NO. 13-5975

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]

BRIEF OF PLAINTIFFS/APPELLEES

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PART I: MINISTERIAL ISSUES

STATEMENT RE: SIXTH CIRCUIT RULE 26:

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

STATEMENT REGARDING ORAL ARGUMENT:

This represents the second time this case has come before this Court. The Court now has the benefit of two opinions issues by the District Court on the relevant issues and the issues have twice been submitted to the Court in the pleadings of the parties. Accordingly, Appellees believe that the issues have been adequately presented in the pleadings and rulings in the record and the briefs of the parties and no oral argument is required.

JURISDICTION; STATEMENT OF THE CASE AND STATEMENT OF FACTS:

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

STANDARD OF REVIEW:

On appeal, the court reviews the District Court's findings of law de novo and findings of fact for clear error. *United States v. Matthews*, 278 F.3d 560, 561 (6th Cir. 2002). To the extent that this is an appeal from a grant of summary judgment, this reviews the ruling of the District Court *de novo*. *Binay v. Bettendorf,* 601 F.3d 640, 646 (6th Cir. 2010). However, the District Court's ruling was based on the application of the *Anderson/Burdick* balancing test discussed in Section A-1. Under this test, a determination of the constitutionality of the challenged statutes is a question of fact – and this

determination must be reviewed under the "clear error" standard. Accordingly:

- The issues relating to standing and the District Court's determination that the *Anderson/Burdick* test is applicable are questions of law to be reviewed under the *de novo* standard
- The District Court's finding that the challenged statutes are unconstitutional because the burdens imposed on Appellants and excessive when weighed against the State's interest are findings of fact that must be reviewed under the "clear error" standard. Ender the clear error standard, the findings of the District Court must be upheld unless "after reviewing the entire record, [the court is] left with the definite and firm conviction that a mistake has been committed." *Sherwin-Williams Co. v. New York State Teamsters Conf. Pension & Retirement Fund*, 158 F.3d 387, 393 (6th Cir. 1998)

STATEMENT OF ISSUES PRESENTED FOR REVIEW;

1: Whether the District Court erred in determining that the minor party petition signature requirements of TCA §2-1-104(a)(24) are unconstitutional.

2. Whether the District Court erred in determining that the petition filing date for minor parties wanting to nominate their candidates by primary election, but retaining the signature requirements of §2-1-104(a)(24) is unconstitutional.

3. Whether the District Court erred in determining that TCA §2-5-208(d)(1) -- which automatically and always grants the top position on the ballot to the candidate who represents the majority party in the Tennessee General Assembly, is unconstitutional.

SUMMARY OF ARGUMENT

Pursuant to TCA §2-1-104(a)(24), to become a "Recognized minor party" a

minor party must submit petitions that "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." For the most recent general election, this requirement was 40,049 signatures. The District Court held that TCA §2-1-104(a)(24) is unconstitutionally burdensome. Appellees contend that the ruling of the District Court was correct because:

(1) An examination of the totality of the ballot access related provisions of the Tennessee Code establishes that Tennessee has ***no*** legitimate justification for the onerous signature requirements established by TCA §2-1-104(a)(24).

(2) The burdens imposed on voters, candidates and minor parties by the requirements of TCA §2-1-104(a)(24) significantly outweigh any plausible state interest that is advanced by TCA §2-1-104(a)(24)

In its initial ruling, the District Court held that the statutes requiring minor parties to nominate their candidates by primary elections and to submit their signature petitions by the first Thursday in April were unconstitutional. Following the entry of that ruling, the Tennessee General Assembly amended the relevant statutes to eliminate the requirement that minor parties nominate their candidates by primary elections. However, even under the amended statute, minor parties that want to nominate their candidates by primary elections must still submit their petition signatures by the first Thursday in April. The amended statute did not change the number of petition signatures required. Appellee's contend that even with an "alternative/optional" filing date, the unconstitutionality of the number of petition signatures required renders unconstitutional any filing date requiring this number of signatures. Furthermore, in its initial ruling, the District Court held that the April filing date is unconstitutional *as to candidates*. That ruling has not been appealed and is

now final. The amended statute does not provide a constitutional petition filing date for minor party candidates. Therefore, even if it were to be held to be constitutional, it is meaningless because there is no constitutional provision governing the qualification of candidates to participate in the primary.

TCA §2-5-208(d)(1) established a ballot listing schema under which the candidates of the majority and minority parties in the General Assembly are guaranteed to positions on the ballot and minor party candidates and independent candidates are always relegated to lower positions on the ballot. In both its initial and renewed rulings, the District Court concluded that TCA §2-5-208(d)(1) is unconstitutional because it prevents the candidates of minor parties from ever gaining the benefits of the "positional bias" of the top position on the ballot. Appellees contend that the District Court was correct for the reasons stated in its opinion. However, Appellees also contend that TCA §2-5-208(d)(1) is facially unconstitutional because it violates principles of Equal Protection by failing to treat similarly situated persons – e.g. all candidates for a particular office – alike.

PART II - ARGUMENT:

A: STANDARDS FOR DETERMINING THE CONSTITUTIONALITY OF ELECTION RELATED STATUTES:

A-1: The Anderson/Burdick Test:

In *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012), the Sixth Circuit adopted as the controlling test for determining the constitutionality of a challenged electoral statute the "balancing test" set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). Application of the standard set forth in these cases is particularly appropriate

here because both of these cases we "minor party ballot access" cases, just as this case is.

