IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GREEN PARTY OF TENNESSEE, CONSTITUTION PARTY OF TENNESSEE, Plaintiffs, v. 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.	)	Case No. 3:11-cv-00692 Judge Haynes

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants, the Coordinator of Elections for the State of Tennessee and the Secretary of State for the State of Tennessee, hereby submit this Response in Opposition to Plaintiff's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56.

INTRODUCTION AND FACTUAL BACKGROUND

Plaintiffs, the Green Party of Tennessee ("GPT") and the Constitution Party of Tennessee ("CPT") have filed suit asserting a facial challenge to a number of Tennessee's election statutes. Specifically, Plaintiffs assert that the filing dates established in Tenn. Code Ann. § 2-13-107(a) and § 2-5-101(a)(1) impose an unconstitutional burden on minor parties and that the combined

effect of these two statutes with the provisions of Tenn. Code Ann. § 2-1-104(a)(24) unconstitutionally deny new political parties the ability to obtain the status of a "recognized minor party." Plaintiffs also challenge the filing deadline contained in Tenn. Code Ann. § 2-5-101(a)(1) with respect to party primary candidates, as well as the requirement of Tenn. Code Ann. 2-13-202 that all political parties nominate their candidates for Governor, the state general assembly, United States Senator and the United States House of Representatives. Plaintiffs further assert that Tenn. Code Ann. § 2-1-104(a)(24) is unconstitutionally vague and delegates legislative functions to the Coordinator of Elections. Finally, Plaintiffs challenge the provisions of Tenn. Code Ann. § 2-5-208(d)(1) governing the placement of candidates on the ballot as unconstitutionally violating their equal protection rights.

A. Tennessee's Ballot Access Regulations

The State of Tennessee provides four routes for potential candidates to have their names placed on the general election ballot: (1) as the nominee of a "statewide political party"; (2) as the nominee of a "recognized minor party"; (3) as an independent candidate; and (4) as a write-in candidate. Each of these routes has different requirements.

Statewide Political Party Nominee

In 2011, the Tennessee General Assembly revised the state election laws to redefine "statewide political parties". *See* Pub. Act 2011, Chap. 257 §§ 1, 2. Under these new provisions, a "statewide political party" is defined as

> [a] political party at least one (1) of whose candidates for an office to be elected by voters of the entire state in the past four (4) calendar years has received a number of votes equal to at least five percent (5%) of the total number of votes case for gubernatorial candidates in the most recent election of governor.

Tenn. Code Ann. § 2-1-104(a)(31). Statewide political parties are the only parties required to nominate their presidential candidates by primary. Tenn. Code Ann. § 2-13-205(a). They are also required to nominate their candidates for governor, general assembly members, U.S. Senator and U.S. Representative. Tenn. Code Ann. § 2-13-202. They may nominate their candidates for all other offices by any method authorized under the rules of the party or by primary election under this title. Tenn. Code Ann. § 2-13-203.

In order to qualify as a candidate in a statewide political party primary other than the presidential primary, Tennessee's election laws require only the filing of a nominating petition signed by the candidate and twenty-five (25) or more registered voters who are eligible to vote to fill the office by the qualifying deadline. Tenn. Code Ann. § 2-5-101(b). That qualifying deadline is the first Thursday in April. Tenn. Code Ann. § 2-5-101(a)(1). In 2012, the qualifying deadline for statewide political party primary candidates (other than presidential candidates) will be April 5, 2012 and the primary election will be held on August 2, 2012. *See* Tenn. Code Ann. § 2-13-202 and § 2-1-104(a)(26).

With respect to statewide political party presidential primary candidates, there are two methods by which candidates may qualify to appear on the ballot in the state's Presidential Preference Primary. First, a candidate may be named by the Tennessee Secretary of State, who is required to submit a list of the names to the State Election Commission not later than the first Tuesday in December of the year before the year in which the election will be held (December 6, 2011). The Secretary of State has the sole discretion to include only those candidates that he has determined are generally advocated or recognized as candidates in national news media throughout the United States. Tenn. Code Ann. § 2-5-205(a)(1).

Second, the candidate may gain access to the primary ballot by submitting a petition signed by at least twenty-five hundred (2,500) registered voters no later than noon on the first Tuesday in December of the year before the year in which the election will be held (December 6, 2011). Tenn. Code Ann. § 2-5-205(a)(2). In 2011, the Tennessee General Assembly moved the date of the state's Presidential Preference Primary from the first Tuesday in February to the first Tuesday in March (March 6, 2012). Tenn. Code Ann. §2-13-205.

Recognized Minor Party Nominee

In addition to redefining what constitutes a "statewide political party", the Tennessee General Assembly also established and defined a new category of political party – the "recognized minor party". A "recognized minor party" is defined as

> 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, states its name, and contain the names of registered voters from a single county.

Tenn. Code Ann. § 2-1-104(a)(24).

In order to qualify as a recognized minor party for purposes of nonpresidential elections, the petition required in Tenn. Code Ann. § 2-1-104(a)(24) ("new party petition") must be filed with the Coordinator of Elections on the same deadline for candidates to qualify for the August primary election. Tenn. Code Ann. § 2-13-107(a). Again, for 2012 that deadline is noon on April 5, 2012. The Coordinator of Elections is allowed thirty (30) days to verify petition signatures for recognized minor parties. Tenn. Code Ann. § 2-13-107(b). Any Tennessee registered voter may sign a new party petition and may sign more than one new party petition.

Additionally, Tennessee's election laws place no temporal or geographic restrictions on the gathering of signatures for a new party petition.

Like statewide political parties, recognized third parties are required to nominate their candidates for governor, general assembly member, U.S. Senate and U.S. Representative by primary, but candidates for all other offices, including President, may be nominated by any method authorized under the rules of the party or by primary election. Tenn. Code Ann. §§ 2-13-202, 203. Also like statewide political parties, in order to qualify as a candidate in a recognized minor party primary, Tennessee's election laws require only the filing of a nominating petition signed by the candidate and twenty-five (25) or more registered voters who are eligible to vote to fill the office by the qualifying deadline. Tenn. Code Ann. § 2-5-101(b). Furthermore, in order to ensure that candidates have full ballot access, Tennessee's election laws provide that if the Coordinator of Election determines that the petition submitted by a party does not meet the statutory requirements to be declared a recognized minor party, any candidates seeking to represent such minor party who had timely filed nominating petitions will be placed on the regular November general election ballot as independent candidates. Tenn. Code Ann. § 2-13-107(c).

With respect to presidential elections, the process for recognized minor parties is significantly different. Since recognized minor parties are not required to nominate their presidential candidates by primary, Tennessee's election laws simply require that the chair of the nominating body certify to the Coordinator of Elections the presidential nominee of a recognized minor party by the qualifying deadline, which is the third Thursday in August. Tenn. Code Ann. § 2-13-203(c) and § 2-5-101(a). This deadline would also be the same deadline for a political

party to submit the petition required in Tenn. Code Ann. § 2-1-104(a)(24) to qualify as a recognized minor party.

Independent Candidates

The third route for obtaining access to the general election ballot is as an independent candidate. In order to qualify as an independent candidate for any office other than President on the November general election ballot, Tennessee's election laws require a candidate to file a nominating petition signed by the candidate and twenty-five (25) or more registered voters who are eligible to vote to fill the office by the qualifying deadline. Tenn. Code Ann. § 2-5-101(b). That qualifying deadline is the first Thursday in April. Tenn. Code Ann. § 2-5-101(a)(1). Independent presidential candidates are required to file a nominating petition containing the signature of the candidate and twenty-five (25) or more registered voters for each elector allocated to Tennessee (*i.e.*, 275 signatures of registered voters) by the qualifying deadline, which is the third Thursday in August. Tenn. Code Ann. § 2-5-101(a) and (b).

Write-In Candidate

The fourth route to the general election ballot is as a write-in candidate. *See* Tenn. Code Ann. § 2-5-207(d)(1) and § 2-7-117. A write-in candidate is not required to file any sort of nominating petition. Instead, write-in candidates are required to file a written notice with the appropriate election official fifty (50) days before the election. *See* Tenn. Code Ann. § 2-7-133(i) and § 2-8-113(c).

B. The Plaintiff Minor Parties

Constitution Party of Tennessee (CPT)

The CPT was established by Joan and Darrell Castle in 1992. The CPT does not have a charter, by-law, rules, records or any formal registration of its members. Instead, it considers persons on its mailing list to be members of the organization. Since its inception, the CPT has never had a candidate for a statewide office; instead, it has only endorsed presidential candidates who have run as independent candidates on the ballot in Tennessee. *See Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064, 1073 (M.D.Tenn. 2010). The Constitution Party's National Convention is scheduled to be held on April 18-21, 2011, at which convention delegates will vote and adopt the party platform for the next four years and well as nominate the Constitution Party's 2012 Presidential Candidate. *See* Notice of Upcoming Events: "Constitution Party Presidential Nominating Convention Coming Soon" found at http://www.constitutionparty.com/view_events.php (Nov. 29, 2011) attached hereto as Exhibit 1 and incorporated herein by this reference. Additionally, there are currently two individuals who have filed with the Federal Election Commission statements of candidacy for the 2012 Presidential Election as candidates of the Constitution Party. *See* Statement of Todd Clayton filed September 12, 2011 and Statement of Betsy Pauline Elgar filed October 26, 2011, attached hereto as Collective Exhibit 2 and incorporated herein by this reference.

Green Party of Tennessee (GPT)

The GPT was initially established in 1992-93 and reformed in 1999-2000. The GPT is governed by by-laws. Among other things, those by-laws require that nominating conventions for statewide offices must be held at a minimum of one month prior to any and all related state

candidate filing deadlines. *Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d at 1073. Presidential nominating conventions are required to be held at least one month prior to the Green Party of the US Presidential Nominating Convention and only candidates who have been officially recognized by the Green Party of the US may be considered at those conventions. *See* Green Party of Tennessee By-Laws attached hereto as Exhibit 3 and incorporated herein by this reference. As of November 2, 2011, the Green Party of US (GPUS) had officially recognized two candidates for the 2012 GPUS nomination for President: Kent Mesplay and Jill Stein. *See* GPUS Officially Recognized candidates seeking the 2012 GPUS nomination for President of the United States found at http://gp.org/committees/pcsc/2012/gpus-recognized-candidates/ (November 29, 2011) attached hereto as Exhibit 4 and incorporated herein by this reference. Additionally, Mr. Mesplay filed his statement of candidacy for the 2012 Presidential election with the Federal Election Commission on May 24, 2011. Ms. Stein filed her statement on November 2, 2011. *See* Mesplay and Stein Statements of Organization attached hereto as Collective Exhibit 5 and incorporated herein by this reference.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Chao v. Hall Holding Co*., 285 F.3d 415, 424 (6th Cir. 2002). The party moving for summary judgment has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can reasonably be drawn

therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970); *CenTra, Inc. v. Estrin*, 538 F.3d 402, 412 (6th Cir. 2008). However, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 251-52 (1986); *Harrison v. Ash*, 539 F.3d 510, 516 (6th Cir. 2008).

Once a moving party has met its burden of production, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Sigler v. Am. Honda Motor Co*., 532 F.3d 469, 483 (6th Cir. 2008) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The nonmoving party cannot rely upon the assertions in its pleadings; rather that party must come forward with probative evidence such as sworn affidavits, to support its claims. *Celotex*, 477 U.S. at 324; *Martin v. Ohio Turnpike Comm'n*., 968 F.2d 606 (6th Cir. 1992), *cert. denied*, 506 U.S. 1054 (1993). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50 (citations omitted). "The mere possibility of a factual dispute is not enough." *Mitchell v. Toledo Hosp*., 964 F.2d 577, 582 (6th Cir. 1992). Therefore, a court must make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than de minimis. *Hartsel v. Keys*, 87 F.3d 795 (6th Cir. 1996).

