NO. 12-5271

IN THE UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

GREEN PARTY OF TENNESSEE and
CONSTITUTION PARTY OF
TENNESSEE

Plaintiffs/Appellees

v.

TRE HARGETT, et al.

Defendants/Appellants

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
[DISTRICT COURT NO. 3:11-CV-00692]

RESPONSE BRIEF OF PLAINTIFFS/APPELLEES

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STATEMENT RE: SIXTH CIRCUIT RULE 26

Pursuant to Rule 26.1(a), Plaintiffs/Appellees and political organizations organized in Tennessee and no entity has a corporate affiliate/financial interest in this action.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been scheduled in this case for July 25, 2012.

I: JURISDICTION; STATEMENT OF THE CASE; STATEMENT OF FACTS AND STANDARD OF REVIEW:

Except as otherwise specifically noted herein, Appellees generally concur with Appellants' statement of jurisdiction, statement of the case, statement of facts and the applicable standard of review.

II: ARGUMENT:

Before addressing Appellants' arguments, it is appropriate to reiterate certain legal standards that are applicable to this Court's deliberations.

Law Applicable to Appeal:

As noted by Appellants, subsequent to entry of a Final Order by the District Court, the Tennessee General Assembly enacted, and the Governor signed, legislation that changed significant provisions on the Tennessee Code that were challenged by Appellees – and on which the District Court ruled in favor of the Appellants.

The Supreme Court has instructed that "a court [on direct review] is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Board,* 416 U.S. 696, 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974). Accordingly, this Court must consider the arguments presented in

this appeal in the context of the changes made by the General Assembly in 2012 except where doing so would result in a "manifest injustice."[1]

Arguments to be Considered on Appeal.

In the Orders on appeal, the District Court addressed only a select few of the arguments made by Appellees. However, "[a]ppellate courts reviewing a grant of summary judgment may affirm on any grounds supported by the record, even on grounds that are different from those considered or relied on by the district court." *Brooks v. Davey Tree Expert Co.,* 2012 U.S. App. LEXIS 7770 *14 (6th Cir. 1012) *citing Hayes v. Equitable Energy Res. Co.,* 266 F.3d 560, 569 (6th Cir. 2001). Accordingly, it is appropriate for this Court to consider of all arguments made by Appellees in the proceedings in District Court. This principle has particular relevance to arguments presented in Sections II-A-1 and III-B-2.

Arguments Not Proper for Appeal:

Appellants have presented arguments in their Initial Brief that were not presented in their pleadings or arguments in the District Court. It is a well-settled rule that an appellate court should not consider arguments made for the first time

[1] One instance in which it would be manifestly unjust to apply the new law relates the filing deadline for minor parties to qualify as "recognized minor parties." Under the old law, minor parties had to file their qualifying signature petitions in April. Under the new law, minor parties that choose not to participate in primary elections have until 90 days before the general election to file their petition signatures. Neither of the Appellants intend to nominate their candidates by primaries. However, at this late date, it would be manifestly unjust for the court to require them to file qualifying petitions after the District Court ordered that they be recognized as "recognized minor parties" because of the unconstitutionality of that statute in effect when that ruling was entered.

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."). This principle has particular relevance to arguments presented in Sections III-B-1-a and III-D.

II-A: PLAINTIFFS' CHALLENGE TO THE CONSTITUTIONALITY OF CANDIDATE FILING DEADLINES HAS NOT BEEN RENDERED ENTIRELY MOOT:

Appellants argue that action by the Tennessee General Assembly in 2012 renders moot certain aspects of the District Court's opinion and that these aspects of the District Court's opinion should be vacated. [Init. Br. P: 33-36][2] As discussed below, the recently enacted legislation does render completely moot the relevant rulings by the District Court. Moreover, for reasons discussed below, it would be improper to vacate the relevant portions of the District Court's order.

II-A-1: The District Court's Holding That Mandatory Primaries For Minor Parties Are Unconstitutional Is Moot:

Appellate correctly recites that legislation enacted by the Tennessee General Assembly in 2012, Tenn. Public Acts Ch. 955, eliminated the mandatory primary election for the nomination of minor party candidates. Accordingly, the District

[2] The pagination in Appellants' Initial Brief does not match the pagination in the Table of Contents or the header of the electronically filed brief. All references herein to Appellants Initial Brief ["Init. Br."] are references to the page numbers in the body of the Initial Brief.

Court's ruling in favor of Appellees on Count III, in which they challenged the constitutionality on the mandatory primary for minor parties as the exclusive means of selecting candidates, has been rendered moot – *for now*. However, if the District Court's ruling is vacated, as the Appellants request, that ruling would become a nullity and there would be nothing to prevent the General Assembly from reversing itself at some time in the future and reinstating a mandatory primary for minor parties. The District Court's ruling is the only thing that stands in the way of such an action. Accordingly, the District Court's ruling on Count III should *not* be vacated.

Moreover, legislation reinstating the mandatory primary for minor parties could be enacted so as to take effect before a judicial challenge to its constitutionality could be presented and decided. Therefore, the potential for such an action by the General Assembly brings the issue within the ambit of the doctrine of "capable of repetition but evading review." Accordingly, a ruling that the District Court's decision is moot is not appropriate.[3]

II-A-2: The District Court Did Not Address the Issue of the Constitutionality of Tennessee's "Open Primary."

In addition to challenging the constitutionality of the mandatory primary for minor parties, Appellee's challenged the constitutionality of Tennessee's "open

[3] Application of the doctrine of "capable of repetition but evading review" also negates Appellant's argument that there is no active case-or-controversy."

primary." Having held that Tennessee's statutes requiring mandatory primaries for minor parties was unconstitutional, it was not necessary for the District Court to address the constitutionality of making these primaries "open primaries." However, because Public Acts Ch. 955 retains a provision for primary elections for minor parties, the constitutionality of making those primaries "open primaries" remains alive as a case-or-controversy.

The issues relating to the constitutionality of "open primaries" was fully briefed in pleadings in the District Court. [See RE 20, Plaintiffs' Motion for Summary Judgment on Counts II, III and IV, P:12-18; RE 39, Defendants' RESPONSE to Motions for Summary Judgment, P:51-61; RE 42, Plaintiffs REPLY in Response to Defendants Response to Motions for Summary Judgment, P:31-35][4]. Accordingly, this Court has the authority to consider, and rule on, these arguments even though they were not addressed by the District Court. However, because the issue remains a live case-or-controversy only because of a subsequent enactment by the General Assembly, Appellants believe it is more to remand the issue for a ruling by the District Court.