In *Anderson*, the court explained its balancing test as follows:

> "[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 790.[1] (Emphasis added)

A-2: Continued Application of "Strict Scrutiny"

[1] In its' later (renewed) expression of this test, in *Burdick*, the Supreme Court stated the test as follows:

> "A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the Plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the Plaintiff's rights." 504 U.S. at 434

There is a minor difference in the test as it was stated in *Anderson* and in *Burdick.* Specifically, while *Anderson* requires the court to consider the "*legitimacy and strength*" of the asserted state interest, *Burdick* does not. However, because, in *Burdick,* the Court relied on *Anderson* for its statement on the applicable standard, it may be assumed that that the Court intended to incorporate the entirety of the *Anderson* test and its omission of the "legitimacy and strength" requirement of *Anderson* was not intentional and *Burdick* did not intend to alter the *Anderson* standard

Even where the *Anderson/Burdick* test might otherwise be applicable, the Supreme Court has refused to "balance" the competing interest when the burden imposed by the statute is "*severe*." In *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005), the court observed that "[s]trict scrutiny is appropriate [] if the burden is severe." 544 U.S. at 592. *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) ("Regulations imposing severe burdens on associational rights must be narrowly tailored to serve a compelling state interest …"); *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) ("if a regulation burdens voting rights severely, the regulation is reviewed under the compelling interest standard."); *DeLaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C. 2004) (Applying strict scrutiny to challenge to petition signature requirement.) From this is follows that the Court has acknowledged the continuing requirement to apply strict scrutiny when the burden imposed by a statute is severe.

Although the *Anderson/Burdick* test is most commonly characterized as a "balancing" test, in his concurring opinion in *Crawford v. Marion County Election Bd.,* 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) Justice Scalia properly characterized the test as a "two-track" test. Justice Scalia explained:

> "[S]trict scrutiny is appropriate only if the burden is severe." *Clingman v. Beaver*, 544 U.S. 581, 592, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005). Thus, *the first step is to decide whether a challenged law severely burdens [a First Amendment right.].* Ordinary and widespread burdens, such as those requiring "nominal effort" of everyone, are not severe. *Id.* at 591, 593-597, 125 S. Ct. 2029, 161 L. Ed.2d 920. *Burdens are severe if they go beyond the merely inconvenient*. *See Storer v. Brown*, 415 U.S. 724, 728-729, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) (characterizing the law in *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968), as 'severe' because it was 'so

burdensome as to be virtually impossible to satisfy).” 533 U.S. at 205. (Emphasis added)

A-3: Issues Relating to Evidence and Proof:

The vast majority of challenges to elections laws are decided on summary judgment. However, with the expanded application of the *Anderson/Burdick* test there has been a relaxation of some of the traditional standard for granting summary judgment.

The *Anderson/Burdick* test demands more than a mere recitation of “boiler plate” justifications for a state statute. When read literally, the test requires a statement of the State’s “*precise*” interest in the statutes and the “*strength and legitimacy*” of those interests and the “*necessity*” of the statute to satisfy those interests. As discussed *infra*, the burden of proof is in the government as to these issues. However, although only the members of a state legislature really know the real reason for a legislative enactment, no court had demanded “primary source” evidence of the issues on which the state has the burden of proof. Instead, the courts have focused on such issues as the internal consistency of state election codes.

Likewise, where plaintiffs have the burden of proof regarding the injury caused by, or the burdens imposed by, a statute, the courts have not demanded that plaintiffs “prove” the magnitude of burdens by incurring the cost of trying, and failing, to satisfy. Instead, the courts have accepted, as “proof” of a burden, reasonable evidence of the burden that would be imposed on a reasonably diligent plaintiff. That is, while courts still demand actual evidence in measuring the magnitude of asserted burdens, they have applied standards of common sense in determining whether plaintiffs will actually suffer from these burdens.

Stated in more general terms, in applying the *Anderson/Burdick* test to motions for summary judgment in election law cases, the courts have adopted practices that place their rulings somewhere between the application of traditional standards for summary judgment and a bench trial. No court has expressly stated that this is what it is doing, but an examination of relevant authorities makes it clear that this has become the accepted practice in election law challenges.

A-4: Application of Standards In this Case;

As discussed in Section B-3, Tennessee's minor party petition signature requirement is one of the most burdensome in the nation and, as history has shown, it has been virtually impossible to satisfy. Therefore, as to this portion of this appeal, strict scrutiny applies[2]. As to the other portions of this appeal, the *Anderson/Burdick* test applies.

B: THE DISTRICT COURT CORRECTLY RULED THAT TENNESSEE'S MINOR PARTY PETITION SIGNATUTE REQUIREMENT IS UNCONSTITUTIONAL[3]

Pursuant to TCA §2-1-104(a)(24), to become a "Recognized minor party" a minor party must submit petitions that "bear the signatures of registered voters equal

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[2] Appellants acknowledge that they relied on the *Anderson/Burdick* test in their initial pleading and in the first appeal of this case. However, later judicial decisions and further evaluation of applicable authorities have caused counsel to conclude that strict scrutiny is the applicable standard for the references portion of this case.

[3] In Section I.A. of their Initial Brief, Appellants argue that the District Court erred in finding that the petition signature requirements of TCA §2-1-104(a)(24) are unconstitutional. Appellants did not, however, in their "Statement of Issues Presented for Review," identify this aspect of the District Court's ruling as an issue presented for review. Nonetheless, Appellees address it is this Section.

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." For the most recent general election, this requirement was 40,049 signatures. The District Court held that TCA §2-1-104(a)(24) is unconstitutionally burdensome.

As this court explained in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006)

> "In determining the magnitude of the burden imposed by a state's election laws, the Supreme Court has looked to the associational rights at issue, including whether alternative means are available to exercise those rights; the effect of the regulations on the *voters*, the *parties* and the *candidates*; evidence of the real impact the restriction has on the process; and the interests of the state relative to the scope of the election." 462 F.3d at 587 (Emphasis added)[4]

Blackwell makes it clear that impediments to the inclusion of minor parties on the ballot burden voters and candidates as well as parties. Therefore, for purposes of applying the *Anderson/Burdick* test, the State must be able to articulate a precise and legitimate interest for burdening all three classes of persons and entities that are affected by its minor party petition signature requirements.