However, in determining whether there is a genuine issue of material fact, "[a] district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). Thus, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and

admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

Finally, in reviewing a party's motion for summary judgment, a court's function is not to "weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. In doing so, all evidence must be viewed in the light most favorable to the nonmoving party. *Id.* Ultimately, the standard for determining whether summary judgment is appropriate is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

ARGUMENT

The State of Tennessee has a right, if not an obligation, to limit access to the general election ballot to only those political parties that enjoy a substantial modicum of support among the electorate. *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970 (1971); *Burdick v. Takushi*, 504 U.S. 428, 446-447, 112 S.Ct. 2059, 2070-2071 (1992). State regulation of access to the ballot furthers its legitimate objective of avoiding overcrowded ballots, frivolous candidacies and voter confusion. *Bullock v. Carter*, 405 U.S. 134, 145, 92 S.Ct. 849, 857 (1972). Thus the State's ballot access regulations are constitutional if, while imposing significant but reasonable burdens, they do not serve to completely eliminate political opportunity for minor parties.

Plaintiffs have made a facial challenge to a number of Tennessee's election laws and spend much time asserting that the state's interests are not significant and/or no showing of such interests has been made. However, the Supreme Court has held that there is no requirement that a State make a particular showing of voter confusion, ballot overcrowding, or frivolous

candidacies to support a reasonable restriction on ballot access. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196, 107 S.Ct. 533, 537-538 (1986). Additionally, the laws at issue here only deal with access to the State's general election ballot. A political group that fails to meet the standards in the State's access scheme is still free to describe itself as a political party, to endorse candidates, to campaign and/or raise funds on behalf of candidates or issues, and otherwise engage in the political process. Indeed, there are few limits on a group's ability to come together and engage in political activity in this State. The only limit the laws at issue in this case place on them is whether their candidates can appear on the general election ballots with the party's label. Thus, the question for this court is whether these particular restrictions, in the context of the entire ballot access scheme as a whole, is a reasonable, non-discriminatory restriction or, as a practical matter, renders ballot access merely theoretical. *American Party of Texas v. White*, 415 U.S. 767, 781, 94 S.Ct. 1296, 1306 (1974).

Of course, one problem in making this determination is that Plaintiffs have raised a facial challenge to these elections law which are new and have never been applied or tested. "[A] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully," *United States v. Salerno*, 481 U.S. 739, 745 (1987), and the Supreme Court and the Sixth Circuit Court of Appeals have both recognized that a claimant who makes a facial attack on a law is requesting "strong medicine." *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 960-61 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 1048 (U.S. 2010) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

> "[F]ederal courts do not lightly uphold facial challenges" because such efforts do not seek to invalidate laws in concrete, factual settings but to "leave nothing standing." *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc). Further, "[c]laims of facial invalidity often rest on speculation[,] . . . raise the risk of premature interpretation[,] . . . run contrary to the fundamental

> principle of judicial restraint[,] . . . [and] threaten to short-circuit the democratic process." *Wash. State Grange v. Wash. State Republican Party*, --- U.S. ---, 128 S.Ct. 1184, 1191, 170 L.Ed.2d 151 (2008) (citations omitted). For these reasons, facial invalidation of a statute is a remedy that courts employ "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613, 93 S.Ct. 2908.

Id. Thus, before a federal court will announce such a judgment, they generally insist that the claimant show one of two things: (1) that there truly are "no" or at least few "circumstances" in "which the Act would be valid"; or (2) that a court cannot sever the unconstitutional textual provisions of the law or enjoin its unconstitutional applications. *Connection Distrib. Co. v. Holder*, 557 F.3d 321, 335 (6th Cir. 2009), *cert. denied*, 130 S.Ct. 362 (U.S. 2009) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987) and *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. at 1190)); *see also Crawford v. Marion County Election Board*, 553 U.S. 181, 200, 128 S.Ct. 1610, 1622, 170 L.Ed.2d 574 (2008). "To do otherwise would amount to a judicial trespass – a court's striking of a law in all of its applications even though the legislature has the prerogative and presumed objective to regulate some of them." *Id*.

Finally, in making any judgment about the constitutionality of the statutes in question, it should be kept in mind that state legislatures are presumed by federal courts to have acted constitutionally in making laws. *See McDonald v. Board of Election Commissions*, 394 U.S. 802, 809 (1969); *Harford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy*, 740 F.2d 1362, 1366 (6th Cir. 1984).

> A statute will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt every possible presumption not clearly inconsistent with the language and subject matter is to be made in favor of the constitutionality of legislation. Every reasonable presumption or intendment must be indulged in favor of the validity of an act and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution, that a court will refuse to

> sustain its validity. A statute is presumed to be constitutional and it will not be declared unconstitutional unless clearly so, or so beyond a reasonable doubt.

City of Ann Arbor, Mich. v. Northwest Park Construction Corp., 280 F.2d 212, 223 (6th Cir. 1980) (internal citations omitted). Furthermore, courts must avoid construction of statutes that would render the statute unconstitutional. *See, e.g., Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 628-29, 113 S.Ct. 2264, 2282-2283, 124 L.Ed.2d 539 (1993).

A. Tennessee's Requirements for "Recognized Minor Party" Status Do Not Unduly Burden Plaintiffs' Rights.

While political parties do have First and Fourteenth Amendment rights to associate for the advancement of common beliefs, those rights do not insulate them from state regulation. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364 (1997). States are granted authority to substantially regulate elections to ensure that they are fair, honest, and orderly through the enactment of election codes. *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). The Supreme Court has established with "unmistakable clarity" that States "have an 'undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot.'" *Munro v. Socialist Workers Party*, 479 U.S. at 194 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-789, n. 9, 103 S.Ct. 1564, 1569-1570, n. 9 (1983)). Additionally, restrictions that do not affect a political party's ability to perform its primary functions of organizing, developing, or recruiting supporters, choosing a candidate, or voting for that candidate in a general election have been held not to impose a severe burden. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (laws which prohibited an individual from appearing on the ballot as the candidate for more than

one party are valid); *Burdick v. Takushi*, 504 U.S. 428 (1992) (an election system which prohibits write-in candidates is valid); *Clingman v. Beaver*, 544 U.S. 581 (1992) (state's semi-closed primary system that only allows registered members of party and registered independents to vote in primary election is valid).

With respect to state ballot-access laws, the Supreme Court has established a framework for examining such laws. Under that framework, a court must weigh the character and magnitude of the injury to the rights protected by the First and Fourteenth Amendments against the state's interests in justifying the requirements imposed by its election laws. *Anderson*, 460 U.S. at 789. The level of scrutiny applied to the state's requirements depends on the extent to which the challenged regulation burdens First and Fourteenth Amendment rights. *Burdick*, 504 U.S. at 434. If the state's requirements severely restrict those rights, then the requirements may be upheld only if they are narrowly tailored to advance a compelling state interest. *Id.* If, however, state law imposes only "reasonable," "nondiscriminatory" restrictions upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions imposed. *Id. See also Anderson*, 460 U.S. at 788. Each case, however, must be resolved on its own facts, after due consideration is given to the practical effect of election laws of a given state, viewed in their totality. *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982).

Plaintiffs have asserted that Tenn. Code Ann. § 2-1-104(a)(24) and § 2-13-107, which contain the requirements for qualifying as a "recognized minor party", are facially unconstitutional in violation of their First and Fourteenth Amendment rights. Specifically, they assert: (1) that the filing deadline established in Tenn. Code Ann. §2-13-107 unduly burdens their constitutional rights; (2) that the petition signature requirements contained in Tenn. Code

Ann. § 2-1-124(a)(24), standing alone, and in conjunction with the filing deadline, unduly burden their constitutional rights; (3) the provisions of Tenn. Code Ann. § 2-1-104(a)(24) are unconstitutionally vague; (4) the provisions of Tenn. Code Ann. § 2-1-104(a)(24) unconstitutionally delegate legislative powers to the Coordinator of Elections; and (5) the prohibition against a recognized minor party including the word "independent" or "nonpartisan" in its name contained in Tenn. Code Ann. § 2-13-107(d) violates their rights of free speech. In support of these arguments, Plaintiffs rely solely upon the opinion of their expert and the fact that no minor party has qualified to be on the ballot in Tennessee since 1968.

The State Defendants submit its petition and filing deadline requirements set forth in Tenn. Code Ann. § 2-1-104(a)(24) and § 2-13-107(a) are supported by a number of important state interests, including: (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. Each of these interests find strong support in settled case law, the evidentiary record as discussed further herein, or both.

1. The filing deadline established in Tenn. Code Ann. § 2-13-107(a) is necessary in order for state and local election officials to fulfill their responsibilities in assuring ballot accuracy and timely distribution of absentee ballots.

As discussed *supra*, under the newly enacted provisions of Tenn. Code Ann. § 2-13-107(a), a political party that seeks to qualify as a "recognized minor party" – for purposes of nonpresidential elections – is required to file a petition containing the requisite number of signatures by the first Thursday in April of the election year. Plaintiffs assert that this filing

deadline unduly burdens their First and Fourteenth Amendment rights because: (1) it is earlier than necessary to enable the Coordinator of Elections to perform his functions and therefore does not further the State's interest; (2) it requires minor parties to organize long before the candidates of major parties are known and long before there is significant interest in an upcoming election; and (3) it requires new parties to collect signatures at a time of year when voter interest in election is low and potential petition signers are not yet sufficiently educate regarding the positions of candidates of the established parties to be motivated to support the formation of a new party. The only evidence Plaintiffs rely upon in support of their argument is their expert's opinion that "no published opinion of any court, since before 1968, upholds a petition deadline for a group to become a qualified party that was earlier than May of the election year."[1]

However, Tennessee's April filing deadline is tied directly to the date by which absentee ballots must be distributed to military and other registered voters residing overseas. Both federal and state law mandate that absentee ballots must be mailed out to these voters no later than forty-five (45) days before an election. *See* 42 U.S.C. § 1973ff-1(8) and Tenn. Code Ann. § 2-6-503(a). That deadline for the August 2012 election is June 18, 2012. The federal law requirement was only enacted by Congress in 2009 and there does not appear to be any ballot access case addressing the relationship between a state's new party filing deadline and this new 45-day deadline for distributing military absentee ballots.

For the year 2012, there are fifty-one (51) business work days (Monday through Friday) between the April 5 filing deadline and the June 18 deadline by which military ballots must be mailed out. Assuming a political party submits a petition seeking to qualify as a recognized minor party, then during that time period, the Coordinator of Election must separate out and forward the appropriate signature pages to each of the 95 county administrators of election for

[1] *See* Exhibit A to Plaintiffs' Motion for Summary Judgment on Counts I-A and I-B.

signature verification and receive the reports from the those counties. Pursuant to statute, the Coordinator and the 95 administrators have thirty (30) days to complete this task. *See* Tenn. Code Ann. § 2-13-107(b). Once this task is completed and the qualifying names for the ballot have been determined, the ballots for each county have to be prepared, reviewed by the Coordinator of Elections, and then printed, with time allotted for proof-reading and corrections made. Once the final ballots are printed they are then sent to the county administrators for distribution by the June 18 deadline. However, as set forth in the attached affidavits of Beth Henry-Robertson, Deputy Coordinator of Elections, Vicki Koelman, Montgomery County Administrator of Elections, and Albert Tieche, Davidson County Administrator of Election, timely completion of these tasks is not simple and the April filing deadline is actually necessary in order for these and other state and local election officials to meet the June 18 deadline.

Specifically, Beth Henry-Robertson, Deputy Coordinator of Elections, testified that the State of Tennessee has approximately 3,872,868 registered voters, of which 3,503,355 are active voters. Ms. Henry-Robertson testified that the State Election Office is staffed with eight (8) full-time employees and two part-time employees. They perform a host of duties, including (1) implementing various federal and state election regulations, including the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301, *et seq.*, and the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973, *et seq.*; (2) processing candidate nominating petitions for statewide and multi-county candidacies; (3) approval of ballots for all 95 counties; (4) assisting county election officials with identifying appropriate polling places; (5) training local election officials regarding state election procedures; and (6) maintaining and updating the statewide voter registration database and candidate databases. Additionally, during 2012, the State Election Office will be involved in assisting county election officials with their implementation

of the redistricting plan adopted by the Tennessee General Assembly. *See* Affidavit of Beth Henry-Robertson attached hereto as Exhibit 6 and incorporated herein by this reference.