II-A-3: The District Court's Holding That April Filing Date for Minor Party Candidates Participating in Primary Election is Unconstitutional Is NOT Moot:

[4] Because of the ambiguity regarding the propriety of addressing this issue in this appeal, the arguments presented below are not repeated here.

In addition to removing the mandate that minor parties nominate their candidates by primary elections, the legislation enacted by the General Assembly in 2012 eliminated the April the filing date for minor party candidates *when the party chooses not to nominate its candidates by primary elections*. However, the new statute restates the requirement that minor party *candidates* file their petitions in April in years that the party chooses to select its candidates by primary election. The requirement that minor party candidates file their petition in April was held to be unconstitutional by the District Court. In other words, the new statute constitutes a re-enactment of a requirement that the District Court held to be unconstitutional.

Significantly, Appellants have not appealed that portion of the District Court's ruling that held the April filing date for minor party *candidates* to be unconstitutional. It is unclear whether this was an oversight by Appellants or Appellants believe that the new statute renders the District Court's ruling on this point moot. What is clear is that the General Assembly completely ignored the District Court's ruling and re-enacted a provision that the District Court held to be unconstitutional. This creates a procedural conundrum here because:

a) This court must base its ruling on the law now in effect.

b) The law now in effect contains a provision that the District Court held to be unconstitutional.

c) Appellants have not appealed the District Court's ruling that the relevant provision of Tennessee Code was unconstitutional. [5]

If this court holds that the District Court's ruling has been rendered moot by the new law, the inevitable consequence will be a new lawsuit challenging the April candidate filing deadline. However, that would be a waste of judicial resources because it has already been held to be unconstitutional. Accordingly, Appellees urge the court to merely affirm the District Court's ruling – even though it has not been disputed in Appellants' Initial Brief – and rule that TCA 2-13-107(a)(1), as amended by Public Acts Ch. 955, is unconstitutional[6].

II-B: THE TENNESSE STATUTORY REQUIREMENTS FOR MINOR PARTY RECOGNITION ARE UNCONSTITUTIONAL:

Appellants challenge to the District Court's rulings that Tennessee's requirements for minor parties to obtain the statue of "recognized minor party" are erroneous on two grounds.

First, Appellants improperly argue that the April filing date for minor party qualifying petitions is constitutional. [Init. Br. P: 39-44]

Second, Appellants argue that Tennessee's minor party petition signature requirement is constitutional. [Init. Br. P: 45-49]

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[5] Conceivably, Appellants will attempt to cure their failure to challenge the District Court's ruling on the April minor party candidate filing date by raising it as a new issue in their Reply Brief. However, it is not proper to raise an entirely new issue in a Reply, and any attempt by Appellants to do so should be stricken.

[6] In the alternative, the issue should be remanded to the District Court where the General Assembly can be ordered to show cause why it should not be held in contempt of court for re-enacting a statute that the District Court has held to be unconstitutional.

As an introduction to its arguments on these points, Appellants devote several pages to a discussion of the requirement for a facial challenge to the constitutionality of the relevant statutes. [Init. Br. P: 36-39]. It is not entirely clear what the purpose of this discussion is, but it appears that Appellants are suggesting that the challenged statutes should be held to be constitutional if they would be constitutional under *some* possible circumstances. However, the statutes at issue are clear and unambiguous and can only be applied one way -- and Appellants to not even suggest that they can be *applied* in any way other than as written. Accordingly, the only issue is whether the statutes are constitutional in the only way that they can be applied.

II-B-1: The Filing Date for Minor Party Qualifying Petitions is Unconstitutional:

In the District Court, as here, the Appellants argued that the ballot access qualifying deadline established by TCA §2-13-107(a) is justified by the time requirements needed to verify petition signatures and satisfy the requirements of the Military and Overseas Voters Empowerment Act, "MOVE," 42 U.S.C. § 1973ff-1(8) and Tenn. Code Ann. § 2-6- 503(a) requiring that absentee ballots be mailed to members of the military, and other registered voters residing overseas, no later than forty-five (45) days before an election. This argument failed in the District Court, and must fail here, for two reasons.

First, Appellants argument is barred by principles of claims preclusion.

Second, Appellants argument is rendered untenable by Public Acts Ch. 955

II-B-1-a: Appellants' Argument is Barred by the Doctrine of Claims Preclusion:

In *Libertarian Party of Tennessee v. Goins*, 793 F. Supp. 2d 1064 (M.D. Tenn. 2010), the Plaintiffs challenged the minor party petition filing date -- the very same challenge that is presented in Count I-A of this case. However, in their defense in that case, Appellants did not present any argument relating to the implications, or requirements of, the MOVE Act -- although the argument would have been equally applicable to that case.

Under the doctrine of claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been raised* in that action." *Federated Department Stores v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). (Emphasis added) The doctrine of claims preclusion is predicated on the need to promote judicial efficiency by requiring the parties to raise all related issues in a single proceeding. *See Brown v. R.J. Reynolds Tobacco Co.,* 611 F.3d 1324, 1333 (11th Cir. 2010) ("The idea underlying claim preclusion is that if a matter has already been decided, the[litigant] has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined .") Although the doctrine is generally applied to prevent plaintiffs from engaging in claim-splitting, the

doctrine is equally applicable prevent defendants from asserting additional defenses in a later case on the same topic as an earlier case. This conclusion finds support in the fact that in *Moitie* the Supreme Court referred to "the parties," and not just the plaintiffs.

"The Sixth Circuit has interpreted the doctrine of claim preclusion as having four elements: (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action." *Ohio ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 520 (6th Cir. 2011).

Appellants and Appellees in this case were all parties to *Libertarian Party of Tennessee v. Goins*. The issue in *Goins* was the same issue that was presented in this case. Appellants' argument could, and should, have been raised in *Goins*, and the decision entered in *Goins* was entered by a court of competent jurisdiction after a full and fair hearing. Therefore, all four elements justifying application of the doctrine of claim preclusion are present in this case.

In this case, the District Court specifically recognized that all facts related to Appellants MOVE argument were known to Appellants prior to the date of its decision in *Goins* but had not been raised in that case. [R.E. 45, P:47-48].

