**CASE NO: 12-5271**

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

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| **GREEN PARTY OF TENNESSEE, CONSTITUTION PARTY OF TENNESSEE Plaintiffs-Appellees** | ) | **On Appeal from the U.S. District for the Middle District of Tennessee Case No.: 3:11-00692** |
| **Vs.** | ) | |
| **TRE HARGETT in his official capacity as Tennessee Secretary of State, and MARK GOINS, in his official capacity as Coordinator of Elections for the State of Tennessee Defendants-Appellants** | ) | |

**APPELLEES' RESPONSE IN OPPOSITION TO APPELLANTS' MOTION FOR STAY**

**COME NOW**, Appellees, GREEN PARTY OF TENNESSEE and CONSTITUTION PARTY OF TENNESSEE, and file this Response to Appellants' Motion for Stay and say:

## A. GENERAL ARGUMENTS:

Before addressing the specific arguments asserted by Appellants, it is necessary for the Court to address two issues that (a) make Appellants' motion not properly considerable by the Court and (b) render common arguments presented by Appellants unsustainable.

### A-1: Appellants Did Not Assert Their Claims in the District Court Proceedings:

It is a well-settled rule that an appellate court should not consider ***arguments*** made for the first time on appeal. *Lewis v. Whirlpool Corp.*, 630 F.3d 484, 490 (6th Cir. 2011) citing *Hood v. Tenn. Student Assistance Corp*., 319 F.3d 755, 760 (6th Cir. 2003) ("It is well-settled that this court will not consider arguments raised for the first time on appeal unless our failure to consider the issue will result in a plain miscarriage of justice.")

A subtle but significant variant of this rule applies to ***issues*** raised for the first time on appeal. As this court said in *Lockhart v. Napolitano,* 573 F.3d 251, (6th Cir. 2009), "[d]espite our general rule that issues not presented to the district court but raised for the first time on appeal

are not properly before the court, we have stated that it may be appropriate to consider a new issue on appeal if it is presented with sufficient clarity and completeness for us to resolve the issue." *Id.* at 261 citing *McFarland v. Henderson*, 307 F.3d 402, 407 (6th Cir. 2002).

Although Appellants did assert the arguments made in their motion for a stay in the District Court, *Appellants did not present any of those arguments in the District Court prior to its entry of the orders being appealed.* Therefore, *Appellants have not preserved the arguments asserted in their motion for stay.* [Specific instances of arguments that were not preserved for appeal are discussed *infra*.]

**A-2: Defendants' Contention that the District Court's Rulings are Not Supported by Evidence Untenable.**

As to both of the issues discussed in Appellants' motion for a partial stay, Appellants argue that the District Court improperly relied on studies that had not been introduced into evidence.

Appellants' argument is based on the technical argument that Plaintiffs had not affirmatively *asked* the court to take judicial notice of the studies cited by other courts. However, pursuant to Fed. R. Evid. 201(c)(1), a court "may take judicial notice *on its own*." Fed. R. Evid. 201(d) further provides that "[t]he court may take judicial notice at any stage of the proceeding." Thus, it cannot be argued that the District Court lacked authority to take judicial notice of the studies it cited in its challenged rulings.

Pursuant to Fed. R. Evid. 201(e), "[o]n timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed." In their motion, Appellants further argue that no notice was ever given them (by the District Court) that it was taking judicial notice of the studies it cited and, therefore, Appellants "were unable to request the opportunity to be heard in accordance with Rule 201(e)." [App. Motion, p-13, fn. 4]. This is a frivolous argument.

When the District Court entered its rulings on February 3, 2012, it cited articles that had not been cited by Appellees. According to Appellants, they were, therefore, on notice that the District Court was relying on these authorities. Fed. R. Evid. 201 does not require a court to give *affirmative* notice to a party that it has taken judicial notice of these studies. That notice was obvious on the face of the District Court's rulings. At that time, Appellants could have requested a hearing or filed a motion for reconsideration. But they did not take either of these

actions. Defendants cannot now assert an argument that they waived, by their inaction, in the proceedings in the District Court.

## B: APPELLANTS HAVE NOT SATISFIED THE REQUIREMENTS FOR A STAY:

Appellants correctly note that, in order to be granted a stay, they must show, at a minimum, that (a) they are likely to succeed on the merits and (b) the public interest is served by granting the requested stay. However, Appellants have not satisfied either of these requirements.