With respect to verification of the signatures submitted pursuant to Tenn. Code Ann. § 2-1-104(a)(24) and § 2-13-107(a), the actual verification is done at the local level. The State Election Office separates out the signature pages by county and then forwards them to the appropriate county election offices. *Id*. at p. 6. The local county election offices then must look up each signature either in their computer system for scanned signatures or the file system (permanent voter registration cards) and compare the name, address and signature on the permanent voter registration card with the name, address and signature on the petition. In verifying the signatures, the local county election officials are required to follow the guidelines set forth in Tenn. Code Ann. § 2-1-107. Among other things, this statute requires that if the address shown on the petition is within the precinct in which the person is registered but is not the address shown on the registration card, and all the other information matches up, then the signatures is to be considered valid and counted. Thus, any time that the address on a petition is different than the address listed on a person's permanent voter registration card, the local county election offices have to check their maps to see if that address is located within the same precinct to determine if that signature should be counted, making the process of verifying signatures labor-intensive and time-consuming. *See* Affidavit of Vicki Koelman at p. 4, attached hereto as Exhibit 7 and incorporated herein by this reference; Affidavit of Albert Tieche at p. 4, attached hereto as Exhibit 8 and incorporated herein by this reference. Additionally, many of the county election offices provide the opportunity for candidates and parties to review and challenge any rejected signatures on a petition. *Id*. Many of the county election offices have limited staff, with

twelve (12) counties having only one (1) full-time employee and six (6) counties in which the office is open less than five (5) days a week. Henry-Robertson Affidavit at p. 2.

During the 2012 election year, the process of verifying signatures will be complicated by the redistricting work that will be ongoing in each of the 95 counties. Any implementation of the redistricting plan that is adopted by the General Assembly will not begin until after the results of the March Presidential Preference Primary and County primary have been certified on March 26, 2012, and must be completed before early voting begins on July 13, 2012, for the August election. Koelman Affidavit at pp. 5-7; Tieche Affidavit at pp. 5-7; Henry-Robertson Affidavit at pp. 7-8.

As noted, Tenn. Code Ann. § 2-13-107(b) only allows state and local election officials thirty (30) days to verify signatures on a petition submitted by a minor party; however, until this verification is completed, the county election offices cannot begin the process of printing their ballots. Again, this is not a simple task. For the August 2012 election, each county has to prepare at least five (5) different ballots: a paper ballot for the Republican primary, paper ballot for the Democratic primary, paper ballot for the August general election, machine ballot for the Republican primary, and machine ballot for the Democratic primary (a machine ballot for the August general election is not required as the poll workers can lock voters out of the primary races listed on the ballot). If a political party qualifies as a recognized minor party, then the county election offices will have to prepare two additional ballots – one paper and one machine ballot for that party's primary. Henry-Robertson Affidavit at 4-5.

Due to the different populations of and different voting equipment used by the counties, the amount of time it takes to prepare and print the ballots once they have been approved varies. However, in Davidson County, which is the second largest county in the state, it takes

approximately two weeks to prepare the ballot and another week to get the ballot printed – assuming nothing goes wrong. *See* Tieche Affidavit at 8-9. Once the ballots have been printed, the county election offices then have to prepare them for distribution to military voters, which requires: (1) the printing and labeling of three separate envelopes (1 for the ballot affidavit, 1 for returning the ballot and 1 for mailing the ballot); (2) identification of the appropriate ballot (*i.e.*, correct Congressional and state districts, *etc*. for that person); (3) placing of all the information in the correct envelopes and sealing of the envelopes; and (4) physically transporting the sealed mailing envelope to the Main Post Office for mailing. Again, the amount of time it takes to complete this process varies by county, but in Montgomery County, the fifth largest county in the State, it takes the county election office approximately two (2) weeks *after the ballots have been printed* to have the ballots ready to be distributed to military voters. *See* Koelman Affidavit at 7-8.

In sum, the undisputed testimony of all three election officials clearly demonstrates that the April filing deadline is nearly as generous as the State can afford to be while yet reserving enough time to discharge its election-related duties and account for unexpected disruptions.[2] Indeed, all three testified that if the filing deadline for a political party to qualify as a recognized minor party were moved to a later date in the election cycle, not only would they not be able to get their ballots distributed to military voters in compliance with the MOVE Act, but that it would be very difficult for them to have everything timely and accurately ready for the August election and early voting. *See* Koelman Affidavit at pp. 11, 15; Tieche Affidavit at pp. 10-11, 15; and Henry-Robertson Affidavit at pp. 3-4, 13.

[2] All three election officials testified as to their other election-related activities and duties ongoing during this same time period, including the conducting of elections during non-presidential election years. *See* Koelman Affidavit at pp. 11-15; Tieche Affidavit at pp. 11-15; Henry-Robertson Affidavit at pp. 8-13.

Federal courts have recognized that any choice of a filing deadline is "necessarily arbitrary". *U.S. Taxpayers of Florida v. Smith*, 871 F.Supp. 426, 432 (N.D.Fl. 1993) (citing *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983). Thus, any filing deadline, like any percentage or other numerical requirement, could be challenged *ad infinitum*, the challenging party contending that allowing parties to file a few days later would not leave the State's interest unprotected. *Id*. Consequently, the state is not required to pick a perfect deadline, just one that is, essentially reasonable in light of the burdens imposed. *Barr v. Ireland*, 575 F.Supp.2d 747, 760 (S.D.W.Va. 2008).

In light of the undisputed testimony of Ms. Henry-Robertson, Ms. Koelman and Mr. Tieche, the State has clearly demonstrated that the April filing deadline is not only reasonable, but necessary, in light of the population size of the state, the variety of the 95 political subdivisions through which the Coordinator of Elections must function in order to carry out both the verification and election process, and the time required for ballot preparation, printing and delivery, including the military absentee ballots that are required to be ready for distribution on June 18, 2012. *See also* Expert Report of Dr. Todd Donovan at pp. 11-12, attached hereto as Exhibit 9 and incorporated herein by this reference. Indeed, a number of courts have found a filing deadline to be justified based upon a showing by state and local election officials of the need for that deadline in order to perform their election-related duties. *See, e.g., Nader v. Keith,* 385 F.3d 729, 734 (7th Cir. 2004) (recognizing that time has to be allowed between the deadline for petitions and the election to enable challenges to the validity of the petitions to be made and adjudicated and then to enable a ballot to be printed that will contain the names of all the candidates and that must be printed well before the election so that it can be distributed to registered voters who vote by absentee ballot); *Libertarian Party of Maine v. Dunlap*, 659

F.Supp.2d 215, 224 (D. Maine 2009) (noting that "Elections Division staff needs to know which candidates' name are to appear on the ballot no later than 11 weeks ahead of the election" to ensure that ballots can be printed and sent to absentee voters in time); *Barr v. Ireland*, 575 F.Supp.2d at 751 (finding that filing deadline tied directly to date when absentee ballots must be distributed to the military and other citizens); *U.S. Taxpayers Party of Florida v. Smith*, 871 F.Supp. at 437 (finding that filing deadline was justified, recognizing that in addition to verifying signatures, election officials must also conduct primaries in addition to overseeing voter registration and performing other regular duties).

Plaintiffs have also challenged the April filing deadline on that grounds that it requires minor parties to organize long before the candidates of major parties are known and long before there is significant interest in an upcoming election and that it requires new parties to collect signatures at a time of year when voter interest in election is low and potential petition signers are not yet sufficiently educated regarding the positions of candidates of the established parties to be motivated to support the formation of a new party. Again, the only "evidence" Plaintiffs rely upon in support of this argument is the opinion of their expert.

However, as discussed in the opinion of Defendant's expert Dr. Todd Donovan, data from public opinion polls show that voter attention to presidential contests begins to increase as early as January of the election year, with interest peaking from early February through March before it declines through early summer. Donovan Report at pp. 14-15. Additionally, a published study reporting a statistical analysis of the relationship between filing deadlines and the success of ballot access for minor party and independent U.S. Senate and gubernatorial candidates in 2000 and 2004 found that the filing deadline did not predict the number of non-major party candidates on state ballots – thus demonstrating that other factors, such as the

amount of time allowed to collect signatures, are more important in determining minor party ballot access. *Id*. at 17.

Additionally, the American political landscape in recent decades has changed significantly. As noted by Defendants' expert, beginning in 1988 the major party organizations in states began "frontloading" the schedule of primaries and caucuses and have compressed this schedule such that by 2008, 70% of convention delegates were selected by March 2. Donovan Report at pp. 18-19. *See also Nader v. Connor*, 332 F.Supp.2d 982, 991 (W.D.Tex. 2004) ("The desire by states to participate in increasingly earlier primaries and be a part of "Super Tuesday" has in fact "ratched forward" much more than Texas political life. The political life of the entire country has been affected. In 2004, twenty-three states and the District of Columbia selected delegates committed to presidential candidates either by primary or caucus held on or before March 9. It is a simple reality that the selection of presidential candidates occurs much earlier today than in the not too distant past.")

Indeed, with the upcoming 2012 Presidential election, the candidates for the Republican presidential nomination have already all announced their candidacies and even had their first televised debate on May 5, 2011, eighteen months prior to the general election. *See* Expert Report of Dr. Bruce Oppenheimer at p. 5 attached hereto as Exhibit 10 and incorporated herein by this reference. Moreover, even the Plaintiffs' national organizations themselves have recognized this "ratcheting forward" of the political cycle. As of November 2, 2011, the Green Party of the United States (GPUS) had already officially recognized two candidates for the 2012 GPUS nomination for President in accordance with the national party's rules and criteria, and the Constitution Party has scheduled its national party convention to select its presidential nominee

and establish the party platform in April 2012.[3] *See* Exhibits 1 and 4. Thus, as Defendants' expert noted, April is apparently not too early for the national Constitution Party to organize for purposes of electing its Presidential candidate and establishing the party platform for the next four years, but is too early for sufficient public interest to stimulate the gathering of names on a petition for the formation of a new party. Oppenheimer Report at p. 6.

Moreover, this phenomenom of earlier candidacies is not limited to presidential elections. As noted by Defendants' expert Dr. Oppenheimer, in the 2010 Tennessee gubernatorial election, the Tennessee Republican gubernatorial field was already well-established more than a year prior to the general election with three of the four major candidates announcing in early January of 2009 and the only Democratic candidate announcing in April 2009. Oppenheimer Report at p. 6. Additionally, as noted by both of Defendants' experts, campaigns for statewide and congressional office have grown increasingly expensive such that the reality is now that of the permanent campaign. Serious major party candidates are required to build their organizations and to begin soliciting campaign contributions earlier than in the past given the demands of contemporary election costs – usually more than a year prior to the next general election. At the same time, states have increasingly adopted more rigorous campaign finance reporting requirements which often require that candidates file reports or notices in order to fundraise long before they are required to file as a candidate seeking ballot access (s*ee, e.g.*, Tenn. Code Ann. §§ 2-10-102(3) and 2-10-105(e)(1)). Donovan Report at p. 19; Oppenheimer Report at pp. 5. Indeed, as of October 31, 2011, 122 individuals had already announced their candidacies for either the August 2012 Primary or the November 2012 General elections by filing their appointment of political treasurer form with the Tennessee Bureau of Ethics and Campaign

[3]Additionally, at least two individuals have filed statements of candidacy as candidates of the Constitution Party with the Federal Election Commission, as well as the two individuals recognized by the GPUS as official presidential candidates of the GPUS. *See* Exhibits 2 and 5.

Finance. *See* Affidavit of Drew Rawlins attached hereto as Exhibit 11 and incorporated herein by this reference.

Finally, both of Defendants' experts testified as to factors other than Tennessee's ballot access laws that explain the absence of minor parties on the ballot, including: (1) plurality elections and single member constituencies (Oppenheimer Report at pp. 1-2; Donovan Report at pp. 3-6)[4]; (2) ease of ballot access for independent or non-major party candidates (Oppenheimer Report at pp. 2-3; Donovan Report at pp. 30-31); (3) Tennessee's "office" ballot structure (Oppenheimer Report at p. 3); (4) underlying political environment of the state (Donovan Report at pp. 23-24); and (5) lack of underlying public interest in minor parties in the state (Donovan Report at pp. 23, 25-27). Additionally, both experts opine that Tennessee's ballot access requirements, when viewed in totality with the rest of Tennessee's election laws do not present any measurable barrier to ballot access for minor parties in Tennessee. (Oppenheimer Report at pp. 1-4; Donovan Report at pp. 12-33).

Accordingly, Defendants submit that based upon the undisputed testimony of election officials Beth Henry-Robertson, Vicki Koelman, and Albert Tieche, as well as the opinions of their experts Drs. Oppenheimer and Donovan, Tennessee's filing deadline is reasonable and justified by the state's legitimate interests 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.

