IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
Civil Division

GREEN PARTY OF TENNESSEE, CONSTITUTION PARTY OF TENNESSEE Plaintiffs	)	**Case No.: 3:11-CV-692**
Vs.	)	
TRE HARGETT in his official capacity as Tennessee Secretary of State, and MARK GOINS, in his official capacity as Coordinator of Elections for the State of Tennessee, Defendants	)	

REPLY IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT

COME NOW, Plaintiffs GREEN PARTY OF TENNESSEE and CONSTITUTION PARTY OF TENNESSEE and file this REPLY in support of their Motions for Summary Judgment and say:

I: DEFENDANTS' GENERAL ARGUMENTS:

Defendants devote a significant portion of their Response [Doc. 36] to a recitation of background facts the general standards for summary judgment and the scope of a State's authority to regulate elections. For the most part, these discussions reiterate facts and authorities recited in Plaintiffs' motions. Accordingly, no response to these discussions is required.

I-A: Defendants' "Analysis" of Requirements for Challenges to the Facial Constitutionality of the Relevant Statutes is Without Merit:

Defendants begin their legal argument with a general discussion of the standards for a facial challenge to the constitutionality of a statute. [Doc. 36, P:11-13] and. In later sections of their Response, assert that Plaintiffs cannot satisfy their burden for maintaining a facial challenge. Defendants' general contention that Plaintiffs' facial challenges are unsustainable is readily put to rest with an examination of two recent Supreme Court decisions involving challenges to election laws -- *Wash. State Grange v. Wash. State Re-publican Party*, 552 U.S.

442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) and *Crawford v. Marion County Elections Board,* 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008).

Washington State Grange: In *Washington State Grange v. Wash. State Republican Party*, the Court considered a challenge to a voter passed initiative providing that candidates for office shall be identified on the ballot by their self-designated "party preference." Under Washington's primary system, all candidates, regardless of party affiliation, are listed on a single primary ballot and the top two candidates—regardless of party "affiliation" (or lack thereof) proceed to the general election. Plaintiff's contention was that allowing candidates to declare a "party preference" on the primary ballot would be confusing to voters because it enabled candidates who had no affiliation with a party to "self-declare" a party affiliation and to be nominated as if they were party's candidate. According to the plaintiff, this constituted an unconstitutional interference the party's First Amendment freedom of association and right to control who "represented" the party. In rejecting Plaintiff's contention that the statute was facially unconstitutional, the Court emphasized that "a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." 552 U.S. at 449, 128 S. Ct. at 1190. Inasmuch as the statute had not yet been applied, and the Court could envision a means by which the statute could be constitutionally applied, it rejected the Plaintiff's challenge.

The case at bar is significantly different from *Washington State Grange* in that there is no issue of implementation. The statutes governing new party and candidate petition filing deadlines [challenged in Counts I-A and II] are specific and unambiguous. The requirement that all parties nominate their candidates for offices identified in TSA §2-13-202 through primaries, and only through primaries [a requirement that is challenged in Count III], is specific and unambiguous. And the statute establishing the priority a candidate ballot listing [challenged on Count IV] is specific and unambiguous. These challenged statutes *can only be applied in one way*—and Plaintiffs are properly arguing that they are unconstitutional when applied as unambiguously written. In *Washington State Grange*, the Court said that facial challenges to the constitutionality of a statute are disfavored because that "often rest on speculation" about how a statute will be applied. 552 U.S. at 450. There is, however, no such problem with the Tennessee statutes that leave no room for speculation about their application.

In Count I-B, Plaintiffs also challenge the constitutionality of TCA §2-1-104(24) on the grounds that it is unconstitutionally vague and represents an unconstitutional delegation of a power granted only to the legislature alone by the Elections Clause of the U.S. Constitution. This challenge is not subject to the principles enunciated in *Washington State Grange*.

Crawford: In *Crawford v. Marion County Elections Board*, the Court considered a challenge to Indiana's voter identification law. In that case, the Plaintiffs were challenging the requirement that voters produce a photo identification as a precondition to being allowed to vote. According to Plaintiffs, this requirement imposed an unconstitutional burden on the exercise of the voting franchise because many voters do not have any photo identification and would be excessively burdened if required to obtain one. The court rejected this challenge on the grounds that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute." 553 U.S. at 189, 128 S. Ct. at 1615. That is, the Supreme Court's holding was based on the lack of evidence to support a facial attack on the statute and not, as Defendants appear to content, on legal principles underlying facial challenges to the constitutionality of a statute.

The case as bar is unlike *Crawford* in that Plaintiffs are not relying on evidence to show that the challenged statutes would be unconstitutional in all their applications. To the contrary, Plaintiffs are relying on a plethora of case authorities that have already considered evidence of the burdens imposed by statutes (like the Tennessee statutes challenged by Plaintiffs) and held those statutes to be unconstitutional.

I-B: Defendants' "Justification" for Tennessee's Ballot Access Restrictions are Unsupported:

On page 15 of their Response (and again on page 25), Defendants offer a litany of asserted State interests in limiting ballot access.[1] The justifications put forth be the State are the standard mantra justifications offered by states in defense of ballot access limiting laws. However, a court is not required to accept at face value any justification the state may give for its

[1] Specifically, Defendants assert that the state has an interest in:

> "(1) requiring potential candidates to show some minimum level of support for their candidacy by the electorate, (2) halting the waste and confusion that might otherwise result from a lack of that showing, (3) avoiding disruption of the ballot and election preparation process, (4) assuring honest elections, and (6) avoiding disruption of ongoing voter education, poll worker training, and impending responsibilities to assure ballot accuracy and timely distribution of absentee ballots."

practices. Rather, the court must determine that the offered justification is *real*, and not merely a pretextual justification for its practices. In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), the court specifically stated that:

> "Reliance on suppositions and speculative interests is not sufficient to justify a severe burden on First Amendment rights." 462 F.3d at 593 *citing Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 315-16 (3d Cir. 1999).

As the Supreme Court cautioned in *U.S. v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 2275, 135 L.Ed.2d 735 (1996), the court should be leery of justifications that are "invented post hoc in response to litigation." 518 U.S. at 533, 116 S.Ct. at 2275.

Even an otherwise legitimate state concern cannot be accepted without *evidence* that the problem the state is addressing is real. *See Washington State Grange v. Washington State Republican Party*, *supra*, where the court commented on the merits of a claim that a particular practice would result in voter confusion by stating that: "[i]n the absence of evidence, we cannot assume that Washington's voters will be misled." *Id*. at 1195. (Citations omitted). Therefore, it is insufficient for a state to merely assert one of the mantra defenses as justification for its statutes. Rather, it must present evidence of a real problem that its ballot access limiting statutes seek to address. The principle that a state must put forth actual evidence of the legitimacy of its proffered justifications is controlling law in the Sixth Circuit. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2005) (Rejecting rejected the State's argument that its laws were necessary to maintain "political stability" because "the State has put forth no evidence that [its] interests are compelling or that they are advanced by [its practices.].")

In applying the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780, 787-88, 103 S.Ct. 1564, 1569, 75 L.Ed.2d 547 (1983), discussed is Doc. 21, P: 12, the court is required to establish the *legitimacy* and *strength* of a proffered state interest. Inasmuch as the state has not provided any *evidence* of the legitimacy of its proffered interest, there is nothing to be weighed against the burdens imposed by the challenged statutes on the Plaintiffs.

In addition to having a legitimate reason for its practice, the state must also show that its practice actually corrects (or, at least, mitigates) the problem that "justifies" its action. *See Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 315 (3d Cir. 1999) (Holding unconstitutional a state action because, even though the action was justified

as an effort to respond to a real problem, the state failed to specifically demonstrate how its action served its interests.").

Defendants have failed to offer any evidence that their asserted "justifications" for Tennessee's ballot access limitations are anything more that fabrications and have made no efforts to demonstrate how the challenged statutes direct address, let alone solve, the asserted "problem." Therefore, they may not be properly considered by the court.

II: ANALYSIS OF DEFENDANTS' EXPERT REPORTS:

Defendants' expert witness reports do not specifically address the issues raised in the individual Counts of Plaintiffs' Complaint. Rather, they present assertions that have varying degrees of relevance to various Counts asserted by Plaintiffs. Therefore, it is appropriate to begin with an examination of the propositions advanced by Defendants' experts.

Five general observations about Defendants' experts' reports are relevant:

First: Defendants' experts do not address the issues relevant to this case. Instead, they focus primarily on identifying alternative explanations for why Plaintiffs have had been unable to obtain ballot access in the past and have attempted to artificially justify the burdens on *party* access to the ballot with arguments relating to ballot access on the part of *candidates*. These two types of ballot access restrictions are independent, and arguments relating to the latter are not applicable to ballot access restrictions imposed on the former.

Second: Defendant's experts seek to justify Tennessee's restrictions on recognition of *minor parties* based on contentions that *candidates* have easy access to the ballot as independent candidates. These arguments completely ignore the fact that impediments to party recognition violate candidates' First Amendment rights of free association, and rights to identify their association on the ballot, *in addition to rights of ballot access*.

Third: Defendants' experts assert -- Dr. Oppenheimer expressly and Dr. Donovan implicitly – propositions that have been expressly rejected by controlling rulings by the U.S. Supreme Court and the Sixth Circuit.[2]

[2] Inasmuch as neither Dr. Oppenheimer nor Dr. Donovan is an attorney, they may be forgiven for not recognizing that their contentions, and conclusions, have been rejected as a *matter of law*. However, Defendants are represented by counsel, and her reliance on the opinions of Defendants' experts for propositions that have been rejected by controlling authorities cannot be so easily forgiven.

Four: Most of the data on which Defendants' experts rely is either (a) outdated, (b) presented in an incomplete and misleading manner or (c) based on studies of *ballot initiatives* – which are wholly different from petitions needed to qualify minor parties and their candidates.