Accordingly, the District Court concluded that "the claim preclusion branch of the *res judicata* doctrine precludes proof on any administrative issues to justify the State's [party petition] deadline."

Appellants have not argued that the District Court erred in its application of the claims preclusion doctrine. Instead, they have proceeded as if there had been no such ruling, and have not shown any reason why this holding is not correct.

More importantly, Appellants did not, in the proceedings in District Court, present any argument in opposition to the application of the doctrine of claims preclusion. Therefore, they have waived this argument and cannot raise it here.

II-B-1-b: Appellants' Analysis Does Not Justify Tennessee's April Filing Date:

Appellants make much of the fact that county election supervisors have 30 days to verify petition signatures and that absentee ballots must be mailed to voters 45 days before the primary and that the April filing date for petitions is necessary for ballots to be prepared and for the Coordinator of Elections to approve these ballots. TCA §2-13-107(b) establishes that petition signatures must be verified within 30 days of filing. Even allowing an additional two weeks for related ministerial acts, these requirements justify a filing deadline of, at most, 90 days before the primary election[7].

[7] Appellants make must of the fact that the District Court appeared to reject their claim that the MOVE Act required absentee ballots to be sent to 45 days before the primary election. [Init.

The April filing date established by TCA §2-13-107(a) is 120 days before the primary elections, and every case to consider the issues has held that an April filing date, or a date 120 days before a primary election, unconstitutional.[8] Appellants concede that these cases pre-date the MOVE ACT. However, Appellants' contention that the April minor party petition filing date is necessary to comply with the MOVE Act is rendered meaningless by the provisions of Public Acts Ch. 955.

Br. P: 40]. On this issue, they are correct. That is what 42 U.S.C. § 1973ff-1(a)(8) requires. However, as the District Court noted, 42 U.S.C. § 1973ff-1(a) has been in effect for decades [RE 45, P:87] and, even under prior versions of the act, absentee ballots had to be sent not less than 30 days before an election. Appellants do not suggest that they had any difficulty complying with the prior 30 deadline, and they have not produced any <u>evidence</u> that the difference between 30 and 45 days represents a material increase in their burden.

[8] See *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (Holding New Jersey's April filing deadline unconstitutional.); *New Alliance Party of Ala. v. Hand*, 933 F.2d 1568 (11th Cir. 1991) (Holding Alabama's April filing deadline unconstitutional.); *Libertarian Party of Nevada v. Swackhamer,* 638 F.Supp. 565 (D. Nev. 1986) (Holding Nevada's April filing deadline unconstitutional.); *Staddard v. Quinn*, 593 F.Supp. 300 (D. Me. 1984) (Holding Maine's April filing deadline unconstitutional.); *Citizens to Establish a Reform Party of Ark. v. Priest*, 970 F. Supp. 690, 697-98 (E.D. Ark. 1996) (concluding that a January deadline prevented minor parties from finding volunteers, attracting media coverage and recruiting supporters, all of which impacted its ability to appear on the ballot). Even filing dates later than April have been held to be unconstitutional. *McLain v. Meier*, 637 F.2d 1159, 1163-64 (8th Cir. 1980) (June deadline 90 days in advance of primary held to be unconstitutional.).

Appellants make much of the Findings of Fact and Conclusions of Law issues in *Libertarian Party of 0klahoma v. Ziriax*, 5:12-cv-119 (W.D. Okla. Mar. 19, 2012) in which the court considered Oklahoma's change of filing date from May 1 to March 1. However, that ruling was merely a ruling on a motion for a preliminary injunction. The court has subsequently heard additional arguments on the issue and a ruling in pending.

In any event, the Oklahoma primary is in June, whereas the Tennessee primary in is August. Therefore, in attempting to justify Tennessee's April minor party filing date based the Oklahoma court's approval of a March filing date, Appellants are mixing apples and oranges.

In Public Acts Ch. 955, the legislature restated the requirement that minor parties wishing to nominate their candidates by primary elections file their party nominating petitions in April.[9] However, Public Acts Ch. 955 adds a new provision for minor parties that *do not hold primaries*. This provision, new TCA§2-13-107(a)(2), provides that:

> "To be recognized as a minor party for purposes of a general election, a petition as required in § 2-1-104 must be filed in the office of the coordinator of elections no later than twelve o'clock (12:00) noon, prevailing time, *ninety (90) days prior to the date on which the general election is to be held*. The petition shall be accompanied by the name and address of the person or the names and addresses of the members of the group or association filing the petition form the recognized minor political party." (Emphasis added.)

The requirements of the MOVE Act apply to both primary and general elections. In the new TCA§2-13-107(a)(2), the General Assembly has established 90 days is sufficient time to verify minor party petition signatures and do all the other things needed to comply with applicable law. *If 90 days is sufficient to satisfy all legal requirements for the general election, it is sufficient to satisfy all requirements for a primary*.

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[9] Public Acts Ch. 955 amends TCA§2-13-107(a), to provide, in relevant part:

> "(a)(1)To be recognized as a minor party for purposes of a primary election, a petition as required in § 2-1-104 must be filed no later than twelve o'clock (12:00) noon, prevailing time, on the appropriate qualifying deadline as established in § 2-5-101(a) in the office of the coordinator of elections. The petition shall be accompanied by the name and address of the person or the names and addresses of the members of the group or association filing the petition to form the recognized minor political party."

As the Supreme Court explained in *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 185, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979), "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," and that a State must "adopt the least drastic means to achieve [its] ends." The Tennessee General Assembly has determined that 90 days is sufficient time to verify petition signatures and otherwise comply with all provisions of applicable law. Therefore, requiring minor parties that choose to hold primaries to file their petition signatures more than 90 days before the primaries does not satisfy the "least restrictive means" requirement of. *Socialist Workers Party.*

II-B-1-c: Appellants Argument is Based On Circular Reasoning:

Appellants contend that the April filing deadline for new parties electing to use primary elections is necessary because the verification of petition signatures within the 30 days allowed by TCA§2-13-107(a) imposes an excessive burden of county election commissioners who are required to verify the 40,000+ minor party petition signatures required by statute.. However, this burden exists only because Tennessee has established an unconstitutionally high petition signature

requirement.[10] But for the high number of signatures that must be collected, the Appellant's argument is meaningless.

