

No. 08-6245

**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
The Honorable Robert L. Echols

REPLY BRIEF OF APPELLANT

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Introduction

In the August 2008 primary election, the voters of Tennessee State Senate District 22 elected Appellant Rosalind Kurita (“Senator Kurita”) to represent them in the November 2008 general election. However, when the Democratic party did not like the choice of the voters, the party - without making the reason for their decision known, without affording basic rights to the candidate they did not want, and contrary to the statutory scheme of the state of Tennessee - overturned the will of the voters. For the reasons set forth below, which refute the arguments presented by Appellees in their Joint Brief of the Defendants/Appellees (“Appellees’ Brief”), as well as the arguments set forth in the Brief of Appellant filed on February 18, 2009 (“Appellant’s Brief”), Appellant Rosalind Kurita respectfully requests that this Court reverse the decision of the District Court.

Statement in Support of Oral Argument

Appellant agrees with Appellees that oral argument would be helpful in this case to deal with the various constitutional issues that must be decided.

Argument

I. The bifurcated Tennessee statutory scheme for primary elections does not give parties carte blanche to choose a candidate.

A. Tennessee has a bifurcated system for its primary election system in which primary elections are not purely political.

Appellees argue that there is no bifurcation of party nominations under Tennessee law, because the political parties play a central role in ensuring that nominees reflect party values.¹ *See* Appellee’s Brief at 14-18. However, the Tennessee statutory scheme does provide for a bifurcated system of selecting political party nominees, where candidates for offices specified by statute - including State Senators - are nominated via primary elections, Tenn. Code Ann. (“TCA”) § 2-13-202, while the candidates for all other elections are selected by the political party. TCA § 2-13-203(a), and which makes those positions requiring a primary election more than purely political matters.

Thus, the statutory bifurcation of Tennessee’s primary election system is clear.² By contending that the choice of who appears on the general election ballot

¹One issue here also concerns Appellees’ labeling of this “election contest” as a “nomination contest.” That issue and the problems it has caused are dealt with extensively at n. 4, *infra*.

²For example, a non-bifurcated system would be one in which political parties in Tennessee would be able to choose their nominee for the general election for every partisan elected position, or a system where all disputed elected positions require primary elections.

is a purely political matter, with the choice of the person who appears on the general election ballot ultimately being a decision for the party alone, the Appellees argue that the Tennessee primary elections are, at most, a recommendation to the party - in other words, the political parties retain the power to decide who appears in the general election, whatever the results of the primary election may be. However, Tennessee law provides otherwise: the political parties are bound by the primary election results, unless one of two narrow requirements that would allow for the drastic remedy of overturning an election are met. *See* Section V.A, *infra*. Moreover, as set forth in Appellant's Brief and not disputed by Appellees, the definition of "primary election" found in the Tennessee Code makes it clear that the purpose of the primary election is to select a candidate to appear on the general election ballot - i.e., that the process of selecting the candidate to appear on the general election ballot is not given to the political party. TCA § 2-1-104(19) (Defining "primary election as "an 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").³ And, while Appellees

³Further, by stating that a primary election is "held *for* a political party," the definition of "primary election" suggests that the election is conducted by someone other than the political party itself - in other words, the primary election is held by the State for the political party. TCA § 2-1-104(19).

correctly note that the Tennessee courts have held that primary election contests are conclusive on the courts, they gloss over the other requirement for conclusiveness: that the primary election contest must be lawful. When the primary election contest is not lawful - which this election contest clearly was not - it is necessary for the courts to step in, and protect the rights of the candidates, the members of the political party, and the voters.

B. The results of the primary election were binding upon the Democratic Party, and requiring the Party to follow election contest rules ensures that the associational rights of the Democratic Party and the citizens of Tennessee are preserved and upheld.