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[4] *See also Anderson v. Celebreze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) where the court explained:

> "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those *voters* whose political preferences lie outside the existing political parties. By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Id.* at 794

In their attempt to justify Tennessee's minor party signature petition requirement, Appellants have (as discussed in Section B-4-(b)) have relied exclusively on *technical justifications relating to the ballot itself.* Appellants have not made any effort to justify the burdens that excluding new parties from the ballot have on voters and candidates. Moreover, in their Initial Brief, Appellants have argued only that Tennessee's petition signature requirements do not impose an unconstitutional burden on *minor parties themselves*. However, as discussed below, Tennessee petition signature requirements also impair the associational rights of *voters* and deprive *candidates* of significant rights. Finally, and perhaps most importantly, as the Supreme Court said in *Anderson v. Celebreze*"

> "[T]he primary values protected by the First Amendment -- a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open -- are served when election campaigns are not monopolized by the existing political parties." 460 U.S. at 794 (Citations omitted)

Thus, any analysis of burdens imposed on ballot access must begin with a presumption that such burdens are contrary to public policy and our democratic principles.

B-1: Tennessee's Party Petition Signature Requirements Impair the Associational Rights of VOTERS.

The importance of minor parties in our political system cannot be overstated. As the Supreme Court said in *Sweezy v. New Hampshire*, 354 U.S. 234, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957):

> "In our political life, third parties are often important channels through which political dissent is aired. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by

> minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society." 354 U.S. at 250-251

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

> "The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. 393 U.S. at 31

In *Rhodes*, the Court went on to say:

> "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." 393 U.S. at 31

In *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998), this Court explained that:

> "It is especially difficult for the state to justify a restriction that *limits political participation by an identifiable political group whose members share a particular viewpoint...*" *Id.* at 921 *quoting Anderson v. Celebreze*, 460 U.S. 780, 793, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)

In evaluating Appellants' justification for Tennessee's petition signature requirement, it is important for the Court to bear in mind that in *Libertarian Party of Ohio v. Blackwell*, this Court said:

> "The Court has consistently noted the fundamental interest of citizens to create and develop new political parties. To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, the Court has called for the demonstration of *a corresponding interest sufficiently weighty to justify the*

> *limitation.*" 462 F.3d at 588 quoting *Norman v. Reed*, 502 U.S. 279, 288-89, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992). (Emphasis added)

Because, as discussed in Section B-3, Tennessee's minor party petition signature requirements are among the most restrictive in the nation, Appellants must demonstrate a correspondingly significant state interest and cannot rely on justifications that have been upheld in cases where far less burdensome requirements have been challenged.

B-2: Tennessee's Party Petition Signature Requirements Burden Both VOTERS And CANDIDATES.

In Tennessee, qualification as a "recognized minor party" has only one implication --it allows the candidates of a minor party to be identified on the ballot by their party affiliation. Candidates who are affiliated with a minor party that has not satisfied Tennessee's petition signature requirement can only be listed on the ballot as an "Independent" candidate. However, candidacy as the nominee of a party and candidacy as an Independent *are not the same*. Denying candidate 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. In *Rosen v. Brown*, 970 F.2d. 169 (6th Cir. 1992), this Court specifically recognized the importance of having a party affiliation – a voter cue -- identified on the ballot.

As discussed in Section B-4-(b), virtually anyone who wants to run for office can get on the ballot under Tennessee's liberal *candidate* ballot access requirements. Therefore, Tennessee's *party* petition signature requirements do absolutely nothing to reduce the number of candidates on the ballot and do nothing to prevent frivolous candidates from appearing on the ballot.

The ***only*** real significance of Tennessee's *party* petition signature requirement is that the candidates of parties that satisfy the requirements are identified on the ballot by their party affiliation – while the candidates of parties that do not satisfy the petition signature requirements are listed as independents. There are two consequences of this fact:

- *Candidates* are deprived of the benefit of having voters know their party affiliation.
- *Voters* are deprived of the voting cue represented by a designation of a candidates party affiliation.

Therefore, to satisfy the requirements of the *Anderson/Burdick* test, the State must show a legitimate justification for only allowing the candidates of parties who satisfy the petition signature requirement to have their party affiliating identified on the ballot.

B-3: Tennessee's Minor Party Petition Signature Requirements Impose Unconstitutional Burdens on Minor Parties

The petition signature formula established by TCA §2-1-104(a)(24) requires minor parties seeking status as "recognized minor parties" to submit petitions containing the signatures of more than 40,000 voters. This requirement is the fifth highest petition signature requirement in the nation. However, with the exception of Alaska, all states having higher petition signature requirements have populations far in excess of Tennessee. [R.E. 45, Memorandum Opinion, ID P: 741-742] The exclusionary impact of Tennessee's minor party petition signature requirement is readily established by the fact between the time the State established its minor party petition signature requirements and the date this litigation was begun, only one minor party had

even qualifies for ballot inclusion.[5] In *Libertarian Party of Ohio v. Blackwell*, this Court specifically noted that:

> "[A] historical record of parties and candidates being unable to meet the state's ballot-access requirements is a helpful guide in determining their constitutionality. 462 F.3d at 589-90 (Citations omitted)

Because Tennessee's requirements impose a <u>*severe burden*</u> on minor parties, strict scrutiny applies. As discussed in Section B-4-(a), Appellants cannot even offer a <u>*plausible*</u> justification for Tennessee's requirements – much less the "compelling state interest" required to satisfy strict scrutiny, the minor party petition signature requirements must be found to be unconstitutional.

Additionally, in the proceedings in the District Court, Appellees provided evidence that the cost of complying with Tennessee's minor party petition signature requirements could, if paid petition signature collectors were used, exceed $120,000. [R.E. 45, Memorandum Opinion, ID P: 741-742] Even if only a portion of the signatures mandated by the Tennessee statute had to be collected by paid signature collectors, the cost associated with this effort would impose an extraordinarily heavy burden on a minor party struggling for recognition in Tennessee. The District Court did not rely on the cost factor in determining that Tennessee's petition signature requirement is unconstitutional. 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."