[4]These have also been recognized by the Supreme Court as other factors in our political system making it difficult for third parties to success in American politics. *Timmons*, 520 U.S. at 362.

2. The Signature Percentage Requirement of Tenn. Code Ann. § 2-1-104(a)(24) does not violate Plaintiffs' First and Fourteenth Amendment Rights.

Plaintiffs also challenge the two and a half percent (2.5) signature requirement of Tenn. Code Ann. § 2-1-104(a)(24), separately, and in tandem with the petition filing deadline, as unconstitutionally burdening their rights to associate, to cast their votes effectively and to express their own views in violation of the First Amendment and Fourteenth Amendment. Specifically, Plaintiffs charge that requiring a prospective party to collect signatures equaling 2.5% of the vote from the prior gubernatorial election presents too high a threshold for any new party to achieve. Again, Plaintiffs' rely solely upon the opinion of their expert who opines that Tennessee's 2.5% percent signature requirement is the "sixth most demanding in the nation" and that the cost of signature collection alone "exceeds the revenue available to the party and effectively prevents that from obtaining ballot access." Plaintiffs' expert further opines that a state really only needs 5,000 signatures in order to meet its "legitimate state interest in preventing voter confusion that can be caused by overly-crowded ballots." Finally, Plaintiffs' expert opines that "as many as six or more candidates have appeared on the general election ballot as candidates for statewide or federal office on at least 50 occasions since the principle of 'avoiding voter confusion' was first enunciated, and there is no evidence that there was any voter confusion in those elections". Winger's Report Opinions 3 and 4 (Doc. 19 at p. 31).

There is no denying, however, that as a general proposition, as much as a five percent (5%) signature requirement has been upheld as constitutional in numerous ballot access challenges. *See, e.g., Am. Party of Texas v. White*, 415 U.S. at 789 ("Demanding signatures equal in number to 3% or 5% of the vote in the last election is not invalid on its face."); *Storer*, 415 U.S. at 739-40 (5% requirement not facially unconstitutional); *Jenness v. Fortson*, 403 U.S.

at 438-39 (upholding Georgia statute requiring signatures of 5% of registered voters before independent candidates could be placed on ballot); *Swanson v. Worley*, 490 F.3d 894, 905 (11th Cir. 2007) (upholding Alabama statute requiring independent candidates obtain signatures of 3% of vote in last gubernatorial election); *Rogers v. Corbett*, 468 F.3d 188, 195 (3rd Cir. 2006) (upholding Pennslyvania statutes requiring candidate of minor political party obtain signatures of 2% of vote in last election); *Cartwright v. Barnes*, 304 F.3d 1138, 1141, 1142 (11th Cir. 2002) (reaffirming constitutionality of Georgia 5% signature requirement); *Rainbow Coalition of Okla. v. Oklahoma State Election Bd.*, 844 F.2d at 741-742, 744 (10th Cir. 1988) (upholding Oklahoma statute requiring signatures of 5% of the number of votes cast in most recent election); *Libertarian Party of Florida v. Florida*, 710 F.2d at 792-95 (upholding Florida statute requiring minor party candidate obtain signatures of 3% of all registered voters to appear on general election ballot); *Block v. Mollis*, 618 F.Supp.2d 142, 150 (D.R.I. 2009) (upholding Rhode Island statute requiring new political party obtain signatures of 5% of vote from prior election).

The Supreme Court has recognized that states have a legitimate interest in requiring that new party demonstrate that it has significant support within the community. This interest is in "avoiding confusion, deception, and event frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554, 562-63 (1971); *see also Barr v. Galvin*, 626 F.3d 999, 111 (1st Cir. 2010).

> This "support" requirement is meant "to safeguard the integrity of elections by avoiding overloaded ballots and frivolous candidacies, which diminish victory margins, contribute to the cost of conducting elections, confuse and frustrate voters, increase the need for burdensome run-offs, and may ultimately discourage voter participation in the electoral process.

Libertarian Party of Maine v. Diamond, 992 F.2d 365, 371 (1st Cir. 1993). In addition, the requirement assures that a new political party is actually a political organization with significant

support rather than an independent candidacy masquerading as a political body. *Coalition for Free & Open Elections v. McElderry*, 48 F.3d 493, 498 (10th Cir. 1995). Thus when candidates list a party affiliation, the voters and the state are entitled to some assurance that particular party designation has some meaning in terms of a "statewide, ongoing organization with distinctive political character." *Storer v. Brown*, 415 U.S. at 745.

Moreover, the Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), expressly rejected the argument that a party "has a right to use the ballot itself to send a particularized message, to its candidates and to the voters and to the voters, about the nature of its support for the candidate. *Id.* at 363; *see also Burdick*, 504 U.S. at 438 ("[a]ttributing to elections a more generalized expressive function would undermine the ability of states to operate elections fairly and efficiently."). The Court has recently reaffirmed this position, stating not only that the "First Amendment does not give political parties a right to have their nominees designated as such on the ballot," but also that "[p]arties do not gain such a right simply because the state affords candidates the opportunity to indicate their party preferences on the ballot." *Libertarian Party of New Hampshire v. Gardner*, 638 F.3d 6, 16 (1st Cir. 2011) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453, n.7, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)).

With respect to Plaintiffs' expert's opinion that Tennessee's signature requirement is the "sixth most demanding," such argument and/or evidence is irrelevant. As the federal courts have recognized, "[a] court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature." *Libertarian Party of Florida v. Florida*, 710 F.2d at 794 (citing *Storer v. Brown*, 415 U.S. at 729-30). Furthermore, the Supreme Court has upheld a broad array of election schemes, and thus, the

issue in this case is whether Tennessee's election scheme is constitutional, not whether Tennessee's scheme is the best relative to other states. *See Green v. Morthan*, 155 F.3d 1332, 1339 (11th Cir. 1998) ("There is a range of fees and signatures requirements that are constitutional, and [a state] legislature is free to choose its ballot access requirements from that constitutional spectrum.").

Furthermore, as noted by Defendants' experts, it is difficult to conduct a truly fair ranking of states' signature requirements because there are variations in state ballot access laws beyond the number of signatures required and because the ease of obtaining signatures varies greatly within the contexts of different states. Oppenheimer Report at p. 5. Indeed, there are a number of elements of Tennessee's ballot access laws that ease the burden of gathering signatures and that treat minor party candidates more favorably than rules in many other states, *i.e.*, (1) no restrictions whatever are placed upon the free circulation of petitions; (2) voter may sign a petition even though he has signed others; (3) voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary; (4) voter who has signed a new party petition is free thereafter to participate in another party's primary; (5) signer of a petition is not required to state that he intends to vote for that party's candidates at the election; (6) voter who has previously voted in party primary is fully eligible to sign a petition; (7) no requirement that signature on petition be notarized; (8) no restrictions on how many signatures may come from specific geographical area with new party petitions; (9) no restrictions on how many signatures can be submitted in an effort to meet the 2.5% requirement and (10) no restrictions on when the petitioning effort can begin. *See* Donovan Report at p. 28; *see also Swanson v. Worley*, 490 F.3d at 904; *Libertarian Party of Florida v. Florida*, 710 F.2d at 794; *Jenness v. Fortson*, 403 U.S. at

438-39. Thus, Plaintiffs' expert's use of only a single metric – the percentage requirement – taken out of the broader context is misleading. *See* Oppenheimer Report at p. 5.

Furthermore, with respect to Plaintiffs' expert's opinion that Tennessee's signature requirement places too great a financial burden on minor parties, initially it should be noted that Plaintiffs' have raised a facial, and not an as applied challenge to the constitutionality of this provision. Furthermore, Plaintiffs' expert cites no data in support of his opinion. Additionally, Plaintiffs' expert's opinion appears to be based on the assumption that a minor party would have zero ability to mobilize volunteers and/or on the assumption that the substance of the petition (*i.e.*, recognition as a minor party) would be of such little interest to voters that volunteers would be unable to collect signatures. However, as testified by Defendants' expert, minor party experiences in other states demonstrates that volunteer efforts are successful even when the petitioning requirements (other than the percentage amount) are much more restrictive than in Tennessee. Donovan Report at pp. 17-18. The inability of a minor party to recruit volunteers to gather signatures also begs the question of the party's ability to demonstrate that it is actually a political organization with significant support in the community. Accordingly, that Plaintiffs may incur some costs because of the choice to hire individuals to collect signatures, does not impose severe burdens on the Plaintiffs. *See Green Party of Arkansas v. Martin*, 649 F.3d 675, 683 (8th Cir. 2011) (citing *Am. Party of Texas v. White*, 415 U.S. 767, 794, 94 S.Ct. 1296, 39 L.Ed. 744 (1974) (noting that the States need not "finance the efforts of every nascent political group seeking to organize itself")).

Finally, with respect to Plaintiffs' arguments that a signature requirement in excess of 5,000 is more than necessary to avoid voter confusion, the Supreme Court has recognized that a state has a legitimate interest in avoiding voter confusion, deception, or other election process

frustrations without presenting empirical evidence that the contested measure in fact reduces those risks. *Constitution Party of Kansas v. Biggs*, -- F.Supp.2d --, 2011 WL 1595042 at *5 (D. Kan. April 22, 2011) (citing *Storer*, 415 U.S. at 736); *see also Munro*, 479 U.S. at 195. Additionally, Plaintiffs' expert's opinion concerning the lack of evidence of voter confusion where there have been six or more candidates in over fifty state and federal elections since the principle of "avoiding voter confusion" was first recognized, glaringly and blatantly ignores perhaps the most infamous example of voter confusion resulting from ballot overcrowding – the "butterfly" ballot used in Palm Beach County, Florida in the 2000 Presidential election. As noted by the court in *Nader v. Keith*, "[t]hat fiasco was a consequence of the fact that the ballot listed ten Presidential candidates." 385 F.3d at 733; *see also* Donovan Report at pp. 9-11.

Tennessee's 2.5% signature requirement clearly falls within the range of petition signature requirements for new party ballot access that have been upheld as constitutional. Furthermore, there is no evidence in the record indicating how this signature requirement operating in tandem with the state's filing deadline and other election laws in a manner that is unconstitutionally restrictive as these laws only became as May 23, 2011. There is evidence in the record, however, of minor parties having qualified for ballot status in states with the same or greater signature requirements. *See* Donovan Report at p. 14. Moreover, there is also undisputed evidence in the record that there is at least one minor political party – American Elect – that is seeking to qualify as a recognized minor party through the petitioning process contained in Tenn. Code Ann. § 2-1-104(a)(24) and § 2-13-107. *See* Henry-Robertson Affidavit at pp. 13-14. If this party is successful in such petitioning process, it cannot be said that there are no circumstances under which the Act would be valid and, therefore, a determination as to the facial validity of these statutes is premature.

Tennessee has an important interest "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot. *Munro*, 107 S.Ct. at 537. While unrecognized political parties representing minority views are vital to the continuation of a representative government, this must be balanced with the state's important interests in controlling fractionalism, avoiding voter confusion, and reducing the burden of additional administrative costs. *Constitution Party of Kansas v. Biggs*, 2011 WL 1595042 at *8, *Nader v. Keith*, 385 F.3d at 732-33. In light of the undisputed evidence of Defendants' factual and expert witnesses, Tennessee's 2.5% petition signature requirement and petition filing deadline, operating separately and in tandem with each other, do not unnecessarily restrict or infringe upon the associational rights of Plaintiffs and are reasonable and justified by legitimate state interests. Accordingly, Defendants submit that under the *Anderson* balancing test, they are entitled to a judgment in their favor finding that this petition signature and filing deadline do not violate Plaintiffs' constitutional rights.

3. Tenn. Code Ann. § 2-1-104(a)(24) is not unconstitutionally vague.

Plaintiffs have also challenged the provisions of Tenn. Code Ann. § 2-1-104(a)(24) on the grounds that they are unconstitutionally vague. Tenn. Code Ann. § 2-1-104(a)(24) provides as follows:

> "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. (emphasis added)

Plaintiffs argue that the language of Tenn. Code Ann. § 2-1-104(a)(24) "leaves the Coordinator of Elections with unfettered discretion to establish party qualifying petition requirements that the legislature has not seen fit to establish and this is unconstitutional."[5]

The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

"The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). The Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 498-99. The void for vagueness doctrine "is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing . . . statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of contact are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972).