Five: Defendants' expert attempt to justify Tennessee's ballot access restrictions *individually*. However, as discussed in Plaintiffs' General Memorandum in Support of Motions for Summary Judgment [Doc. 21, P:11-12], the Court must consider the *cumulative* effect of restrictions that may individually be constitutional. Neither of Defendants' experts has addressed the issue of the *cumulative* effect of the burdens imposed by Tennessee.

These core flaws in Defendants' experts' Reports are addressed below:

II-A: Report of Dr. Todd Donovan:

Dr. Todd Donovan begins his report with an "examination" of the record of success of minor party candidates and the historical impact of minor parties in general. [Report, P:1-11] The essence of Dr. Donovan's summation is that minor party candidates have little electoral success. However, this is irrelevant to Plaintiffs lawsuit. Regardless of their prospects for success, minor parties and their candidates have a right to *try* to win. The issue is not whether minor parties and their candidates will win. The issue is whether the state has unconstitutionally denied them an opportunity to *participate* in elections as parties and as party candidates.

On page 13 of his Report, Dr. Donovan attempts to summarize recast Plaintiffs arguments as the basis for his arguments against these assertions. In this summation, Dr. Donovan references, as "authority" for his characterization of Plaintiffs argument, pages 31 and 32[3] of the "Affidavit and Expert Opinion of Richard Winger," Plaintiffs' expert. However, Mr. Winger's report – attached to Docs. 19 and 20 -- is only 3 pages long *and do not contain the assertions attributed to him.* It is not known what document Dr. Donovan is referring to, but it is clear that he has mischaracterized Plaintiffs' positions for the purpose of attacking a "straw man."

On pages 13-16 of his Report, Dr. Donovan discusses signature petition requirements and filing dates. However, his analysis does not present evidence that is relevant to this case. Specifically, Dr. Donovan notes that some states have petition due-dates earlier than Tennessee. This observation suffers from three flaws.

[3] See footnotes 24 and 28 of Dr. Donovan's report.

First: Dr. Donovan does not state when the referenced States conduct their primary elections. The Courts have repeatedly held that filing deadlines more than 120 days before an election are unconstitutional.[4] Without knowing the relevant election dates, and the temporal relationship between the filing date and the election date – Dr. Donovan's observations have no significance.

Second: The Table used by Dr. Donovan to illustrate his point about filing dates and signature requirements [Table 1. Page 16] relates to *ballot initiatives*, *not party or candidate filing dates.* Ballot initiative filings and minor party/candidate filings are entirely different. Ballot initiatives and ballot access by minor parties (and their candidates) are of significantly different relevance to voters and enjoy significantly different visibility among potential petition signers. Moreover, the ability to parties (and candidates) to appear on the ballot and the inclusion of ballot initiative are totally different in their respective importance to voters and in the general public visibility of petition signature collection efforts. Therefore, rules relating to ballot inclusion of one are not relevant in considering the constitutionality of ballot access limitations imposed on the other.

Third: The mere fact that other states *have* filing deadlines earlier than Tennessee is irrelevant to a determination of *the constitutionality* of the Tennessee schema. There is little doubt that many states employ practices that would be held unconstitutional *if challenged in court*. Plaintiffs have been unable to identify any court challenge to the statutes of the states referenced by Dr. Donovan. Therefore, the *mere existence* of these statutes is not relevant evidence of their constitutionality – or the constitutionality of the challenged Tennessee statutes[5].

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[4] Case authorities supporting this point are identified in Doc. 18 at page 8, fn 8.

[5] Illustrative of this point is the fact that, in 2010, Dr. Donovan might have also identified Tennessee as a state where an early (March) filing deadline existed. However, in *Libertarian Party of Tennessee Et. Al. v. Goins*, 3:08-00063 (M.D. Tenn Sept. 20, 2010) this court held that the March filing deadline was unconstitutional. This shows that the mere existence of early filing deadlines that have never been challenged in court is not "evidence" of their constitutionality.

Dr. Donovan also devotes a significant portion of his Report to a discussion of differences in the success of minor parties in obtaining ballot access in other states and factors that may explain by Plaintiffs have not had success in obtaining ballot access in Tennessee. Based on his analysis, Dr. Donovan concludes that "*there is simply less market demand for minor parties in Tennessee than in other states*." [Report, P:27] Once again, Dr. Donovan's conclusion is irrelevant to the issue before the court – which is whether Plaintiffs have been unconstitutionally burdened by Tennessee's requirements for demonstrating that they *do* have sufficient support to justify ballot access.

In response to Plaintiffs' contention that Tennessee's filing deadline falls at a time in the election cycle before voters have become seriously interested in the upcoming election [asserted in Doc. 19, P:5-8], Dr. Donovan relies exclusively on arguments relating to interest in *presidential* primaries. However, interest in *presidential* primaries is entirely different from interest in state and local elections and in interest in allowing alternative minor parties to have candidates for these offices.[6] Moreover, even where interest in a presidential primary galvanizes interest in that race, there is no evidence that such interest extends to interests in state and local elections.

In page 22 of his Report, Dr. Donovan attempts to justify Tennessee's 2.5% party petition signature requirement by identifying, in Table 2, six states with similar party-qualifying petition signature. However, Dr. Donovan mixes apples and oranges by identifying *current* petition requirements while identifying parties that qualified for the ballot based on *past* requirements. Specifically:

> Dr. Donovan lists Idaho, whose petition signature requirement is *now* 2%, and notes that the Libertarian Party has obtained ballot inclusion. However, Libertarian Party first got on the ballot in Idaho in 1976, when only 1,500 signatures were required for new parties, and has remained on the ballot ever since.
>
> Dr. Donovan lists Indiana, whose petition signature requirement is *now* 2%, and notes that the Libertarian Party has obtained ballot inclusion. However, the Libertarian Party has not done a statewide petition in Indiana since 1994. It has been on ever since, not because it has petitioned, but because Indiana has a fairly

[6] It is also significant that in 2008, more than half the states held their presidential primary elections before February 13. However, in 2012, half the states will not hold their presidential primaries until after April 13. See http://www.ballot-access.org/2011/11/25/november-2011-ballot-access-news-print-edition/. Thus, *local* interest in such presidential primaries is does not now galvanize until later in the year.

> easy vote test for a party to *remain* ballot-qualified, and the Libertarian Party has always met it starting in 1994.
>
> Dr. Donovan lists Kansas, whose petition signature requirement is now 2%, and notes that the Libertarian Party has obtained ballot inclusion. However, the Libertarian Party has not done a statewide petition in Kansas since 1990. It has been on ever since for the same reasons as Indiana.
>
> Dr. Donovan lists Oklahoma, whose petition signature requirement is now 3%, but then leaves the "parties with candidates" blank, because no minor party has successfully petitioned in Oklahoma since 2000.
>
> Dr. Donovan lists Pennsylvania, whose petition signature requirement is now 2% of winning candidate's vote for statewide *judicial* office in the odd year before the more important even year elections. Because of the limited interest (and low voter turnout) in judicial elections, the numerical signature requirement in Pennsylvania is equivalent to approximately one-half of 1% when applied to the same computation base used in Tennessee[7].

In pages 28-29 of his report, Dr. Donovan notes that 18 states have filing dates earlier than Tennessee's and asserts that this is "evidence" that Tennessee's filing date is constitutional. The error in Dr. Donovan's contention is that he does not state when the referenced states hold their primary elections. For example, March filing date might be appropriate if the state held its primary election is April. However, Tennessee does not hold its primary election until August, more than 120 days after the required filing date.

As discussed in Plaintiffs' motion for summary judgment on Count I-A, [Doc. 18, P: 8], filing deadlines too far in advance of the State's primary elections are unconstitutional. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (filing deadline for new political party of 120 days prior to primary election is unconstitutional); *Blomquist v. Thomson*, 739 F.2d 525 (10th Cir. 1984) (Same); *McLain v. Meier*, 851 F.2d 1045, 1050-51 (8th Cir. 1988) (February deadline, 90 days prior to the primary, held unconstitutional); *Libertarian Party of Ohio v. Husted*, 2:11-cv-722 (S.D. Ohio September 7, 2011) (Enjoining Ohio from enforcing requirement the new parties file petitions 90 days before the primary elections.)

As discussed in Plaintiffs' General Memorandum in Support of Motions for Summary Judgment the court must determine the constitutionality of a State's fining requirements based on the totality of the burden they impose. [Doc. 21, P: 11-12] Dr. Donovan's "evidence" relates

[7] While defects in Dr. Donovan's Report are not, *per se*, of great relevance to Defendants Response, they are relevant to determining how much credibility should be attached to Dr. Donovan's opinion.

only to Plaintiff's contention that the Tennessee's filing deadline in *too early in the year*. But Dr. Donovan makes no attempt to establish that Tennessee's filing deadline in not unconstitutionally distant from the date of Tennessee's primary elections.

Finally, in the discussion on pages 29-30 of his report, Dr. Donovan implicitly challenges the credibility of Plaintiffs' expert by noting that filing dates published in *Ballot Access News*, which is authored by Plaintiffs expert, differ from the dates published by the Federal Elections Commission. However, at the instigation of Plaintiffs' expert, on December 1, 2011, the FEC revised the chart relied on by Dr. Donovan to report the correct dates recited by Defendant's expert[8].

In pages 30-31 of his Report, Dr. Donovan attempts to justify Tennessee's ballot access statutes by contending that "Non-Major Party Ballot Access is Robust in Tennessee." He justifies this proposition with the contention that minor party candidates have easy access to the ballot *as independents* [P-30] and "evidence" based on the presence of independent candidates for <u>*state*</u> offices. However, as discussed in the following discussion of Dr. Oppenheimer's expert report, the courts have repeatedly rejected the proposition that access to the ballot as an Independent candidate is a justifiable substitute for ballot inclusion as a party candidate. But more importantly, reliance on evidence of historical ballot access as candidates for <u>*state office alone*</u> is insufficient.