Appellants are attempting to justify the constitutionality of one statute because of the burden imposed on County Election Commissioners by another statute that is, itself, unconstitutional. Inasmuch as the State has the ability to reduce the number of petition signatures that must be verified, on it cannot argue that the burden on verifying these signatures justifies imposing a filing deadline that is more in advance of an election than the legislature itself, in Public Acts Ch. 955, has determined to be unnecessary.

II-B-1-d: Appellants Have Not Offered Any PROOF of an Excessive Burden on County Election Officers:

In their Initial Brief, Appellants go to great lengths to identify the many duties of the county coordinators of elections that impair their ability to verify petition signatures submitted by new minor parties within the 30 days allowed by law. [Init. Br. P-26-27] However, Appellants do not identify, or even suggest, a statutory basis requiring on which these activities must be conducted *during to 30 allowed for petition signature verification*. Therefore, there is no basis for concluding that the petition signature verification requirements create an undue for county coordinators of elections.

[10] The unconstitutionality of Tennessee's minor party petition signature requirement in discussed in Section III-C.

Additionally, the affidavits filed in the District Court are irrelevant for the simple reason that the county election administrators have *never had to verity minor party petition signature* because no minor party has, for almost half a century, conducted a successful signature collection drive to obtain ballot access. Therefore, the best that can be said for Appellants' affidavits is that county election administrators speculate that they *might* face a daunting burden in verifying minor party petition signatures. "Might" is simply too slender a reed on which to base a ruling on the constitutionality of the challenged statute. "Reliance on suppositions and speculative interests is not sufficient to justify a severe burden on First Amendment rights." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2006)[11].

II-B-2: Tennessee's Party Qualifying Petition Signature Requirement is Unconstitutional:

Appellants argue that the District Court erred in determining that the minor party petition signature requirement is unconstitutional[12]. According to

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[11] The District Court basically adopted this reasoning when it said:

> "Because a minor political party's petition has never been subjected to this process in Tennessee for decades, Defendants' proof of estimates of the administrative burdens are *speculative.*" [RE 45, P:73] (Emphasis added)

[12] TCA §2-1-104(a)(24) defines a "recognized minor party" 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*

Appellants:

1) Tennessee's minor party petition signature requirement is constitutional under the standard established in *Folsom v. Jenness*, 403 U.S. 431, 91 S.Ct. 1970, 1976 (1971).

2) The District Court erred in awarding Appellees ballot qualified ("recognized minor party") status.

Both of these arguments fail appreciate the basis for the District Court's ruling the basis for the authorities on which they rely.

II-B-2-a: The Petition Standards Established by *Folsom v. Jenness* (and its Progeny) Are Not Applicable:

Ballot inclusion petition signature requirements have consistently been upheld on the grounds that states have a legitimate interest in avoiding the voter confusion that may result when there are too many candidates on the ballot. However, Tennessee's signature requirement for minor parties does not further the achievement of this objective because the qualification of a new party in Tennessee has no relevance to the number of candidates who appear on the ballot.

In Tennessee, the *same petition signature requirements* apply to all *candidates*, regardless of their party affiliating or their status as an independent candidate. [See TCA §2-5-101(b)]. Therefore, the issue of whether a minor

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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;"

party itself has qualified for ballot access has no bearing in the number of signatures a candidate must collect – and does nothing to affect the number of candidates on the ballot[13]. Tennessee is unique.

In most states, *candidate* petition requirements are determined by reference to the ballot access status of the candidate's *party*.[14] That is, states (permissibly) have greater petition signature requirements for candidates of major and minor parties and independent candidates of a party because:

a) The "modicum of support" required for the candidate of a recognized party has presumptively been satisfied by the fact that the party has qualified for ballot inclusion.

b) The "modicum of support" required for an Independent candidate to be included on the ballot must be demonstrated by the candidates petitions alone.

That is, in states where the number of petition signatures a candidate must collect

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[13] Significantly, in 2010, Tennessee had 16 candidates for Governor listed on the ballot. Thus, it is obvious that the Tennessee statutes do nothing to control the number of candidates on the ballot of avoid voter confusion.

[14] For example: in New Mexico:

a) The candidates of ***major parties*** qualify for the ballot or the primary election by filing petitions containing the signatures of *two percent* of the total vote of the candidate's party in the state or district at the last preceding primary election. [NMSA §1-8-33]

b) The candidates of ***minor parties*** qualify for the ballot or the general election by filing petitions containing the signatures of *one percent* of the total number of votes cast at the last preceding *general election.* [NMSA §1-8-2].

c) ***Independent*** candidates qualify for the ballot or the general election by filing petitions containing the signatures of three percent of the total number of votes cast in the state or district for governor at the last preceding *general election* [NMSA §1-8-51].

depends on the status of the candidate's party, party qualification does affect the number of candidates on the ballot. However, in Tennessee the same numbers of petition signatures are required for all candidates – whether they represent a party or are "Independent" candidates. Thus, the "qualified" status of a minor candidate's party does not affect his (or her) petition signature requirement. Rather, for minor parties, the only consequence of a minor party obtaining "qualified" status is that its candidates are entitled to be identified on the ballot by their party affiliation. However, *no court has ever held that a state has a legitimate interest to justify a party-qualifying statute whose SOLE effect is preventing a candidate from having his party affiliation identified on the ballot*.

Because Tennessee minor party qualifying petition requirement has no effect on the number of candidates in the ballot, it can only be upheld if it serves some other legitimate state purpose. This determination must be made by applying the balancing test established by the Supreme Court in *Anderson v. Celebrese*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In that case, the Court said that:

> "[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

In *Rosen v. Brown*, 970 F.2d. 169 (6th Cir. 1992), this court held that the identification of a candidate's party affiliation on the ballot provided a valuable "voting cue." A candidate who has a party affiliation, but who is denied the benefit of having that affiliation shown on the ballot, is denied the benefit of that "voter cue."

Although Tennessee permits candidates who have a party affiliation, but whose party does not qualify as a "recognized minor party," to be included on the ballot as an Independent candidate, *this is not enough*. Candidacy as the candidate of a party and candidacy as an Independent *are not the same*. As the court held in *McLain v. Meier*, 637 F.2d 1159, 1165 (8th Cir.1980), "[a] candidate who wishes to be a party candidate should not be compelled to adopt independent status in order to participate in the electoral process." Moreover, in *Storer v. Brown*, 415 U.S. 724, 645, 94 S.Ct. 1274, 1286, 39 L.Ed.2d 714 (1974), the Supreme Court specifically recognized that "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other."