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[5] In 1968, the American Independent Party qualified for ballot inclusion, but the success of the American Independent Party is an anomaly. The American Independent Party was formed by George C. Wallace, for purposes of his presidential campaign, at the height of the tumultuous civil rights movement. It is hardly surprising that, at that sad time is American history, the voters of Tennessee would flock to his petition effort and segregationist message.

Brooks v. Davey Tree Expert Co., 478 Fed. App. 934, 940 (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 all arguments made by Appellees in the proceedings in District Court.

Finally, it must be recognized that the petition signature requirement imposed on minor parties is a *repetitive burden*. TCA §2-13-107(f) provides, in relevant part, that:

> "To maintain recognition beyond the *current election year*, a minor party must meet the requirements of a statewide political party as defined in § 2-1-104[6]. *A recognized minor party who fails to meet such requirements shall cease to be a recognized minor party. Such party may regain recognition only by following the procedures for formation of a recognized minor party."* (Emphasis added)

As discussed in Section E, under current Tennessee law, a minor party that does not nominate its candidates by primary election has until 90 days before the general election to satisfy the signature requirements of TCA §2-1-104(a)(24). However, if none of its candidates satisfy the requirements of TCA §2-1-

[6] TCA §2-1-104(30) defines a "Statewide political party" as:

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

Significantly, while TCA §2-1-104(30) gives "Statewide political parties" "*four (4) calendar years*" to satisfy the requirements for retaining their status, new minor parties must satisfy the requirement for becoming "Statewide political parties" *in their first year of existence*. The constitutionality of this distinction has not been challenged in this action because TCA §2-13-107(f) was enacted *after* the District Court entered its initial decision. However, this does not prevent the Court from considering the issue in determining the magnitude of the burden the Tennessee statutes, in their aggregate, impose on minor parties.

104(30) in that election, the party loses its status as a "recognized minor party" and has to start anew and collect 40,000+ signatures to participate in the next election.

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

> "New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." 393 U.S. at 31

TCA §2-13-107(f) effectively requires new parties to meet a *5%* threshold at the ballot box *immediately after* satisfying the *2%* requirement that the state deems sufficient to justify their participation in the electoral process[7]. ***No other state's ballot qualification schema removes a minor party's qualified status is the same year it is obtained***. This imposes an unjustifiable burden on minor parties.[8]

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[7] Appellees do not dispute the proposition that states have a legitimate interest in requiring minor parties to show some measure of electoral success to retain their ballot qualified status. Rather, Appellees contend only that imposing back-to-back 40,000 petition signature requirements imposes an undue burden.

[8] As Justice O'Conner explained in her concurring opinion in *Clingman v. Beaver,* 544 U.S. 581, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005):

> "A court should "examine the *cumulative* burdens imposed by the *overall* scheme of electoral regulations upon the rights of voters and parties to associate through primary elections. ... Panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition." *Id.* at 607

See also *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) (Holding unconstitutional a provision of the Ohio election law based on an examination the statutory schema taken as a whole); *Storer v. Brown,* 415 U.S.

B-4: Appellants Have Not, And Cannot, Justify Tennessee's Petition Signature Requirement:

As they have throughout these proceedings, Appellants continue to rely on the contention that Tennessee's minor party petition signature requirement is within the range of requirements that have been held to be constitutional. [Init. Br. P:30-32][9] Significantly, Appellants have not attempted to show that Tennessee's petition signature is *necessary* to satisfy any particular state interest. Appellants have not even attempted to demonstrate that the State was a *legitimate* interest in its onerous petition signature requirements.

The authorities cited by Appellants all rely, directly or indirectly, on the seminal case of *Folsom v. Jenness*, 403 U.S. 431, 91 S.Ct. 1970, 29 L. Ed. 2d

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724, 727, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) (The concept of "'totality' is applicable ... in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights."); *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579, 582 (6th Cir. 2006) (Specifically criticized the State of Ohio because, in its defense, it "analy[zed] the burdens imposed by the challenged statutes *separately,* rather than addressing their *collective impact*." (Emphasis added)

Appellants argue that "The district court acknowledged that the 2.5% signature requirement is facially constitutionally under established Supreme Court precedent." [I.B. P: 28], and that is correct. However, that "acknowledgement" was based on a reference to a Tennessee Supreme Court opinion in which the statute was construed *in a vacuum* – e.g. independent of the totality of related statutes. However, as noted herein, that is not how this Court must evaluate the statute. *Evan a facial challenge to an individual provision of the Tennessee statutes must be evaluated in the context of the totality of the related statutes.*

[9] The page numbers in Appellant's brief do not correspond to the page numbers identified for the location of specific topics in the Table of Contents for Appellant's brief. In this pleading, Appellee will refer to the actual page numbers in Appellant's brief.

554 (1971) in which the Supreme Court upheld the Georgia 5% signature requirement. However, *Jenness* was decided *before* the *Anderson/Burdick* framework for evaluating constitutional challenges to state election laws was established.[10] Moreover, in many of the cases where signature *formula's* similar to Tennessee's have been upheld, the challenged statutes include caps on the number of signatures required without regard to their formula's.[11]

As previously noted, only five states have more onerous minor party petition signature requirements than Tennessee, and the authorities relied on by Appellants all relate to the requirements of those states[12]. However, Appellants have, in material respects, either misstated the law in those states or failed to give the whole story. Specifically:

> **FIRST**: Appellants cite *Rogers v. Corbett*, 468 F.3d 188 (3d Cir. 2006) for the proposition that in Pennsylvania minor parties qualify with petitions containing the signatures of 2% of votes in last election equaling 67,070 signatures. [Appellants Brief, P-31]. But that is not the law in Pennsylvania. In Pennsylvania, *candidates* first

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[10] Although the authorities cited by Appellants all acknowledged *Anderson* and/or *Burdick*, their ultimate decisions were based exclusively on a perpetuation of the numerical (or percentage) standard(s) that have developed since *Jenness* *without an examination of the strength or legitimacy or a state interest or the necessity of the statutory requirements to achieve the state's objective*.