In *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995), the Supreme Court stated that:

> "Nothing in the Constitution or The Federalist Papers ... supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." 514 U.S., at 842, 115 S.Ct. 1842. (Emphasis added)

More recently, in *Cook v. Gralike*, 531 U.S. 510, 528, 121 S.Ct. 1029, 1029, 149 L.Ed.2d 44 (2000), the Supreme Court emphasized that:

> "… Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside." (Emphasis added).

[8] Although the recited dates are not inherently relevant to this litigation, Dr. Donovan's reliance on *secondary* sources for his arguments – as opposed to Mr. Wingers reliance on *primary* sources for his evidence – raises fundamental questions about the significance of Dr. Donovan's "expert" testimony.

Therefore, even evidence that a state has not impaired ballot access on the part of candidates for *state* office is insufficient in the absence of evidence that the challenged practice does not impair ballot access on the part of candidates for *federal* office. Neither of Defendant's experts have even suggested that such evidence exists.

II-B: Report of Br. Bruce Oppenheimer:

II-B-(1): A Candidate's Party Label Provides a Valuable Voting Cue:

Dr. Bruce Oppenheimer begins his report with a general argument that "*[t]here is no rationale for minor parties to incur the cost of Party ballot access because there exist other vehicles for minor parties and their candidates to influence elections that are less costly and as, if not more, effective than ballot access.*" [Report, P:1-2] Dr. Oppenheimer bases this contention on the assertions that:

a) "[H]aving a party label for a minor party candidate has little or no added value…" [Report, P:1] and

b) The fact that minor party candidates have little likelihood of prevailing makes participation in the primaries to nominate major party candidates a preferred method of influencing representation. [Report, P:1-2]

Dr. Oppenheimer goes on to contend that there is no real need for minor parties to have ballot access because

a) In Tennessee, it is relatively easy for *candidates* to obtain ballot inclusion as Independent candidates, and

b) "The success of minor parties and their candidates rests not on the party label but, instead on the visibility of the candidate." [Report, P:2].

As the court held in *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir.1980), "*[a] candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process.*" Moreover, in *Storer v. Brown*, 415 U.S. 724, 645, 94 S.Ct. 1274, 1286, 39 L.Ed.2d 714 (1974), the Supreme Court specifically recognized that "*the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.*" See also *Bullock v Carter*, 405 US 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972) in which the Court said: "*[w]e can hardly accept as reasonable*

an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law." 405 US at 146-47.

Dr. Oppenheimer's apparent contention that a party label next to a candidate's name on the ballot is of little importance is equally flawed. In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Court also considered expert testimony on the issue and adopted the argument that:

> *"[P]arty candidates are afforded a "voting cue" on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior. Many voters do not know who the candidates are or who they will vote for until they enter the voting booth. Without a label, voters cannot identify the nonparty candidates or know what they represent."*

Id. at 172. According to the expert witness in *Rosen*, "*this effect is so substantial that Ohio dooms Independent candidates to failure by its means of structuring the ballot.*" [9] The importance of voting cues was also established in: Dalton, Russell, "*Partisan Mobilization, Cognitive Mobilization and the Changing American Electorate*," Electoral Studies, 2007, 26(2), pp. 274-86; Rahn, Wendy, "*The Role of Partisan Stereotypes in Information Processing About Political Candidates*," American Journal of Political Science, 1993, 37(2), pp. 472-96 and Conover, Pamela Johnston, "*Political Cues and the Perception of Candidates*," American Politics Research, 1981, 9(4), pp. 427-48;

On page 2 of his Report, Dr. Oppenheimer says "*there is no empirical evidence of an additional benefit in terms of winning votes for candidates running with a minor party label as opposed to running as independents*." To the contrary, a study by Richard Winger, Plaintiffs' expert, shows that presidential candidates in the counties of Michigan, Indiana, Kentucky, West Virginia, and Pennsylvania that border Ohio did substantially better than those same candidates did in the neighboring Ohio counties where they were denied the benefit of party labels. See Winger, R., "*Ballot Format: Must Candidates be Treated Equally*," The Cleveland State Law Review, Volume 45, number 1, 1997.

On page 2 of his Report, Dr. Oppenheimer further says, "*If having the party label on the ballot were worth more in terms of electoral performance of their candidates, minor parties would undertake the effort of getting ballot access*." Apparently, Dr. Oppenheimer is unaware

[9] Unlike Dr. Oppenheimer, the expert in *Rosen v. Brown*, Professor Jack DeSario, was recognized as an expert on voting behavior. Dr. Oppenheimer has no apparent credentials in the subject of voter behavior, and has not referenced and study or authoritative source for his naked conclusion. Accordingly, and in accordance with principles of *stari decicis*, this Court is bound by the controlling authority of *Rosen v. Brown*.

that, as this Court recognized in its opinion in *Libertarian Party Et. Al. v. Goins*, 793 F. Supp. 2d 1064 (M.D. Tenn. 2010), there are numerous instances in which minor parties in Tennessee have attempted, but failed, to obtain ballot access in Tennessee.

Dr. Oppenheimer's contention that is the candidate, not the party, that makes a difference in electoral success is also rendered false by the realities of electoral politics. Throughout the nation, states are now engaged in redistricting to reflect the results of the 2010 census. It is too well recognized to require citation of authority that the party in power in state legislatures seek to redefine district boundaries based on concentrations of voters of their own party so as to give the candidates of their party an electoral advantage. Such practices would be meaningless of Dr. Oppenheimer's proffered conclusion was correct.

Dr. Oppenheimer further ignores the fact that electoral success *per se* is not the only way in which minor parties are burdened by the lack of a party identification of their candidates on the ballot. Specifically, the mere presence of "Party candidates" on the ballot raises public awareness of the existence of an organized party apparatus and makes it more possible for minor parties to recruit voters, and candidates, to their cause.

As the Supreme Court said in *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968):

> "New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." 393 U.S. at 23, 89 S.Ct. at 10-11.

Requiring the candidates on new, minor parties to seek office as independent candidates prevents minor parties from establishing the ballot presence, and electoral visibility, that is needed for them to grow.

Significantly, while Dr. Oppenheimer suggests that a party label is not important to candidates, he also states that "[u]n like a *minor* party candidate, a label is *very helpful* to a *major* party candidate." [Report, P:3; Emphasis added] This raises the obvious question: "Why is a party label important to a *major* party candidate but not a *minor* party candidate." A minor party cannot become a major party without public awareness of its existence, and the presence of its candidates on the ballot *with a party label*.

Dr. Oppenheimer also contends that because candidates are grouped (on the ballot) by office, not by party, the "*ballot structure greatly reduces the role of party label in voting and*

leads votes [sic] to focus more on candidates." [Report, P:3] However, Dr. Oppenheimer's assertion is flawed in two respects.

FIRST: Dr. Oppenheimer does not cite any evidence – from either his own research or from any authority – establishing that voters focus on *candidates* rather than *parties* in making their choices.

SECOND: Dr. Oppenheimer ignores the fact that TCA §2-5-208(d)(1) [the constitutionality of which as challenged in Count IV of Plaintiffs' Complaint] mandates that candidates by listed on the ballot in a manner that gives the candidates of parties priority placement on the ballot and relegates independent candidates to the bottom of the ballot. Priority placement on the ballot has consistently been found to provide an advantage to candidates placed at the top of the ballot.

Finally, Dr. Oppenheimer suggests that Tennessee's open primary system of nominating candidates is sufficient to enable *minor* parties to advance their political agenda by participating in the selection of the nominees of the *major* parties. [Report, P:3] However, this proposition is contrary to the proposition stated by the Supreme Court, in *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957), that:

> "In our political life, third parties are often important channels through which political dissent is aired. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society."

In *Williams v. Rhodes*, 393 U.S. 23, 31, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), the Supreme Court said:

> "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes.

And in *Anderson v. Celebreze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) the Supreme Court said:

> "[I] is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint…" 460 U.S. at 793.

II-B-(2): Tennessee's Minor Party Signature Requirement:

In defense of Tennessee's minor party petition signature requirement, Dr. Oppenheimer notes, correctly, that other states hive higher signature requirements. However, Dr. Oppenheimer does not even attempt to address issues relating to *when* – during the year or the election cycle – minor party signature collection efforts must be undertaken. As Plaintiffs argue in their motion for summary judgment, it is the *combination* of a high signature requirement and an early filing requirement that makes Tennessee's requirements unconstitutional. Dr. Oppenheimer does not even attempt to address this issue.

Dr. Oppenheimer further suggests that "*the costs involved in organizing and obtaining signatures are declining because [of] internet access, various forms of social media and technological advances*" and "*obtaining registered voter lists , contacting voters, organizing workers, distributing information and other activities that used to impose significant costs on signature drives and now nearly cast free*." [Report, P:5] This contention has no relevance because no state permits petitions to be signed via the internet.

Signature collection is a "boots on the ground" activity. It requires real people to seek the signatures of other people. It is virtually impossible for new minor parties to satisfy high signature collection requirements without the assistance of paid petition signature collectors.

Lastly, Dr. Oppenheimer suggests that the "per signature" cost of paid signature collectors ($1.50-2.00 per signature) stated by Richard Winger in his affidavit/report, "*clearly exaggerates the real cost of obtaining signatures in the contemporary environment*." [Report, P:5] However, Dr. Oppenheimer does not suggest a different figure – or even indicate a factual basis for his conclusion.

Contrary to Dr. Oppenheimer's unsupported contention, as article in the Denver Post on May 10, 2010, "Heaping Burdens on Petitions" [http://www.denverpost.com /opinion/ci_15112507?source=bb] reports petition signature collection cost of $3.50 each, up from $1.50 for the prior year. Likewise, as article in the Detroit Free Press reports a petition signature collection cost of $3.50 per signature. [http://www.pridesource.com /article.html?article=8599] But perhaps most significantly, a study of 49 successful ballot initiatives in 2010 found an *average* cost of $3.39 per signature – with costs in excess of $9.00 in some cases. [http://www.ballotpedia.org/wiki/ index.php/2010 ballot_measure_petition

_signature-costs.] Thus, if anything, the costs recited by Richard Winger are well below the market rate for petition signatures.