Contrary to Appellees' argument that primary elections and election contests are purely political matters entirely free from state regulation, the results of the primary election contest were binding upon the Democratic Party, unless narrow criteria set by Tennessee courts were met.⁴ *See Forbes v. Bell*, 816 S.W.2d 716, 719 (Tenn. 1991); Appellant's Brief at 9-17; *see also* Section V.A., *infra*. Appellees state this when they acknowledge that one requirement for those elected as the general election candidate is that he or she be "lawfully selected by party

⁴Appellees argue that the cases presented by Senator Kurita in her Appellant's Brief are limited in application to election contests of general elections. *See* Appellees' Brief at 18. However, the language of *Forbes* is not limited in any such way. *Forbes*, 816 S.W.2d at 719 (language of holding applies to an "election"; not limited to general elections).

members.” Appellees’ Brief at 18. However, because there was no reason stated on the record (either orally or in writing) for the State Primary Board’s decision after the election contest, there is no way to know that the decision of that body was based on the validity of the election or followed the requirements of Tennessee law.

Senator Kurita is not asking the Court to take away the power of the party to choose who it allows to run for political office under the banner of the Democratic Party.⁵ However, this is not a situation where the nominees are in question - this is

⁵In various places throughout their brief, Appellees refer to the events surrounding this election contest as a “nomination contest.” However, a “nomination contest” would presumably involve a contest of a person’s appropriateness to serve as a nominee for a political party, as opposed to an “election contest,” which concerns the validity of the election itself and the voting process. That Senator Kurita was an appropriate nominee of the Democratic Party is not at issue in this case; this is an “election contest.”

Had the Democratic Party had a problem with the choice of Senator Kurita as the nominee in the first place, that problem should have been addressed by the Party long before the primary election, in order to ensure that all candidates on the primary election ballot were approved and appropriate members of the party. If an issue with Senator Kurita as a representative of the Democratic Party was the reason for the overturning the election results (which is unknown, because the reason or reasons the election was overturned was never put on the record, as set forth in Section V.C., *infra*), this was an improper reason to hold or decide the election contest under Tennessee law, and would be better addressed at a point earlier in this process than an election contest of the primary election results.

As opposed to an “election contest,” a “nomination contest” would be a purely political matter, because the party - not the State - has the right to determine who is a proper representative of the party. This is in contrast to a primary election and an election contest, which only occur after the party has allowed nominees - all of whom must be acceptable to the party pursuant to Tennessee law - to appear on the primary ballot, able to be voted upon by anyone who meets the requirements to vote in that primary election. All candidates for the general assembly in Tennessee must be members of the political party before they can be placed on the ballot as such. TCA § 2-13-104; *see also* TCA § 2-13-201 (all people appearing on ballot must be nominees of party). Further, it is the State - not the political party - who determines

a case where the election contest itself, and the election contest process, were inherently flawed. Because the State has delegated its responsibilities to hold an election contest to the political parties, it is incumbent upon the parties to set and follow rules regarding election contests, to ensure that the rights of the Democratic Party and Tennessee's citizens are upheld, and the results be binding under all but the most egregious circumstances.

II. Senator Kurita has a protected property interest in the results of the election.

Although, for the reasons set forth in Appellant's Brief and herein, Senator Kurita has a property interest in the results of the election by virtue of the reasons

what the requirements are to vote in a primary election, as well as who meets those requirements to vote in a primary election. TCA § 2-7-115 (setting forth requirements set by Tennessee as to who may and may not vote in a primary election). By the time of the primary election, while the poll watchers appointed by a political party have the right to protest individual voters at the polling places, the party no longer has the right to control even basic aspects of the election, and the purely political aspect of the election process has ended. TCA § 2-7-126 (providing a procedure to challenge voters at the time of primary election, subject to review of election judges representing all parties on the ballot). Indeed, the Tennessee Supreme Court's ruling that an election can only be overturned in two very narrow - and completely apolitical - circumstances, further underscores that, by the time of the primary election, the election process is no longer purely political. *Forbes*, 816 S.W.2d at 719. That the legislature has chosen to give the right to hold an election contest to the political parties does not make it a purely political right; the very fact that the State gives this right to the political parties underscores that it is *not* a purely political right..

