispose of the case on its merits.

On October 24, 2008, this Court issued an order denying the emergency motion for injunction pending appeal. In denying the motion, this Court held that it could not “find a likelihood that Kurita will succeed in showing a property right in the primary voter election results of her initial certification” and that “Kurita has not shown a sufficient likelihood of establishing the facial invalidity of Tenn. Code Ann. § 2-17-104.”

Plaintiff subsequently filed a motion with this Court requesting that her appeal be expedited so as to allow this Court “to grant her requested relief of a special election, to occur prior to January 13, 2009, when the Tennessee Senate reconvenes.” Again, the Defendants all filed responses in opposition to this request for an expedited appeal.

On December 3, 2008, this Court entered an order denying the request for an expedited appeal, finding that “[b]oth the court and the parties would benefit by the initiation of a normal briefing schedule which would permit full and deliberate review in this matter.”

On February 25, 2009, the Defendants filed a joint motion to dismiss Plaintiff’s appeal to this Court, asserting that the case had become moot and

therefore this Court lacked jurisdiction. On April 9, 2009, this Court entered an order denying the motion to dismiss. (Record Entry No. 65, Order of USCA Denying Motion to Dismiss).

## **STATEMENT OF FACTS**

The Defendants hereby adopt by reference and incorporate as if fully restated herein the Statement of Facts contained in the district court's memorandum opinion issued October 14, 2008. (Record Entry No. 53, Memorandum Opinion at pp. 3-8).

## SUMMARY OF THE ARGUMENT

This case concerns a primary election for the Tennessee Democratic Party's nomination for State Senate District 22. Defendant Tim Barnes certified to have lost that primary election to the incumbent, Plaintiff Rosalind Kurita, by 19 votes. Defendant Barnes timely filed an election contest with the State Primary Board pursuant to Tenn. Code Ann. § 2-17-104. After a full evidentiary hearing at which both parties were represented by counsel, the State Primary Board declared the primary election results void. Thereafter, at a joint nominating convention among local Democratic Party representatives, Defendant Barnes was selected as the Democratic Party nominee for State Senate District 22.

Having lost this nomination fight, Plaintiff now asks this Court to step into an intra-party dispute and to declare her the Tennessee Democratic Party's nominee for State Senate District 22. Courts have viewed taking such action as inappropriate, a conclusion justified by the well-settled legal principles stated by the district court, namely that political parties are not state actors and that candidates do not possess any constitutionally protected property right in primary election results.

Furthermore, through Tenn. Code Ann. § 2-17-104, the Tennessee legislature has appropriately delegated the final word on primary election

challenges to the political parties. Such delegation is unquestionably constitutional on its face as found by the district court.

Finally, the procedures and standards agreed to by the parties and adopted by the State Primary Board in deciding the election contest clearly left very little risk of erroneous deprivation of rights and nothing in the law supports invalidating the Board's decision solely on the grounds urged by Plaintiff, namely, that the agreed rules of procedure were not in place prior to the primary election itself and that the State Primary Board did not issue a written decision laying out the legal rationale and evidentiary basis for its decision.

Federal and state courts have consistently and correctly declined invitations to inject the judiciary into the political party nominating process, and Plaintiff cannot show any valid basis for this Court to do so here.

## STANDARD OF REVIEW

The District Court dismissed Plaintiff's complaint finding that it failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983 because there was no state action involved and Plaintiff lacked a protected property interest. This court reviews de novo a district court's dismissal of a complaint under Rule 12(b)(6). *Nicols v. Muskingum College*, 318 F.3d 674, 677 (6<sup>th</sup> Cir. 2003); *Begala v. PNC Bank*, 214 F.3d 776, 779 (6<sup>th</sup> Cir. 2000).

## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY FOUND THAT TENNESSEE ELECTION LAW VESTS THE POLITICAL PARTIES WITH AUTHORITY TO DETERMINE WHICH CANDIDATES ARE BEST SUITED TO REPRESENT THE PARTIES IN THE GENERAL ELECTIONS FOR SPECIFIC PUBLIC OFFICES.**

#### **A. The District Court's findings are consistent with well-established precedent of the Tennessee Supreme Court construing Tennessee election law.**

The district court found that, by designating state political party executive committees as the bodies to hear primary election contests, Tennessee election law gives the political parties the exclusive right to determine which candidates are best suited to represent the parties in the general elections for specific public offices. Plaintiff asserts that, in making this finding, the district court erred.

In essence, Plaintiff argues that, when the Tennessee General Assembly recodified Tennessee's election laws in 1972, it created a bifurcated system of selection of political party nominees, *i.e.*, political party nominees for certain offices must be selected in primary elections, while nominees for other offices may be selected through party rules. In light of this "bifurcated system," Plaintiff argues that, when the Tennessee Supreme Court held in *Inman v. Brock*, 622 S.W.2d 36, 42 (Tenn. 1981), that party nominations are purely political rights, it was only referring to nominations held under rules and regulations promulgated by

the party. However, according to the Plaintiff, when the nomination is pursuant to a mandatory primary election, *i.e.*, governed by “statutory proceedings,” then “purely political rights” are not involved.

This argument, however, is premised on Plaintiff’s own misunderstanding and mischaracterization of Tennessee’s primary election laws and the nature of primary elections. Tennessee first adopted a compulsory primary election law in 1909. *See* Acts of 1909, Public Chapter 102. The purpose of that law was to establish a “compulsory system of legalized primary law for political nominations.” The Act did not apply to nominations for judges or to county offices, other than legislative members, county executive committeemen and delegates to state conventions. Acts of 1909, Public Chapter 102, Section 1. Thus, contrary to Plaintiff’s assertions, Tennessee’s compulsory election laws have, from the very beginning, only applied to party nominations for certain offices.