The importance of paid signature collectors is so great that states with a history of oppression minor parties and their candidates-- including Colorado, Montana and Nebraska -- have proposed and enacted legislation specifically to make it illegal to use paid signature collectors. See http://www.ballotpedia.org/wiki/index.php/Pay-per-signature.

II-B-(3): April Minor Party Petition Filing Deadline:

In their motion for summary judgment on Count I-A, Plaintiffs argue that Tennessee's April filing deadline for minor party petitions in unconstitutionally early in the election cycle. In fact, as Plaintiffs state in their motion, *every* court to consider the issue has held that April filing deadlines are unconstitutional.

Dr. Oppenheimer's Report does nothing but attack the logic of judicial decisions cited by Plaintiffs. Specifically, he argues that the prolonged campaigns that characterize *presidential* primaries "proves" that voters are actively interested in electoral issues early in the election cycle. Therefore, according to Dr. Oppenheimer, minor parties do not face any impediment to motivating voters to sign the petitions for new parties.

The core problem with Dr. Oppenheimer's contention is that only *major* party candidates engage in prolonged presidential campaigns. During the protracted presidential campaigns, *minor* parties have no visibility, and there no basis for concluding that voter interest in third-party activities is promoted at a time when the major parties have not even chosen their candidates.

II-B-(4): Minor Parties Should Be Allowed to Control their Own Nominating Process:

In their motion for summary judgment (on Count IV), Plaintiffs argue, *inter alia*, that Tennessee's open primary system enables other parties (and/or their candidates) to flood a minor party's primary and defeat a candidate likely to pose a credible challenge to a major party candidate. Dr. Oppenheimer shrugs this contention off with the contention that major parties (and their candidates) would have no real reason to invade the nominating process of minor party candidates. [Report, P:6-7]

Dr. Oppenheimer's contention on this point is at odds with his contention that minor parties can advance their agenda by participating in the primary elections of the major parties

and helping determine who their candidate is. [Report, P: 1-2] That is, while arguing that the interests of *minor* parties are better served by invading the primaries of *major* parties, Dr. Oppenheimer contends that *major* parties would have no interest in invading the primaries of *minor* parties. Dr. Oppenheimer does not recite any basis for this conclusion.

III: ARGUMENTS RELATING TO SPECIFIC CLAIMS:

III-A: COUNT I-A:

In Count I-A, Plaintiffs argue that the April qualifying petition filing date for minor parties is unconstitutional – both because (a) it is too early in the election cycle and (b) it is too far in advance of the primary election. [With respect to their contention that the April filing deadline is too far in advance of the primaries, Defendants further argue that the April filing deadline both impermissibly limits new party formation and encourages the formation of splinter parties. Neither of these arguments is addressed by Defendants in their Response.]

III-A-(1) Tennessee's April Filing Deadline for New Parties in Unconstitutional:

As noted in Plaintiffs' Motion for Summary Judgment on Count I-A, *every* court decision addressing this issue has held that April filing dates for new parties are unconstitutional. Moreover, numerous courts have held that filing deadlines more than 120 days before a primary are unconstitutional. Significantly, in *Libertarian Party of Ohio v. Husted*, 2011 U.S. Dist. LEXIS 100632 (S.D. Ohio 2011), the court issued an order enjoining Ohio from enforcing a filing deadline a mere 90 days before the election. Thus, Defendants have a heavy burden in arguing that Tennessee's April filing deadline is constitutional, and opinion testimony is is necessarily subordinate to judicial opinions reaching contrary conclusions..

Defendants base their opposition to Count I-A primarily of the Reports of their expert witnesses and the affidavits of three selected county election administrators. However, neither Defendants' "evidence," nor their accompanying arguments, are even remotely sufficient to overcome the weight of the related and controlling precedents.

III-A-(1)-(a) Defendants' Experts' Reports Are Irrelevant: As discussed in the preceding analysis of Defendants' experts' Reports, the premises on which they base their conclusions regarding the proposition that the ease of ballot access by independent candidates are irrelevant and contrary to controlling precedent that establishes that, as a matter of law,

candidacy as an Independent is not an adequate substitute for candidacy as the nominee of a Party.

Defendants also rely on the expert report of Dr. Donovan to dispute the proposition that Tennessee's April filing deadline does not come at a time of the year when voter interest has not yet galvanized. [Doc. 36, P:22-23] Defendants also devote many pages to a discussion of the current Republican *presidentia*l debates and early *presidential* primaries. [Doc. 36, P:22-23] However, *presidential* campaigns are of an entirely different character than efforts to qualify a new political party in a State. But most importantly, Defendants experts' conclusion that Tennessee's April filing deadline does *not* come before voter interest has galvanized is contrary to a plethora of decisions holding to the contrary.[10]

Additionally, the undocumented assertions of Defendants' experts that the financial burden that Tennessee's party petition signature requirement imposes on new parties cannot be accepted *because (as discussed supra) it is contrary to documented facts.*

III-A-(1)-(b) Affidavits of Country Election Officials Are Irrelevant: In defense of Tennessee's April filing deadline for minor parties and their candidates, Defendants also offer the affidavits of three county election administrators. When reduced to their essence, all of these affidavits say the same thing: (a) it's a lot of work to verify petition signatures and (b) we're short of funds and staff. These contentions, and concerns, are irrelevant for evidentiary purposes.

As an evidentiary matter, Defendants affidavits are irrelevant for the simple reason that the county election administrators have *never had to verity minor party petition signature* because no minor party has, for almost half a century, conducted a successful signature collection drive to obtain ballot access. Therefore, the best that can be said for Defendants affidavits is that county election supervisors *might* face a daunting burden in verifying minor party petition signatures. "Might" is simply too slender a reed on which to base a ruling on the constitutionality of the challenged statute.

When reduced to their essence, Defendants are attempting to justify a minor party filing date based on the fact that the legislature will not appropriate sufficient funds to administer its

[10] *See McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Citizens to Establish a Reform Party in Arkansas v. Priest*, 970 F. Supp. 690 (D. Ark. 1996) and *American Party v. Jernigan*, 424 F.Supp. 943 (E.D.Ark.1977) cited and discussed in fn. 6 of Doc. 19.

laws based on a constitutional filing date. Under this logic, the State could limit voting to one hour on election day and argue that its limit was justified because the legislature did not appropriate sufficient funds to keep the polls open all day. Obviously, such a practice, and argument, would not satisfy constitutional standards.

In their Response, Defendants make much of the fact that county election supervisors have 30 days to verify petition signatures[11] and absentee ballots must be mailed to voters 45 days before the primary. [Doc. 36, P:16-17]. In addition, time must be allowed for ballots to be prepared and for the Coordinator of Elections to approve these ballots. *Id.* Together, these requirements justify a filing deadline of, *at most*, 90 days before the primary election. While the affidavits of county election supervisors enumerate many other activities they are engaged in, none of this is irrelevant to determining when petitions must be filed.[12] That is, because TCA §2-13-107(b) established that petition signatures must be verified within 30 days, they must be verified within 30 days *of any prescribed filing date* – regardless of whether that date is in April, May or later.

Count I-A presents an instance in which the Court must consider the cumulative effect of Tennessee's minor party ballot access petition requirements. If the county election supervisors are believed:

1) They face an excessive burden because they must verify an extraordinary number of signatures.

2) They face an excessive burden because Tennessee requires an excessing number of signatures.

3) They face an excessive burden because the Tennessee Code limits the time they have to verify petition signatures.

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[11] TCA §2-13-107(b) establishes the time county election supervisors have to verify petition signatures. Thus, the legislature has, by statute, determined what is a sufficient time to perform this activity. In their Response, Defendants do into great detail about that many steps that must be taken to verify signatures. While this discussion is obviously intended to persuade the Court that county election supervisors face a daunting task, the statute established what the legislature considers a reasonable time to verify petition signatures, and the detail provided by Defendants is irrelevant.

[12] In pages 21-22 of their Response, Defendants reference several authorities for the proposition that states must have time to verify petition signatures etc. Plaintiffs do not dispute this general proposition. However, inasmuch as the Tennessee legislature has established the time within which these activities must be accomplished, Defendants' general argument that time in needed for the administrative task of verifying signatures etc., Defendants authorities have no independent relevance and add nothing to the discussion.

If the burden of verifying signatures is too great, the solution is either to appropriate more money, reduce the signature requirement or enlarge to time allowed for signature verification. All of these alternatives is within the control of the legislature, and the legislature's refusal to take any of these actions is not justification for upholding a filing deadline that repeatedly been held to be unconstitutional.

III-A-(2) Tennessee's Party Petition Signature Requirement is Excessively Burdensome:

Defendants devote six pages of their Response [P: 26-32] to their argument that courts have upheld formulas even more restrictive than the Tennessee 2.5% (of the total number of votes cast for gubernatorial candidates in the most recent election of governor) used to determine the number of petition signatures required to "qualify" a new minor party. Plaintiffs do not dispute that greater signature requirements have been upheld, and even noted this fact in their Motion for Summary Judgment on Count I-A. [Doc. 19, P: 12-13][13] But the formula alone is not what Defendants take issue with. Rather, it is the *cost* of complying with this signature requirement that Plaintiffs contend imposes an unconstitutional burden. No identified case has discussed the significance of this economic burden.

In their Motion for Summary Judgment, Plaintiffs estimate the cost of complying with Tennessee's party petition requirement as up to $120,000 and contend that the cost of petition signature collection imposes an excessive burden on minor parties. [Doc. 19, P: 15] In response to this argument, Defendants present two argues, neither of which is supported by "evidence."