Denying candidates who have an identified party affiliation the right to have that affiliation identified on the ballot denies them the benefit of a significant

"voter cue" and imposes an excessive burden on their chances of election. Therefore, under the *Anderson* standard, Appellants must show that Tennessee has a legitimate and compelling interest in denying candidates to benefit of a party affiliation designation on the ballot *and* that the state interest justifies its onerous minor party petition signature requirements.

Appellants did not, in the proceedings in the District Court, offer *any* justification for requiring parties become "recognized minor parties" in order for their candidates to have their party affiliation identified on the ballot. Therefore, application of the *Anderson* test compels a finding that Tennessee's minor party petition signature requirement in unconstitutional.

II-B-2-b: Tennessee's New Party Qualifying Petition Signature Requirement is Unconstitutional:

TCA §2-1-104(a)(24) requires that minor parties seeking "recognized minor party" status file petitions containing "*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.*" Appellants base their entire argument in that fact that Tennessee's 2.5% signature requirement is within constitutionally permitted limits. However, the permissibility of the formula for determining the number of petition signatures required to qualify a new party for ballot access is not *alone* enough justify a finding that it is not unconstitutionally burdensome.

In the seminal case, *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 1976 (1971), the Supreme Court upheld Georgia's requirement that new parties qualify for the ballot by filing petitions containing the signatures of 5% of the number of registered voters at the last general election for the office in question. This 5% threshold has become the standard against which all subsequent challenges to the constitutionality of petition signature requirement have been measured.

In their Initial Brief, Appellants rely exclusively in *Jenness,* and its progeny, to establish that Tennessee's 2.5% signature requirement is constitutional because it is less that the signature requirements that have been held to be constitutional. But a high signature requirement is only constitutional if it is necessary to achieve a legitimate and compelling state interest[15]. As previously discussed, the only significance of Tennessee's minor party petition signature requirement is to determine which candidates are entitled to have their party affiliation identified on the ballot. In *Jenness*, the Court upheld the Georgia statute because Georgia justified its requirement by the need to avoid voter

[15] Even Georgia has abandoned its onerous petition signature requirement.

confusion by limiting the number of candidates on the ballot[16]. However, Tennessee cannot assert such a justification.

In *Jenness*, the Supreme Court's decision was based on a somewhat arbitrary determination that Georgia's 5% signature requirement did not impose an excessive burden on new parties. [Init. Br. P-45-50]. However, *Jenness* was decided more than a decade before *Anderson v. Celebrese* established the standard for evaluating the constitutionality of petition signature requirements. The continuing applicability of the 5% *Jenness* standard must also now be considered in light of the Supreme Court's decision in *Anderson v. Celebrese*.

None of the parties in *Jenness* presented, and the Court therefore did not consider, evidence of the actual burden imposed on new parties by a state's petition signature requirement. However, under *Anderson*, the court is required to consider this burden,

In this case, Appellees produced competent and evidence that the financial burden imposed on minor parties seeking recognition in Tennessee is so great as make obtaining recognition for minor parties all but impossible[17].

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[16] The significance, and merits, of the "avoiding voter confusion" argument for limiting the number of candidates on the ballot is dubious at best. Since *Jenness* was decided, ballots in th various states have included at least 6 candidates for statewide and federal office on at least 50 occasions [See Expert Report of Richard Winger, Exhibit "A," Opinion Three and attached exhibit] and there is no evidence that voter confusion resulted.

[17] In their motion for summary judgment on Count I Appellees argued:

On the other hand, as also discussed above, the only consequence of obtaining recognition in Tennessee is that minor party candidates gain the right to have their party affiliation identified on the ballot. A weighting of the burden on new parties against to significance of the state interest falls in the category of a "no brainer." The petition signature requirement for minor parties is clearly unconstitutional under the *Anderson* test.

II-B-2-c: The District Court Properly Awarded Appellees Ballot Inclusion Status:

Appellants do not specifically challenge the District Court's award of recognition as "recognized minor parties" as relief for Tennessee's unconstitutional petition signature requirement[18]. In fact, Appellants *did not*

> To satisfy the petition requirements for a new minor party in 2012, the party must collect 40,039 valid signatures. The rule of thumb is that petitioners must collect between 1.5-1.75 times the minimum number of signatures required to assure compliance with a reviewing officers standards[17]. Thus, new minor parties must actually collect in excess of 60,000 signatures. This is a far greater number than be collected by the members of a new minor party alone, so the party must resort to the use of paid signature collectors—at a market cost of between $1.50-2.00 per signature. Therefore, new minor parties may be required to pay as much as $120,000 to satisfy the requirements of the Tennessee Code. This is obviously an excessively onerous burden. But, more importantly, it doubly burden's new parties my diverting limited resources from disseminating the party message. [R.E. 12, P: 15].

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

[18] In awarding Appellees "recognized minor party" status, the District Court was not plowing any new legal ground. The courts have consistently held that where an impediment to

once offer any arguments in opposition to Appellants argument that they were entitled to ballot inclusion as relief for Tennessee's unconstitutional statutes. Therefore, they cannot *now* argue that this court erred in granting the requested relief.

In its Order the District Court awarded Appellees "recognized minor party" status on the grounds that they had, in previous elections and previous petition drives, shown that they enjoyed sufficient support to satisfy the "modicum of support" requirement for recognition as recognized minor parties. Moreover, the support shown for Appellees in previous elections and previous petition drives exceeds the petition requirements that other, similar states have accepted as satisfying the "modicum of support" requirement[19].

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ballot access is found to be unconstitutional, the proper relief is to order that the injured party be given access to the ballot. See *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 1, 21 L.Ed.2d 69 (1968) (ordering Independent Party candidate placed on the ballot after finding the state election law provisions failed to provide a constitutionally proper means of access to the ballot.); *McCarthy v. Briscoe,* 429 U.S. 1317, 1323, 97 S.Ct. 10, 50 L.Ed.2d 49 (1976) (Upholding lower court order placing a plaintiff's name on the ballot as an appropriate remedy where the State has failed to provide constitutionally appropriate means of access to the ballot.); *Goldman-Frankie v. Austin,* 727 F.2d 603, 607 (6th Cir. 1984) (placing candidates name on ballot after Michigan legislature failed to correct a constitutional defect in its statutory provision of providing ballot access to independent candidates.): *Libertarian Party of Ohio v. Bruner,* 567 F.Supp.2d 1006 (S.D. Ohio 2008) (Ordering that the Libertarian Party be included on the ballot after Ohio had failed to correct a constitutional defect of Ohio's ballot access laws.).