[11] For example, the statute at issue in *Green Party of Arkansas v. Martin*, 649 F.3d 675 (8th Cir. 2011) (relied on by Appellants at I.B. p-35) had a 3% formula requirement but caped the signature requirement at 10,000.)

[12] In each of the opinions relied on by Appellants, the court (purportedly) applied the *Anderson/Burdick* balancing test. However, in entering these decisions, the courts did not have the benefit of the guidance provided by Justice Scalia in *Crawford v. Marion County Election Bd.,* as discussed in Section A-2.

obtain ballot inclusion by filing petitions containing the signatures equal to 2% of the number of votes cast *for the* ***WINNING*** *candidate* in the previous election for statewide office, *NOT THE* ***TOTAL*** *VOTE*, Then a minor party becomes qualified as a "party of political body" (Pennsylvania does not distinguish between major and minor parties) if, in at least ten counties, the candidates of that party receive votes totaling at least 2% of the votes cast *for the winning candidate* in the county and a statewide total of 2% of the highest number of votes cast *for the winning candidate*. Assuming that most elections are at least somewhat close, Pennsylvania's signature requirement is closer to 1% that the 2% claimed by Appellants. While Pennsylvania's system may be complex, it is not what Appellants represent it to be.

SECOND: Appellants cite *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974) as "upholding 5% requirement equaling approximately 325,000 signatures." [Appellants Brief, P-31, 33] However, *the Court* ***did no such thing.*** Rather, the Court remanded the question of the constitutionality of the petition signature requirement to the District Court for further findings of fact.

<u>THIRD</u>: Appellants rely on decisions from North Carolina [*McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215 (4th Cir. 1995)], Oklahoma [*Rainbow Coalition of Okla. v. Oklahoma State Election Bd.*, 844 F.2d 740 (10th Cir. 1988)] and Florida [*Libertarian Party of Florida v. Florida*, 710 F.2d 790, 792-95 (11th Cir. 1983)] for the proposition that signature requirements equal to, or greater than, Tennessee's have been held constitutional. [Appellants Brief, P-31]. However, in each of these states, the signature requirements for minor parties is (or was) *<u>the same as the signature requirements for independent candidates</u>*. [North Carolina, NCGS §163-122 and Oklahoma 26 Okl. St. §5-112 (1978) [13]. Florida has no currently relevant statute because mandatory petitions were done away with in 1999] Therefore, there was consistency in all requirements relating to ballot access and the "modicum of support" and "avoiding voter confusion" justifications (discussed in the following sections) could at least be shown to be legitimate. However, as discussed in the following section, Tennessee imposes only nominal petition signature requirements on independent candidates. Therefore, the Tennessee ballot access schema is materially different from the systems upheld in Appellants cited authorities.

<u>FOURTH:</u> Appellants rely on *Block v. Mollis*, 618 F.Supp.2d 142 (D.R.I. 2009) for the proposition that Rhode Island has a

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13 In 2010, Oklahoma reduced its independent candidate petition signature requirement to 4% [see 2009 OK. HB 3261] while retaining its 5% requirement for new minor parties.

minor party petition signature requirement of 5% of votes in last election. *Rhode Island has no such requirement*. Rhode Island only requires minor party candidates to submit 1,000 signatures for statewide office, 500 for US House, and 50 for state legislature. *THEN* the party becomes a recognized party *IF* its candidate for governor or president (whichever office is on the ballot in the election) receives 5% of the vote for the relevant office.

B-4-(a): Appellants Cannot Offer A Plausible Justification for Tennessee's Petition Signature Requirement:

The *Anderson/Burdick* test requires the Court to weigh the burden on Plaintiffs against the *strength and legitimacy* of the State's precise interest in the challenged statute. Merely asserting a vague, generalized justification is not enough. *The burden is on the State to prove its justification for a challenged statute*.[14]

As justification for its minor party petition signature requirements, Appellants have recited the standard litany of judicially recognized justifications[15]. In particular, Appellants rely on two justifications:

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[14] *See Navarro v. Neal*, 904 F. Supp. 2d 812, 819 (N.D. Ill. 2012) ("The burden of offering a justification for ballot restrictions falls on the [State].") (Citations omitted.).

[15] Specifically, Appellants asserted in their Response to Appellees' initial motion for summary judgment that the state has an interest in:

> "(1) requiring potential candidates to show some minimum level of support for their candidacy by the electorate, (2) halting the waste and confusion that might otherwise result from a lack of that showing, (3) avoiding disruption of the ballot and election preparation process, (4) assuring honest elections, and (6) avoiding

(1) States are justified in requiring candidates and parties to show, by petition signatures, that they have a "modicum of support"[16] before being provided ballot access.

(2) States are justified in imposing petition signature requirements to limit ballot access so as to avoid having so many candidates on the ballot as to cause voter confusion.[17]

In considering the merits of these justifications for Tennessee's onerous petition signature requirements, the Court must bear in mind three facts:

FIRST: The justifications that Appellants rely on are based on decisions that pre-date *Anderson* and *Burdick*. Therefore, whatever merit there may be to these justifications, it is not enough to merely recite the "magic words." Rather, Appellants must establish that their asserted justification is the *real* reason for the statute.[18]

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disruption of ongoing voter education, poll worker training, and impending responsibilities to assure ballot accuracy and timely distribution of absentee ballots." [R.E. 36, Response to Motion for Summary Judgment, ID P: 194]

[16] The "modicum of support" justification for petition signature requirements was first recognized in *Jenness v. Fortson*, 403 U.S. 43, 91 S. Ct. 1970, 29 L. Ed. 2d 554 (1971) which has been cited for this proposition in virtually every decision where the petition signature requirements have been challenged.