Here, Plaintiffs' arguments that Tenn. Code Ann. § 2-1-104(a)(24) is unconstitutionally vague are based on a strained construction of the language of the statute, as well as pure

[5]Plaintiffs' Motion for Summary Judgment on Counts I-A and I-B (Doc. # 19 at p. 20).

speculation and hypotheticals. Specifically, Plaintiffs assert that the statute merely establishes a minimum signature requirement, and thus they speculate that the Coordinator of Elections might choose to establish a higher requirement. (Doc. # 19 at p. 21). Plaintiffs further speculate that the Coordinator of Elections might require that signatures be notarized or that signature collectors be registered voters or otherwise take action that leaves new parties with an unconstitutionally short time to collect petition signatures. (*Id*. at p. 22).

These hypothetical scenarios are exactly the reason why federal courts are hesitant to sustain facial challenges to a legislative act. *See Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. at 1191 ("[c]laims of facial invalidity often rest on speculation[,] . . . raise the risk of premature interpretation[,] . . . run contrary to the fundamental principle of judicial restraint[,] . . . [and] threaten to short-circuit the democratic process."). Moreover, Plaintiffs' speculations as to how the Coordinator of Elections might act under the statute implicates two of the cardinal rules governing the federal courts:

> " '[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *United States v. Raines,* 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 1960), quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). Citing a long line of cases, *Raines* also held that "[k]indred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." These guideposts are at the bottom of the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Allen v. Louisiana,* 103 U.S. 80, 83-84, 13 Otto 80, 26 L.Ed. 318 (1881), quoted with approval in *Field v. Clark,* 143 U.S. 649, 695-696, 12 S.Ct. 495 505-506, 36 L.Ed. 294 (1892). Absent "weighty

> countervailing" circumstances, *Raines, supra*, 362 U.S. at 22, 80 S.Ct. at 523, this is the course that the Court has adhered to. *Reagan v. Farmers' Loan & Trust Co.,* 154 U.S. 362, 395-396, 14 S.Ct. 1047, 1053-1054, 38 L.Ed. 1014 (1894); *Champlin Refining Co. v. Corporation Comm'n,* 286 U.S. 210, 234-235, 52 S.Ct. 559, 564-565, 76 L.Ed. 1062 (1932); *Watson v. Buck,* 313 U.S. 387, 395-396 (1941); *Buckley v. Valeo,* 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976).

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02, 105 S. Ct. 2794, 2801, 86 L. Ed. 2d 394 (1985). Here, the plain language of the statute vests discretion in the Coordinator of Elections to establish the *form* of the petition and nothing more.

Plaintiffs also complain that Tenn. Code Ann. § 2-1-104(a)(24) is unconstitutionally vague because it does not contains any standards for rejecting signatures on petitions and without any knowledge about how the Coordinator of Elections will review petitions, parties are left with no way of determining how many "extra" signatures they will have to collect. (Doc. # 19 at p. 22). This argument is simply without merit. Tennessee's election laws already contain statutory standards for the review of signatures on petitions – whether they be nominating petitions, referenda petitions or new party petitions. Specifically, Tenn. Code Ann. 2-1-107 sets forth the standards that must be followed in determining whether a signature is valid and should be counted. In addition, Ms. Henry-Robertson testified that all county election officials are required to follow the standards set forth in Tenn. Code Ann. § 2-1-107 in verifying signatures on petitions; Ms. Koelman and Mr. Tieche, as county election administrators, affirmed this testimony. *See* Henry-Robertson Affidavit at p. 6; Koelman Affidavit at p. 4; Tieche Affidavit at p. 4. Additionally, Tennessee courts have recognized that Tenn. Code Ann. § 2-1-107 contains clear and specific standards for determining the validity of signatures. *See State ex rel. Potter v. Harris*, 2008 WL 3067187 (Tenn. Ct. App. Feb. 11, 2008).

Although Tenn. Code Ann. § 2-1-104(a)(24) does not answer every hypothetical Plaintiffs raises, it does not contain any prohibitions or provide for any penalties. It is a civil statute, not a criminal statute. As such, it is entitled to greater tolerance of vagueness than the Court would allow an act with criminal penalties. The plain language of the statute vests discretion in the Coordinator of Elections to establish the form of the petition but specifically requires that the *petition*, at a minimum, contain: (1) the signatures of registered voters equal to at least two and one-half percent of the total number of votes cast for gubernatorial candidates in the most recent election for governor and (2) on each page of the petition state its purpose, its name and contain the names of registered voters from a single county. These standards it creates for the petition requirements are not vague and provide clear guidance to a person of ordinary intelligence about what is requested to comply with the statute. Persons of common intelligence need not guess at its meaning or differ as to its application. Accordingly, Tenn. Code Ann. § 2-1-104(a)(24) is not void for vagueness under the Fourteenth Amendment.

4. Tenn. Code Ann. § 2-1-104(a)(24) does not unconstitutionally delegate legislative authority to the Coordinator of Elections.

In addition to asserting that the provisions of Tenn. Code Ann. § 2-1-104(a)(24) are unconstitutionally vague, Plaintiffs also assert that Tenn. Code Ann. § 2-1-104(a)(24) violates Art. I, § 1, and Art. I, § 4, of the United States Constitution by delegating powers to the Coordinator of Elections that are committed solely to the legislature.

Art. I, § 1

Article I, Section 1 of the federal Constitution vests "[a]ll legislative Powers herein granted . . . in a *Congress of the United States*." (emphasis added). Thus, the Supreme Court has repeatedly held that when *Congress* confers decisionmaking authority upon agencies *Congress* must "lay down by legislative act an intelligible principle to which the person or body

authorized to [act] is directed to conform." *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928) (emphasis added). Here, the alleged unlawful delegation contained in Tenn. Code Ann. § 2-1-104(a)(24) was by the Tennessee General Assembly. However, the plain language of Art. I, § 1, and the Supreme Court's application of that language makes clear that the prohibition against delegation of legislative power contained in Art. I, § 1, of the federal Constitution applies only to Congress and not to the Tennessee General Assembly. Accordingly, Plaintiffs' cannot assert a claim against the Tennessee General Assembly for violation of Art I, § 1, of the federal Constitution.

Moreover, to the extent that Plaintiffs' claim is construed as one alleging an unconstitutional delegation of the power of the Tennessee General Assembly under the provisions of Art. II, §§ 1 and 2, of the Tennessee Constitution, the Supreme Court has made clear that such a suit is barred by the Eleventh Amendment, even under the doctrine of pendent jurisdiction. *See Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117-121, 104 S.Ct. 900, 917-919, 79 L.Ed.2d 67 (1984).[6]

Art. I, § 4

Art. I, § 4 of the U.S. Constitution states that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." In interpreting state power under the Elections Clause, the Supreme Court has stated:

> The Elections Clause gives States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S., at 366, 52 S.Ct., at 399. . . . States are thus entitled to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of

[6] Additionally, violations of state law are not sufficient to state a claim under 42 U.S.C. § 1983. *Monroe v. McNairy County, Tennessee*, 520 F.Supp.2d 917, 920 (W.D.Tenn. 2007).

> the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788, n. 9, 103 S.Ct. 1564, 1570, n. 9, 75 L.Ed.2d 547 (1983). For example, in *Storer v. Brown*, 415 U.S. 724, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), the case on which petitioners place principal reliance, we upheld the validity of certain provisions of the California Elections Code. In so doing, we emphasized the States' interest in having orderly, fair, and honest elections "rather than chaos." *Id.*, at 730, 94 S.Ct., at 1279. We also recognized the "States' strong interest in maintaining the integrity of the political process by preventing interparty raiding," *id.*, at 731, 94 S.Ct., at 1279, and explained that the specific requirements applicable to independents were "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot," *id.*, at 733, 94 S.Ct., at 1281. In other cases, we have approved the States' interests in avoiding "voter confusion, ballot overcrowding, or the presence of frivolous candidacies," *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-195, 107 S.Ct. 533, 537, 93 L.Ed.2d 499 (1986), in "seeking to assure that elections are operated equitably and efficiently," *Burdick v. Takushi*, 504 U.S., at 433, 112 S.Ct., at 2063, and in "guard[ing] against irregularity and error in the tabulation of votes," *Roudebush v. Hartke*, 405 U.S. 15, 25, 92 S.Ct. 804, 810, 31 L.Ed.2d 1 (1972). In short, we have approved of state regulations designed to ensure that ***835** elections are " 'fair and honest and ... [that] some sort of order, rather than chaos, ... accompan[ies] the democratic processes.' " *Burdick v. Takushi*, 504 U.S., at 433, 112 S.Ct., at 2063, quoting *Storer*, 415 U.S., at 730, 94 S.Ct., at 1279.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-35, 115 S. Ct. 1842, 1869-70, 131 L. Ed. 2d 881 (1995).

Plaintiffs assert that this provision, known as the "Elections Clause," delegates the power to manage elections to federal office to the legislature and the legislature alone, and thus while a "legislature remains free to delegate powers needed to ***implement*** its enactments – subject to the standards discussed above, the legislature cannot delegate powers to create law." (Doc. # 19 at pp. 23-24) (emphasis in original). Plaintiffs thus argue that Tenn. Code Ann. § 2-1-104(a)(24) violates the Election Clause because it gives the Coordinator of Election the discretion to establish the form of the petition which Plaintiffs apparently consider to be the equivalent of

creating or making law. Plaintiffs rely primarily upon the decision in *Libertarian Party of Ohio v. Brunner*, 567 F.Supp.2d 1006 (S.D. Ohio 2008) in making this argument.

Plaintiffs' reliance on *Brunner* is entirely misplaced as the facts are materially dissimilar. In *Brunner*, the Ohio statutes defining the methods of ballot access for minor or third parties had been declared unconstitutional and the Ohio General Assembly had taken no action to establish ballot access standards for minor political parties, thus leaving no lawful, statutory criteria to be followed by the Secretary of State or the various Boards of Election of each County. In the absence of legislation from the Ohio General Assembly enacting new constitutional ballot access procedures, the Ohio Secretary of State issued a Directive requiring minor political parties to: (1) obtain petition signatures equal to one-half of one percent of the votes cast for governor in the 2006 general election and (2) file nominating petitions 100 days before the primary. *Id*. at 1009-1010. The district court enjoined the Secretary from enforcing this directive, holding that the Secretary of State lacked the authority to promulgate the Directive in the absence of express delegation from the Ohio General Assembly.

> In this case, the Directive issued by the Secretary of State does not interpret provisions of legislation or resolve factual disputes arising under Ohio law. Instead, the Directive establishes a new structure for minor party ballot access, a structure not approved by the Ohio legislature. . . . Absent an express delegation of legislative authority, this Court cannot assume that the Ohio General Assembly intended to vest the Secretary of State with the legislative authority conferred in Article I, Section 4 and Article II, Section 1.

Id. at 1012; *see also Moore v. Brunner*, 2008 WL 3887639 at * 1 (S.D. Ohio Aug. 21, 2008).[7]

[7]Contrary to Plaintiffs' assertions, the court in *Brunner* specifically did not address the issue of whether the Ohio General Assembly could delegate its authority to direct the manner in which the state of Ohio votes for Senators and Representatives or selects electors to vote for President to a member of the executive branch. 567 F.Supp.2d at 1012.

Here, unlike the Ohio Secretary of State, the Coordinator of Elections has promulgated no new rule nor issued any directive in the absence of legislative action. Instead, the Coordinator of Elections has merely established the form of the petition required in Tenn. Code Ann. § 2-1-104(a)(24) – an administrative function expressly delegated to the Coordinator of Elections by the Tennessee General Assembly. Consequently, it cannot be fairly said that, in doing so, the Coordinator of Elections acted in a legislative capacity or in any way usurped the legislature's authority. Moreover, Plaintiffs have not demonstrated that the form of the petition established by the Coordinator of Elections exceeded this statutory delegated authority, only engaged in pure speculation. Accordingly, Plaintiffs' claims that Tenn. Code Ann. § 2-1-104(a)(24) violates the Elections Clause are without merit and should be denied.

5. Plaintiffs' lack standing to challenge the provisions of Tenn. Code Ann. § 2-13-107(d).

Tenn. Code Ann. § 2-13-107(d) contains certain prohibitions on the name used by a minor party once it has qualified as a "recognized minor party":

> The name used by the minor party shall not be or include the name of any statewide political party then in existence or any word forming any part of the name of any statewide political party then in existence, and shall not include the word "independent" or "nonpartisan." The coordinator of elections shall redact any portion of a minor party name that violates this section.