Part of the confusion on this issue may stem from Senator Kurita's argument that she has a right to be the Democratic nominee who appears on the general election ballot, subject to the right of the State - and subsequently delegated to the political parties - to hold a contest of the election results. However, Appellant was also a Democratic nominee at the time of the primary election, as was her opponent, Appellee Tim Barnes. The right to appear as the Democratic candidate on the general election ballot should not be confused with the right to be a Democratic nominee in an election - two situations involving entirely different sets of laws and arguments.

set forth in these briefs, because the election contest itself was not proper, she continues to have a property interest in that right. *See* Appellant's Brief at 17-22.

The problem with Appellees' argument that they were under no obligation to afford Senator Kurita an election contest hearing subject to due process requirements is in the ultimate outcome of such reasoning. The right to be the party's representative on a general election ballot may only be divested after a lawfully conducted hearing. *See* TCA § 2-17-104. However, if Appellees are correct in their reasoning, a "lawfully conducted hearing" can include an election contest hearing that does not guarantee due process rights, and the election contest may be conducted to whatever rules - or lack thereof - that the political party deems expedient on the very day that the election contest is held. *See* Sections V.A & V.B, *infra*; Appellant's Brief at 27-30. Surely, a "lawfully conducted hearing" must provide, at a minimum, the basic guarantees of Tennessee law in an election contest - a minimum that the State Primary Board did not meet. *See* Section V.A., *infra*; Appellant's Brief at 27-29.

The right to appear on the general election ballot may be overturned by an election contest. *See* TCA § 2-17-104. However, as everyone agrees, the election contest must also be lawfully conducted. However, under Appellees' reasoning, because there is no due process right, that which is "lawful" is whatever the

political party decides it to be, without the requirement of due process.⁶

III. The actions of the State Primary Board constituted state actions under either the public function test or the symbiotic relationship/nexus test.

A. The actions of the State Primary Board constituted state action under the public function test.

While they cite the three stated reasons of the District Court to show that the public function test was not met, the District Court's decision on this point, as well as the arguments of the Appellees, are based on a fundamental misunderstanding. This fundamental problem with the District Court's reasoning is that the District Court confuses a nomination contest with an election contest, and its decision is based on the election contest being a nomination contest. *See* Memorandum at 16-17; *see also* Appellee's Brief at 31-32. As set forth above, *see* n. 5, this is an "election contest," not a "nomination contest." This election contest procedure, as part of the conduct of an election, is traditionally reserved to the state and not the political parties. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). This reasoning is confirmed by the fact that the political party's right to conduct the election contest has to be given to the political parties via Tennessee statute. *See* TCA § 2-17-104. That elections and processes related to elections are a state

⁶Taken to an extreme, this viewpoint would not require any process at all. Even if the election contest hearing did not require full due process protections, it did need to provide the basic protections Tennessee law provides for in all election contests, and it failed to do so.

function - not a purely political function - was not a fact contested by the District Court; the District Court carefully went through the Supreme Court's reasoning that "the conduct of the elections themselves is an exclusively public function." Memorandum at 17-18 (quoting *Flagg Bros.*, 436 U.S. at 158).

Further, as shown in Appellant's Brief, the law is clear that "elections conducted by organizations which in practice produce the uncontested choice of public officials" are state actions. *Flagg Bros.*, 436 U.S. at 158. The primary election for a State Senator in Tennessee is not an election conducted by the party, but a state run election. See Appellant's Brief at 23. However, the Supreme Court has held that, even if the primary election was an election controlled and run entirely by the political party, it would still be a state action. *Flagg Bros.* at 158. That the State runs the primary election process in Tennessee only underscores that it is not a purely political matter.

B. The actions of the State Primary Board constituted state action under the symbiotic relationship test/nexus test.

As with the public function test, the District Court makes the same fundamental error when dealing with the symbiotic relationship test / nexus test, because its reasoning requires this to be a "nomination contest," not an "election contest." See Memorandum at 20-21 ("The Court does not agree with Plaintiff's

proposition that the state legislature's decision to permit political parties to resolve their own *nominating contests* prior to the general election . . . constitutes state action under the law") (emphasis added). Because of this fundamental error, the reasons set forth in Section III.A, *supra*, and the reasons set forth in Appellant's Brief at 24-25, the District Court erred when it declined to find that the symbiotic relationship test / nexus test had been met.

