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

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MOTION FOR PARTIAL STAY OF JUDGMENT PENDING APPEAL

Defendants Tre Hargett and Mark Goins, in their official capacities, by and through their counsel of record, the Attorney General and Reporter for the State of Tennessee, hereby respectfully move for a stay pending appeal of that portion of this Court's order of February 3, 2012, directing that the Defendants place the Plaintiffs' names next to their candidates on the November General Election ballot and directing that the Defendants conduct a random drawing

for the order of placement of political party candidates on the November General Election ballot.[1]

INTRODUCTION AND BACKGROUND

Plaintiffs, the Green Party of Tennessee ("GPT") and the Constitution Party of Tennessee ("CPT") filed suit asserting a facial challenge to a number of Tennessee's election statutes. Specifically, Plaintiffs asserted 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 challenged 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 by party primary. Plaintiffs further asserted that Tenn. Code Ann. § 2-1-104(a)(24) is unconstitutionally vague and delegates legislative functions to the Coordinator of Elections. Finally, Plaintiffs challenged the provisions of Tenn. Code Ann. § 2-5-208(d)(1) governing the placement of candidates on the ballot as unconstitutionally violating their First Amendment rights.

This Court, in a memorandum and order issued February 3, 2012, upheld all of Plaintiffs' facial challenge. The Court found that "any deadline in excess of sixty (60) days prior to the August primary for the filing of petitions for recognition as a political party is unenforceable"

[1] Defendants filed a Notice of Appeal from this Court's Orders of February 3 and February 29, 2012. Although Defendants are appealing all of the issues addressed in those orders, Defendants are only requesting a stay of judgment pending appeal as to these two issues.

and enjoined the Defendants "from enforcement of the state statutes requiring Plaintiffs to select their nominees by primary, awarding ballot preference to the majority party and the use of "Independent or Nonpartisan" in a political party's name." The Court further ordered that Plaintiff have made a significant showing of support to justify their recognition as political parties and to have their parties' names next to their candidates on the general election ballot. Finally, the Court ordered the Defendants to "conduct a public random drawing for the order of placement of the political parties' candidates' names on the general election ballot" and to revise the "Nomination Petition" to delete the reference that the signatory is a member of the party. (Record Entry 45, Memorandum at 89).

STANDARD OF REVIEW

In determining whether a stay should be granted, this Court considers the same four factors that are traditions considered in determining whether to issue a preliminary injunction. *Baker v. Adams County/Ohio Valley Sch. Bd.,* 310 F.3d 927, 928 (6th Cir.2002) (per curiam). These factors are: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog,* 945 F.2d 150, 153 (6th Cir.1991). All four factors are not prerequisites but are interconnected considerations that must be balanced together. *Id.*

ARGUMENT

A. LIKELIHOOD OF SUCCESS ON THE MERITS

The Sixth Circuit has recognized that to justify the granting of a stay, a movant need not always establish a high probability of success on the merits. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay." *Id.* Thus, at a minimum, a movant is required to show "serious questions going to the merits." *In re Delorean Motor Co*., 755 F.2d 1223, 1229 (6th Cir. 1985).

1. Tenn. Code Ann. § 2-5-208(d)(1) – Ballot Order

Plaintiffs challenged the constitutionality of Tenn. Code Ann. § 2-5-208(d)(1), which governs the placement of candidates on the ballot, asserting that it denied them an equal opportunity to win votes, thus violating their equal protection rights under the Fourteenth Amendment. Plaintiffs' argument rested 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, *i.e*., "positional bias." This Court found, based upon the Sixth Circuit's decision in *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992) and empirical evidence from certain social studies,[2] that "Tenn. Code Ann. § 2-5-209(d)(1)'s preferential placement of the majority party candidates on election ballots provides an impermissible "voting cue" that violates Plaintiff's First Amendment rights as well as the First Amendment rights of Tennessee voters." (Record Entry 45, Memorandum at 83.)