FIRST: Defendants say that "*Plaintiffs may incur some costs because of the choice to hire individuals to collect signatures, does not impose severe burdens on the Plaintiffs*," [Doc. 36, P: 30]. In making this argument, Defendants seek to diminish the burden of collecting over 40,000 signatures by suggesting that only "some" costs are likely to be incurred.

Defendants also claim that Plaintiffs'' expert cited no data in support of his estimate of signature collection costs. However, as discussed *supra*, independent published sources unambiguously establish that signature collection costs are, in fact, significantly in excess of the costs recited by Defendant's expert. That is, while Plaintiffs' expert estimated the cost of

[13] Under current law, it requires approximately 40,000 valid signatures to become a "recognized minor party." During the 2011 legislative session, Senator Stacey Campfield, a Republican, introduced a bill (S.B. 617) that would have reduced the signature requirement to 2,500 While the bill died in committee, Senator Campfield's action at leasr demonstrates that some members of the General Assembly believe that Tennessee's requirements are too onerous.

signature collection at between $1.50 and $2.00 per signature, an independent study of 49 successful ballot initiatives in 2010 found an average cost of $3.39 per signature – with costs in excess of $9.00 in some cases. [http://www.ballotpedia.org/wiki/ index.php/2010 ballot_measure_petition_signature-costs.] Thus, if anything, the costs recited by Richard Winger are well below the market rate for petition signatures.

SECOND: Defendants contend that the costs of signature collection estimated in Defendants' Motion for Summary Judgment is based on an artificial premise that all signatures must be collected by paid signature collectors. However, Defendants do not offer any evidence that this assumption is not accurate. In fact, even if only half the requisite number of signatures had to be collected by paid signature collectors, based on the costs reported in the above published authority would put this cost at over $100,000. Even this figure would represent a sum far in excess of funds available to the organizers of a new minor party.

III-A-(3): Summary:

In *Libertarian Party of Tennessee Et. Al. v. Goins*, 793 F. Supp. 2d 1064 (M.D. Tenn. 2010), this Court held that Tennessee's prior (March) new party petition filing date was unconstitutional – and specifically cited cases holding that even an April filing date is unconstitutional. The legislature has had its chance to establish a constitutional filing date and has chosen not to do so.

WHEREFORE, the Court should hold that (a) Tennessee's requirement that parties file their qualifying petitions in April is unconstitutional and (b) as relief, this Court should award Plaintiffs status as "recognized minor parties."

III-B: COUNT I-B:

TCA § 2-1-104(a)(24) provides::

> "'Recognized minor party' means any group or association that has successfully petitioned by filing with the coordinator of elections a petition which shall conform to requirements established by the coordinator of elections, but which must at a minimum bear the signatures of registered voters equal to at least two and one-half percent (2.5%) of the total number of votes cast for gubernatorial candidates in the most recent election of governor, and on each page of the petition, state its purpose, state its name, and contain the names of registered voters from a single county."

Plaintiffs contend that TCA §2-1-104(a)(24) represents an unconstitutional delegation of power to the Coordinator of Elections because it (a) violates the prohibition against the delegation of legislative powers, (c) is unconstitutionally vague and (c) violates the Elections Clause of the U.S. Constitution.

III-B-(1): TCA §2-1-104(a)(24) Is Unconstitutionally Vague:

In their Motion for Summary Judgment on Count I-A, Plaintiffs contend that TCA § 2-1-104(a)(24) represents an unconstitutional delegation of legislative powers and is unconstitutionally vague because it does not delineated the limits of the powers of the Coordinator of Elections. As an example of the problem represented by TCA § 2-1-104(a)(24), Plaintiffs suggest that statute gives the Coordinator of Elections to power to impose a petition signature requirement in excess of what is constitutionally permissible.[14]

Defendants dismiss this argument with the self-serving conclusion that "the plain language of the statute vests discretion in the Coordinator of Elections to establish the *form* of the petition and nothing more.' [Doc. 36, P: 35][15] While that may have been the intent of the statute, that is not what it says.

The portion of TCA § 2-1-104(a)(24) that denies the Coordinator of Elections the authority to reduce the number of petition signature requirements unambiguously limits the discretionary power of the Coordinator of Elections *with respect to the number of petition signature requirements he/she may require*. This portion of TCA § 2-1-104(a)(24) would have no relevance if, as Defendants contend, that statute only delegated to power to establish the *form* of the petition.

It is a fundamental principle of statutory construction that a statute must be construed to give meaning to all the provisions of the statute. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 520, 99 L. Ed. 615 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute."). Defendants' proffered interpretation of TCA § 2-1-

[14] Specifically, Plaintiffs contend [Doc. 19, P:21] that" "[b]ecause the statute merely establishes a minimum signature requirement that the Coordinator of Elections cannot go below, the Coordinator of Elections remains free to establish a higher requirement—and the statute does not place any upper limit on the number of signatures than may be required. Petition signature requirements represent one of the most frequently litigated issues in ballot access law. Case law makes it clear that petition signature requirements in excess of 3-5% are unconstitutional. However, because TCA §2-1-104(a)(24) does not limit the number of signatures the Coordinator of Elections may require, he is free to require an unconstitutional number of signatures."

[15] Defendants' contention that TCA § 2-1- 104(a)(24) is only a grant of authority to establish the form of petitions is repeated in many portions of their Response.

104(a)(24) violates this principle by suggesting that TCA § 2-1-104(a)(24) should be read as if the limitation on the number of petition signatures that the Coordinator of Elections may require was not even included in the statute.

Defendants further argue that the scenario suggested by Plaintiffs (as well as Plaintiffs contention that TCA §2-1-104(a)(24) permits the Coordinator of Elections to impose unconstitutional requirements that, for instance, signatures must be notarized) are merely hypothetical consequences of applying TCA §2-1-104(a)(24) as written. According to Defendants, the existence of such hypothetical applications of TCA §2-1-104(a)(24) are insufficient to sustain a *facial* challenge to the constitutionality of the statute. [Doc. 37, P:34-35] However, Plaintiffs are not asserting a facial challenge to the constitutionality of TCA §2-1-104(a)(24). Instead, they are asserting that TCA §2-1-104(a)(24) is unconstitutionally vague, and a challenge asserting unconstitutional vagueness is not subject to the general standards for challenging the validity of a statute based on how it is, or may be, applied..

Defendants further argue that TCA §2-1-104(a)(24) is not unconstitutionally vague because *other* provisions of the Tennessee Code establish standards *for verifying petition signatures*. [Doc. 36, P:35] This argument is, however, irrelevant because the discretion granted to the Coordinator of Elections by TCA §2-1-104(a)(24) is not limited to anything having to do with petition signatures. To the contrary, it provides that the petition "shall conform to requirements established by the coordinator of elections", *without <u>any</u> limitation on what those requirements may be*.

Finally, TCA §2-1-104(a)(24) does not in any way limit ***<u>when</u>*** the Coordinator of Elections must publish his requirements. Thus, even of Defendants were correct in asserting that TCA §2-1-104(a)(24) only refers to matters relating to the form of party petitions, the Coordination of Elections could refrain from announcing his requirements until it is so late in the election cycle that no party could possibly connect the requisite number of signatures in time to satisfy the statutory filing deadline.

<u>III-B-(2): TCA §2-1-104(a)(24) Constitutes an Unconstitutional Delegation of Powers to the Coordinator of Elections</u>:

In pages 36-37 of their Response, Defendants appear to be arguing that the "non-delegation doctrine" only applies to acts of Congress, and not to the acts of the Tennessee General Assembly. This argument suffers from two general flaws:

FIRST: The power purportedly delegated to the Coordinator of Elections by the General Assembly applies to *federal* elections as well as to *state* elections. The Elections Clause of the U.S. Constitution unambiguously states that regulations relating to elections to federal offices must be established *by the legislature*. To the extent that TCA §2-1-104(a)(24) has implications for election to federal office, the Tennessee legislature cannot delegate its powers to the Coordinator of Elections.

SECOND: Defendants contend that TCA §2-1-104(a)(24) cannot be held unconstitutional because the Coordinator of Elections has "*promulgated no new rule nor issues any directive in the absence of legislative action.*" [Doc. 36, P:40] However, this contention misses the point. Under TCA §2-1-104(a)(24), the Coordinator of Elections *can* establish requirements that have not been established by the legislature. The fact that he has not yet done so (a point that Plaintiffs do not concede) does not make TCA §2-1-104(a)(24) any less an unconstitutional delegation of a uniquely legislative power.

III-B-(3): Statutory Limit on New Party Names Is Unconstitutional:

TCA §2-15-107(d) contains a prohibition against a new party including the word "Independent" or "Nonpartisan" in its name. This obviously violates principles of political free speech. While the Coordinator of Elections may argue that this prohibition is necessary to avoid confusion on the ballot where there are independent candidates, there is no reason why such candidates cannot be identified as "unaffiliated" and all confusion avoided. Thus, the state can avoid ballot confusion through a means that does not imping on a party's rights of free speech.

Defendants do not offer any arguments in opposition to Plaintiffs claim. Rather, they argue only that Plaintiffs lack standing to assert their claim because neither of the Plaintiffs includes the word "independent" or "nonpartisan" in their name. [Doc. 36, P:42] Therefore, according to Defendants, Plaintiffs are not presenting a case and controversy which they have standing to make. This argument suffers from two fatal flaws.