This Act of 1909 was immediately challenged as being in violation of the provisions of the Tennessee Constitution relating to elections and qualifications of voters therein proscribed. *See Ledgerwood v. Pitt*, 125 S.W. 1036 (1910). The Tennessee Supreme Court held that primary elections were not elections for purposes of these provisions of the Tennessee Constitution:

The object of this modern invention of political parties is primarily for the purpose of permitting and requiring the entire electorate of that party to participate in the

nomination of candidates for political office. *The plan is simply a substitution for the caucus or convention.*

*Id.* at 1039 (emphasis added). That court further noted that those cases upholding the general rule that state legislatures have the power to pass reasonable primary election laws were bottomed on two propositions:”

(1) *That such primaries are not in reality elections, but merely nominating devices;* and (2) that they are valuable auxiliaries for the promotion of good government and are regulated by legislative enactment for the public welfare.

*Id.* at 1041 (emphasis added).

The Tennessee Supreme Court addressed this issue again in *Mathes v. State*, 121 S.W.2d 548 (Tenn. 1938). In that case, the court held once again that primary elections were not elections, but rather an “arrangement to test the wish of the members of a political party as to who shall be their party nominees for a public office.” *Id.* at 549 (citing *Lillard v. Mitchell*, 37 S.W. 702, 703 (Tenn. Ch. App. 1896)).

Thus, contrary to Plaintiff’s assertions, primary elections have from their inception in Tennessee been recognized by the Tennessee Supreme Court not to be elections, but rather, to serve as merely nominating devices for the political parties. Furthermore, it was with this well-established principle in mind that the Tennessee Supreme Court held that, under state law, party determinations on primary election or nomination contests are conclusive on the courts: “The entire matter is referred

to the governing authority of the party for its decision, and this is eminently proper, as the question is purely political.” *Heiskell v. Ledgerwood*, 234 S.W.2d 1001, 1002 (Tenn. 1921) (quoting *Democratic Executive Committee, etc. v. Dougherty*, 134 Ky. 402, 120 S.W. 343 (Ky.App. 1909)).<sup>2</sup>

That primaries are intended to act as a “nominating device” for political parties is further evidenced by the very statute on which Plaintiff relies. Specifically, Tenn. Code Ann. § 2-13-202 provides that “[p]olitical parties shall nominate *their candidates* for the following offices by vote of *the members of the party* in primary elections at the regular August election. . . .” (Emphasis added). Tennessee election laws further make clear that it is the political party that has the authority to exclude those who are not bona fide party members from appearing on the primary ballot or voting in the party primary. Tenn. Code Ann. § 2-5-204 (acknowledging the authority of party executive committees to disqualify a candidate on the grounds that the candidate is not a party member; Tenn. Code Ann. § 2-7-126 (clarifying that challenges to voters on the basis of party membership are decided by election officials “of the party”). These are not matters subject to determination by state officials, but are rightfully recognized as the

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<sup>2</sup> The requirement that primary election contests be heard and decided by the party’s State Primary Board, currently codified at Tenn. Code Ann. § 2-17-104, was first enacted by the Tennessee General Assembly in 1917 and has remained essentially unchanged since then. *See* Acts of 1917, Public Chapter 118, Section 29.

exclusive province of the parties themselves. So too, does the Tennessee General Assembly recognize the sole authority of the political parties to resolve primary election contests. Tenn. Code Ann. § 2-17-104.

Consequently, there is no bifurcation of party nominations under Tennessee law. Rather, from beginning to end in all party nominations, Tennessee election law makes clear that the respective political parties play a central role in ensuring that their nominees reflect party values and are lawfully selected by party members. Plaintiff's suggestion that a partisan nomination to the Supreme Court is merely a political right, but that a partisan nomination to a legislative office is a property right protected by the Constitution, is simply without support under Tennessee law. Accordingly, the district court correctly held that "Tennessee state law is abundantly clear that the State's chancery courts lack jurisdiction to hear state primary election challenges like this one because such disputes involve purely political rights and such disputes are to be referred to the political parties for resolution." (Record Entry No.53, Memorandum Opinion at 26-27) (citing *Heiskell v. Ledgerwood*, 234 S.W. 1001, 1001-02 (Tenn. 1921); *Taylor v. Tennessee State Democratic Executive Comm.*, 574 S.W.2d 716, 717-18 (Tenn. 1978); *Inman v. Brock*, 622 S.W.2d 36, 42-43 (Tenn. 1981)).

**B. The District Court's findings are not contrary to the nature of election contests in Tennessee.**

Plaintiff also asserts that the findings of the district court are contrary to the nature of election contests in Tennessee and that, under Tennessee case law, 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.’” Appellant’s brief at pp. 23-24. This argument is fatally flawed in at least two respects.

First, the cases cited by Plaintiff all address the standards for the voiding of an election to fill some public position or trust provided or established by law, *i.e.*, general elections. As discussed *supra*, Tennessee courts have long recognized that primaries do not constitute such elections, but are merely “an arrangement to test the wish of the members of a political party as to who shall be their party nominee for a public office.” *Lillard*, 37 S.W. at 704; *see also Ledgerwood*, 125 S.W. at 1039; *Mathes*, 121 S.W.2d at 549. Consequently, the standards for determining election contests are inapplicable to primary election contests.

Second, Plaintiff’s assertion that 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 is an inaccurate statement of the applicable law. In *Emery v. Robertson County Election Comm'n*, the Tennessee Supreme Court held that courts may

void an election where the evidence reveals that the number of illegal ballots cast equals or exceeds the difference between the two candidates receiving the most votes . . . courts may also void elections upon a sufficient quantum of proof that fraud or illegality so permeated the conduct of the election as to render it incurably uncertain, even though it cannot be shown to a mathematical certainty that the result might have been different.

586 S.W.2d 103, 108-09 (Tenn. 1979). Here, the State Primary Board voided the primary election based upon its finding that there was “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.” (Record Entry No. 37, Memorandum in Support of Motion to Dismiss of Tennessee Democratic Party at p. 3). Thus, although not required, the State Primary Board did focus on the validity of the primary in determining the primary election contest.