IV. Tennessee Code Annotated § 2-17-104 is unconstitutional on its face.

Though Appellees state that there are circumstances where TCA § 2-17-104 could be constitutional, this is not the case. Two fatal flaws - the lack of a due process requirement in the statute, and the inability to review the decision of the election contest hearing in the statute - render TCA § 2-17-104 unconstitutional on its face.

Under TCA § 2-17-104, as currently written, there is no requirement that the political parties conduct election contests pursuant to due process. While in a perfect world, election contests would be held pursuant to due process, and guarantee the rights of those appearing at the hearings, the statute does not on its face require due process, and, as has been set forth before in Appellant's Brief and will be set forth in Section V, *infra*, in practice, those due process guarantees are not practiced.

Moreover, though it delegates to the political parties the exclusive jurisdiction to dispose of primary election contests, the statute fails to provide any means for the review of a decision of the political party, thus rendering the statute, in all cases, invalid. *See Taylor v. Tennessee State Democratic Executive Committee*, 574 S.W.2d 716 (Tenn. 1978). By delegating this exclusive jurisdiction to the political parties, the political parties are acting in a quasi-judicial role, which requires an available system of review for an election contest hearing. *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). However, as written, no review is guaranteed - nor even contemplated - by TCA § 2-17-104, and thus, even if a due process election contest hearing requirement is somehow read into the meaning of the statute, the statute still does not allow for any review of the decision of the political party, to whom Tennessee has entrusted an election contest via statute and for which review is necessary.

V. Senator Kurita was denied her due process rights.

Appellant will address each of the due process concerns addressed by Appellees in turn. First, however, a threshold interest must be addressed.

Appellees point to the *Matthews* test as the test Senator Kurita must meet when dealing with her due process concerns. *See* Appellees' Brief at 38-39; *see also* *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). However, despite holding this up as the test Senator Kurita must meet, Appellees fail to even address this test in several of their attempts to show that due process was adequately followed. This is telling, because such an application would show the due process shortcomings of the hearing. Even when Appellees do apply the *Matthews* test, it is misapplied, and, for each aspect of the hearing addressed by Appellees, due process under *Matthews* was not afforded to Senator Kurita.

A. The election contest hearing was not conducted pursuant to proper rules.

Contrary to Appellees' arguments that substituting the term "may" for "must" and allowing any evidence to be considered in resolving an election contest, this change in language is a major and fundamental flaw in the rules used at the election contest hearing ("Hearing Rules"). The standard used in the Hearing Rules does not comport with the requirements found under Tennessee law. *See* Appellant's Brief at 27-29. The substitution of the term "may" for "must," in the Hearing Rules, as well as allowing for review of any items deemed relevant under the Hearing Rules, allowed a decision on the election contest to be

made by any criteria. However, Tennessee law is clear that an election may only be overturned in two narrow situations. *Compare Forbes*, 816 S.W.2d at 719 *with* Rule 11(b); *see also* Appellant's Brief at 27-29.

The difference between the term "may" and "must" can create fundamental differences in the meaning of a statute or legal conclusion. However, Appellees would have this Court believe that, in a hearing to decide whether the results of a primary election should be overturned, such a difference is meaningless. Because Senator Kurita's due process rights were on the line here - as well as the rights of the members of the Democratic Party to have a proper representative on the general election ballot and the voters to have their ballots counted - this difference cannot be allowed to stand.

The standard used by the Democratic Party in the election contest - i.e., a standard that does not comport with Tennessee law - leads to one distinct consequence: those making the decisions as to whether the election was proper could make that decision based on whatever criteria they desire. For example, in Senator Kurita's case, they may have made that decision based on personal animosity, because they did not think that Senator Kurita was the "best" candidate for the Democratic party, or that they did not agree with previous decisions made

by her.⁷ However, under the narrow requirements of *Forbes*, these are improper reasons to overturn the results of an election:

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.