Plaintiffs assert that the prohibition against including the word "independent" or "nonpartisan" in a minor party's name violates their rights of free speech. (Doc. # 19 at p. 16). This claim should be denied as Plaintiffs' lack the standing necessary to assert such claim.

Article III, § 2 of the federal Constitution extends the "judicial power" of the United States only to "Cases" and "Controversies," of which the component of standing is an "essential and unchanging part." *Hooker v. Sasser*, 893 F.Supp. 764, 766 (M.D.Tenn. 1995) (citing *Lujan*

v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 363-64 (1992)); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (standing to sue is part of the common understanding of what it takes to make a justiciable case). Thus, a party seeking to invoke this Court's jurisdiction must establish the necessary standing to sue before this Court may consider the merits of that party's cause of action. *Id*.

The Supreme Court has set forth three elements which comprise "the irreducible constitutional minimum of standing":

> First, and foremost, there must be alleged (and ultimately proved) an "injury in fact" – a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural' or hypothetical.'" *Whitmore v. Arkansas, supra*, at 149, 155, 110 S.Ct. at 1723 (quoting *Los Angeles v. Lyon*, 461 U.S. 95, 101-102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983). Second, there must be causation – a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1925-1926, 48 L.Ed.2d 450 (1976). And third, there must be redressability – a likelihood that the requested relief will redress the alleged injury. *Id*., at 45-46, 96 S.Ct. at 1927-28; *see also Warth v. Seldin*, 422 U.S. 490, 505, 95 S.Ct. 2197, 2208, 45 L.Ed.2d 343 (1975).

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102-04, 118 S.Ct. 1103, 1016-17, 140 L.Ed.2d 210 (1998).

The primary focus of a standing inquiry is on the party, not on the merits of the claim. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 484, 102 S.Ct. 752, 765, 70 L.Ed.2d 700 (1982) and *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). Although standing does not depend on the merits, it often runs on the nature and source of the claim asserted and, therefore, a standing inquiry requires a "careful judicial examination of the complaint's allegations to ascertain whether the

particular plaintiff is entitled to an adjudication of the particular claims asserted." *Id*. Furthermore, when the claimed injury involves the violation of a statute, the court must determine "whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. at 500. In addition to these constitutional requirements, federal courts have established certain prudential principles that affect standing. *See Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir. 1999). These prudential limitations enforce the principle that "the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted. *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991).

A plaintiff bears the burden of demonstrating standing and must plead it components with specificity. *Valley Forge*, 454 U.S. at 472. Moreover, an alleged injury must be "direct" to constitute an injury sufficient to support standing. *See Taub v. Commonwealth of Kentucky*, 842 F.2d 912, 918 (6th Cir. 1988). Article III requires that a plaintiff show that he " 'personally has suffered some actual or threatened injury'" as a result of the allegedly illegal conduct of the defendant. *Valley Forge*, 454 U.S. at 472.

Here, neither of the Plaintiffs – the Constitution Party of Tennessee or the Green Party of Tennessee – includes the word "independent" or "nonpartisan" in their names. Nor does either Plaintiff include in their names the name of any statewide political party in existence or any word forming any part of the name of any statewide political party in existence. The provisions of Tenn. Code Ann. § 2-13-107(d) are not even applicable to either of the Plaintiffs, and thus there can be no threat of redaction by the Coordinator of Elections.[8] Consequently, Plaintiffs cannot show that either "personally has suffered some actual or threatened injury as a result of the

[8]Additionally, Plaintiffs' complaint does not contain any allegations that Plaintiffs intend to include any of these prohibited words in their name in the future.

allegedly illegal conduct of the defendants" and, therefore, Plaintiffs' claims as to the constitutionality of Tenn. Code Ann. § 2-13-107(d) should be denied for lack of standing.

B. Tennessee's Candidate Filing Deadline Is Not Unconstitutional.

In addition to challenging Tennessee's statutes governing ballot access, Plaintiffs have also challenged the deadline contained in Tenn. Code Ann. § 2-5-101(a)(1) for candidates in the August primary election to qualify as being unconstitutionally early. Plaintiffs also assert that the time period allowed for candidates to gather signatures on nominating petitions contained in Tenn. Code Ann. § 2-5-102(b) and the form of the petition set forth in Tenn. Code Ann. § 2-5-102(a) are unconstitutional; however, Plaintiffs have not plead either of these claims in their complaint, nor have they requested any relief with respect to these claims in their complaint. *See* Plaintiffs' Complaint (Doc. 1).

As discussed in the previous section, a party seeking to invoke this Court's jurisdiction must establish the necessary standing to sue before this Court may consider the merits of that party's cause of action. Plaintiffs' assert that they have standing to challenge the candidate filing deadline under the "doctrine of associational standing." An organization has standing to bring suit on behalf of its members where the members could sue in their own right, the interests involved are related to the organization's purpose, and the claim asserted and the relief requested do not require the participation of individual members in the suit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Hunt v. Wash. State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)); *Friends of Tims Ford v. Tenn. Valley Auth.,* 585 F.3d 955, 967 (6th Cir.2009). However, in order to prove Article III standing, Plaintiffs' members still must demonstrate that: "(1) [they have] suffered an 'injury in fact' that is (a) concrete and

particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.*, 528 U.S. at 180–81, 120 S.Ct. 693.

Furthermore, since these elements are not mere pleading requirements but rather an indispensable part of a plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. *Lujan*, 504 U.S. at 561. Thus, at the summary judgment stage, a plaintiff cannot rest on "mere allegations" contained in the complaint, but must "set forth" by affidavit or other evidence of "specific facts." *Id.*; *see also* Fed.R.Civ.P. 56(e). Thus, an organization seeking to establish "injury in fact" for purposes of a summary judgment motion must "submit affidavits or other evidence showing, through specific facts, . . . that one or more of [the organization's] members would be 'directly' affected apart from their 'special interest' in th[e] subject." *Lujan*, 504 U.S. at 563 (citing *Sierra Club v. Morton*, 405 U.S. 727,735, 739, 92 S.Ct. 1361, 1366, 1368 (1972)).

Here, Plaintiffs have submitted no affidavits or other evidence of specific facts demonstrating that one or more of their members have been or would be directly affected by the provisions of Tenn. Code Ann. § 2-5-101 or § 2-5-102. Consequently, Plaintiffs cannot establish the requisite "injury in fact" for purposes of associational standing and, therefore, Plaintiffs' challenges to Tenn. Code Ann. § 2-5-101 and § 2-5-102 should be denied.

Furthermore, assuming Plaintiffs do have the requisite associational standing, Tennessee's candidate filing deadline is clearly constitutional as it imposes only a reasonable and nondiscriminatory restriction. Tenn. Code Ann. § 2-5-101(a) requires that all candidates for the

August primary election – both major and minor party candidates – file their nominating petition by the first Thursday in April of the election year. Plaintiffs assert that this filing deadline imposes severe burdens on candidates of minor parties because it requires them to collect signatures at a time when voter interest is low and because minor party candidates are not likely to emerge until the major party candidates and their positions are known. (Plaintiffs' Motion for Summary Judgment on Counts II, III and IV, Doc. # 20 at pp. 6-7).

Once again, Plaintiffs present no evidence in support in the form of either affidavits or expert testimony that early filing deadlines place significant burdens on *candidates* of minor parties. In fact, Plaintiffs' expert only testifies as to the financial burdens placed on minor parties and candidates when they are required to obtain more than 5,000 signatures. (Winger Report Op. 3). Here, Tennessee's election laws only require a minor or major party candidate to obtain the signatures of *25* or more registered voters who are eligible to vote to fill the office. Tenn. Code Ann. § 2-5-101(b)(1). Thus, even if a minor party candidate chose to hire an individual to collect *all* the signatures, according to Plaintiffs' expert the financial burden on such candidate would be less than $100.

Moreover, the fact that Tennessee's filing deadline applies to both major and minor party candidates is a significant distinction from the situation in *Anderson*. The early filing deadline in *Anderson* imposed a severe burden on independent candidates by putting them at a disadvantage because it required them to file almost five month *before* the major party nominees were named. Here, Tennessee's filing deadline is clearly nondiscriminatory – it applies to all party candidates and all party candidates are equally burdened. There is no particular group which feels the additional burden of being placed at a disadvantage with respect to the rest of the field.

Furthermore, Tennessee's early filing deadline serves Tennessee's important state interest of equal treatment of candidates and its administrative interest of being able to process candidates' petitions and verify signatures in the midst of completing a host of other tasks necessary to prepare the ballot and to conduct a fair election. *See* Affidavits of Beth Henry-Robertson, Vicki Koelman and Albert Tieche. Additionally, Tennessee's early filing deadline is necessary in order to allow sufficient time to resolve any challenges to a candidate's qualification without disruption of the election process. *See Barrett v. Giles County*, No. M2010-02018-COA-R3-CV, 2011 WL 4600431 at * 4(Tenn. Ct. App. Oct. 5, 2011) ("Challenges to a candidate's right to appear on a ballot should ordinarily be brought before the election – preferably in time for the issue to be resolved before the ballots have to be printed and before the start of absentee and early voting.").

Thus, there is nothing in the record for this Court to conclude that the burden Tennessee has placed on *all* party candidates to engage in campaign efforts prior to April in order to obtain a place on the August primary ballot is severe or inherently unreasonable. The April filing deadline is not so early that a diligent candidate cannot meet the requirement of obtaining *25* signatures. Furthermore, the deadline is reasonable with respect to minor party candidates as there is nothing in the case law which suggests that a state is required to give minor party candidates the advantage of jumping into a race in response to late-breaking events which impact the political landscape when major parties do not have the same flexibility. *See Lawrence v. Blackwell*, 430 F.3d 368, 374 (6th Cir. 2005) (citing *Munro*, 479 U.S. at 198).

Similarly there is nothing in the record for this Court to conclude that the burden Tennessee has placed on all party candidates with respect to the amount of time to collect signatures in order to obtain a place on the August primary ballot is severe or inherently

unreasonable. The 90 day period contained in Tenn. Code Ann. § 2-5-102(b) for gathering signatures is not so short a time period that a diligent candidate cannot meet the requirement of obtaining ***25*** signatures. Accordingly, assuming that Plaintiffs have the requisite associational standing, Plaintiffs' arguments that Tennessee's early candidate filing deadline and 90 day period for collecting signatures violates their First and Fourteenth Amendment rights fail and should be denied.

Finally, with respect to Plaintiffs' challenge to the constitutionality of Tenn. Code Ann. § 2-5-102, Plaintiff has simply mischaracterized the requirements of this statute. Plaintiffs assert that this statute mandates that signers of nominating petitions declare that they are members of the party whose nomination the candidate seeks. Plaintiffs assert that disclosure of this information violates voters' right to privacy and unduly burdens minor parties because potential signers may be unwilling to sign a minor party candidate's nominating petition.

Contrary to Plaintiffs' assertions, however, Tenn. 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.

Furthermore, the provisions of Tenn. Code Ann. § 2-5-102(a) should be read *in pari materia* with the provisions of Tenn. Code Ann. § 2-5-101(b), as both statutes specifically address the requirements for nominating petitions. *See In re Foos*, 405 P.R. 604, 609 (N.D. Ohio

2009) (citing 2b Sutherland Statutory Construction § 51:1 (7th ed.)). That statute provides as follows:

> (b)(1) Nominating petitions shall be signed by the candidate and twenty-five (25) or more registered voters who are eligible to vote to fill the office. Nominating petitions for independent presidential candidates shall be signed by the candidate and twenty-five (25) or more registered voters for each elector allocated to the state. Each independent candidate must designate the full number of electors allocated to the state.
> (2) The signer of a petition must include the address of the signer's residence as shown on the signer's voter registration card in order to that person's signature to be counted. In the event that the signer of a petition includes information on a nominating petition that exceeds the information contained on such person's voter registration card, the signature shall be counted if there is no conflict between the nominating petition and the voter registration card. If no street address is shown on the signer's voter registration card, that person's signature and add address as shown on the voter registration card shall be sufficient. A street address shall be sufficient, and no apartment number shall be required.
> (3) A person's regular signature shall be accepted just as the person's legal signature would be accepted. For example, for the purposes of this subsection (b), "Joe Public" shall be accepted just as "Joseph Q. Public" would be accepted.