**C. Affirmance of the District Court’s findings is necessary to preserve the associational rights of the Tennessee Democratic Party.**

Plaintiff finally argues that the district court erroneously relied upon the associational rights of the Tennessee Democratic Party to support its interpretation that, under Tennessee election law, the party has complete discretion to determine which candidate is best suited to represent the party in the general election.

Rather, plaintiff asserts that “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.” Appellant’s brief at p. 17.

In making this argument, Plaintiff once again relies upon her own misunderstanding or mischaracterization of Tennessee’s election laws, including the nature of primary elections, and ignores well-established Tennessee Supreme Court precedent. More importantly, however, this argument ignores what the Supreme Court has said with respect to political parties’ associational rights.

For over two hundred years, political parties have been one of the primary mechanisms for citizens to associate with one another for the advancement of their common goals. The Supreme Court has consistently held that political parties have a right of association protected by the First Amendment. *E.g.*, *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1191 (2008); *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Eu v. San Francisco County Democratic Party Cent. Committee*, 489 U.S. 214, 224 (1989). The protection of the First Amendment’s associational rights recognizes citizens’ “freedom to join together in furtherance of common political beliefs.” *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-15 (1986).

Central to a political party’s First Amendment rights is the selection of party nominees for political office. The Supreme Court has “vigorously affirm[ed] the

special place the First Amendment reserves for, and the special protection it accords, the process by which a political party ‘select[s] a standard bearer who best represents the party’s ideologies and preferences.’” *California Democratic Party*, 530 U.S. at 575; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (“[T]he New Party, and not someone else, has the right to select the New Party’s standard bearer.”). As the Supreme Court has recognized:

In no area is the political association’s right to exclude more important than in the process of selecting its nominee. That process often determines the party’s positions on the most significant public policy positions of the day, and even when those positions are predetermined it is the nominee who becomes the party’s ambassador to the general electorate in winning it over to the party’s views.

*Id.* Owing to the special protection afforded political parties to select their own nominees, the Supreme Court has consistently found that a party’s nomination processes are not “wholly public affairs that States may freely regulate.” *Id.* at 572-73.<sup>3</sup>

The commitment of nomination contests to the respective political parties under Tennessee election law serves to protect the parties’ private associational rights from undue governmental interference. The exclusive jurisdiction of the State Primary Board over nomination disputes has been recognized by both the

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<sup>3</sup> It should be noted that these constitutional protections against State regulation make clear that the Tennessee Democratic Party, like all political parties, is a private association, and not a state actor.

Tennessee General Assembly, who is responsible for enacting the law, and the Tennessee courts, who are responsible for interpreting and applying the law. Thus, the district court was entirely correct in finding that “this case is governed by the Supreme Court cases warning federal courts to avoid interference with the First Amendment associational rights of a political party when that party is engaged in the process of selecting its nominee for public office.” (Record Entry No. 53, Memorandum Opinion at p. 19).

## **II. PLAINTIFF DOES NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THE RESULT OF THE PRIMARY ELECTION.**

The threshold inquiry in any case under the due process clause is whether the plaintiff possesses a liberty or property interest in the subject matter at issue. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The due process clause protects only those interests to which one has a “legitimate claim of entitlement.” *Id.* at 577. This has been defined to include “ ‘any significant property interests . . . including statutory entitlements.’ ” *See Brotherton v. Cleveland*, 923 F.2d 477, 480 (6<sup>th</sup> Cir. 1991) (citations omitted). Property interests are not created by the Fourteenth Amendment; rather, they are created and defined by independent

sources such as state law. *See Brotherton*, 923 F.2d at 480. State supreme court decisions are controlling authority for such determinations, but if the state supreme court has not ruled on the precise issue in question, this Court has held that it must look at other indicia of state law, including state appellate court decisions. *Id.* at 480.

The district court correctly held that, under Tennessee law, Plaintiff does not possess a property right in the certified results of the August 2008 primary election for State Senate District 22. (Record Entry No. 53, Memorandum Opinion at 29). In an attempt to convince this Court that the district court's ruling is in error, however, Plaintiff suggests that the court made a fundamental error in "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." Appellant's Brief at 17.

According to Plaintiff, 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. As a result of this "bifurcated system of selection of political party nominees," "the certified nominees 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." Appellant's Brief at 18-19. Accordingly, Plaintiff argues that once the State Coordinator of Elections

certified Plaintiff as having received the most votes in the primary pursuant to Tenn. Code Ann. § 2-8-113(a), she had a vested property right in that certification, protected by the Fourteenth Amendment.

**A. Under Tennessee’s election laws, Plaintiff only had a contingent right subject to the outcome of Defendant Tim Barnes’ election contest.**

Plaintiff’s argument is fundamentally flawed for the reasons discussed in the previous section, as well as for the reasons cited by the district court. The district court held that the election code must be read in its entirety, and that such a reading leads to the conclusion that “[t]he certifications of the result of the State Senate District 22 primary race were necessarily subject to the election contest filed by Defendant Barnes.” (Record Entry No. 53, Memorandum Opinion at p. 25).

Specifically, Tenn. Code Ann. § 2-8-101(a) requires the county election commission to meet no later than the second Monday after an election to compare the returns and certify the results as shown by the returns. Here, the county election commissions for the three counties comprising State Senate District 22 met on August 18 and certified that Plaintiff had received 4,477 votes and that Defendant Tim Barnes had receive 4,458 votes in the primary election. (*Id.* at p. 3). On August 25, 2008, Defendant Barnes filed an election contest with the State Primary Board of the Tennessee Democratic Party pursuant to Tenn. Code Ann. § 2-17-104(b), which requires that an election contest be filed within five (5) days after the certification of results by the county election commissions. (*Id.*).

Thereafter, on September 4, 2008, pursuant to Tenn. Code Ann. § 2-8-113(a), the State Coordinator of Elections issued certificates declaring the party nominees of various state primary races based upon the votes received by the candidates, including the Democratic primary for State Senate District 22. Thus, contrary to Plaintiff's assertions, this certification of results by the State Coordinator of Elections was issued *after* the filing of the election contest by Defendant Tim Barnes. Consequently, whatever rights Plaintiff inherited as a result of this certification were only contingent and could not, by definition, vest, if at all, until after the election contest was decided. As the district court correctly stated, "[t]he Democratic Party could not finalize its choice of a candidate until Defendant Barne's election contest was resolved by the State Primary Board." (Record Entry No. 53, Memorandum Opinion at p. 25).