816 S.W.2d at 719 (emphasis added).

Unfortunately, because the State Primary Board made absolutely no findings as to the reason for its decision - either orally or as a written record - we have no way of knowing the reasons for the decision that they made in overturning the primary election. *See* Section V.C, *infra*.⁸

Indeed, this basic failing of due process is immediately apparent even under the *Matthews* standard articulated by Appellees - had the proper test been applied,

⁷This last problem would be particularly suspect in a case such as this, where Senator Kurita cast the deciding vote - against her own party - for a Republican lieutenant governor. *See, e.g.,* Greg Johnson, *An Unexpected and Epic Turn*, Knoxville News Sentinel, Jan. 12, 2007, <http://www.knoxnews.com/news/2007/jan/12/johnson-an-unexpected-and-epic-turn/>.

⁸Though a court could equate the terms “may” and “must,” in certain circumstances, such as in order to effectuate legislative intent, that result cannot be reached here. Once the State Primary Board failed to make a decision on the record as to their reasons for overturning an otherwise valid election, we cannot know if their rendering of the requirement that a decision be made under one of two valid standards was met, thus negating any equivalence in the meanings of the terms “may” and “must.”

Senator Kurita would have been assured that the election contest was overturned for one of the two narrow and acceptable reasons for doing so. Moreover, applying the proper test would have been *less* work for the State Primary Board, as they would only be able to hear and apply evidence regarding the two reasons articulated by the Tennessee Supreme Court that are available to overturn an election.

B. Appellees failed to provide proper notice of the rules that would govern the election contest hearing.

From the beginning of this suit, Appellees have not acknowledged - or, at best, have glossed over - the pertinent fact that, even before the hearing, Senator Kurita objected to the Hearing Rules.⁹ While Senator Kurita and her attorneys were participants in the drafting of the Hearing Rules, she never agreed to those rules, her attorney specifically noted her objection to such “agreed” rules, and asked that her objection be disclosed in written form to the members of the State Primary Board. *See* Response in Opposition to Plaintiff’s Motion for Preliminary

⁹Indeed, Appellees’ labeling of the Hearing Rules as “Agreed Rules” is inappropriate in light of Senator Kurita’s stated objection to such rules before the hearing, as part of the hearing, and continuing today as part of this suit. Moreover, to have the Hearing Rules labeled as “Agreed Rules” during the hearing injects a prejudice to the very nature of the rules and hearing itself, when Senator Kurita’s attorney had specifically asked that her standing objection the “agreed” rules be submitted - in writing - to all 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”).

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”). Further, Appellees’ suggestion that Senator Kurita has failed to object to the Hearing Rules at later points is untrue, as this suit attests to.

Had the Hearing Rules been settled and in a final form prior to the primary election - or, for that matter, at any point prior to the date of the election contest hearing itself - a benefit would have accrued not only to Senator Kurita, but to all involved in the election contest itself, thus meeting the *Matthews* test.¹⁰ For example, the members of the State Primary Board, as well as Senator Kurita and her opponent, Appellee Tim Barnes, would have been aware of the standard that would decide the election contest. Instead, that standard was not set in a final manner until that morning, preventing not only Senator Kurita and Appellee Barnes from knowing exactly what rules would govern the hearing until the day of that hearing, but also the members of the State Primary Board from going into the hearing with some prior knowledge of what standard they would use to determine

¹⁰The fact that such rules were not adopted in a final form until the date of the election contest itself is troubling. Though they were not changed in any meaningful way that day, there were no procedural safeguards in place that prevented this from happening - i.e., the Hearing Rules could have been changed up to and on the date of the election contest itself.

the result, or what standard they needed to hear evidence on. Moreover, Appellees suggest that there is no reason to have such Hearing Rules in place prior to the primary election itself, but simple logic dictates otherwise. A person who is running in an election that they know will be close may make an extra effort to ensure that the election results are as fair as possible (such as by finding more people to serve as poll watchers, who can ensure that only proper voters are voting under TCA § 2-7-126).

C. The State Primary Board selected the candidate that they preferred and failed to make the reasons for their decision part of any record of the hearing.