[17] The "avoiding voter confusion" justification for petition signature requirements originated in dicta in *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968). Although, in *Rhodes*, the court rejected the argument that having too many candidates on the ballot would result in voter confusion – based on the fact that as many as eight candidates could be included on the Ohio ballot without creating any voter confusion – this justification has become a common defense in ballot access challenges -- even though it has *never* been shown that voter confusion results from having too many candidates on the ballot.

[18] In *U.S. v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 2275, 135 L.Ed.2d

SECOND: It is not sufficient to assert that Tennessee's petition signature requirements are intended to solve a hypothetical problem. Rather, as the court said in *Heideman v. S. Salt Lake City*, 348 F.3d 1182 (2003):

> "The burden of proof is on the government to demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)."[19]

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735 (1996), the Supreme Court specifically cautioned against acceptance of after-the-fact justifications stating that:

> "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." 518 U.S. at 533, 116 S.Ct. at 2275.

[19] In *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1997), the Supreme Court said;

> "That the Government's asserted interests are important in the abstract does not mean, however, that the must-carry rules will in fact advance those interests. When the Government defends a regulation on [a First Amendment right] as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It *must demonstrate that the recited harms are real, not merely conjectural*, and that *the regulation will in fact alleviate these harms in a direct and material way.*" *Id.* at 664. (Emphasis added)

THIRD: Even where there is evidence that the problem a stature seeks to address is real, the statute does not satisfy constitutional standards unless it can be shown that the statute alleviates the problem it is intended to address. *See Reform Party of Allegheny County v. Allegheny County Dep't of Elections,* 174 F.3d 305, 315 (3d Cir. 1999) (Holding unconstitutional a state action because, even though the action was justified as an effort to respond to a perceived problem, the state failed to specifically demonstrate how its action served its interests.") In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 593 (6th Cir. 2006), the Sixth Circuit specifically referenced *Allegheny* when it held unconstitutional an Ohio statute limiting ballot access because "the State has provided no evidence that its registration procedure for minor parties in any way protects [the state's asserted] interests." *Id.* at 594.[20]

As discussed *supra*, in the cases relied on by Appellants to demonstrate approval of signature requirements greater than those established by the

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[20] The relatively recent trend of the courts to require proof of the existence of a problem that a stature is purportedly intended to address raises important questions about the weight that should be given to generalized assertions that statutes are intended to avoid voter confusion. For years, defendants, and the courts, avoided the need to justify their statutes with *evidence* of voter confusion based on the Supreme Court's decision in *Munro v. Socialist Workers Party*, 479 U.S. 189, 93 L. Ed. 2d 499, 107 S. Ct. 533 (1986) where the Court declined to demand such proof.

However, in the years since *Munro* was decided literally hundreds of elections have been held with as many as five candidates on the ballot for one office and there is no indication that there is any problem with voter confusion. [The Court can take judicial notice of the fact that there are frequently at least five candidates on the ballots in presidential primaries and there is no indication that voter confusing has resulted.] Moreover, to the extent that there is an evolving trend to require evidence that a statute actually solves any problem that is posited by states as justification for their statutes, something more than a mere assertion that a statute is intended to alleviate a hypothetical problem is necessary.

Tennessee statute, the state/defendant had relied on the "modicum of support" and/or the voter confusion" justifications for their petition signature requirements. However, in these cases, there were no other provisions of the state election codes that undermined the states' argument. *That is not the case here.*

As previously noted, in *Libertarian Party of Ohio v. Blackwell*, this Court said:

> "The Court has consistently noted the fundamental interest of citizens to create and develop new political parties. To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, the Court has called for the demonstration of *a corresponding interest sufficiently weighty to justify the limitation.*" 462 F.3d at 588 quoting *Norman v. Reed*, 502 U.S. 279, 288-89, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992). (Emphasis added)

As also previously noted, Tennessee has one of the most burdensome minor party qualifying requirements in the nation. Under the dictates of *Libertarian Party of Ohio*, Appellants must advance a correspondingly weighty state interest to justify Tennessee's minor party petition signature requirement. As discussed in the following section, an examination of the Tennessee statutes in their totality[21]. and election history shows that (a) *none of the authorities relied on by appellants are applicable* and (b) *none of the generally accepted justifications for high minor party petition signature requirements aret available to Appellants*

[21] As discussed *supra*, the constitutionality of election laws must be determined based on an analysis of the effect of all related laws considered together.

B-4-(b): Appellants Proffered Justification for Tennessee's Minor Party Petition Signature Requirement is not LEGITIMATE

Appellants cannot rely on the "modicum of support" or "avoiding voter confusion" justifications for its onerous minor party petition signature requirements for the simple reason that:

(1) The Tennessee statutes do not actually limit the number of candidates on the ballot.

(2) The Tennessee statutes do not actually require candidates to show a meaningful "modicum of support" before being granted ballot inclusion.

While Tennessee's minor *party* signature requirements are among the strictest in the nation, Tennessee's signature requirements for *candidates* are ***the most liberal in the nation***. Specifically, TCA §2-5-101(b)(1) provides that:

> "Nominating petitions shall be signed by the candidate and twenty-five (25) or more registered voters who are eligible to vote to fill the office. Nominating petitions for independent presidential candidates shall be signed by the candidate and twenty-five (25) or more registered voters for each elector allocated to the state. Each independent candidate must designate the full number of electors allocated to the state."

It is intuitively obvious that virtually anyone can obtain the signatures of the 25 registered voters needed to be listed on the ballot. Having established this insignificant standard for *candidates* to satisfy the "modicum of support" requirement to be listed on the ballot, there is no reasonable justification for *parties* to have to collect in excess of 40,000 signatures. Furthermore, the record shows, and the District Court specifically noted, that in the 2010 election, Tennessee had 16 candidates on the ballot for governor, and there is no evidence of voter confusion. [R.E. 45; Memorandum Opinion, ID P: 757] The

District Court justifiably relied on this fact in holding that Tennessee's petition signature requirement was not justified by a "voter confusion" argument.