**B. Tennessee courts have consistently held that the right to become a nominee of a political party is a purely political right as distinguished from a property right.**

In finding that Plaintiff had no protected property right in the certification of the primary election results, the district court also relied upon several Tennessee Supreme Court decisions in which that court pointedly recognized that the right to become a nominee of a political party for a public office is a purely political right, as distinguished from a civil or property right:

Courts of equity are conversant only with matters  
of property and maintenance of civil rights, and in the

absence of statutory authority will not interfere to enforce or protect purely political rights. Accordingly, a court of equity ordinarily will not undertake by injunction or otherwise to supervise the acts and management of a political party for the protection of purely political rights when no rights of property are involved.

*State ex rel. Inman v. Brock*, 622 S.W.2d 36, 42 (Tenn. 1981); *see also Taylor v. Tennessee State Democratic Exec. Comm.*, 574 S.W.2d 716, 717 (Tenn. 1978) (“It is apparent from a reading of the seventeenth chapter of the election code that the legislative intent was that intraparty squabbles over the nominating procedures are to be considered a political matter which are to be resolved by the party itself without judicial intervention.”).

Tennessee law declaring that there is no protected property interest in a party nomination is consistent with decisions of both federal and other state courts. *See Taylor v. Beckham*, 178 U.S. 548 (1900); *Snowden v. Hughes*, 321 U.S. 1, 7 (1944) (holding that “an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause”); *Corn v. City of Oakland City*, 415 N.E.2d 129 (Ind.Ct.App. 1981) (finding no property interest in office based upon nomination); *State ex rel. Pecyk v. Greene*, 114 N.E.2d 922, 927 (Ohio Ct. App. 1953) (finding that because there is no vested right in public office, there can be no vested right in the mere nomination to such office); *State ex rel. Robinett v. Jarrett*, 196 P.2d 849, 850 (Okla. 1948) (right of candidate to certification of nomination for representation in Congress was purely

political as distinguished from a civil or property right); *Sergel v. Healy*, 218 Ill.App. 245, 1920 WL 1129, \* 8 (Ill.Ct.App. 1920) (the mere right to office or of the nomination to an office cannot be regulated or controlled by the writ of injunction); *Walls v. Brundidge*, 160 S.W. 230, 233 (Ark. 1913) (“[A] court of equity will not undertake to supervise the acts and management of a political party for the protection of a purely political right . . . To hold otherwise would establish what could not but prove a most mischievous precedent, and would be a long step in the direction of making a court of equity a committee on credentials, and the final arbiter between contesting delegations in political conventions.”); *Lahart v. Thompson*, 118 N.W. 398 (Iowa 1908) (“The nomination at a primary election gives the person receiving it no vested interest in the office for which he is named or in any place upon the official ballot which may not be taken away by the . . . Legislature or [a] . . . body to whom the power has been delegated.”); *Anthony v. Burrow*, 129 F. 783 (D.Kan. 1904) (“The right to become the nominee of a political party for a public office, whether national or state, and as such nominee to receive the votes of the qualified electors voting to fill such office, is a purely political right as contradistinguished from a civil or property right.”).

Furthermore, the cases cited by Plaintiff do not support finding a property interest in the certification of the results by the State Election Coordinator. Indeed, as those decisions make clear, no property interest in a party nomination exists

when the primary election has been voided by an authorized tribunal like the State Primary Board. In *Taylor v. Nealon*, 120 S.W.2d 586 (Tex. 1938), the Texas Supreme Court held that “the person receiving a majority of the votes on the face of the election returns is entitled to the nomination, together with all its attendant statutory rights, *unless it can and shall be finally adjudged otherwise by some tribunal authorized to do so.*” *Id.* at 587 (emphasis added). Simply put, even if one accepts that there is a property right in a nomination, which no Tennessee court has ever held, that right does not vest if an authorized tribunal voids the primary election. *See also Rowe ex rel. Schwartz v. Lloyd*, 36 A.2d 317, 319 (Penn. 1944) (recognizing that “[a]s to a nomination vote being a ‘vested’ right, it is a right subject to reasonable regulations imposed by Legislature.”).

The Tennessee Supreme Court has recognized that “[a]t common law there existed no right to contest in the courts the title to nomination of a political party for office; and therefore no such right exists unless specifically provided by statute.” *Taylor v. Tennessee State Democratic Executive Comm.*, 574 S.W.2d at 717; *see also Brickell v. State Election Board*, 221 P.2d 785, 788 (Okl. 1950). There is no such statute in Tennessee. Rather, the Tennessee General Assembly, through Tenn. Code Ann. § 2-17-104, has conferred exclusive jurisdiction to determine primary election or nomination contests on the party’s State Primary Board, and such determinations are conclusive upon the courts. *Id.*; *see also*

*Heiskell v. Ledgerwood*, 144 Tenn. 666, 234 S.W. 1001 (1921). Here, it is undisputed that the State Primary Board, as authorized by Tennessee law, voided Plaintiff's primary election victory after conducting a hearing. Accordingly, even under the authority she relies upon, Plaintiff had no property interest in the Democratic Party nomination for State Senate District 22.

### **III. THE ACTIONS OF THE STATE PRIMARY BOARD DID NOT CONSTITUTE STATE ACTION.**

In order for Plaintiff to succeed in this appeal, she is required to demonstrate that the district court erred in finding that there was no state action that could support a claim made pursuant to the Fourteenth Amendment. Plaintiff has simply not met that burden.