FIRST: In *Libertarian Party Et. Al. v. Goins*, 793 F. Supp. 2d 1064 (M.D. Tenn. 2010), this court expressly recognized that it is not necessary for a plaintiff to have already suffered an injury to have standing to assert a claim that a statute is unconstitutional.[16]

[16] As authority for its holding, the court cited *Williams v. Rhodes*, 393 U.S. 23, 28, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) (Holding that the Socialist Labor Party had standing to challenge Ohio's restrictions on minor party ballot

SECOND: The implication of Defendants' argument is that Plaintiffs must change their name – to include the words "independent" or "nonpartisan" in their name *before* they have standing to raise their claim. However, this argument ignores the implications of other provisions of the Tennessee Code. For example, as minor parties, Plaintiffs have to satisfy the onerous petition requirements of the Tennessee Code (discussed *supra*)—and incur the massive expense of doing to. If Plaintiffs undertook a petition drive via a petition effort in which they included the words "independent" or "nonpartisan" in their name, they risk being denied ballot inclusion by virtue of TCA §2-15-107(d). Thus, the mere existence of TCA §2-15-107(d) has an extraordinary *chilling effect* on Plaintiffs choice of the name by which they wish to be known and represented on the ballot. Because of this chilling effect on their First Amendment rights to free speech – e.g. the right to identify themselves by the words "independent" or "nonpartisan" -- Plaintiffs have standing to assert their claim.

WHEREFORE, the Court should hold that TCA §2-1-104(a)(24) and TCA §2-15-107(d) are unconstitutional and enjoining Defendants from enforcing or applying them.

III-C: COUNT II:

In Count II, Plaintiffs contend that Tennessee's candidate petition filing schema is unconstitutional because: (a) the April filing deadline for candidate petitions is unconstitutionally early in the election cycle; (b) the time allowed for candidate petition signature collection in unconstitutionally limited and (c) the candidate nominating petition form prescribed by statute is unconstitutional. None of these contentions is addressed in the Reports of Defendants' expert witnesses or the affidavits submitted by Defendants. Rather, Defendants argue that Plaintiffs lack standing to assert this claim.

III-C-(1): Plaintiffs Have Standing To Challenge the Filing Date for Candidates:

Defendants contend that Plaintiffs lack standing to contest the April candidate filing deadline because they have not identified a candidate who has been or may be, injured by the

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access even though the party there had not filed any petition with signatures); *Storer v. Brown*, 415 U.S. 724, 738, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1973) (Holding that independent presidential and vice-presidential candidates had standing to challenge California's ballot access not withstanding their failure to file any petition with signatures seeking ballot recognition.); *Stevenson v. State Board of Elections*, 794 F.2d 1176 (7th Cir. 1986) (Holding that an independent presidential candidate has standing to challenge Illinois' early filing deadline without showing submissions of petition with signatures); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988) (Holding that minority parties who contested Oklahoma's petition requirements and filing deadline for third parties had standing despite their lack of compliance with statutes).

April filing requirement for candidates. Defendants do not dispute the proposition that Plaintiffs have "associational standing" to assert the interests of their members. However, they contend that Plaintiffs have failed to produce *evidence* that a member of their party would be directly impacted by the limitation on candidate filings. [Doc. 36, P:44]

It is indisputable that *parties* themselves cannot be candidates for elected office – only individual party *members* can be candidates. Therefore, ballot access limitations imposed on individual candidates have a direct impact on a party and its ability to promote its interests through the inclusion of its candidates on the ballot. Accordingly, a burden on ballot access on the part of candidates also imposes a burden of their parties.

Moreover, the existence of a statute that imposes an unconstitutional burden on candidates impairs a party's ability to recruit candidates. Any argument that Plaintiffs lack standing based on the absence of candidates puts the cart before the horse.

Finally, and perhaps most importantly, TCA §2-5-102(b)(5) prevents candidates from even beginning to collect petition signatures until January of an election year.[17] Therefore, Plaintiffs are prevented, by statute, from being able to identify candidates who may be affected by the challenged statute.

III-C-(2): The Existence of a Common Filing Deadline for All Candidates is Irrelevant:

On pages 45-46 of their Response, Defendants emphasize that all candidates – whether those of major parties, minor parties or independents – are required to file their candidate petitions on the same day. Defendants then rely on the fact that the filing deadline is non-discriminatory for their claim that the filing deadline for minor party candidates is constitutional. Defendants argument suffers from three flaws.

FIRST: Plaintiffs contend that the April candidate filing deadline is unconstitutionally early *for all candidates*. Therefore, the fact that it is uniformly applied to all candidates is irrelevant.

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[17] TCA §2-5-102(b)(5) states that:

> "Nominating petitions shall not be issued by any administrator, deputy, county election commissioner or employee of the coordinator's office more than ninety (90) days before the qualifying deadline for the office for which the petition is issued. In any year where reapportionment must occur, the coordinator of elections shall determine the earliest date on which petitions may be issued."

SECOND: In *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997), the court expressly rejected the State's arguments that establishing the same filing date for all candidates was necessary to serve any legitimate state interest. Notably, in rejecting New Jersey's proffered justification for its April filing date, the court said "the Secretary has been unable to articulate how achieving these goals makes it at all necessary or desirable to require alternative party candidates to file almost seven months before the general election." *Id.* at 881.

Just as April filing dates for new parties have been held to be too early because voter interest has not yet galvanized, in *Council of Alternative Political Parties* the court said "early spring filing deadlines require candidates to gather signatures at a time when the election is remote and voters are generally uninterested in the campaign." Id. at 880.

THIRD: TCA §2-5-103(a) requires that candidates file their petitions with, *inter alia*, the executive committee of the state party.[18] However, as this Court recognized in *Libertarian Party v. Goins*, "*in Tennessee, a new political party can only elect a state executive committee after State election officials certify its petition to be a statewide political party.*" 793 F. Supp. 2d at *59.

The established (major) parties have a state executive committee in place, so their candidates have someone to file their petitions with. However, as discussed *supra*, minor parties do not even have to be certified for 30 days after the April filing date for the party. Therefore, there is no one for minor parties to file their petitions with, as required by TCA §2-5-103(a). Thus, candidates of major and minor parties occupy significantly different positions, and the existence of a common filing date does not make that date constitutional as it applies to the candidates of minor parties.

III-C-(3): Candidate Petition Form Is Unconstitutional:

Plaintiffs argue that the candidate petition form mandated by the Tennessee legislature is unconstitutional because it requires signers to declare that they are members of the party whose nomination the candidate seeks. [Doc. 20, P: 8-10] The unconstitutionality of such provisions has been recognized based on the fact that they constitute an invasion of the petition signers right

[18] TCA §2-5-103(a) states that:

> "Each independent or primary candidate for an office elected by the voters of the entire state shall file the candidate's original nominating petition in the office of the state election commission and a certified duplicate with the coordinator of elections and with the chair of the party's state executive committee in the case of primary candidates."

of privacy. See *Libertarian Party of Tennessee v. Goins*, supra at *51; *Workers World Party v. Vigil-Giron*, 693 F. Supp. 989 (D.N.M. 1989); *Libertarian Party of Nevada v. Swackhamer*, 639 F. Supp. 565 (D. Nev. 1986). This is a particularly important consideration when applied to the candidates of minor parties. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982) (Holding unconstitutional a state statute requiring the minor parties disclose the names of their supporters because it imposed a severe burden on "a minor political party which historically has been the object of harassment by government officials and private parties." 459 U.S.at 88.

In response to this argument, Defendants contend that:

> "Code Ann. § 2-5-102 does not mandate that signers of candidate nominating petitions declare that they are members of the party whose nomination the candidate seeks. Instead, Tenn. Code Ann. § 2-5-102(a) states that ―[n]omination petitions shall be in substantially the following form: . . .‖ (emphasis added). There is nothing in the rest of that statute which states that signers of candidate nominating petitions must declare that they are members of the party whose nomination the candidate seeks or that a petition is not valid unless the signers declare that they are members of the party. In fact, Tenn. Code Ann. § 2- 5-102 makes no reference to such a requirement whosever." [Doc. 39, P: 47]

Defendants' argument is frivolous on its face. According to Defendants, a candidate would be free to ignore any provision of the form prescribed by the legislature as long as he "*substantially*" complied with the requirements of the form. However, while the *stature* says that the candidate nominating petition form must be "substantially" in the prescribed form, *the form distributed to candidates by the county elections supervisors* *does not contain such a statement.*

TSA § 2-5-102(b)(1) provides that:

> "All nominating petitions required for nomination and election to all congressional, state, county, municipal and political party executive committee offices shall be furnished only by the county election commission office. . . ."

And TSA § 2-5-102(b)(3) provides that:

> The items [in the form distributed by the county election commission office] may not be altered, and a petition on which any of these items has been altered may not be accepted in the office in which it is required to be filed in this state.

Thus, while TSA § 2-5-102(a) may permit the county election supervisors to deviate from the prescribed form (which none of them appear to do), candidates *cannot* alter the form (or, presumably, leave any portion for the form blank.).

WHEREFORE, the Court should hold that (a) Tennessee's requirement that candidates file their qualifying petitions in April is unconstitutional and (b) the candidate nominating petition form is unconstitutional.

III-D: COUNT III:

In Count III, Plaintiffs contend that (a) Tennessee's requirement that parties nominate candidates for certain offices through primaries, *and no other means*, is unconstitutional and (b) Tennessee's requirement that minor parties nominate their candidates through "open primaries" unconstitutionally impairs the Plaintiffs' freedom of association rights guaranteed by the First Amendment. Defendants do not directly address the arguments presented in Plaintiffs motion. [Doc. 20]. Rather, they contend that (a) Plaintiffs' are estopped from asserting their claim and (b) the Tennessee Code does not violate Plaintiffs rights to control their association.

III-D-(1): Defendants' Res Judicata Argument is Misplaced:

Defendants contend that the constitutionality of TSA §2-13-202 was ruled on in *Libertarian Party of Tennessee v. Goins*, *supra*, and that, therefore, Plaintiffs claim is barred by the doctrines of res judicata and collateral estoppel.

In order for estoppel to apply, four factors must be present: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) the determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have result in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Hooker v. Federal Election Com'n*, 92 F.Supp.2d 740, 744 (M.D.Tenn. 2000) (*citing N.L.R.P. v. Kentucky May Coal Co., Inc.*, 89 F.3d 1235, 1239 (6th Cir. 1996).