Because the ease of ballot access by *candidates* defeats any claim that the minor party signature petition requirements serve any legitimate state interest, Tennessee's minor party signature petition requirements are unconstitutional.

B-5: Defendants Have Not Established A NEED[22] For Tennessee's Onerous Minor Party Petition Signature Requirements:

In both *Anderson* and *Burdick*, the Supreme Count instructed that a reviewing court must determine the extent to which a state's justification for a statute make it "*necessary*" to impose the burdens imposed by a statute. Appellant correctly notes that the practices of one state are not relevant to a determination of the constitutionality of the statutes of another state addressing a similar problem. [Appellants Brief, P-33] However, Appellee has never suggested that the challenges Tennessee statute is unconstitutional because other states have imposed less restrictive petition signature requirements on minor parties. What Appellees' suggest is that the practices of other statue are *relevant* to a determination of whether Tennessee's highly burdensome signature requirements are *necessary* to achieve the State's objective – whatever that may be. Appellants do not dispute this proposition.

[22] Plaintiffs have identified only one case, *Diaz v. Cobb,* 475 F. Supp. 2d 1270 (S.D. Fla. 2007), in which the court specifically considered the "necessary" requirement of *Anderson* and *Burdick*. In that case, the court found that "the state has not fulfilled its burden of proof. Defendants have not presented this Court with any justification for the state's legislative judgment that a twenty-nine day cutoff, [for registration] without a grace period, [for correcting errors in the voter registration] is *necessary* to achieve the state's legitimate goals." *Id*. at 1277 (Emphasis added) [Although other decisions have noted the "necessary" requirement of *Anderson* and *Burdick*, this requirement has not been germane to their decisions.]

C: THE DISTRICT COURT CORRECTLY RULED THAT MINOR PARTY PETITION FILING DEADLINE IS UNCONSTITUTIONAL

Prior to 2013, minor parties had to file their petition signatures by the first Thursday in April to qualify to have their candidates identified on the ballot by their party affiliation. In its initial ruling, the District Court held that this filing date was unconstitutional. In 2013, the Tennessee General Assembly amended the minor party petition filing deadline to establish two relevant deadlines. Under the new statute:

- New minor parties that do NOT want to nominate their candidates by primaries have until 90 days before the general election to file their signature petitions. [TCA §2-3-107(a)(2)]
- New minor parties wanting to nominate their candidates by primaries must file their signature petitions by the first Thursday in April. [TCA §2-3-107(a)(1)]

Because the new statute was enacted after the District Court's initial ruling that the April filing date was unconstitutional, this Court remanded the case to the District Court for a determination of whether the April filing date was also unconstitutional when it represented an optional/alternative filing date. The District Court has again held that the April filing date is still unconstitutional, and it is this ruling that is appealed.

Before addressing the merits of Appellants arguments, the Court must consider three matters.

FIRST: The new April filing date retains the petition signature requirement of discussed in Section A. If that requirement is held to be unconstitutional, it is unnecessary to consider whether the "alternative" April filing date is constitutional.

SECOND: Appellants assert that Appellees did not have standing to challenge the constitutionality of the optional/alternative filing date. If the Court rules for Appellants on this issue, the District Court's ruling is a nullity and this Court does not have jurisdiction to consider the remainder of Appellants' argument. [23]

THIRD: The same April filing date that now applies for minor parties wanting to nominate their candidates by primaries *also applies to the candidates of minor parties*. However, in its initial ruling, the District Court held that the subject April filing date is unconstitutional as to candidates. [R.E. 46, Order, ID # 856-58] ***This holding has not been appealed and is, therefore, final***. In the enactment that established the alternative filing date for minor parties intending to nominate their candidates by primaries, the General Assemble re-established [TCA §2-13-107(c)] *the **same** petition filing requirement for minor party candidates that had previously been held to be unconstitutional*. Therefore, as it now stands, *there is no constitutional provision in the Tennessee Code for **candidates** to qualify to participate in a minor party's primary.*

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[23] Although, as discussed in section E-2, Appellants contend that they do have technical standing to argue this issue, there are other questions that Appellees believe the Court needs to consider. Specifically, because the new statute was not enacted until *after* the District Court entered its judgment for Appellees, Appellees did not (and could not have) challenged its constitutionality. This raises the question: Did the District Court have jurisdiction to rule on a "claim" that was not asserted by Appellees in their complaint? Appellees do not take any position on this question other than to suggest that the Appellants failure to object to the District Court's consideration amounts to a *de facto* consent to an implied amendment to Appellees' Complaint. Nonetheless, because any ruling that this Court will be controlling on any future action by a different plaintiff, Appellees suggest that the Court needs to address the issue.

> Consequently, even if the April filing deadline for minor parties wanting to hold primaries is constitutional *the statute is meaningless* ***because there is no constitutional provision in the statutes governing how candidates qualify to participate in such primaries.***

Appellants devote the majority of their discussion of filing dates to the differences between preparing for August elections – which include *primary* elections for state/federal offices ***and*** general elections for county offices -- and November, general elections. [Appellants Brief, P:37-42]. However, none of this has anything to do with the constitutionality of the April filing date.

Every fact that Appellants recite with regard to preparation for August elections was true when there was only one filing date[24]. In its initial ruling (R.E. 45, Memorandum), District Court held that the April filing deadline was unconstitutional. In their first appeal in this case [Sixth Circuit Case 12-5271] Appellants challenged that ruling. However, they have abandoned that challenge. Because Appellants have abandoned their direct challenge to the District Court's ruling that the April filing date is unconstitutional, that ruling is now the undisputed law of the case. [25]

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[24] When reduced to its essence, Appellants justification for the April filing date is that there is a lot of work to be done between that date and the August primary /general elections. But as the court said in *Libertarian Party of Ohio v. Husted*, 2011 U.S. Dist. LEXIS 100632 *15-16 (E.D. Ohio 2011), "having a lot of work is not an explanation for severe burdens on constitutional rights." Likewise, in its initial ruling in this case, the District Court discounted Appellants argument by emphasizing that, in establishing a voting schedule and signature requirement that amplifies the state's workload, "the State has imposed this burden upon itself." 882 F. Supp. 2d at 1007.