### B-1: RE: Appellants' Arguments Relating to BALLOT POSITIONING:

Appellants have failed to establish that they are likely to prevail on the merits of the arguments presented in their motion for stay and have failed to show that their interest, or the public interest, will be benefited by a stay.

#### B-1-(a): Appellants Have Not Established that They are Likely to Succeed on the Merits:

Appellants initially argue that the District Court improperly relied on studies that had not been referenced in the cases cited by Plaintiffs. This argument is based on the premise that the District Court improperly took judicial notice of the studies it cited. This argument is untenable under principles discussed in Section A-3, *supra.*

Defendants then argue that there was no properly tendered and admitted evidence that there was a ballot position bias. However, on page 9 of their motion, Appellants expressly acknowledge that:

> "The effect of ballot placement on voting is a matter of fact and virtually every court that has found prejudice resulting from preferential ballot placement has done so based upon significant evidence demonstrating such prejudice." [App. Motion, p-9].

Defendants then proceed to cite several cases, all of which were identified in Plaintiffs' pleadings, in support of this proposition.[1] Nonetheless, even after having conceded that "virtually every court [to have considered the issue of preferential ballot placement] has found prejudice," Defendants rely on three isolated cases for the proposition that "evidence" of

[1] In fact, Plaintiffs cited ten opinions supporting their contention that preferential ballot placement statutes are prejudicial and, therefore, unconstitutional. [Record Entry 20, Motion for Summary Judgment on Counts II, III and IV, p-16, fn. 23.]

prejudice should have been required by the District Court. Appellants' argument is irrelevant for two reasons:

**FIRST**, Appellants never raised any of the arguments presented in their motion for a stay in either their responses to Appellees' motions for summary judgment or at oral argument. Therefore, there was never a reason for evidence other than case authorities, and references to studies referred to in them, to be brought to the District Court's attention. Moreover, even if the issues had been raised in their responses to Appellee's motion for summary judgment, the time for discovery had expired. Appellants cannot be permitted to "sand bag" Appellees by not presenting an objection to Appellees' arguments in the District Court and then assert those arguments for the first time on appeal.

**SECOND:** The "evidence" demanded by Appellants is not relevant to either of the grounds on which the District Court could have based its ruling – and would not have changed the outcome even if the demand had been made.

The statute at issue, TCA §2-5-208(d)(1), provides that:

> "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 if there is not a recognized minor party on the ballot, shall follow the minority party, with the listing of the candidates' names alphabetically underneath."

There are two bases under which this statute can be challenged. It can be challenged under the balancing test of *Anderson v. Celebreze* 460 U.S. 780, 787-88, 103 S.Ct. 1564, 1569, 75 L.Ed.2d 547 (1983); or it can be challenged as being facially unconstitutional. The District Court's ruling was proper under either of these tests.

**B-1-(a)(1): The Anderson Test:** The general analytical framework for evaluating constitutional challenges to state election laws was articulated by the Supreme Court in *Anderson v. Celebreze*, 460 U.S. 780, 787-88, 103 S.Ct. 1564, 1569, 75 L.Ed.2d 547 (1983). The *Anderson* test imposes the following requirements on a court:

> "[The court] must **first** consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the

> plaintiff seeks to vindicate. It **then** must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." 460 U.S. at 789, 103 S.Ct. 1570.

The evidentiary arguments offered by Appellants would, if applicable, go to the first prong of the *Anderson* test – the character and magnitude of the injury resulting from the priority placement schema established by TCA §2-5-208(d)(1). Appellants have acknowledged that the courts have repeatedly found that there is *some* prejudice in statutes providing priority ballot positioning.[2]

Appellants also have conceded that virtually every court to consider the issue has concluded that there is *some* positional bias associated with a preferential position on the ballot. This being the case, under the *Anderson* test, even in that absence of "evidence" quantifying the magnitude of this bias, the state then haf the burden of coming forward with identifying a legitimate state interest that is achieved by TCA §2-5-208(d)(1). However, *the state did not offer **any** justification for TCA §2-5-208(d)(1).* Therefore, *any* evidence of prejudice is sufficient to justify the District Court's ruling under the *Anderson* test.

**B-1-(a)(2): The Facial Validity Test:** In *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008), the Supreme Court stated the established principle that a plaintiff can succeed on a facial challenge to the constitutionality of a statute if plaintiffs "establish that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." 552 U.S. at 449, 128 S. Ct. at 1190.

Appellants have satisfied the requirement for a successful facial challenge because TCA §2-5-208(d)(1) *can only be applied in one way* -- and under that application:

- The candidates of the majority party in the state General Assembly *always* have priority placement on the ballot.