The issue of preferential ballot placement was not before the Sixth Circuit in *Rosen v. Brown*. Instead, as recognized by that court, "the sole issue [was] whether Ohio's refusal, pursuant to Ohio Rev. Code § 3505.03, to place the designation Independent below the name of a

[2] *See* Joanne M. Miller & Jon A. Krosnick, "The Impact of Candidate Name Order on Election Outcomes", 62 Pub. Opinion Q., Vol. 62 No. 3, 291, 293-94, 308-09 (1998) and Laura Miller, "Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter", 13 N.Y.U.J. Legis. & Pub. Pol'y, 373, 405 (2010).

candidate whose name appears on the general election ballot as a result of a nominating petition violates the First and Fourteenth Amendments of the United States Constitution." 970 F.2d at 171. More significantly, the Sixth Circuit was presented with the affidavits of three experts – two political scientists and a marketing and communications professional – testifying to the effect that party identification and the indication of a candidate's party affiliation on a ballot in the form of a voting cue play a crucial role in the a voter's actions at the "climactic moment of choice" in an election. *Id*. at 172-175. Based upon this expert testimony, the *Rosen* Court concluded that the Ohio law "infringes upon the right of supporters of Independent candidates to meaningfully vote and meaningfully associate by providing a 'voting cue' to Democratic and Republican candidates" but not to independent candidates. *Id*. at 176.

Nowhere in its decision, however, did the Sixth Circuit make any findings of prejudice to independent or third party candidates resulting from preferential ballot placement, nor was any evidence of prejudice from preferential ballot placement presented to the court. Moreover, in the subsequent case of *Schrader v. Blackwell*, the Sixth Circuit declined to extend its decision in Rosen to find that Ohio's statute denying party labels on the general election ballot to candidates of unqualified political parties violated the associational rights or parties or candidate or as denying equal protection. 241 F.3d 783, 789 (6th Cir. 2001).

Additionally, the compilation of empirical studies concerning the prejudicial effects of ballot order only analyzed elections in states that use the "office block" ballot form for general elections. *See* Laura Miller, "Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter", 13 N.Y.U. J. Legis. & Pub. Pol'y 373, 387-88 (2010) (noting that all of the modern empirical studies on the effect of ballot order analyzed elections in states that use the

"office block" ballot form for general elections).[3] Tennessee does not use the "office block" ballot form but instead uses the "party block" ballot form for general elections, in which all of the candidates for a party are listed in a single column. *See* Tenn. Code Ann. § 2-5-206.

No study has examined ballot order effects in elections using the "party" block" ballot form and "[g]iven the salience of the party label with this type of ballot, one should expect that positional effects would be minimal." Miller, *supra*, at 388; *see also* Robert Darcy, *Positional Effects with Party Column Ballots*, 39 W. Pol. Q. 648, 661 (1986) (determining that position effect does not occur at all in American general elections in which party listings serve as a cue on the ballot and where voters were asked to pick only one candidate among those running in a contested election).[4] Consequently, there is no evidence of prejudice to minor political parties resulting from preferential placement with respect to the "party block" ballot form used by Tennessee.

Accordingly, Defendants have raised serious questions as to the merits of the Court's ruling that Tenn. Code Ann. § 2-5-208(d)(1) violates Plaintiffs' First Amendment rights and, therefore, have met their burden of demonstrating a likelihood of success on the merits of this issue to warrant a stay pending appeal.

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[3]An "office block" ballot is one in which candidates are listed vertically under the heading of the office they seek.

[4]Moreover, the most recent study of candidate ballot order effect found little systematic evidence indicating that candidates benefit by being listed first on the ballot or that ballot order effects are more likely for minor party candidates. *See* R. Michael Alvarez, Betsy Sinclair, Richard L. Hasen, "How Much Is Enough" The "Ballot Order Effect" And The Use Of Social Science Research In Election Law Disputes", 5 Election L.J. 40, 50-51 (2006). Additionally, unlike the Miller and Krosnik study, *see* n. 1, *supra*, this study employed a multivariate statistical model that controlled for a number of important variables that are likely to influence the outcomes of elections (ideology, partisanship, and demographic attributes of census tracts) and utilized a statistical methodology more appropriate for this type of electoral data. *Id*.