In their Response, Defendants contend that all of the requirements for estoppel are present. [Doc. 36, P: 49-51] Defendants and wrongs, for two reasons,

FIRST: The unconstitutionality of requiring new minor parties to nominate their candidates by primary elections was ***not*** separately challenged in *Goins.* Rather, in *Goins*, the

plaintiffs argued that the *cumulative effect* of multiple statutes,[19] only one of which related to primary elections, rendered the provisions of the Tennessee Code relating to ballot access by minor parties unconstitutional.

SECOND: With respect to TCA §2-13-202, in *Goins*, the issue was whether a new party had to qualify statewide for nominate candidates for the offices specified in that section. This is not the same as arguing against the mandatory nomination of candidates for those offices *through primaries*. In *Goins*,the Court did rule that "Plaintiffs have not demonstrated that these provisions [of TCA §2-13-202] burden their First Amendment rights" and "[t]his statute furthers a relevant state interest in requiring political parties to compete statewide to be deemed a statewide political party." However, this aspect of the ruling in *Goins* has nothing to do with the claims asserted in Count III.

In Count III, Plaintiffs are arguing that:

a) Requiring parties to nominate their candidates for certain offices through primaries *without permitting parties to nominate their candidates through any other means* is unconstitutional.

b) Requiring parties to nominate their candidates for some offices by primaries, while allowing them to nominate candidates for other offices by any means the party choses, serves no legitimate state purpose.

c) Tennessee's open primary system prevents parties from limiting their "association" to voters and candidates who share their philosophy.

These precise issues were not raised or actually litigated in the prior proceeding. For both of the foregoing reasons, the Court cannot find that the first prong of the estoppel test has not been satisfied.

III-D-(2): Tennessee's Mandatory Primary System is Unconstitutional:

As discussed in Plaintiffs motion for summary judgment [Doc. 20, P: 10 et. sec.], it is beyond dispute that states have no constitutional authority to interfere with political parties and impose state requirements on matters relating to the affairs of the party. The nomination of

[19] Specifically, Plaintiffs sought "a judgment declaring T.C.A., §§ 2-1-104(a)(14), 2-1-104(a)(29), 2-1¬107, 2-1-114, 2-13-201(a), and 2-13-202, as applied herein to the Plaintiffs for the 2008 Tennessee Primary and General Elections and all subsequent Primary and General elections in the State of Tennessee and the facts and circumstances relating thereto, unconstitutional in that they violate in their application to the Plaintiffs herein for the 2008 Tennessee Primary and General Elections …" Defendants Exhibit 12, Sec. IV.

candidates is the quintessential function of a political party, and the manner by which a party nominates its candidates cannot be limited by the State.

On page 56 of their Response, Defendants correctly cite *American Party of Texas v. White*, 415 U.S. 767, 94 S. Ct. 1296, 39 L. Ed. 2d 744 (1964) for the proposition that

> "It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election *or by party convention*. 415 U.S. at 781, 94 S.Ct. at 1306. (Emphasis added.)

However, in attempting to justify Tennessee's mandatory primary, Defendants ignore that fact that, in *White,* the court acknowledged the validity of ***both*** primaries and conventions as a means of nominating candidates. Nothing in *White* justifies *limiting* parties to nominating their candidates via primaries.

While it would not be unconstitutional for a state to establish primary elections as the "default option," thus a provision is only constitutional if the state gives parties an "opt-out option" to nominate their candidates by convention – or any other mean established by the party itself. Numerous cases cited by Plaintiffs establish this principal. Tennessee does not provide any such option. Therefore, Tennessee's mandatory primary is unconstitutional.

III-D-(3): Mandatory Open Primaries Violate a Party's Right to Limits its "Association:"

As discussed in their motion for summary judgment on Count IV, Plaintiffs contend that Tennessee's open primary system violates a party's right to control its association to voters who are actually "members" of their party. In their Response, Defendants contend that Tennessee's open primary does not violate the rights of parties to limit those who participate in their primaries because the Tennessee Code has provisions that limit participation in a party's primary to voters who declare an allegiance to that party. [Doc. 36, P: 51 et. sec.]. The problem is that: (a) the first of the statutes referenced by Defendants applies to *candidates*, *not voters*, and (b) the second statute Defendants rely on is *unconstitutional and unenforceable*.

Defendants first contend that:

> "Tennessee election laws [] 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. Id. § 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). … Finally, the Tennessee General Assembly has given political parties the exclusive right to determine which candidates are best suited to represent the party in the general election for specific office by designating state political party executive committees as the bodies to hear primary election contests. Tenn. Code Ann. § 2-17-104." [Doc. 36, P: 54]

Defendants' argument suffers from the fatal flaw that the referenced statutes apply to the exclusion of *candidates* who do not reflect the party's positions and values. However, Defendants are arguing that Tennessee's open primary system impermissibly allows *voters* who have no affiliation with the party -- and violates a minor party's right to limit its associational rights to voters who share its philosophy. The statutes cited by Defendants have no bearing on this issue.

Defendants respond to Plaintiffs argument by asserting that (a) TCA § 2-7-115(b) specifically requires a voter to be a bona fide member of and affiliated with the party in whose primary the voter seeks to vote and (b) TCA § 2-7-126 provides that a voter seeking to vote in a party's primary can be challenged on the basis that the voter is not a bona fide member of and affiliated with that party. These contentions also suffer from fatal flaws:

FIRST: TCA § 2-7-115(b)(2) provides that:

> "At the time the voter seeks to vote, the voter declares allegiance to the political party in whose primary the voter seeks to vote and states that the voter intended to affiliate with that party."

If a *party* wanted to impose such a requirement as a condition for voting in its primary, that would be constitutionally permitted. *See Kucinich v. Tex. Democratic Party*, 563 F.3d 161 (5th Cir. 2009) (Holding that a *party* has the right to require its candidates to pledge to support the winner of its primary.) However, the *State* cannot permissibly impose a limit on who may vote in the primary election of a particular party because that constitutes an impermissible interference with an internal party matter. *See e.g. Woodruff v. Herrera*, 1:09-cv-449 [Doc. 224, P:_23-26] (D.N.M. March 31, 2011) (Holding that a state impermissibly intrudes into the private affairs of a party when, by statute, it limits who may be a party candidate.)[20]

Furthermore, TCA § 2-7-115(b)(2) is itself unconstitutional because it is more restrictive than constitutionally justified. Consider, for example, the fact that, in states where a voter's voter registration identifies a party affiliation, all that is required is that the voter state his party *preference*. However, TCA § 2-7-115(b)(2) requires that "the voter declares *allegiance* to the political party in whose primary the voter seeks to vote." (Emphasis added.)

Primaries involve only specific candidates for specific offices in a single year. There is no justification for requiring a voter to declare allegiance to the political party, and all of its various agendas, as a condition for voting in its primary. Inasmuch as a mere declaration of *preference* for a party is sufficient to satisfy any rational state interest, the requirement that voters declare *allegiance* to a party is

[20] In *Woodruff v. Herrera*, the court specifically referenced the authorities cited in Plaintiffs motion for summary judgment for the proposition that a state has no right to interfere with the internal affairs of a party.

unconstitutional. As the Supreme Court explained in *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 185, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979), "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," and that a State must "adopt the least drastic means to achieve [its] ends." TCA § 2-7-115(b)(2) violates this mandate.

SECOND: TCA § 2-7-126 provides that:

> "A person offering to vote in a primary may also be challenged on the ground that the person is not qualified under § 2-7-115(b). Such a challenge shall be disposed of under the procedure of §§ 2-7-123 -- 2-7-125 by the judge or judges and the other election officials of the party in whose primary the voter applied to vote, with a total of three (3) to decide the challenge."

TCA § 2-7-126 provides that:

> "If any person's right to vote is challenged by any other person present at the polling place, the judges shall present the challenge to the person and decide the challenge after administering the following oath to the challenged voter: "I swear (affirm) that I will give true answers to questions asked about my right to vote in the election I have applied to vote in." A person who refuses to take the oath may not vote."

While TCA § 2-7-126 *appears* to provide a basis for preventing voters who are not affiliated with a party from voting in a party's primary, it is, in fact, a statute without meaning. Specifically, because TCA § 2-7-126 requires a challenged voter to take an *oath* and represent that he satisfies the requirements of TCA § 2-7-115(b)(2). However, the State has no constitutional authority to impose any sworn *oath* requirement on candidates or voters—no matter how well intentioned its motives may be.

Finally, as a practical matter, there is no way for a poll-watcher to know whether or not a voter who opts to vote is a particular primary is or is not associated with the party in whose primary he/she seeks to vote. Obviously, a minor party poll-watcher cannot challenge everyone who seeks to vote in his party's primary without completely bogging down the electoral machinery of the precinct. Therefore, notwithstanding the statutory existence of a mechanism for guarding against party raiding, that mechanism has no practical applicability and the purported statutory limitation of voters participation in the primary of a party whose views the do not share is *entirely illusory*.

Lastly, regardless of any provisions for challenging voters at the polls, Tennessee has no provision for challenging the "legitimacy" of the party affiliations of those who vote by absentee ballot.

III-D-(4): Tennessee's Selective Mandatory Primary System Is Unconstitutional:

It is undisputed that Tennessee only requires parties to nominate candidates for certain offices – the offices enumerated in TCA §2-13-202 -- through primary elections. For all other offices, parties are free to nominate their candidates through any other means they choose.

Defendants go to great length to justify their mandatory primaries based on historical practices and the desire to provide "democratic" system of nomination candidates. [Doc. 36, P: 56-58] However, Defendants have not offered any justification for requiring primaries for some offices but not for others. In fact, if the arguments advanced by Defendants (e.g. primaries provide for broad voter participation and "take political nominations out of the smoke-filled rooms of party bosses") were really applied by the Tennessee General Assembly, candidates for all offices would have to be nominated in primaries. Tennessee simply cannot justify its practice of only requiring candidates for some offices to be nominated by primaries.