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[2] In *Graves v. McElderry*, 946 F. Supp. 1569 (D. Okla. 1996), the Court concluded that, although no quantifiable evidence was submitted, the mere testimony of an expert that there is *some* evidence of positional bias was sufficient to establish that "position bias is present in partisan elections where candidates for office are listed vertically on the election ballot within office blocks." *Id.* at 1576.

- Independent candidates and candidates of any party other than the majority party in the state General Assembly can *never* have priority placement on the ballot.

Plaintiffs are properly arguing that §2-5-208(d)(1) is unconstitutional when applied the only way it can be applied as written.

**B-1(b): A Stay will NOT Serve the Public Interest:**

Appellants correctly note that there is a public interest in avoiding voter confusion on the ballot. Indeed, they base their entire argument on the proposition that the requirement that they establish ballot listing by public random drawing would result in voter confusion.

TCA §2-5-208(d)(1) provides that:

> "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 if there is not a recognized minor party on the ballot, shall follow the minority party, with the listing of the candidates' names alphabetically underneath."

TCA §2-5-208(d)(1) unambiguously favors the candidates of the majority party in the Tennessee General Assembly over the candidates of the party that is not in power and over the candidates of recognized minor parties and Independent candidates.

Appellants contend that voter confusion will result if there are large gaps in the ballot where Appellees have no candidates. However, Appellants' argument is only relevant because *they have elected to use a ballot format that creates the potential for such confusion.* The "problem" on which Appellants base their argument could be completely avoided if Tennessee were to use the more common form of ballot under which all candidates are listed under each office to be filled in any given election.[3]

Appellants cannot claim that voter confusion may result from the District Court's ruling if that confusion results entirely from the decision to use one particular form of ballot.

[3] This form of ballot is generally referred to as the "office block" or "Massachusetts style" election ballot format. The salient features of such a ballot are that the ballot form is printed with columns of "blocks" delineating each public office, and names of candidates are listed vertically within each block, along with their party name and symbol.

Appellants have no reason for, let alone a compelling justification for, continued use of a ballot format that creates a problem that could be easily avoided by the use of an alternative ballot format.[4]

Appellants cite numerous authorities for the general proposition that states, through their legislation, have authority, under the Elections Clause of the U.S. Constitution[5], to regulate the time, place and manner of elections. [App. Motion, p-25-25]. Appellees do not dispute this general proposition.

However, from this general proposition, Appellants make a quantum, and unjustifiable, leap to their contention that "*[t]hese [authorities] clearly recognizes [that] legitimate interest of State would be irreparably harmed if required to conduct a public random drawing for the ballot order on the November general election ballot*" [App. Motion, p-25]. However, none of Appellees cited authorities can even remotely be construed to address the issue of selecting ballot positions. Therefore, there is no basis for Appellants' leap of logic.

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[4] Intermixed with their argument that compliance with the District Court's order would create voter confusion, Appellants argue that somehow the District Court's required method of ballot position selection would create a conflict with respect to presidential elections. This argument was first presented in Appellants' motion for a stay filed in the District Court. That is, they did not make this argument in any prior pleadings or at oral argument. Therefore, it cannot be relied on as the basis of their argument that they will prevail on the merits of their claims.

Appellants argue that the Presidential candidates of minor parties are not required to comply with the April filing deadline established by for all other candidates. In their motion filed in this Court, Appellants further argue that "*[i]f the order [of the District Court] is not stayed, plaintiffs will have obtained party recognition for 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"* [App. Motion, p-23]. On page 28 of their motion, Appellants again argue that "*Plaintiffs [Appellees] did not challenge the Tennessee statutes governing ballot access for minor party presidential candidates; however, the District Courts' order makes no distinction between Plaintiffs' presidential candidates and non-presidential candidates*." Appellants then argue that "*if the District Court's order stands, Plaintiffs [will have] obtained minor-party recognition for their presidential candidates without having complied with the statutory requirements for such recognition."*

The relevance of this argument escapes Appellees because it has nothing whatsoever to do with the issue of ballot placement and the constitutionality of TCA §2-5-208(d)(1).

[5] Article I, section 4, clause 1.

In their pleadings in District Court, Appellants argued only that TCA §2-5-208(d)(1) was not unconstitutional when applied to minor parties because all parties have an equal opportunity to become the majority party in the General Assembly and have a preferential position on the ballot. However, this argument does not negate the fact that the statute makes it harder for any other party to become the majority party in the General Assembly.