2. Recognition Of Plaintiffs As Political Parties And Placement On November General Election Ballot

As previously noted, Plaintiffs made a facial challenge to a number of Tennessee election laws. As such, Plaintiffs placed no evidence in the record about their political parties and/or their support in Tennessee. Despite this lack of evidence, this Court held that

> given the State's acceptance of 25 signatures for Governor and 275 signatures for President of the United States, the Court deem's GPT's past electoral support of almost 20,000 votes and CPT's almost 10,000 signatures to constitute a significant showing of support to justify their recognition as political parties and to have their parties' names next to their candidates on the general election ballot."

(Record Entry 45, Memorandum at 89). The reference to the almost 20,000 votes of the GPT is based upon the results of the 2000 Presidential Election in which the GPT's candidate Ralph Nader received 19,781 votes in Tennessee. (Record Entry 45, Memorandum at 8). The reference to the almost 10,000 signatures is based upon petitions submitted by the CPT in 2001 containing approximately 9200 signatures. (*Id*.).

The United States Supreme Court in *McCarthy v. Briscoe*, 429 U.S. 1317 (1976), first articulated the test for determining whether to order a candidate's name added to the ballot as a remedy for a state's otherwise complete denial of access to the ballot.[5] That Court first noted that in making such determination, "a court should be sensitive to the State's legitimate interest in preventing 'laundry list' ballots that 'discourage voter participation and confuse and frustrate those who do participate.'" *Id*. at 1322. The Court then held that

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[5] In that case, Texas had an election law which precluded candidates for the office of President from qualifying for position on the general election ballot as independents. Senator McCarthy and four Texas voters who supported his independent candidacy for President filed suit asking the court to order Senator McCarthy's names placed on the ballot or, alternatively to devise reasonable criteria by which Senator McCarthy might demonstrate support of his candidacy as a means of qualifying for the ballot. *Id*. at 1318.

> where a State forecloses independent candidacy in Presidential elections by affording no means for a candidate to demonstrate community support, as Texas had done here, a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support.

Id. at 1323. The Supreme Court then looked to the "available evidence," which included "affidavits that tended to show that Senator McCarthy was a serious Presidential aspirant with substantial support in many states," *id*. at 1319, and further noted that Senator McCarthy was a nationally known figure; that he had served two terms in the United States Senate and five in the United States House of Representatives; that he was an active candidates for the Democratic nomination for President in 1968, winning a substantial percentage of the votes cast in the primary elections; and that he had succeeded that year in qualifying for position on the general election ballots in many States. *Id*. at 1323. In light of this available evidence, the Court determined that there was reason to assume the requisite community support for Senator McCarthy as an independent Presidential candidate and ordered that his name be placed on the general election ballot in Texas. *Id*.

This test was subsequently followed by the district court in *Hall v. Austin*, 493 F.Supp. 782 (E.D. Michigan 1980), in determining whether to order the plaintiffs' names added to the general election ballot as independent candidates for President and Vice-President where Michigan election laws provided no statutory method by which independent candidates for those offices could gain access to the ballot. The court rejected the idea that every independent candidate has an unqualified right to be placed on the ballot automatically once a court finds that the state laws unconstitutionally exclude independent candidates and instead, noted that the *Briscoe* opinion provided the most authoritative guidance. *Id*. at 789.

The court then reviewed the candidacies of the plaintiffs in light of the *Briscoe* decision and concluded that "'there is reason to assume' that Hall and Davis have 'the requisite degree of community support.'" *Id*. at 790. Specifically, the court noted that Hall and Davis were nationally known and world-renowned public figures; that Hall had twice before been a presidential aspirant on the ballot in many states; that Hall and Davis had already succeeded in qualifying on the ballot in some states for the 1980 election; and that Hall was on the presidential ballot in Michigan in 1972. *Id*.

The Sixth Circuit first applied the *Briscoe* test in *Goldman-Frankie v. Austin*, 727 F.2d 603 (6th Cir. 1984), a case in which the plaintiff sought to appear on the November general election ballot as an independent candidate for a seat on the Michigan State Board of Education. Applying the *Briscoe* decision, the court looked to see if the requisite community support could be demonstrated. The court noted that plaintiff had been a candidate for the Wayne State University Board of Governors in 1972 and had been a candidate for the Michigan State Board of Education on the Communist Party Ticket in 1974 and found that this evidence was sufficient to demonstrate the requisite community support in order to have plaintiff's name placed on the ballot as an independent candidate. *Id*. at 607-08.