There is nothing in Tenn. Code Ann. § 2-5-101(b) that requires the signer of a nominating petition to declare membership in the party whose nomination the candidate seeks. Moreover, subsection (2) makes clear the only requirement that must be met in order for a signature on a petition to be counted is that the "address of the signer's residence as shown on the signer's voter registration card" must be included on the petition. Accordingly, Plaintiffs' arguments that Tenn. Code Ann. § 2-5-102(a) is unconstitutional because it mandates the signer of a nominating petition to declare membership in the party whose nomination the candidate seeks are in error and should be denied.

C. Tennessee's Party Primary Requirement Serves A Compelling State Interest And Is Not Unconstitutional.

Tennessee's election laws require that all parties – major and minor—nominate their candidates for the offices of governor, general assembly, U.S. Senate and U.S. House of Representatives by primary election. Tenn. Code Ann. § 2-13-202. Plaintiffs assert that this "mandatory primary" requirement unconstitutionally burdens their First Amendment rights of association. Plaintiffs further assert that because there is no "evidence that minor party primaries are necessary to select the candidates of minor parties . . . there is no justification for requiring primary elections for minor parties." (Doc. # 20 at p. 12).

1. Plaintiffs are estopped from challenging the constitutionality of Tenn. Code Ann. § 2-13-202.

Plaintiffs are estopped from bringing this present challenge to the constitutionality of Tenn. Code Ann. §2-13-202 – as this specific constitutional challenge was raised and litigated by the Plaintiffs and decided by this Court in the previous case *Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064 (M.D.Tenn. 2010). Under the collateral estoppel doctrine, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (citing *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). 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).

Plaintiffs previously raised and litigated the issue of the constitutionality of Tenn. Code Ann. § 2-13-202 in *Libertarian Party v. Goins*. Specifically, Plaintiffs sought a declaration that Tenn. Code Ann. § 2-13-202 in addition to other election statutes, "as applied to the Plaintiffs herein for the 2008 Tennessee Primary and General Elections, and all subsequent Tennessee Primary and General Elections, and the facts and circumstances relating thereto, are illegal and unconstitutional" and a permanent injunction enjoining the Coordinator of Elections and the Secretary from enforcing the "aforesaid complained of State Election Laws . . . as applied to the instant Plaintiffs for 2008, and all subsequent Tennessee Primary and General Elections, and the facts and circumstances relating thereto." *See* Complaint, Libertarian Party v. Goins, No. 3:08-63, attached here to as Exhibit 12 and incorporated herein by this reference.

In that proceeding, this Court found that the Plaintiffs had not demonstrated that the requirements of Tenn. Code Ann. § 2-13-202 burdened their First Amendment rights. *Libertarian Party v. Goins*, 793 F.Supp.2d at 1089. Such determination as to the constitutionality of Tenn. Code Ann. § 2-13-202 – and correspondingly the state's ability to enforce the requirements of such statute – was "necessary to the outcome." This prior proceeding clearly resulted in a final judgment on the merits as the case was decided on cross-motions for summary judgment. Finally, the Plaintiffs in the present case were plaintiffs in the prior action and had a full and fair opportunity to litigate the issue of the constitutionality of Tenn. Code Ann. § 2-13-202.[9] Clearly, all the elements of estoppel are present and Plaintiffs'

[9]As noted, the case was decided on cross-motions for summary judgment after full opoprtunity for discovery.

claims as to the constitutionality of Tenn. Code Ann. § 2-13-202 should be denied on the basis of estoppel.

2. Tennessee's party primary does not violate Plaintiffs' First Amendment rights of association.

Even if Plaintiffs' claims are not estopped, Tennessee's requirement that political parties nominate their candidates for governor, general assembly, U.S. Senate and U.S. House of Representatives serves a compelling state interest and, thus, outweighs any burdens imposed on minor political parties. Plaintiffs' assert that because Tennessee has an open primary, *i.e.*, Tennessee's voter registration cards do not identify a party preference or party affiliation and thus any voter can vote on the nominees of any party, such an open primary election violates their First Amendment rights of association. Plaintiffs' cite to *California Democratic Party v. Jones*, 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000), *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006), and *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 101 S.Ct. 67 L.Ed.2d 82 (1981) in support of their argument. Once again, Plaintiffs have mischaracterized Tennessee's election laws.

In short, Plaintiffs' assertion that Tennessee has an open primary and that any voter can vote on the nominees of any party under Tennessee's primary election laws is wrong and contrary to the specific provisions of Tenn. Code Ann. § 2-7-115(b) and § 2-7-126. Tenn. Code Ann. § 2-7-115(b) states:

> (b) A registered voter is entitled to vote in a primary election for offices for which the voter is qualified to vote at the polling place where the voter is registered if:
>
> (1) The voter is a bona fide member of and affiliated with the political party in whose primary the voter seeks to vote; or
>
> (2) 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.

Tenn. Code Ann. § 2-7-126 provides that a person seeking to vote in a party primary may be challenged on the ground that the person is not qualified under § 2-7-115(b), *i.e.*, such person is not a bona fide member and/or affiliated or intending to affiliate with that political party. The Supreme Court has concluded that a primary that allows voters to affiliate with the party at the time of the primary is actually a "semi-closed" primary rather than an "open primary" where any voter can vote for any candidate, or a closed primary where the voter must be registered as a member of the party for some period of time prior to the primary election. *See Mississsippi State Democratic Party v. Barbour*, 529 F.3d 538, 548, n. 1 (5th Cir. 2008 (citing *Tashijan v. Republican Party of Conn.*, 479 U.S. 208, 222, n. 11, 107 S.Ct. 544, 553, 93 L.Ed.2d 514 (1986)).

Thus, contrary to Plaintiffs' assertions, Tennessee actually has a semi-closed primary instead of an open primary. Consequently, Plaintiffs reliance upon *California Democratic Party v. Jones*, *Miller v. Brown*, and *Democratic Party of United States v. Wisconsin ex rel. La Follette* is simply misplaced as Tennessee's election laws and semi-closed primary do not present the same concerns presented in those cases. For example, in *California Democratic Party v. Jones*, Proposition 198 had been adopted which changed California's partisan primary from a closed primary to a blanket primary. "Under the new system, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... for any candidate regardless of the candidate's political affiliation." *California Democratic Party v. Jones*, 530 U.S. 567, 570, 120 S. Ct. 2402, 2406, 147 L. Ed. 2d 502 (2000) (quoting Cal. Elec.Code Ann. § 2001 (West Supp.2000); *see also* § 2151). Whereas under the closed primary each voter received a ballot limited to candidates of his own party, as a result of Proposition 198 each voter's primary

ballot listed every candidate regardless of party affiliation and allowed the voter to choose freely among them. It remained the case, however, that the candidate of each party who won the greatest number of votes "is the nominee of that party at the ensuing general election." *Id.* (citing Cal. Elec.Code Ann. § 15451 (West 1996)). The Supreme Court struck down Proposition 198 as an unconstitutional burden upon the First Amendment associational rights of the California Democratic Party, finding that "Proposition 198 forces petitioners to adulterate their candidate-selection process-a political party's basic function-by opening it up to persons wholly unaffiliated with the party, who may have different views from the party." *Id.* at 567, 568, 120 S. Ct. at 2404-05.

Similarly, in *Democratic Party of United States v. Wisconsin ex rel. La Follette*, Wisconsin's election laws allowed non-Democrats-including members of other parties and independents-to vote in the Democratic primary without regard to party affiliation and without requiring a public declaration of party preference. Under this "open" primary system, the voters in Wisconsin did not vote for delegates to the National Convention; instead they voted for a particular Presidential candidate for the Democratic Party's nomination. Convention delegates were chosen later at caucuses of persons who had stated their affiliation with the party, but under Wisconsin law, they were bound to vote at the National Convention in accord with the results of the open primary election. The Supreme Court found that while Wisconsin's open Presidential preference primary did not itself violate national Democratic Party rules, the State's election laws mandating that the results of the primary shall determine the allocation of votes cast by the State's delegates at the National Convention did. Consequently, the Court found such mandate to be an unconstitutional intrusion into the associational freedoms of the members of the national

Democratic Party. *Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 110-12, 101 S. Ct. 1010, 1013-14, 67 L. Ed. 2d 82 (1981).

Finally, in *Miller v. Brown*, Virginia's election laws provided that "[a]ll persons qualified to vote, pursuant to §§ 24.2-400 through 24.2-403, may vote at the primary. No person shall vote for the candidates of more than one party." Va.Code Ann. § 24.2-530 (2006). Virginia's election law further provided that an incumbent is allowed to select the method of his renomination. *See* Va. Code Ann. § 24-2-509. Pursuant to this provision, the incumbent senator for the 11 Senatorial District had selected a primary as his method of nomination. The court ultimately found that Virginia's law providing for an open primary was not facially unconstitutionally, but violated the plaintiff's First Amendment association rights as applied to the incumbent senator's invocation of the statute mandating a forced open primary. *Miller v. Brown*, 465 F. Supp. 2d 584, 595 (E.D. Va. 2006) *aff'd*, 503 F.3d 360 (4th Cir. 2007).

In contrast to these cases, Tennessee's election laws do not require a party to open up its primary to persons wholly unaffiliated with the party. Instead, the very statute Plaintiffs challenge – Tenn. Code Ann. § 2-13-202 – provides that "[*p*]*olitical parties* shall nominate *their candidates* for the following offices by vote of *the members of the party* in primary elections at the regular August election. . . ." (Emphasis added). Tennessee election laws further make clear that it is the political party that has the authority to exclude those who are not bona fide party members from appearing on the primary ballot or voting in the party primary. *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). Additionally, as noted, Tenn. § 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 Tenn. Code Ann. § 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. 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; *see also Kurita v. State Primary Bd. of Tennessee Democratic Party*, No. 3:08-0948, 2008 WL 4601574 (M.D.Tenn. Oct. 14, 2008). These provisions are not statutory principles subject to determination by state officials, but rightfully recognized as the province of the parties themselves. These statutes further clearly demonstrate that Tennessee's semi-closed primary "preserv[es] the political parties as viable and identifiable interest groups, insuring that the results of a primary election ... accurately reflec[t] the voting of the party members." *Clingman v. Beaver*, 544 U.S. 581, 594, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005 (alterations in original) (internal quotations omitted).[10] Accordingly, Tennessee's semi-closed primary does not severely hinder Plaintiffs' associational rights.

3. Tennessee's "mandatory" primary requirement serves a compelling state interest.

Plaintiffs' only other challenge to Tenn. Code Ann. § 2-13-202 is that "[t]here is **no** empirical evidence suggesting that candidates nominated by primaries are any more representative of a political party (or the preferences of the people of a district) than those nominated by other means" and thus there is no reason why minor parties "should not *continue* not [to] have the option of nominating candidates in accordance with their own rules." (Doc. #20

[10] Additionally, it should be noted that in all of the cases relied upon by the Plaintiffs, the political party challenging the state's open primary had adopted party rules essentially providing that only members of that party were eligible to vote in the party's primary. Here, Plaintiffs present no such evidence. As such, it is questionable as to whether Plaintiffs even have standing to challenge Tennessee's primary election statutes. *See Mississippi State Democratic Party v. Barbour*, 529 F.3d at 545-546.

at pp. 16-17) (emphasis in original). Once again, the Supreme Court has made clear that there is no requirement that a State make a particular showing of voter confusion, ballot overcrowding, or frivolous candidacies to support a reasonable restriction on ballot access. *Munro*, 479 U.S. at 195-196. Thus, lack of empirical evidence is not a sufficient grounds to sustain a facial challenge to this statute.

Furthermore, while the Supreme Court has noted that rules governing a political party's internal affairs "directly implicate the associational rights" of the party and its members, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 229, 109 S.Ct. 1013, 1023, 103 L.Ed.2d 271 (1989), that Court has also recognized that the states' power to regulate the nominating process is beyond dispute. "It is too plain for argument . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election or by party convention." *American Party of Tex*., 415 U.S. at 781, 94 S.Ct. at 1306.