Finally, it must be noted that the version of TCA §2-5-208(d)(1) challenged in this case was enacted by the Republican-controlled Tennessee General Assembly in 2011. The previous version of TCA §2-5-208(d)(1) read, in relevant part:

> "On general election ballots, the name of each statewide political party having nominees on the ballot shall be listed at the top of the columns, with the listing of the candidates' names underneath."

Significantly, the prior version of the statute did not have any provision establishing the order in which columns would be assigned to political parties – and Appellants did not offer any evidence of any problem justifying the change implemented by the 2011 version of the statute. Therefore, the Court can only reasonably conclude that the change made by the Republican-controlled General Assembly was intended to benefit the candidates of the Republican Party.[6]

Under the old version of TCA §2-5-208(d)(1), the same problem the Appellants now claim would cause voter confusion (i.e., large blanks under the columns for minor parties) would exist. The only effect of the District Court order is to randomize the location of these columns.

**B-2: RE: Appellants' Arguments That Appellees Are not Entitled to be Recognized as Parties Entitled to be Identified with their Candidates on the Ballot:**

Appellants' second contention is that this Court should stay that portion of the District Court's ruling that Appellees must be recognized as ballot-qualified parties and that their

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[6] As the court said in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006),

> "[T]he State may not be a wholly independent or neutral arbiter as it is controlled by the political parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." Quoting from *Clingman v. Beaver,* 544 U.S. 581, 125 S.Ct. 2029, 2044, 161 L.Ed.2d 920 (2005) (O'Conner, J., concurring)

candidates are entitled, on the ballot, by their party affiliation. As to this issue, Appellants argument must fail for two reasons.

**B-2-(a): Appellants Have Not Established the Likelihood of Success on the Merits:**

The District Court concluded that the Appellees had, by virtue of the performance of their candidates in past elections, established that they enjoyed sufficient support to justify being recognized as ballot-qualified parties. *Appellants do not, in their motion for a stay, challenge this aspect of the District Courts' ruling*. Rather, they only argue that they should not be required to identify the Appellees' candidates on the ballot by their party affiliation. Clearly, if a candidate's party is recognized as being ballot-qualified, a candidate has the right to have his party affiliation identified on the ballot.

Concededly, Appellants do argue that the State has a legitimate interest in requiring that "third parties who are granted access to the ballot are *boni fide* and are actually supported on their merits." [App. Motion, p-26 citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997). However, *they do not ask the Court to stay the District Court's ruling that Appellees are entitled to be recognized as ballot-qualified parties*[7, 8].

[7] The reason Appellants do not challenge the provision of the District Court order granting Appellees status as "recognized minor parties" is simple and obvious. If the Appellees were *now* denied status as recognized minor parties, the candidates of the Appellants would have to be treated as Independent candidates for all purposes. However, the candidate petition filing deadline for Independent candidates has passed. Therefore, if the Court were to stay the provisions of the District Court order granting Appellees "recognized minor party" status, it would necessarily be excluding all candidates of the Appellees from the ballot. This would obviously constitute irreparable harm to candidates of Appellees and deny voters the choice of additional candidates. Therefore, if Appellants had sought a stay of the portion of the District Court's order granting Appellees "recognized minor party" status, their motion would necessarily have failed because of the injury that such a stay would produce.

[8] Appellants do, on pages 16-20 of their motion, engage in a discussion regarding the propriety of the District Court's award of "recognized minor party" status as relief after holding that other provisions of the Tennessee statutes imposed unconstitutional barriers to ballot inclusion. However, Appellants have not, on their motion for a stay, asked for any relief relating to this holding by the District Court.

Moreover, even the argument presented by Appellants is untenable. Specifically, Appellants argue that cases in which the courts have awarded ballot inclusion as relief when ballot access laws were held to be unconstitutional only awarded ballot inclusion *to individual candidates*. Appellants contend that these authorities do not justify awarding ballot inclusion as

Rather, from the proposition stated in *Timmons*, Appellants leap to the conclusion that "*the State*

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relief where state laws impose an unconstitutional burden <u>*on parties*</u>. On p. 18 of their motion, Appellants say that it was not until 2008, in *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. (S.D. Ohio 2008), that any court had ordered a party to be included on the ballot as relief for an unconstitutional law limiting ballot access. Appellants have failed to do their research:

> In *MacBride v. Exon*, 558 F.2d 443 (8th Cir. 1977), the Eighth Circuit affirmed the district court's (unpublished) decision ordering the Libertarian Party to be included on the ballot as relief after finding that Nebraska's ballot-access statute was unconstitutional.
>
> In *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), the court ordered that "Socialist Labor Party by name, and its candidate for Governor, Joseph Pirincin, and its candidate for United States Senator, John O'Neill, all be placed upon the ballot for the 1970 Ohio general election" after holding that the Ohio statutes' petition signature requirements were unconstitutionally burdensome.
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> In *Libertarian Party of Nevada v. Swackhamer*, 638 F. Supp. 565 (D. Nev. 1986), the court ordered the Libertarian Party to be included on the ballot after finding that the petition filing deadline for new parties was unconstitutional.