Prior to 2008, *Briscoe* and its progeny had only dealt with the denial of ballot access to independent candidates and, thus, in determining the requisite community support, the focus was on the individuals themselves and their candidacies. In 2008, the *Briscoe* test was first applied to a minor political party in the case of *Libertarian Party of Ohio v. Brunner*, 567 F.Supp.2d 1006 (S.D. Ohio 2008). There, the Libertarian Party of Ohio sought to have its candidates for President, Vice President, United States House of Representatives and the Ohio General Assembly placed on the November 2008 general election ballot. Two years prior, the Sixth

Circuit had held that Ohio's statutes defining the methods of ballot access for minor or third parties were unconstitutional; however, the Ohio General Assembly had taken no action to establish ballot access standards for minor political parties. *Id*. at 1009.

In light of this failure of the Ohio General Assembly to prescribe constitutional ballot access requirements, the district court looked to the Sixth Circuit's decision in *Goldman-Frankie* for guidance. *Id*. at 1015. The court recognized that the "Constitution gives the Ohio legislature significant discretion to establish election procedures" and that the court "will not prescribe Constitutional election procedures for the state, but in the absence of constitutional, ballot access standards, when the 'available evidence' establishes that the party has 'the requisite community support,' this Court is required to order that the candidates be placed on the ballot." *Id*. The "available evidence" included the fact that the Libertarian Party of Ohio was founded in 1972, had qualified for the Ohio ballot in previous years, its presidential candidate (who was also a plaintiff) was on the ballot in 31 other states for the 2008 general election and the Libertarian Party had submitted a petition in March 2008 containing 6,545 signatures. *Id.* at 1010, 1014. The district court found that this evidence was sufficient to demonstrate the requisite community support and ordered the Libertarian Party's candidates be placed on the ballot for the November general election. *Id*. at 1015.

Shortly thereafter, the Socialist Party USA also sought to have its candidates for President and Vice President placed on the Ohio November general election ballot. *Moore v. Brunner*, No. 2:08-CV-224, 2008 WL 3887639 (S.D. Ohio Aug. 21, 2008). In light of the previous decision in Libertarian Party v. Ohio, the parties agreed that the sole issue was "whether the Socialist Party USA has shown the 'requisite community support' sufficient to gain access to

the Ohio ballot in the November 4, 2008 general election." *Id*. at *4. The court found that the Socialist Party USA had made a sufficient showing stating:

> The Court finds that the Socialist Party USA has the requisite community support to be placed on the ballot in the state of Ohio based on the following undisputed facts in the parties' memoranda. Socialist Party USA has a century-long history of involvement in presidential politics. The Party held is last biennial convention in St. Louis, Missouri in October, 2007, at which time it nominated Moore and Alexander as its candidates. Socialist Party candidates appeared on the ballot in eight states in the 2004 presidential election, and garnered 10,822 votes nationwide. For the upcoming 2008 election, Plaintiffs Moore and Alexander have currently qualified in Vermont, New Jersey and Colorado, and are actively seeking ballot access in 18 other states, including Ohio. "By early September . . . the Moore/Alexander ticket should be on no fewer than ten state ballots, with continuing hopes of reaching perhaps ten more." As for a showing of support in Ohio, the Socialist Party "has an active state affiliate in Ohio with a Charter and state officers" since at least 1999. The party has gathered several thousand signatures of Ohio residents.

Id. at *5.

In light of these rulings, Defendants submit that they have raised serious questions as to the merits of the determination that the Plaintiffs have sufficiently demonstrated the requisite community support to justify their recognition as political parties and to have their parties' names next to their candidates on the general election ballot and, therefore, have met their burden of demonstrating a likelihood of success on the merits of this issue.