[19] Exhibit B to the affidavit of Richard Winger shows the number of petition signatures required to qualify minor parties in all states. As shown in this table, Tennessee requires many times the number of petition signatures required by almost every state of comparable size and similar demographics. Although the practices of other states are not controlling on Tennessee, they are highly relevant to a determination of the number of signatures that are sufficient to satisfy the "modicum of support" standard of *Jenness*.

It is also relevant that, in *Goldman-Frankie v. Austin,* 727 F.2d 603, 607 (6th Cir. 1984), the court held that there *was* sufficient evidence that a candidate had sufficient community support be justify ballot inclusion based on that fact Goldman-Frankie had previously received almost 15,000 votes as a candidate for the Wayne State University Board of Governors and almost 6,000 votes as a candidate for the Michigan State Board of Education.

Likewise, in *Libertarian Party of Ohio v. Brunner*, 567 F.Supp.2d 1006 (S.D. Ohio 2008) awarded ballot inclusion to the Libertarian Party based on its history and demonstrated support as a national party. Specifically the court noted that the Libertarian Party had been founded in 1972, it had qualified for the ballot in 31 other states for the 2008 general election and had submitted a petition containing 6,545 signatures – even though the applicable state statute required more than 40,000 signatures. That is, the court held that the parties has sufficient support to justify ballot inclusion based solely on the facts that they had been in existence for many years and had succeeded in qualifying for the ballot, and placing candidates on the ballot in many states and had collected sufficient petition signatures to demonstrate a "modicum of support."

As previously discussed, a burden imposed on constitutional rights cannot be more burdensome than necessary to satisfy a legitimate state objective. The fact that Tennessee requires four times as many petition signatures as other, similar states is, at minimum, highly suggestive that is requirement is more burdensome that necessary. Therefore, the State has the burden of showing that Tennessee's signature requirement satisfies the "least restrictive means" standard. Appellants have not offered any arguments or evidence showing that it does.

These same considerations apply to the Appellees in this case. 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. Thus, under the standards previously applied by this court, awarding ballot inclusion was proper.

Finally, contrary to Appellants' contention, a finding that a party enjoys voter support is *not* a precondition to the granting of ballot inclusion as relief. Rather, a mere finding that a state statute is unconstitutional, or a finding that a state has failed to follow a constitutional procedure is sufficient to justify the relief of ballot inclusion. For example, in *Campbell v Bennett,* 212 F Supp. 2d 1339 (M.D. Ala. 2002), the court granted ballot inclusion as relief for a mere *procedural violation* where the plaintiffs were not provided notice of a statutory change. Likewise, in *Nader 2000 Primary Committee Inc. v Hechler*, 112 F Supp. 2d 575 (S.D.W.V. 2000) the court order Ralph Nader's name included on the ballot because the state statute requiring petition circulators to be registered voters was held to be unconstitutional. Neither of these cases were decided on the basis that the candidates had, either directly or by implication, established that they had sufficient voter support to justify ballot inclusion. Therefore, the fact that Tennessee's various filing deadlines are unconstitutional is sufficient to justify the District Court's order that the Appellees be granted "recognized minor party status.

II-C: THE GRANT OF POWERS BY TCA §2-1-104(a)(24) TO THE COORDINATOR OF ELECTIONS IS UNCONSTITUTIONAL

TCA §2-1-104(a)(24) defines a "recognized minor party" 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, state its name, and contain the names of registered voters from a single county;"

The underlined portion of the statute is the portion of the statute at issue.

> Appellants contend that the statute unambiguously limits the Coordinator of Elections to prescribing the form of minor party qualifying petition.
>
> Appellees contend that the statute is so broad and vague that it would permit the Coordinator of Elections to (a) require that minor party petitions require more than a constitutional number of signatures[20] and (b) promulgate a form that would be unconstitutional[21].

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

[21] As examples of form requirements that would be unconstitutional, Appellees cited *American Constitutional Law Found. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997) (Holding unconstitutional a state statute that required petition signature collectors to be registered voters.); *Ciudadana v. Gracia*, 283 F. Supp. 2d 469 (D. P.R. 2003) (Finding unconstitutional a Puerto Rico statute requiring petition signatures to be notarized.); *Fontes v. City of Central Falls,* 660 F. Supp. 2d 244 (D.R.I. 2009) (Holding unconstitutional a statute that limited voters to signing the petition of only one candidate for each office.) [R.E. 19, P:21]

In the Order appealed, the District Court held that TCA §2-1-104(a)(24) was unconstitutionally vague and constituted an impermissible delegation of legislative authority. Appellants contend that the District Court erred in both respects.

II-C-1: TCA §2-1-104(a)(24) is Unconstitutionally Vague:

A statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926), if it does not give "a person of ordinary intelligence fair notice" of conformity with the statute's requirements, *United States v. Harris,* 347 U.S. 612, 617, 98 L. Ed. 989, 74 S. Ct. 808 (1954), or if it "encourages arbitrary and erratic" enforcement by public officials. *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972). As the Supreme Court stated in *Cramp v. Board of Public Instruction,* 368 U.S. 278, 287, 82 S.Ct. 275, 281, 7 L.Ed.2d 285 (1961):

> "The vice of unconstitutional vagueness is [] aggravated where ... the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.... "

"Laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). See also *Stromberg v. People of State of California*, 283 U.S. 359, 369, 51 S.Ct. 532, 536,

75 L.Ed. 1117 (1931) ("A statute which upon its face, and as authoritatively construed, is vague and indefinite … is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.")

Nothing in TCA §2-1-104(a)(24) provides any guidance as to the scope of, or limits on, the authority of the Coordinator of Elections. "The fundamental rationale underlying the vagueness doctrine is that due process requires a statute to give adequate notice of [a statutes] scope." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1971). A statute is vague when "no standard of conduct is specified at all." *Id.* Citing *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971).