In deciding whether an action is state action, the district court pointed to the three tests intimated by the Supreme Court and adopted by this Court: (1) the public function test; 2) the state compulsion test; and 3) the symbiotic relationship or nexus test. (Record Entry No. 53, Memorandum Opinion at p. 15); *see also Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6<sup>th</sup> Cir. 1992). The district court examined the actions of the State Primary Board under the public function test and the nexus test, and determined that those actions did not satisfy either test, and thus, the actions of the State Primary Board were not fairly attributable to the State. (*Id.* at pp.14-22).

### A. Public Function Test

As to the public function test, the district court held that, “[t]o satisfy the ‘public function’ test, the private entity must exercise ‘powers traditionally exclusively reserved to the State.’ ‘This test is difficult to satisfy[,]’ and is interpreted narrowly. While many functions have been performed traditionally by governments, very few have been exclusively reserved to the State.” (*Id.* at p. 15 (internal citations omitted)).

In finding that the actions of the State Primary Board did not satisfy the public function test, the district court pointed to several factors. First, the district court noted that, in Tennessee, the “power to select a nominee for a political party has never been reserved traditionally and exclusively to the State[.]” (*Id.*) Second, the district court pointed to the fact that any state action in relation to selecting the nominee of the Tennessee Democratic Party would likely infringe on the party’s associational rights. (*Id.* at p. 16). The district court also distinguished the Supreme Court’s holdings in the so-call “white primary” cases, *see California Democratic Party v. Jones*, 530 U.S. 567, 572-73 (2000), from the case here, noting that the Supreme Court has subsequently limited the scope of those holdings to situations in which state rules invidiously discriminate against African-Americans. (*Id.* at 19). Rather, the district court found that this case was “governed by the Supreme Court cases warning federal courts to avoid interference

with the First Amendment associational rights of a political party when that party is engaged in the process of selecting its nominee for public office.” (*Id.*).

In response to the district court’s lengthy discussion concerning application of the public function test, Plaintiff summarily states that, “[h]ere, 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.” Appellant’s Brief at 24. Plaintiff then concludes that, since the conduct of elections is a power traditionally reserved to the State, the State Primary Board’s actions in adjudicating the primary election contest are state actions under the public function test.

Plaintiff cites no authority for this novel proposition that the adjudication of a primary election contest is a “critical function integral to the conduct of the State’s primary election scheme.” Moreover, Plaintiff ignores the fact that under Tennessee law, resolution of political party disputes is neither traditionally nor exclusively performed by the government. To the contrary, intra-party disputes are traditionally left for the political parties to resolve on their own and free from government oversight, regulation or intervention. Indeed, rather than authorizing state officials to resolve nomination disputes, the Tennessee General Assembly has expressly disclaimed any authority for the State of Tennessee to participate in

nomination contests whatsoever.<sup>4</sup> *See* Tenn. Code Ann. § 2-17-104. Similarly, Tennessee courts have consistently held that the political party has “exclusive jurisdiction” over a nomination contest. In determining whether a given function has been exclusively reserved for the state, courts regularly look to the state’s laws and regulations. *See Redmond v. The Jockey Club*, 2007 WL 2250978 at \*9 (6<sup>th</sup> Cir. 2007). Here, Tennessee law establishes that the resolution of a nomination dispute is a private and not a public function, much less an exclusive public function. Accordingly, Plaintiff has failed to identify any error committed by the district court in finding that the public function test did not apply to the actions of the State Primary Board.

#### **B. Symbiotic relationship or nexus test**

The district court also correctly recognized that the symbiotic relationship or nexus test did not apply to the State Primary Board. In discussing the nexus test, the district court stated, “[u]nder this test, ‘the action of a private party constitutes a state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.’” (Record Entry No. 53, Memorandum Opinion at p. 19).

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<sup>4</sup> The requirement that primary election contests be decided by the party’s State Primary Board has been in effect in Tennessee since 1917. *See* n. 2, *supra*.

In response, Plaintiff suggests that Tennessee's statutory recognition of the parties' role in resolving primary election contests constitutes a symbiotic relationship. The mere fact, however, that the State Primary Board acted pursuant to a provision in Tennessee's election code does not clothe the State Primary Board with the authority of the state. *United States v. Coleman*, 628 F.2d 961, 964 (6<sup>th</sup> Cir. 1980) (“[W]here state involvement in private constitutes no more than acquiescence or tacit approval, the private action is not transformed into state action even if the private party would not have acted without the authorization of state law.”). The Tennessee General Assembly has deliberately taken a hands-off approach to primary election contests, reserving such contests exclusively to the political parties. Tenn. Code Ann. § 2-17-104. As the district court found, “the legislature’s position is antithetical to state action,” and the “[p]urely political action taken by the party under the umbrella of this broad statute does not transform the party’s decision into state action[.]” (*Id.* at pp. 20, 21). Accordingly, the district court did not err in finding that there was no state action that could support a claim made pursuant to the Fourteenth Amendment.

#### **IV. TENNESSEE CODE ANNOTATED SECTION 2-17-104 IS FACIALLY CONSTITUTIONAL.**

The district court correctly held that the challenged statute, Tenn. Code Ann. § 2-17-104, is facially constitutional. In reaching this conclusion, the district court

parsed the statute and found three requirements: (1) the statute provides that any candidate may contest the primary election; (2) such a contest must set forth the grounds for the contest and be filed within five days of the certification of results; and (3) the state primary board must hear and determine the matter and make a disposition of the dispute. (Record Entry No. 53, Memorandum Opinion at p. 33). The district court further found that the State Primary Board was charged by statute with doing two things pursuant to such a challenge: “1) hear and determine the contest; and 2) make the disposition of the contest which justice and fairness require, including setting aside the election if necessary.” (*Id.* at 34).

The district court then found that, in light of the very high standard to show facial unconstitutionality,<sup>5</sup> “[i]t is not enough for Plaintiff to speculate that the State Primary Board would decide a nomination arbitrarily or capriciously. Numerous circumstances can be envisioned under which the State Primary Board could constitutionally discharge its duties under this statute pursuant to fair standards and procedures adopted by the Board prior to, and tailored for, a particular election contest.” (*Id.* at pp. 34-35).