B. IRREPARABLE HARM TO THE DEFENDANTS

1. Tenn. Code Ann. § 2-5-208(d)(1) – Ballot Order

Pursuant to Article I, section 4, clause 1 of the United States Constitution, states have the authority to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives[.]" Thus, the Supreme Court has recognized that states have an interest in

protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials. *Bullock v. Carter*, 405 U.S. 134, 145 (1972). The Court has further recognized that states also have a strong interest in the stability of their political systems. *Eu v. San Francisco County Democratic Cent. Committee,* 489 U.S. 214, 226 (1989); *Storer v. Brown*, 415 U.S. 724, 736 (1974). Finally, states clearly have a compelling interest in organizing a comprehensible and manageable ballot where the parties, offices and candidates are presented in a logical and orderly arrangement, so as to avoid voter confusion. *See Libertarian Party v. Colorado v. Buckley*, 938 F.Supp. 687, 693 (D. Colorado 1996) (recognizes state's interest in maintaining an orderly ballot and assuring the integrity and reliability of the election process); *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."); *Koppell v. New York State Bd. of Elections*, 8 F.Supp.2d 382, 387 (S.D.N.Y. 1998) (state's regulatory interests more than sufficient to justify minimal burden); *Meyer v. Texas*, No. H-10-3860, 2011 WL 1806524 at * 6 (S.D. Tex. 2011) (recognizes 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).

These clearly recognized legitimate interests of the State would be irreparably harmed if required to conduct a public random drawing for ballot order on the November general election ballot, particularly given the lack of any empirical evidence of prejudice to minor political

parties resulting from preferential placement with respect to the "party block" ballot form used by Tennessee.

2. Recognition Of Plaintiffs As Political Parties And Placement On November General Election Ballot

The Supreme Court has recognized that a state has a strong interest in maintaining the stability of its political system. *See Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 226 (1989). Additionally, the Court has held that there is an "important state 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 – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

> [The] State has a legitimate interest in regulating the number of candidates on the ballot. . . . In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections . . . we are bound to respect the legitimate objective of the State in avoiding overcrowded ballots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political process from frivolous or fraudulent candidacies.

Bullock v. Carter, 405 U.S. 134, 145 (1971).

Finally, the Supreme Court has recognized that "[t]he State surely has a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported, on their own merits. . . ." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997).

These clearly recognized and legitimate interests of the State will be irreparably harmed if the State is required to recognize Plaintiffs as political parties and to place their party's name

next to their candidates on the November general election ballot where Plaintiffs have not sufficiently demonstrated the requisite community support. These interests will also be irreparably harmed in that the Court's order directing that Plaintiffs be recognized as political parties and that their party names be placed next to their candidates on the November general election ballot does not distinguish between Plaintiffs' candidates for Governor, Tennessee General Assembly and US Senate and House of Representatives and Plaintiffs' candidates for President and Vice-President.

Tennessee's statutes do not require minor parties to nominate their presidential candidates by primary. Instead, as specifically pointed out by Defendants,[6] Tennessee's election laws simply require that the chair of the minor party's 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 is also 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. This deadline, which is only 81 days prior to the November general election, and the 2.5% petition signature requirement clearly fall within the constitutional parameters upheld by the Supreme Court in *Jenness v. Fortson*, 403 U.S. 431, 433-434 (1970) (upholding 5% signature requirement and filing deadline of second Wednesday in June in an election year) and *American Party of Texas v. White*, 415 U.S. 767, 784 (1974) (upholding 1% signature requirement and filing deadline 120 days prior to general election).

Plaintiffs did not challenge Tennessee statutes governing ballot access for minor party presidential candidates, however, this Court's order makes no distinction between Plaintiffs'

[6] *See* Record Entry 36, Defendants' Response in Opposition to Motions For Summary Judgment at 5).

Presidential candidates and Plaintiffs' candidates for other statewide office. Consequently, Plaintiffs have obtained party recognition of their *presidential* candidates without having demonstrated that they are actually supported on their own merits by providing the statutory required petition.[7] Thus, the State's 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" will be irreparably harmed if a stay of this Court's order is not granted.