Appellants also emphasize that, in *Brunner*, the court ordered the Libertarian Party to be included on the ballot based on the fact that the Libertarian Party had been in existence since 1972 and had previously had presidential candidates on the ballot in 31 states. If this is sufficient evidence of support, it is equally relevant that the Green Party and the Constitution Party have both been in existence for more than 20 years, and each has had candidates on the ballots of most states – including candidates for President of the United States.

Numerous courts have also awarded ballot inclusion where the plaintiff had shown some community support with less that the number of signatures required to satisfy the state's petition signature requirements. See *Swackhamer, supra* (Plaintiff had collected 5,000 of the 15,000 required signatures.); *Blumquist v. Thompson*, 739 F.2d 525 (10th Cir. 1984) (Plaintiff had collected 3,535 of the 8,000 required signatures.)

Finally, courts have awarded ballot inclusion based solely on a finding that a challenged statute is unconstitutional with evidentiary showing of support for the party. See *Socialist Labor Party v. Rhodes, supra*.; *Libertarian Party of Ohio v. Husted*, 2011 U.S. Dist. LEXIS 100632 (S.D. Ohio 2011) (Ordering the Libertarian Party to be included on the ballot for the 2011 elections without any discussion of support for the party.

*will be irreparably harmed if the State is required to recognize Plaintiffs as political parties and place their name next to their candidates on the November general-election ballot.*" While this conclusory assertion may be applicable to the "injury" prong on the test for granting a stay, it is not a substitute for the requirement that Appellants establish a likelihood of success on the merits.

In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), this Court considered an analogous case in which a candidate was denied the right to be identified as an "Independent" on the ballot. In that case, an expert witness had testified that "party candidates are afforded a 'voting cue' on the ballot in the form of a party label which research indicates is the most significant determinant of voting behavior." *Id.* at 173. The Court held that the statute "is unconstitutional because it violates the *First* and *Fourteenth Amendment* rights of Independent candidates to be so designated on Ohio's general-election ballots." *Id.* at 178. Based on its ruling in this controlling precedent, the Court must now find that candidates of Appellees are equally entitled to have their party affiliation identified on the general-election ballot.

**B-2-(b): The State has no Legitimate Interest in Denying Candidates the Use of a Party-Affiliation Designation on the Ballot:**

The *State* has no legitimate interest that would be advanced by precluding candidates of Appellees the use of their party label on the ballot. While *other candidates* may not want competitors to be identified by their party affiliation, the State has no such interest.

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

> "[W]hile states enjoy wide latitude in regulating elections and in controlling ballot content and ballot access, they must exercise this power in a reasonable, nondiscriminatory, *politically neutral fashion*." 459 F.3d at 590.

A legislative enactment that clearly favors the established parties cannot be deemed politically neutral.

Appellants cannot establish any interest of the State in prohibiting candidates of the Appellees from having a party label on the ballot.

**C: SUMMARY**

For reasons discussed in Section A, the Court should not even consider Appellants' motion for stay. However, if the Court chooses to consider Appellants' motion, the motion

should be denied because Appellants have failed to establish a likelihood that they will succeed or that it is in the public interest to grant a stay.

___s/s Alan. P. Woodruff_____
Alan P. Woodruff, Esq.
Counsel for Green Party of Tennessee and the
Constitution Party of Tennessee
106 Tangency Drive
Gray, Tennessee 37615
(423) 207-0688.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and exact copy of the foregoing Response to Motion for Partial Stay has been served on Darrell L. Castle, Esq, (Local Counsel for Plaintiffs), 4515 Poplar Avenue, Suite 510, Memphis, Tennessee 38117 and Janet M. Kleinfelter, Esq, (Counsel for Defendants), Office of Tennessee Attorney General, P.O. Box 20207, Nashville, Tennessee 37202 via the Court's CM/ECF e-mail notification system on this 10th day of April, 2012.

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