Many of Senator Kurita's problems with the decision of the State Primary Board could have been avoided with a simple action on the part of the State Primary Board: they could have made the reason or reasons for their decision on the record.¹¹ However, no such reasons were given, either orally or as part of a

¹¹Appellees have consistently stated that Senator Kurita's position is that the decision had to be made on the written record. However, since the beginning of this suit, Senator Kurita has made clear that her problem is not that the decision was not made as part of a written record, but that no decision outlining the reasons for the decision was made at all - either orally or written. *See* Memorandum in Support of Motion for Preliminary Injunction and Temporary Restraining Order, R. 6, at 14 ("An additional right that must be afforded Plaintiff in a quasi-judicial or judicial hearing, pursuant to the Fourteenth Amendment, is the right to have the reasons for the decision made at the hearing put on the record. . . . The State Primary Board did not state its reasons for its decision on the record; it merely recorded the votes of those present"). Though the reasons for the decision should have been part of a written record, the State Primary Board failed to meet even the lower, oral record requirement.

written record. In overturning the election, the State Primary Board only referred to a small part of the Rule 11(b) standard that purported to govern the election contest hearing, ignored significant aspects of the standard, and never gave any actual reasons for the decision it made. *See* n. 11, *infra*. In making the actual decision, not one member of the State Primary Board referred to any specific “improper, illegal and/or fraudulent acts which so permeated the Primary Election as to render the outcome of the election incurably uncertain”; the State Primary Board merely took a voice vote as to whether they accepted a subcommittee’s statement of the decision itself - not the reasons behind it. Tennessee Democratic Party State Executive Committee Meeting Transcript (“Hearing Transcript”) at 258-263. Indeed, after the eight hour State Primary Board hearing, all that the State Primary Board managed to do in making their decision was to hold a roll call vote on the recommendation of the subcommittee. Hearing Transcript, p. 258. The members of the State Primary Board could have made their decision to adopt the recommendation based on Rule 11(b) standards (even though such rule was contrary to Tennessee law and problematic on its own), or by a different, unannounced, and improper reason. Though Appellees protest that they did not select a candidate at all, Appellees’ Brief at 43, when the State Primary Board makes a decision without even referencing the rule under which it is making that

decision or the reasons for its decision, it certainly appears to be a selection of a candidate, and not an actual election contest conducted pursuant to well-defined rules.

Indeed, Appellees do not even attempt to make a *Matthews* argument for why there was no decision made on the record, because it would have been quite simple to make a decision on the record. For example, after eight hours of testimony, each of the State Primary Board members could have been asked and polled whether they found the election should be overturned under Rule 11(b) because of an enumerated reason or reasons - but they were not.¹² Such an action would have been simple, but it was not taken. Or, each member of the State Primary Board could have been asked to sign a document declaring that they found the election should be overturned under Rule 11(b) for reasons enumerated as part of the document - but they did not. Any number of simple methods could have provided an additional safeguard of making a decision on the record - either orally or written - but the State Primary Board did not even make these simple

¹²At the State Primary Board hearing, a roll call vote was taken as to whether to accept the recommendation of a Subcommittee, which had recommended that the results be found “incurably uncertain.” *See* Hearing Transcript at 258. This is far different from the actual requirement under Tennessee law, which requires that, to overturn the election, the evidence must show that it “was null and void for some valid reason or reasons.” *Forbes*, 816 S.W.2d at 719. Moreover, the roll call vote does not indicate what sort of “improper, illegal and/or fraudulent acts . . . so permeated the Primary Election as to render the outcome of the election incurably uncertain,” as required under the hearing’s own flawed Rule 11(b).

efforts.

- D. The actions of the State Primary Board were not an internal party matter outside the realm and reach of the State, and therefore review of the election contest hearing needed to be provided for.**

As set forth in Section III, *supra*, and in Appellants' Brief at 22, the actions of the State Primary Board at the election contest hearing were not an internal party matter, and are thus able to be regulated by the State. Moreover, because these were not internal party matters, the decision of the State Primary Board needed to have some mechanism for review, *see* Section IV, *supra*, and Appellant's Brief at 31-32, which it did not, and thus fails.

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.

Dated: May 26, 2009

Respectfully Submitted,

/s/ James Bopp, Jr. _____

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Certificate of Compliance

I hereby certify that this brief contains 5,417 words, in compliance with Fed.
Rule of App. Proc. Rule 32(a)(7).

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 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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