The absence of any standards in TCA §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. *See Deoro v. Delaware Co*., 2009 WL 2245067 *2 (E.D. Penna. 2009) ("Granting unfettered discretion to [] officials [] is unconstitutional because it can lead to arbitrary deprivations of [constitutionally protected] interests and/or create the potential to abuse power at the expense of another.") citing *City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Enactments that are so imprecise that officials have unfettered discretion in their

application are void for vagueness.). See also *Lakewood v. Plain Dealer Pub. Co*., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (holding unconstitutional a statute giving unfettered discretion to city's mayor to grant or deny permits to place news racks on public property).

The Supreme Court has unambiguously stated that ballot access limiting restrictions must be narrowly tailored to achieve a legitimate state interest.[22] As long as the Coordinator of Elections had discretion regarding the requirements that may be imposed on minor parties, there can be no assurance that this requirement for constitutionality is satisfied.

The essence of Appellants' argument is that the District Court erred in finding TCA §2-1-104(a)(24) unconstitutionally vague because the statute could be construed as granting the Coordinator of Elections power to do only constitutionally permitted things. This argument entirely missed the point of the doctrine of unconstitutional vagueness.

The whole point of the doctrine of unconstitutional vagueness is that a statute is unconstitutionally vague if it is so vague that it constitutes an excessive grant of discretion to those responsible for applying it.

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[22] See *Timmons* v. *Twin Cities Area New Party,* 520 U.S. 351, 358, 137 L. Ed. 2d 589, 117 S. Ct. 1364 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."); *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 185, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979) ([E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," and that a State must "adopt the least drastic means to achieve [its] ends.");

Appellants correctly note that a statute should be construed so as to give effect to the will of the legislature. However, there is nothing in the record, or legislative history, to suggest that the General Assembly intended TCA §2-1-104(a)(24) to only constitute a grant of discretion to, as Appellants suggest on page 54 of their Initial Brief, determine the form of minor party petitions.

Appellants further urge to Court to apply a highly deferential test to uphold the constitutionality of TCA §2-1-104(a)(24). But this is not the standard that the court is obligated to apply in this instance.

As the District Court noted, [R.E. 45, P: 86], the vagueness test is applied more stringently where First Amendment rights are affected. As the Supreme Court said in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498-99, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982):

> "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. *If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.*" (Emphasis added).

Laws governing political party formation and access to the ballot unquestionably affect rights of speech and association. Therefore, a stringent test of vagueness must be applied to TCA §2-1-104(a)(24), and the District Court correctly concluded that TCA §2-1-104(a)(24) is unconstitutionally vague.

II-C-2: TCA §2-1-104(a)(24) Impermissibly Delegates a Uniquely Legislative Power.

Article 1, Section 4, of the United States Constitution, generally referred to as the "Elections Clause," provides, in relevant part, that:

> "*The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof*;"

There is no ambiguity in this provision. Only the *legislature* of a state may establish provisions governing the conduct of elections of United States Representatives and Senators.

In their Initial Brief, Appellants focus exclusively on the District Court's discussion on *Libertarian Party of Ohio v. Brunner,* 567 F.Supp.2d 1006 (S.D. Ohio 2008) and argue that *Brunner* inapplicable because Coordinator of Elections has not actually exercised any of the authority granted by TCA §2-1-104(a)(24). Appellants' argument ignores that fact that the District Court engaged in comprehensive analysis of the non-delegation doctrine as the basis its ruling. In its Opinion, the District Court wrote:

> "Under the non-delegation doctrine, a legislature "is not permitted to abdicate or transfer to others the essential legislative functions with which it is thus vested." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935). "The non-delegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). To satisfy constitutional standards, a "delegating" statute must clearly delineate the powers delegated and the limits of its delegated powers. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472

> (2001) ("[W]hen 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.'") (emphasis in original and added); *Am. Power Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (stating that delegation is "constitutionally sufficient if Congress clearly delineates the *general policy*, the public agency which is to apply it, and the *boundaries of this delegated authority*") (emphasis added). [R.E. 45, P:84]

In applying these standards, the District Court properly concluded that:

> "Given the absence of statutory standards for the exercise of the State Elections Coordinator's discretion and that the subject of regulation is explicitly identified in Article 1, Section 4, of the United States Constitution, the Court concludes that Section 2-1-104(a)(24) does not qualify as a permissible delegation of legislative authority." [R.E. 45, P:85]

This was a correct conclusion and should be affirmed.

II-D: THE DISTRICT COURT WAS CORRECT IN HOLDING THAT TCA §2-5-208(D) (1) IS UNCONSTITUTIONAL:

In their Initial Brief, Appellants attack the District Court's finding that the statute, TCA 2-5-208(d)(1), giving automatic top placement on the ballot to candidates of the majority party in the Tennessee General Assembly, is unconstitutional. When reduced to its essence, Appellants argument is that there was not sufficient evidence of positional bias introduced in the District Court to support the Court's holding. In responding to this argument, the District Court said:

> "Defendants insist that the Plaintiffs must prove actual prejudice from this preferential placement statute. Yet, in *Rosen [v. Brown*, 970 F.2d. 169 (6h Cir. 1992)] the Sixth Circuit had expert proof of such

> prejudice from multiple experts. This Court cannot ignore *Rosen's* precedential effect about the actual prejudices of ballot preference. Second, empirical evidence in the social sciences corroborates the Sixth Circuit's and other circuits' holdings on the prejudicial effects of preferential ballot placement. 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). More than a decade later, Rosen's findings of prejudice from preferential ballot placement continue to be viable. See 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) (collecting empirical social science studies). As the latter article concludes: "Substantial empirical evidence points to the conclusion that ballot order effects, particularly in relatively low salience elections, are both statistically significant and large enough in magnitude to alter the outcomes of elections." *Id.* [R.E. 45, P: 80]

The essence of Appellants' argument now is that Appellees, and the District Court, relied on the findings of other cases (in which the relevant studies were examined) rather than introducing the studies themselves[23]. In their Response to Appellee's motion for summary judgment on Count IV, [RE 20], Appellants argued only that:

> "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." [RE 26, P: 60]

However, Appellants did not present any argument in opposition to the District Court's reliance of published studies or the conclusions of the courts where

[23] Appellants also attempt to distinguish *Rosen* in the grounds that *Rosen* involved an Independent candidate and "[i]n Rosen the court did not make any findings of prejudice to minor party candidates resulting from preferential ballot placement." [Init. Br. P: 59] This is a distinction without a difference. Positional bias is positional bias regardless of who it applies to.

studies were presented and where expert witnesses testified and the findings of those courts holding that positional bias had been established. The District Court accepted those publications and findings as competent evidence. In this Court, questions relating to the admissibility of evidence are reviewed under the "abuse of discretion" standard. *United States v. Allen,* 619 F.3d 518, 523 (6th Cir. 2010). Appellants have not, in their Initial Brief, even suggested that the District Court erred in this respect.