Furthermore, Defendants' historical narrative is seriously flawed because it does not recognize that Tennessee has not always required that ***all*** parties nominate their candidates by primaries. As recently as 1964, Tennessee exempted minor parties from its primary requirement.

In 1964, the provision on the Tennessee Code that established required candidates for certain offices to be nominated by primaries was TCA 8-2-208. That section of the Code included the following provision.

> "This chapter shall not apply to nominations of candidates of a party which party did not at the general November election next preceding the primary election mast more than ten percent (10%) of the entire vote of the state for such party's nominee for governor."

This provision of the Tennessee Code has been present (with various language changes) since the "Primary Election Law" was enacted in 1909 and remained in effect until the Code was revised in 1972. In fact, the statute's distinction between parties with respect to their right (or requirement) to hold primary elections was specifically held to be constitutional in *Ledgerwood v. Pitt*, 122 Tenn. 570; 125 S.W. 1036 (Tenn. 1909), one of the authorities cited by Defendants.

Plaintiffs have, as yet, been unable to determine why the exemption of minor parties from the requirement to nominate by primaries was removed. However, Plaintiffs have no duty to explain this change. Under the *Anderson* test, it is the ***Defendants*** who must establish the legitimacy of the present Code provision by presenting ***evidence*** that there was an ***actual***

problem with the old version of the Code and that the elimination of the exemption for minor parties cures this problem.[21] Defendants have not produced, and cannot produce, such evidence.

WHEREFORE, the Court should hold that Tennessee's requirement that parties nominate their candidates *only* through primary elections is unconstitutional.

III-E: COUNT IV:

In Count IV, Plaintiffs argue that TCA §2-5-208(d)(1), which mandates that the names of the names of the candidates of the major party in the Tennessee legislature appear as the top listing on the ballot and the names of minor party candidates be listed on the ballot below the candidates of major parties, is unconstitutional.

A State's interest in regulating elections is limited to maintaining the integrity of their elections. It is not the place of the State to "take sides" by enacting legislation that favors one party over another, or that inherently favors established parties over new parties. As the court said in *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006):

> "[W]hile states enjoy a wide latitude in regulating elections and in controlling ballot content and ballot access, they must exercise this power in a reasonable, nondiscriminatory, politically neutral fashion." 459 F.3d at 590, *quoting Miller v. Moore*, 169 F.3d 1119, 1125 (8th Cir. 1999).

TCA §2-5-208(d)(1) unambiguously favors the candidates of the party in power over the candidates of the party that is not in power. This statute, which was enacted in 2011 when the

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[21] It also merits note that the continued application of the legal principles stated in the cases cited by Defendants [on page 57] are themselves highly doubtful. Consider, for example, the contention that "primaries are not really elections" quoted from *Mathes v. State*, 121 S.W.2d 548, 549 (Tenn. 1938). That proposition is based on the assertion that "the limitations and safeguards of the Constitution apply exclusively to the final election when the officer is chosen in the mode required by the Constitution." *Id*. However, in *Moore v. Ogilvie*, 394 U.S. 814, 818, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), the Supreme Court stated that:

> "*[a]ll* procedures used by a State as an integral part of the election process must pass muster …" (Emphasis added)

More importantly, in *U.S. v. Classic*, 313 U.S. 299, 61 S. Ct. 1031; 85 L. Ed. 1368 (1941), the Supreme Court said.

> "a primary election, which involves a necessary step in the choice of candidates for election as representatives in Congress [] *is an election* within the meaning of the constitutional provision [of the Elections Clause.] , 313 U.S. at 320. (Emphasis added.)

Thus, it is now clear that *all* laws affecting any aspect of ballot access and elections must satisfy constitutional standards.

Tennessee legislature was controlled by the Republicans, is a transparent attempt to bias future elections for the benefit of the Republican Party and its candidates. Thus, while the statute may advance the interests of the ***majority party***, it does not advance and legitimate ***State*** interest.

> As noted in Plaintiffs motion for summary judgment in Count IV [Doc. 20, P-20]:
>
> "[T]he State may not be a wholly independent or neutral arbiter as it is controlled by the political parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006), *Quoting from Clingman v. Beaver*, 544 U.S. 581, 125 S.Ct. 2029, 2044, 161 L.Ed.2d 920 (2005) (O'Conner, J., concurring).

Likewise, in In *Green Party v. Garfield*, 648 F. Supp. 2d 298, 337, fn. 49 (D. Conn. 2009), the court said.

> "[J]ust as the government is not permitted to level the playing field by removing advantages from certain candidates, it is equally prohibited from advantaging certain candidates, i.e., slanting the playing field, so that it enhances the relative position of one candidate over another."

Likewise, in *Bullock v. Carter*, 405 U.S. 134, 145, 92 S. Ct. 849, 857, 31 L. Ed. 2d 92 (1972), the court said:

> '[A] State cannot achieve its objectives by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation."

Defendants contend that Plaintiffs have failed to show that TCA §2-5-208(d)(1) is the product of purposeful discrimination. [Doc. 36, P: 60]. However, the facts speak for themselves. By its terms, TCA §2-5-208(d)(1), favors the majority party in the General Assembly, and TCA §2-5-208(d)(1) was enacted by the Republican majority party and signed by a Republican governor. As the courts have clearly recognized,

> "The first instinct of power is the retention of power, and those who hold public office can be expected to attempt to insulate themselves from meaningful electoral review. *Miller v. Cunningham*, 512 F.3d 98, 103 (4th Cir. 2007) quoting from *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (Scalia, J., concurring in part and dissenting in part). "It is therefore necessary for an independent and co-equal branch of government-the judiciary-to ensure that incumbents are unable to create a system where the "'ins' ... will stay in and the 'outs' will stay out." *Id*.

Thus, it is essential for the Court to "ensure that incumbents are unable to create a system where the "'ins' ... will stay in and the 'outs' will stay out."

Defendants further contend that Plaintiffs have "presented no affidavit, expert testimony or evidence of any kind in support of their factual contention that top placement on the ballot [] is an advantage in an election." [Doc.36, P: 60]. To the contrary, in their motion for summary judgment on Count IV, Plaintiffs have cited both academic studies and judicial opinions establishing that there is a positional bias that favors candidates in certain ballot positions – specifically being listed first on the ballot. Thus, this positional bias is well established and not, as Defendants suggest "simply through what Plaintiffs perceive to be self-evident." [Doc. 36, P: 60]

Under the Tennessee election schema, in order to even be identified on the ballot as the candidate of a party, a minor party candidate's ***party*** must qualify for ballot access. This requirement alone represents a represents a burden on minor party candidates. However, even after their party has qualified for ballot access, TCA §2-5-208(d)(1) relegates minor party candidates to a "second-tier" listing on the ballot – and denies a minor party candidate ***any*** opportunity to have a favorable place on the ballot. The cumulative effect of these impediments to being elected constitute an unconstitutional burden on candidates affiliated with minor parties.[22]

Defendants offer the fantasy argument that TCA §2-5-208(d)(1) "does not classify candidates for ballot position by party affiliation." [Doc. 36, P: 60] However, this is exactly what the statute does – in establishes priority of ballot listing based on a candidate's party affiliation.

In their motion for summary judgment on Count IV, Plaintiffs cited a litany of cases holding that statutes which are indistinguishable from TCA §2-5-208(d)(1) are unconstitutional as violations of Equal Protection[23]. Defendants do not even mention these cases or attempt to distinguish them.

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[22] Plaintiffs are not, as Defendants suggest, claiming that they have a right to top placement on the ballot. Rather, they are claiming only that they should have an *equal opportunity* to obtain top placement and cannot constitutionally relegated to lesser position.

[23] *McLain v. Meier*, 637 F.2d 1159 , 1167 (8th Cir. 1980) ("Such favoritism burdens the fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the fourteenth amendment."); *Snagmeister v. Hartley*, 565 F.2d 460 (7th Cir. 1977) (Affirming district court holding that ballot positioning practices favoring certain parties are unconstitutional.); *Weisberg v. Powell*, 417 F.2d 388, 392-93 (7th Cir. 1969) (Policy of granting priority ballot placement to the candidates of major parties held to be unconstitutional.); *Culliton v. Bd. of Election Comm'rs. of the County of DuPage*, 419 F. Supp. 126 (N.D.Ill.1976) (holding that Republican-first provision violated equal protection clause); *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996 (Striking Democrat-

WHEREFORE, the Court should hold that TCA §2-5-208(d)(1) is unconstitutional and require the Coordinator of Elections and/or county election supervisors to determine candidate ballot positions by random lottery..

___s/s Alan. P. Woodruff_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing REPLY has been served on Darrell L. Castle, Esq, (Local Counsel for Plaintiffs), 4515 Poplar Avenue, Suite 510, Memphis, Tennessee 38117 and Janet M. Kleinfelter, Esq, (Counsel for Defendants), Office of Tennessee Attorney General, P.O. Box 20207, Nashville, Tennessee 37202 via the Court's CM/ECF e-mail notification system on this 16th day of December, 2011.

___s/s Alan. P. Woodruff_____
Alan P. Woodruff, Esq

first statute); *Emmons v. Hooper*, CIV-78-404 C (D.N.M. July 6, 1979) ("[C]itizens voting for an unfavorably positioned candidate would lose the power of their vote to a group of equal strength whose candidate appears in top positions."); *Gould v. Grubb*, 14 Cal. 3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337, 1341 (1975) (en banc) ("The automatic reservation of the top line for incumbents contravenes equal protection."); *Atkins v. N.H. Sec. of State*, 154 N.H. 67, 904 A.2d 702 (N.H. 2006) (Listing candidates from the party that received the most votes in the previous election held unconstitutional);