Tennessee first adopted a compulsory primary election law in 1909 during the Progressive era (1896-1916). *See* Acts of 1909, Public Chapter 102. At the core of progressive philosophy was a desire to make sure that government faithfully represented the will of the people. In order to give the citizenry more say in government affairs, the Progressives implemented the direct primary which was designed "to take political nominations out of the smoke-fille rooms of party bosses and give them to the voters." *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (quoting Richard Hofstadter, *The Age of Reform* 257 (Vintage Books 1955)).

> The Progressives believed democracy should be something greater than competition between political parties. They viewed the direct primary as a vital weapon in their battle to "make government accessible to the superior disinterestedness and honesty of the average citizen. Then, with the power of the bosses broken or crippled, it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government."

Id. (internal citations omitted); *see also* Oppenheimer Report at p. 7.

Indeed, in a challenge to the 1909 act, the Tennessee Supreme Court stated as follows with respect to primary elections:

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

Ledgerwood v. Pitt, 125 S.W. 1036, 1039 (1910). That court further noted that those cases upholding the general rule that state legislatures have the power to pass reasonable primary elections laws were bottomed on two propositions:"

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

Id. at 1041 (emphasis added). Thus, the purpose of Tennessee's mandatory direct primary is to provide a neutral mechanism for resolving party nominating decisions that reduces the role of party leadership and gives ultimate authority to party voters. *See Mathes v. State*, 121 S.W.2d 548, 549 (Tenn. 1938) (primary elections are not elections, but rather an "arrangement to test the wish of the members of a political party as to who shall be their party nominees for a public office.").

The state's interest in enhancing the democratic character of the election process and in eliminating the fraud and corruption that frequently accompanied party-run nominating conventions has been found to be a compelling state interest and that a democratic primary is narrowly tailored to advance these state interests. *See Alaskan Independence Party v. Alaska*, 545 F.3d 1173 (9th Cir. 2008 (finding Alaska's mandatory direct primary system was justified by compelling interests in eliminating fraud and corruption) and *Lightfoot v. Eu*, 964 F.2d at 873

(upholding state's mandatory direct primary under strict scrutiny, because "the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates," and "no measure short of the direct primary would be adequate").[11] *See also* Oppenheimer Report at p. 7 (primary elections allow broad opportunity for citizen participation and engage the citizen interest and serve as a vehicle for educating the electorate about parties and candidates seeking nomination while nomination processes that plaintiffs prefer for minor parties leave control of nominations in the hands of few individuals, discourages competition for their parties' nomination and discriminates against those of lesser economic means from participating.) Accordingly, Tennessee's mandatory semi-closed primary does not on its face impermissibly burden Plaintiffs' associational rights.

D. Tennessee's Ballot Placement Statute Is Constitutional.

Plaintiffs' final challenge to Tennessee's election statutes involves Tenn. Code Ann. § 2-5-208(d)(1), which allots party candidates their own column on the ballot and groups all independent candidates together in one column. Specifically, this statute provides as follows:

> Notwithstanding any other provision of this chapter or this title, on general election ballots, the name of each political party having nominees on the ballot shall be listed in the following order: majority party, minority party, and recognized minor party, if any. The names of the political party candidates shall be alphabetically listed underneath the appropriate column for the candidate's party. A column for independent candidates shall follow the recognized minor party, or there is not a recognized minor party on the ballot, shall follow the minority party, with the listing of the candidates' names alphabetically underneath.

[11]Plaintiffs even admit that a State may mandate primaries, "but only if parties have the right the limit participation in a primary to members of the party." However, Plaintiffs appear to believe that the only way that such limitation can be effected is by requiring a person to designate party preference when registering to vote. Plaintiffs cite no authority for this proposition. (Doc. # 20 at p. 18). As discussed *supra*, Tennessee's election laws do give parties the right to limit participation in a primary to members of the party.

Plaintiffs contend that Tenn. Code Ann. § 2-5-208(d)(1) is discriminatory because it denies them an equal opportunity to win votes, thus violating their equal protection rights under the Fourteenth Amendment.

Plaintiffs' argument rests on the *factual* assumption that the candidate occupying the first position on the ballot will receive a substantial number of "extra" votes from voters who are either uniformed or uninterested in the candidates and habitually select the first name on the ballot. This phenonmenon is referred to as "positional bias." *Ulland v. Growe*, 262 N.W.2d 412, 414 (Minn.), *cert. denied sub nom. Berg v. Growe*, 436 U.S. 927, 98 S.Ct. 2822, 56 L.Ed.2d 770 (1978). There is, however, no constitutional right under the equal protection clause to a favorable ballot position. *See New Alliance Party v. New York State Board of Elections*, 861 F.Supp. 282, 287 (S.D.N.Y. 1994) (rejecting constitutional right of independent party to a better position on the ballot); *Clough v. Guzzi*, 416 F.Supp. 1057, 1067 (D. Mass. 1976) (challenge to state law listing incumbents first on ballot as violating equal protection clause rejected, holding there is no constitutional right to a better ballot position).

In some cases, courts have held that where the ballot position being contested is for the first position on the ballot, then there may be a cognizable claim under the equal protection clause in certain circumstances.[12] *See, e.g., Bohus v. Board of Election Commissioners*, 447 F.2d 821, 822 (7th Cir. 1971); *New Alliance Party*, 861 F.Supp. at 285, 287. However, in considering such claims, courts have established a two-part test, holding that a plaintiff must first show that top placement on the ballot is an advantage in an election and second, must prove the existence of an intentional or purposeful discrimination by authorities in which one class is favored over another. *Strong v. Suffolk County Board of Elections*, 872 F.Supp. 1160, 1164 (E.D.N.Y. 1994)

[12]Presumably, this is the basis of Plaintiffs' challenge, although it is difficult to see how both Plaintiffs can state a cognizable claim for first position on the ballot.

(citing *Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir. 1977) *cert. denied sub nom. Illinois State Board of Elections v. Sangmeister*, 435 U.S. 939, 98 S.Ct. 1516, 55 L.Ed.2d 535 (1978)).

With respect to the first element – proof of which is critical to Plaintiffs' claim – the existence of positional bias should be decided by persuasive empirical evidence and not simply through what Plaintiffs believe to be self-evident. *See New Jersey Conservative Party, Inc. v. Farmer*, 753 A.2d 192, 199 (N.J.Super. 1999). Here, Plaintiffs have presented no affidavits, expert testimony or evidence of any kind in support of their factual contention that top placement on the ballot in Tennessee is an advantage in an election.[13] As such Plaintiffs cannot meet the first prong of the test.

Plaintiffs also cannot meet the second prong of the test – proving the existence of an intentional or purposeful discrimination by authorities in which one class is favored over another. While Plaintiffs assert that "the positional bias favoring major parties is expressly stated in TCA § 2-5-208(d)(1)" (Doc. # 20 at p. 20), Plaintiffs have once again mischaracterized the statute. Tenn. Code Ann. § 2-5-208(d)(1) is actually facially neutral. It does not classify candidates for ballot position by party affiliation, nor does it relegate all candidates for public offices other than those nominated by the Republican or Democratic parties to "lower ballot positions" as Plaintiffs suggest. Rather, it classifies candidates based upon the past successes of the party. Thus, if over time, the Green Party or the Constitution Party develops sufficient voter support so that its members hold the largest number of seats in the combined houses of the general assembly, then

[13]Plaintiffs' expert makes no opinion regarding ballot placement, but instead, opines that party affiliation is what is essential to the candidacy of a minor party candidate. (Doc. # 20 at p. 30). Party identification has been found to militate against the effect of position bias. *See Libertarian Party of Colorado v. Buckley*, 938 F.Supp. 687, 693 (D. Col. 1996), *Ulland v. Growe*, 262 N.W.2d at 418 . Moreover, position bias has been found to be minimal in partisan general elections. *Id*. Tenn. Code Ann. § 2-5-208(d)(1) only applies to partisan general elections.

its candidates will qualify for top ballot position.[14] Furthermore, there is nothing in Tenn. Code Ann. § 2-5-208(d)(1) that excludes minority parties from the ballot nor prevents them from attaining "majority party" or "minority party" status.

Moreover, position bias is not the ineluctable product of a state's election system. Instead, position bias depends on such factors as the amount of "information and encouragement [voters receive] on how they should vote" and voters' "motivation" and thus can be ameliorated by voter education about the candidates. *Koppell v. New York State Bd. of Elections*, 8 F.Supp.2d at 385. However, "[t]he Constitution does not protect a plaintiffs from the inadequacies or irrationality of the voting public; it only affords protection from state deprivation of a constitutional right." *New Alliance*, 861 F.Supp. at 295. Here, while state action is involved in establishing a system for ballot placement, it is nondiscriminatory. Thus, at most, Tenn. Code Ann. § 2-5-208(d) may have only a slight and probably *de minimis* effect on Plaintiffs' constitutional rights. *See Libertarian Party of Colorado v. Buckley*, 938 F.Supp. 687, 692-693 (D. Col. 1996).

"States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder. *Timmons*, 520 U.S. at 358. State's important interest in preventing this disorder thus "permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system." *Id*. at 367. The State clearly has a legitimate interest in maintaining an orderly ballot and assuring the integrity and reliability of the election process. Under Tennessee's ballot position statute, no one political party will always have top ballot position and no incumbent will always have top ballot position.

[14]To the extent that Plaintiffs contend that recognized minor parties are forced to work harder to educate voters to overcome the "head start" afforded to statewide political parties, the courts have concluded that this fact alone does not make the burden severe. *See Koppell v. New York State Bd. of Elections*, 8 F.Supp.2d 382, 385-86 (S.D.N.Y. 1998) ("To conclude that position bias is insurmountable would be to abandon 'faith in the ability of individual voters to inform themselves about campaign issues.'") (quoting *Anderson*, 460 U.S. at 797).

Additionally, other federal courts have noted a state's legitimate interest in basing ballot placement upon a showing of past strength amongst the electorate. *See Board of Election Comm'rs v. Libertarian Party of Illinois*, 591 F.2d 22, 23, 27 (7th Cir. 1979) (Preferential ballot order placement avoids voter confusion, "mak[ing] the ballot as convenient and intelligible as possible for the great majority of voters, who, history indicated, would wish to vote for a candidate of one of the two major parties.").

Thus, to the extent that Plaintiffs experience any injury to their constitutional rights from their inability to be listed first on the ballot, that minor injury is outweighed by the State's regulatory interests in organizing a clear and intelligible ballot, presenting a local arrangement based on the reasonable and nondiscriminatory basis of historical strength of support and displaying candidates in a simply way that avoids voter confusion. *Meyer v. Texas*, No. H-10-3860, 2011 WL 1806524 at * 6 (S.D. Tex. 2011); *see also Board of Election Commr's v. Libertarian Party of Illinois*, 591 F.2d at 25 (held that "[d]ifferent treatment of minority parties that does not exclude them from the ballot, prevent them from attaining major party status if they achieve widespread support, or prevent any voter from voting for the candidates of his choice, and this is reasonably determined to be necessary to further an important state interest does not result in a denial of equal protection."); *Koppell v. New York State Bd. of Elections*, 8 F.Supp.2d at 387 (state's regulatory interests more than sufficient to justify minial burden); *Libertarian Party v. Colorado v. Buckley*, 938 F.Supp. at 693 (state's recognized interest in regulating elections is sufficient to outweigh an "position bias" claimed by plaintiffs); *Ulland v. Growe*, 262 N.W.2d at 418, quoting *Clough v. Guzzi*, 416 F.Supp. at 1068 ("The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate the otherwise legitimate purpose,

especially where the that advantage remains problematic and variable from election to election. And whether for purposes of a more absolute fairness that advantage warrants a different statutory scheme is properly a legislative consideration.").

Accordingly, Plaintiffs' facial challenge to the constitutionality of Tenn. Code Ann. § 2-5-208(d) under the Equal Protection Clause of the Fourteenth Amendment is without merit and should be denied.

CONCLUSION

For these reasons, the Defendants submit that Plaintiffs have failed to establish that they are entitled to a judgment as a matter of law on facial challenge to the constitutionality of Tenn. Code Ann. §§ 2-1-104(a)(24), 2-5-101(a)(1), 2-5-102(b), 2-13-107(a), 2-13-201, 2-13-202, 2-5-208(d)(1). Accordingly, Defendants respectfully request that Plaintiffs' motion for summary judgment be denied and that summary judgment be entered in favor of the Defendants as to the constitutionality of the above-cited statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 12th day of December 2011, that a copy of the above document has been served upon the following persons by:

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