Appellants also now argue that the District Court's reliance on the findings of other courts was improper because the studies relied on by those courts were based on a different form of ballot that is used in Tennessee. [Init. Bt. P:65] However, *Appellants did not make any of these arguments in the proceedings in District Court*. Therefore, they cannot rely on these arguments in this Appeal[24], [25].

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[24] Although Appellants *did* raise the issue of different ballot types in their Motion for a Stay Pending Appeal, [RE 57], this fact does not overcome the fact that the argument was waived when it was not made before the District Court entered its Order.

[25] In addition to having not made their argument in the proceedings in District Court, Appellants did not produce any *evidence* that the publications cited by Appellees and the studies cited in Appellants' authorities would not have been applicable to the form of ballot used in Tennessee. Summary judgment is proper if the materials *in the record* "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To survive a motion for summary judgment, the non-moving party must produce "evidence on which the jury could reasonably find for the non-moving party." *White v. Baxter Healthcare Corp*., 533 F.3d 381, 390 (6th Cir. 2008) In other words, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Inasmuch as Appellants did not

Appellants do not even suggest that there is no positional bias. They merely contend that there was not sufficient evidence of sufficient bias to justify the District Court's conclusion. However, any such argument must fail under the *Anderson* test.

As previously noted, *Anderson* requires a balancing of the burden resulting from application of a statute against the state interest in the statute. In its Order, the District Court particularly cited *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980) wherein the court said "we feel obligated to stress the constitutional requirement that *position advantage must be eliminated as much as possible*." 637 F.2d at 1169. (Emphasis added) [R.E. 45, P: 81-82] Inasmuch as Appellants have not proffered *any* state interest that is advanced by TCA 2-5-208(d)(1), even the slightest burden on Appellees is sufficient to justify a finding that the statute is unconstitutional.

II-E: STATUTORY LIMIT ON NEW PARTY NAMES IS UNCONSTITUTIONAL:

TCA §2-13-107(d) contains a prohibition against a new party including the word "Independent" or "Nonpartisan" in its name. This obviously violates principles of political free speech.

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produce *any* evidence tending to negate Appellees' evidence, they cannot now dispute the sufficiency of the evidence offered by Appellants.

Appellants to not challenge the District Court's holding that TCA §2-13-107(d) is unconstitutional. Instead, they argue only that Appellants did not have standing to challenge the constitutionality of TCA §2-13-107(d). Specifically, they argue that neither of the Appellees has the word "Independent" or "Nonpartisan" in its name and, therefore, they cannot argue that they have been injured by the statute. This argument must fail for two reasons.

FIRST: In *Libertarian Party Et. Al. v. Goins*, 793 F. Supp. 2d 1064 (M.D. Tenn. 2010), this court expressly recognized that it is not necessary for a plaintiff to have already suffered an injury to have standing to assert a claim that a statute is unconstitutional.[26]

SECOND: The implication of Defendants' argument is that Appellants must have obtained ballot access status and change their name to include the words "independent" or "nonpartisan" in their name *before* they have standing to raise

[26] As authority for its holding, the court cited *Williams v. Rhodes*, 393 U.S. 23, 28, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) (Holding that the Socialist Labor Party had standing to challenge Ohio's restrictions on minor party ballot access even though the party there had not filed any petition with signatures); *Storer v. Brown*, 415 U.S. 724, 738, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1973) (Holding that independent presidential and vice-presidential candidates had standing to challenge California's ballot access not withstanding their failure to file any petition with signatures seeking ballot recognition.); *Stevenson v. State Board of Elections*, 794 F.2d 1176 (7th Cir. 1986) (Holding that an independent presidential candidate has standing to challenge Illinois' early filing deadline without showing submissions of petition with signatures); *Rainbow Coalition of Oklahoma v. Oklahoma State Election Board*, 844 F.2d 740 (10th Cir. 1988) (Holding that minority parties who contested Oklahoma's petition requirements and filing deadline for third parties had standing despite their lack of compliance with statutes).

their claim. However, this argument ignores the requirements of Tennessee's new party qualifying petition requirements.

The petitions filed by a minor party seeking status as a "recognized minor party" must contain the name of the party seeking "recognized minor party" statue. To satisfy these requirements, new minor parties must incur the great expense of collecting the large number of petition signatures discussed *supra*. If a new party undertook a petition drive in which they included the words "independent" or "nonpartisan" in their name, they risk being denied ballot inclusion by virtue of TCA §2-15-107(d). Thus, the mere existence of TCA §2-13-107(d) has an extraordinary *chilling effect* on Appellees' choice of the name by which they wish to be known and represented on the ballot.

Study after study has concluded that voters are increasingly frustrated with the major – Republican and Democratic – parties, and an increasing number of voters identify themselves as Independents. The ability – or right – to include the words "independent" or "nonpartisan" in their name is, therefore, significant to parties seeking to gain recognition and a following.

In *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979), the Supreme Court explained:

> "The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. The basic inquiry is whether the conflicting contentions of the parties present a real, substantial controversy between parties

having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *But one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.*" 442 U.S. at 297-8 (Emphasis added) (Citations omitted)

The existence of TCA §2-13-107(d) makes it a *certainty* that Appellees would be denied the right to use the words "independent" or "nonpartisan" in their names. Therefore, under the standards of *Babbitt,* Appellees have standing to challenge the constitutionality of TCA §2-13-107(d).

III: CONCLUSION:

For all the reason stated herein, the Court should affirm the Order of the District Court in all respects.

___s/s Alan. P. Woodruff_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing REPLY has been served on Darrell L. Castle, Esq, 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 21st day of June, 2012.

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

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)(i)

I certify that this brief is in compliance with Fed. R. App. P. 32(a)(7)(C) in that the number of words of the brief, not including the Table of Contents, Table of Authorities, and Disclosure of Corporate Affiliation, is 10,734 words which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B)(i).

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