C. HARM TO OTHERS AND THE PUBLIC INTEREST

1. Tenn. Code Ann. § 2-5-208(d)(1) – Ballot Order

It has been recognized that avoidance of voter confusion is so important that unless this "admittedly vital" interest is protected, the result may be "frustration of the democratic process." *Board of Election Com'rs of Chicago v. Libertarian Party of Illinois*, 591 F.2d 22 (1979) (quoting *Jenness v. Fortson*, 403 U.S. at 442 and *American Party of Texas v. White*, 415 U.S. at 782). Moreover, an organized ballot is of utmost importance in the administration of a democracy.

> Positioning parties in some logical fashion is crucial to an efficient ballot. A ballot should not be formatted like a dartboard; it must have a sensible order to it, one in which, for example, candidates are coordinated spatially by party and office. The ballot should enable the voter to easily and effectively identify the candidate of his or her choice. Thus, to assure the orderly conduct of elections, a State may design a ballot which rationally distinguishes between those entities that previously attracted significant public support and those that did not.

New Alliance Party v. New York State Bd. of Elections, 861 F.Supp. at 299.

Tennessee's current ballot format for general elections – the "party block" format – presents the parties, offices and candidates in a logical and orderly arrangement. As discussed

[7] This is especially significant in light of the fact that Plaintiff CPT has never fielded a candidate for any office in Tennessee other than President.

supra, no empirical study has demonstrated any prejudice resulting from preferential placement on the ballot where the "party block" format is used. However, as recognized by Plaintiffs, minor parties rarely if ever run candidates for all of the offices to be filled where as the two established political parties run candidates for all or substantially all of the offices on the ballot.[8] Thus, if ballot placement of all political parties is determined by lottery (random drawing) – as ordered by this Court – the likely result will be large gaps on the ballot for numerous county and judicial offices, which could confuse many voters and perhaps, in practical effect, cause some voters not to exercise a choice for the offices involved. *See Board of Election Com'rs of Chicago v. Libertarian Party of Illinois*, 591 F.2d at 25-26.

Accordingly, a stay of this Court's order directing Defendants to conduct a random drawing for political party placement on the November election ballot is in the public interest. Moreover, given that there is no empirical study finding harm to a minor party resulting from preferential placement on the ballot where a "party block" ballot format is used, Plaintiffs will not suffer any harm as a result of a stay of this Court's order.

2. Recognition Of Plaintiffs As Political Parties And Placement On November General Election Ballot

As discussed in the previous section, this Court's order directing that Plaintiffs be recognized as political parties and that their party names be placed next to their candidates on the November general election ballot does not distinguish between Plaintiffs' candidates for Governor, Tennessee General Assembly and US Senate and House of Representatives and Plaintiffs' candidates for President and Vice-President – despite the fact that Plaintiffs did not challenge the statutory requirements with respect to ballot access for minor party presidential candidates. Thus, if the order is not stayed, Plaintiffs will have obtained party recognition of

[8] *See* Record Entry 19, Motion for Summary Judgment on Counts I and IA at 30; Record Entry 20, Motion for Summary Judgment on Counts II – V at 12.

their *presidential* candidates on the November general election ballot without complying with the valid statutory requirements, whereas every other minor party seeking party recognition of their presidential candidates will have to comply with the statutory requirements.[9] Moreover, because Plaintiffs did not challenge these statutory requirements, and they clearly fall within the constitutional parameters previously established by the Supreme Court – Plaintiffs cannot demonstrate any harm from a stay that would require them to comply with the statutory requirements in order to have obtain party recognition of their presidential candidates on the November general election ballot.

CONCLUSION

For these reasons, Defendants respectfully request that this Court grant their motion for a stay pending appeal of that portion of this Court's order of February 3, 2012, directing that Defendants place the Plaintiffs' names next to their candidates on the November General Election ballot and directing that Defendants conduct a random drawing for the order of placement of political party candidates on the November General Election ballot.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General and Reporter

[9]Such a possibility is not theoretical. As noted by the Defendants, at least one minor party (Americans Elect) is in the process of attempting to comply with the petition requirements for recognition of its presidential candidate on the November general election ballot. *See* Record Entry 36, Defendants' Response in Opposition to Motion For Summary Judgment, Exhibit 6 at 13-14.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 13th day of March, 2012, that a copy of the above document has been served upon the following persons by:

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