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<sup>5</sup> The Supreme Court has recently affirmed that, in order to succeed on a facial challenge to a statute, a plaintiff must establish that no set of circumstances exists under which the statute as written would be valid and that the law is unconstitutional in all of its applications. *See Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1190 (2008); *see also Crawford v. Marion County Election Board*, 128 S.Ct. 1610, 1623 (2008) (rejecting a challenge to the facial constitutionality of Indiana’s voter identification law).

Moreover, it is a fundamental precept that the acts of the Tennessee General Assembly are presumed valid under Tennessee law, and in cases of doubt the statute should be held constitutional. *See Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1366 (6<sup>th</sup> Cir. 1984) (citing *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969)). Nothing in Plaintiff's one paragraph discussion of her facial constitutional challenge (that does not cite to, identify, or discuss any error by the district court) shows that the district court's finding was erroneous. Accordingly, the district court's determination that Plaintiff failed to carry her burden to make a facial challenge to the constitutionality of Tenn. Code Ann. § 2-17-104 should be affirmed by this Court.

**V. PLAINTIFF CANNOT ESTABLISH ANY VIOLATION OF  
HER PROCEDURAL DUE PROCESS RIGHTS.**

Among her many other claims, Plaintiff has alleged that she failed to receive due process before the State Primary Board. Because it found that Plaintiff had failed to establish "the critical prerequisites" for bringing an action under § 1983, the district court did not reach the question of whether the procedural shortcomings alleged by Plaintiff would amount to a due process violation and correctly noted that to do so "would require the Court to give an unwarranted advisory opinion." (Record Entry No. 53, Memorandum Opinion at pp. 39-40). Given the absence in

this case of any constitutionally-protected property right or state action, this Court should reject any call to do otherwise now.

Regardless, even if due process protection applied to the Election Contest, there still would not be any merit to Plaintiff's due process claims. It is undisputed that the Election Contest was conducted pursuant to Agreed Rules that had been negotiated by the parties themselves in advance of the hearing. (*Id.* at p. 4, n.2) (noting that "Plaintiff participated in preparing these Agreed Rules" and that "Plaintiff did not make any objections to the use of the Agreed Rules and the hearing was conducted in accordance with them"). Moreover, it is crucial to note that Plaintiff does not allege that the Agreed Rules used with her consent by the State Primary Board failed to provide sufficient procedural protections. Rather, she merely claims that she is constitutionally-entitled to have the State Primary Board's decision reversed because the Agreed Rules were not in place prior to the August 7th primary election. Just as important, Plaintiff does not allege either that there was insufficient evidence to support the State Primary Board's finding or that the Primary Board made a decision on any basis other than the evidence presented. Instead, she simply suggests that the State Primary Board's decision should be reversed because there was no formal recitation laying out in writing the legal rationale and evidentiary basis for that decision.

“Due process, unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“Due process is flexible and calls for such procedural protections as the particular situation demands.”). In determining what process is due in a particular situation, federal courts utilize the test announced in *Mathews v. Eldridge* to balance governmental and private interests. According to the *Mathews* decision:

[I]dentification of the specific dictates of due process generally requires consideration of . . . the private interest that will be affected . . . , the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional . . . procedural safeguards, and, finally, the government interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail.

*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Under the *Mathews* balancing test, any proposed additional or substitute procedures must be placed in context with the procedures that were actually used. A court must identify the “probable value, if any, of additional . . . procedural safeguards.” *Id.* Given the extensive procedural protections used by the State

Primary Board without any objection from Plaintiff, there can be no legitimate argument that she was entitled to the additional procedures she urges now.<sup>6</sup>

In the context of a full, adversarial hearing where parties are represented by legal counsel and have a full opportunity to present evidence and cross-examine witnesses, Plaintiff's claim that the absence of these additional procedures should invalidate the entire proceeding simply is not credible and finds no support in the law. The Agreed Rules leave very little risk of an erroneous deprivation of rights, and Plaintiff's proposed additional procedures would come at great expense to achieve very little.

**A. The Agreed Rules provided standards for the Election Contest.**

Plaintiff maintains that there were no "definite and concrete standards by which election contests are to be judged." Appellant's Br. at 28. Specifically, she complains that the inclusion of the terms "may" and "in addition to any other relevant questions" in Agreed Rule 11 provided the State Primary Board the unfettered discretion to resolve the Election Contest in a *potentially* standardless way. There is no merit to this argument. Agreed Rule 11 states as follows:

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<sup>6</sup> Notably, despite what is suggested by her brief, there is no evidence to indicate that either before, during or immediately after the State Primary Board's September 13th hearing, Plaintiff sought any of the additional procedural protections she now claims were required by the Fourteenth Amendment. Given that Plaintiff has been represented by experienced legal counsel throughout every stage of the proceedings at issue in this appeal, the absence of any such evidence plainly reveals the makeweight character of Plaintiff's eleventh-hour due process claims.

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:

a. whether more probably than not the number of votes placed in question as a result of 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 of the Contestant; or

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.

(Record Entry No. 1, Complaint, Exh. D at pp. 2-3). This rule – which was developed by the parties, including Plaintiff, and was adopted and used without objection by the State Primary Board – clearly referenced the enunciated standard of the Tennessee Supreme Court in resolving general election contests. *See Forbes v. Bell*, 816 S.W.2d 716, 719 (Tenn. 1991) (laying out a virtually identical standard). Plaintiff does not allege that the substance of these two standards is constitutionally suspect.

Instead, Plaintiff complains that the use of the word “may” made it *possible* for the State Primary Board to resolve the Election Contest against her without adhering to the standards included in Agreed Rule 11 itself. Plaintiff, however, does not claim that the State Primary Board failed in any way to adhere to this negotiated standards. Nor could she, as the transcript of proceedings makes clear that the State Primary Board strictly adhered to the same standard that Tennessee

courts apply in resolving election contests. (Record Entry No. 14, Notice of Filing, Exh. 1, Transcript of Proceedings at pp. 228-29).

That the State Primary Board was authorized to make other preliminary, subsidiary, or ancillary determinations by the inclusion of the word “may,” does not vitiate the standards that were adopted and followed by the State Primary Board. Under the *Matthews* balancing test, the exclusion of “may” and “in addition to any other relevant questions” from Agreed Rule 11 would have added absolutely no value to the procedural protections of the Election Contest. Instead, they would have unnecessarily limited the State Primary Board from addressing other issues essential to the resolution of the Election Contest. Accordingly, this claim is meritless.

**B. Plaintiff had advance notice of the Agreed Rules governing the Election Contest.**

In an argument that simply does not square with the facts, Plaintiff argues that she (a) “was not provided with the rules that would govern the hearing until just before the hearing;” (b) “did not know how the hearing would be conducted or what she would be allowed to do at the hearing;” and (c) “was unable to properly prepare for the hearing.” Appellant’s Br. at 29.

It is undisputed that the Agreed Rules were substantially completed at a conference in which Plaintiff’s counsel participated on September 9, 2008 and

were in an essentially final form on September 11, 2008.<sup>7</sup> Beyond preserving an objection that the Agreed Rules were not in place at the time the Election Contest was filed, Plaintiff's counsel expressly agreed to the Agreed Rules on September 11th. And, in addition to having full knowledge of those rules, Plaintiff had full knowledge of the grounds of the Election Contest on August 25, 2008, when the

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<sup>7</sup> Less than 48 hours after Barnes' Election Contest was filed, Plaintiff's counsel initiated a discussion about the Election Contest rules and proposed several rules for the parties to use. *See* E-mail from R. Rochelle to B. Phillips dated Aug. 28, 2008 (Record Entry No. 33, Response of in Opposition to Motion for Preliminary Injunction, Exhibit 1). On September 4, 2008, Plaintiff's proposed rules were circulated to counsel for Barnes, and the parties to the contest were invited to submit any additional proposed rules by September 8, 2008. *See* E-mail from B. Phillips to G. Barrett and R. Rochelle dated Sept. 4, 2008. (*Id.*). Barnes submitted proposed rules on September 5, 2008, which were forwarded to Plaintiff's counsel for comment the next day. *See* E-mail from B. Phillips to R. Rochelle and G. Barrett dated Sept. 6, 2008. (*Id.*). On September 9, 2008, counsel for the parties and the Primary Board ***conferred in person to discuss the rules*** that would apply; and on September 11, 2008, the State Primary Board's counsel circulated a substantially final draft of the rules to the parties. *See* E-mail from B. Phillips to R. Rochelle and G. Barrett dated Sept. 11, 2008. (*Id.*). In response, Plaintiff's counsel noted only one objection to the proposed rules, which related to the voting requirements. The State Primary Board's counsel noted that the voting requirements under the proposed rules reflected both the requirements of Tennessee law and party rules. *See* E-mail from B. Phillips to R. Rochelle and G. Barrett dated Sept. 11, 2008. (*Id.*). After being informed of the relevant Tennessee law, Plaintiff's counsel advised that, "[He] does not object to the form of the rules." *See* E-mail from R. Rochelle to B. Phillips (Sept. 11, 2008) (objecting only that the rules were not in place when the contest was filed). (*Id.*). The "Agreed Rules" were circulated to all parties on September 11, 2008, were essentially identical to those used in the Election Contest. At the opening of the State Primary Board meeting on September 13, 2008, the State Primary Board adopted the Agreed Rules without objection from either Barnes or Plaintiff. (Record Entry No. 14, Notice of Filing, Exh. 1, Transcript of Proceedings; Record Entry No. 53, Memorandum Opinion at p. 4, n. 2).

Contest was filed. Moreover, under the Agreed Rules, Plaintiff knew by noon on September 11, 2008, all the evidence Barnes intended to rely upon at the Election Contest hearing. (Record Entry No. 1, Complaint, Exh. D, Agreed Rule 2 at p.1). Given the district court's finding that "Plaintiff participated in preparing these Agreed Rules" and that "Plaintiff did not make any objections to the use of the Agreed Rules and the hearing was conducted in accordance with them," any claim that Plaintiff did not have a meaningful opportunity to prepare for the hearing is baseless. (Record Entry No. 53, Memorandum Opinion at p. 4 n. 2).

Indeed, Plaintiff fails to identify any actual prejudice to her or any procedural benefit that would have been garnered if the rules had been in place prior to the August 7th primary. Because she does not and cannot identify how any part of the proceeding would have been different as a result of greater advance notice, her due process claims fail. *See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 127 S.Ct. 2489, 2496-98 (2007).

**C. The procedures for selecting a Democratic Party nominee did not violate Plaintiff's due process rights.**

Plaintiff goes on to allege that the State Primary Board was "allowed to select a candidate by whatever method desired, rendering the method of selection arbitrary and capricious." Appellant's Br. at 30-31. Again, Plaintiff's argument rests on a false premise. The State Primary Board declared the primary election void. The Primary Board did not "select" a candidate at all. Instead, relying upon

the advice of the State Coordinator of Elections, the Democratic Party's nominee was selected by popularly elected party representatives in the counties where the legislative district was situated. Indeed, Tennessee law contemplates this method of selecting a nominee. *See* Tenn. Code Ann. § 2-13-204.

**D. Lack of “written justification” does not violate Due Process.**

Plaintiff contends that her Due Process rights were violated because “the State Primary Board did not provide **any** justification as to why they were setting aside the election.” Appellant’s Br. at 31 (emphasis added). Again, the facts belie this assertion.

Following nearly eight hours of live testimony, oral argument, election data and other documentary evidence, the State Primary Board concluded that the standard set out by Agreed Rule 11(b) was met, i.e., that there was “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.” This conclusion on the record was the State Primary Board’s justification for setting aside the election.

In the district court below, Plaintiff explained that the State Primary Board should have provided a “written justification” for its decision. (Record Entry No. 6, Memorandum of law in Support of Motion for Preliminary Injunction at p. 14).

Importantly, Plaintiff does not complain that there is insufficient evidence for the Primary Board's decision, only that it did not make written findings of fact and conclusions of law. The most rigorous due process standards, however, do not require this type of written justification demanded by Plaintiff. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

There are no fixed procedures required by due process. Because the State Primary Board is the final arbiter of primary contests and not subject to appellate review, there is little basis for having a written decision. Moreover, the existence of a complete transcript of the hearing and the deliberations make any sort of formal, written decision demanded by Plaintiff redundant. *See, e.g., United States v. Copley*, 978 F.2d 829, 831 (4th Cir. 1992).

Even assuming that some value would be gained from requiring a written decision, the fiscal and administrative burden in requiring a deliberative body of 66 private volunteers from across Tennessee to fashion a unitary and detailed finding far outweighs any gains. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In the context of a multi-member State Primary Board decision, Plaintiff's request for formalized findings is misplaced. This claim fails.

**E. The Exclusive Jurisdiction of the State Primary Board did not violate Plaintiff's Due Process rights.**

Finally, Plaintiff contends that the Primary Board's decision should have been subject to appellate review due to its status as "[a]n administrative body." Appellant's Br. at 32. It is inappropriate, however, to confuse a political party's internal resolution of a primary election contest with a garden variety state administrative matter.

The Tennessee courts and legislature have uniformly concluded that the State Primary Board is vested with the authority to finally and exclusively resolve primary election contests. Tenn. Code Ann. § 2-17-104(c); *Taylor v. Tennessee State Democratic Exec. Comm.*, 574 S.W.2d 716, 717 (Tenn. 1978). This exclusive and final authority is a function of the particular nature of primary election contests and the context in which they arise. As the Tennessee Supreme Court recognized in *Taylor*:

It is apparent from a reading of the seventeenth chapter of the election code that the legislative intent was that intra-party squabbles over the nominating procedures are to be considered a political matter which are to be resolved by the party itself without judicial intervention. The party machinery is much better equipped than the courts to resolve such a dispute with the speed and finality that is required to preserve the integrity of the democratic election process.

574 S.W.2d at 717-18. The commitment of primary election contests to the State Primary Board for final resolution ensures that such contests are conclusively determined in a timely manner that preserves adequate time for the general

election. Moreover, the exclusive authority of the State Primary Board preserves the political parties' constitutionally-protected right to determine their own nominees.

Rather than a procedural shortcoming, the exclusivity and finality of the State Primary Board's resolution is essential to the primary election contest.

## CONCLUSION

For these reasons, the Defendants-Appellees respectfully request that the decision of the district court be affirmed.

Respectfully submitted,

ROBERT E. COOPER, JR.  
Attorney General and Reporter  
State of Tennessee  
JANET M. KLEINFELTER (BPR 13889)  
Senior Counsel  
Special Litigation Division  
Office of Tennessee Attorney General  
P.O. Box 20207  
Nashville, TN 37202  
(615) 741-7403  
[janet.kleinfelter@ag.tn.gov](mailto:janet.kleinfelter@ag.tn.gov)

W. Brantley Phillips, Jr.  
Jeffrey P. Yarbrow  
BASS BERRY & SIMS PLC  
315 Deaderick Street, Ste 2700  
Nashville, TN 37238  
(615) 742-6200  
[bphillips@bassberry.com](mailto:bphillips@bassberry.com)

George E. Barrett  
Douglas S. Johnston, Jr.  
Edmund L. Carey  
217 Second Avenue North  
Nashville, TN 37201  
(615) 244-2202  
[gbarrett@barrettjohnston.com](mailto:gbarrett@barrettjohnston.com)  
[djohnston@barresttjohnston.com](mailto:djohnston@barresttjohnston.com)  
[tcarey@barrettjohnson.com](mailto:tcarey@barrettjohnson.com)

James S. Stranch  
Michael Wall  
BRANSTETTER STRANCH  
JENNINGS  
227 Second Avenue North, 4<sup>th</sup> Floor  
Nashville, TN 37201  
(615) 254-8801  
[jgs@branstetterlaw.com](mailto:jgs@branstetterlaw.com)  
[mwall@branstetter.com](mailto:mwall@branstetter.com)

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)(i)**

I certify that this brief is in compliance with Fed. R. App. P. 32(a)(7)(C) in that the number of words of the brief, not including the Table of Contents, Table of Authorities, and Disclosure of Corporate Affiliation, is 11,268 words, which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B)(i).

/s/JANET M. KLEINFELTER  
JANET M. KLEINFELTER

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of May, 2009, a copy of the above document has been served upon the following persons by:

X Electronic Case Filing (ECF) System to:

James Bopp, Jr.  
Sarah E. Troupis  
BOPP, COLESON & BOSTROM  
1 South 6<sup>th</sup> Street  
Terre Haute, IN 47807-3510  
(812) 232-2434  
[jboppjr@aol.com](mailto:jboppjr@aol.com)  
[stroupis@bopplaw.com](mailto:stroupis@bopplaw.com)

Robert Thomas Rochelle  
Tom P. Thompson, III  
ROCHELLE, MCCULLOCH & AULDS  
109 North Castle Heights Avenue  
Lebanon, TN 37097  
(615) 444-1433  
[rochelle@rma-law.com](mailto:rochelle@rma-law.com)  
[pthomppson@rma-law.com](mailto:pthomppson@rma-law.com)

dated this 11<sup>th</sup> day of May, 2009.

/s/ Janet M. Kleinfelter  
JANET M. KLEINFELTER  
Senior Counsel

## **ADDENDUM**

### **DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

Pursuant to 6 Cir. R. 30(b), the Appellants hereby designate the following relevant district court documents:

<b>Record Entry No.</b>	<b>Document</b>
1	Complaint
14	Notice of Filing, Exhibit 1, Transcript of Proceedings
33	Response in Opposition to Motion for Preliminary Injunction and Exhibits
53	Memorandum Opinion
54	Order Dismissing Complaint with prejudice
61	Order Denying Injunction Pending Appeal