[25] Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S. Ct.

Instead of challenging the District Court's holding that the April filing date is unconstitutional as a stand-alone requirement, Appellants now argue that the April filing date is constitutional *when it is an alternative* to the August filing date that even Appellees agree is constitutional. In support of this contention, Appellants rely on *LaRouche v. Kezer*, 990 F.2d 36 (2nd Cir. 1993). However, LaRouche presented a very different issue than in presented in this case.

LaRouche involved the constitutionality of a pair of statures that produces the *same* outcome in *different* ways. One of the statutes allowed candidates to be placed on the ballot if they who were recognized as candidates in the news media. The other statute enabled candidates who failed the media recognition test to appear on the ballot if they collected signatures from one percent of their party's registered voters. The district court held that the statute allowing candidates to be included on the ballot if they were recognized by the news media was unconstitutionally vague, but it upheld the constitutionality of the petition signature statute. The Second Circuit held that because one of the statutes provided a constitutional means of obtaining ballot inclusion, the fact that the other statute, standing alone, was unconstitutional, was immaterial. However, *LaRouche* differs from this case in a very significant way.

1382, 75 L. Ed. 2d 318 (1983). The Sixth Circuit has also stated that "findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored,* 38 F.3d 1419, 1421 (6th Cir. 1994). A decision at an earlier stage of the same case represents the law of the case not only as to matters decided explicitly but also as to those "decided by necessary implication." *Aldridge v. Lily-Tulip, Inc.*, 40 F.3d 1202, 1207 (11th Cir. 1994). The doctrine of the "law of the case" "protects against the relitigation of settled issues and preserves the finality of judgments." *Birgel v. Board of Comm'rs*, 125 F.3d 948, 952 (6th Cir. 1997) (Conte, concurring opinion).

> In *LaRouche*, a candidate was in *exactly the same position* – e.g. included on the ballot – regardless of which of the alternative mean of ballot access the candidate followed. Neither option gave a candidate any benefit that the other did not give him, and neither option deprived him of any right that the other option gave him.
>
> In this case, a party wanting to elect its candidate via primaries must comply with one law, while a party electing to nominate its candidates by caucus or some other means may comply with a different provision of the law. That is, the *different provisions* on the Tennessee statutes carry with them *different rights and consequences*.

The April filing date was been held to be unconstitutional when all parties were required to nominate their candidates by primary elections. It is no less unconstitutional merely because minor parties have an alternative means of nominating their candidates.

D: THE DISTRICT COURT CORRECTLY RULED THAT TCA §2-5-208(d)(1) IS UNCONSTITUTIONAL

Tenn. Code Ann. § 2-5-208(d)(1) provides, in relevant part, that:

> [O]n 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.

D-1: The District Court's Decision Is Supported By Significant Evidence and Precedent:

The courts have consistently held that statutes giving priority ballot placement based on any schema that does not give all candidates an equal

opportunity for priority placement on the ballot is unconstitutional *because they violate principles of equal protection*.[26] In each of these cases, the court's found that candidates listed higher on the ballot enjoyed an advantage based solely on their position on the ballot.

The courts have repeatedly held that all candidates for the same office must be treated the same. See *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472 (7th Cir. 1986) (Holding unconstitutional a statute requiring different numbers of signatures for candidates for the same or similar offices.); *Rockefeller v. Powers*, 909 F. Supp. 863 (E.D. N.Y. 1995) (Striking petition requirement that discriminated between candidate for the same office.) See also *Bullock v. Carter,* 405 U.S. 134, 148, 31 L. Ed. 2d 92, 92 S. Ct. 849

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26 See also *Weisberg v. Powell,* 417 F.2d 388, 392-93 (7th Cir. 1969) (Policy of granting priority ballot placement to the candidates of major parties held to be unconstitutional.); *Culliton v. Bd. of Election Comm'rs. of the County of DuPage,* 419 F. Supp. 126 (N.D.Ill.1976) (holding that Republican-first provision violated equal protection clause); *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996) (Striking Democrat-first statute); *Emmons v. Hooper*, CIV-78-404 C (D.N.M. July 6, 1979) ("[C]itizens voting for an unfavorably positioned candidate would lose the power of their vote to a group of equal strength whose candidate appears in top positions."); *Gould v. Grubb,* 14 Cal. 3d 661, 122 Cal. Rptr. 377, 536 P.2d 1337, 1341 (1975) (en banc) ("The automatic reservation of the top line for incumbents contravenes equal protection."); *Atkins v. N.H. Sec. of State*, 154 N.H. 67, 904 A.2d 702 (N.H. 2006) (Listing candidates from the party that received the most votes in the previous election and alphabetizing the names if the remaining candidates held unconstitutional); *Holtzman v. Power,* 313 N.Y.S.2d 904, 62 Misc.2d 1020, *aff'd mem.*, 34 App.Div.2d 917, 311 N.Y.S.2d 824, *aff'd mem.*, 27 N.Y.2d 628, 313 N.Y.S.2d 760, 261 N.E.2d 666 (1970) (Statute requiring name of incumbent to appear first of the ballot held to be unconstitutional.); *Kautenburger v. Jackson*, 85 Ariz. 128, 333 P.2d 293, 295 (Ariz. 1958) (declaring unconstitutional an Arizona statute that provided for alphabetical listing of candidates.) These cases establish the general rule that any system that does not give all candidates an equal chance of having the top ballot listing is unconstitutional.

(1972) (finding no justification for filing fees in party primary where "candidates for offices requiring statewide primaries are generally assessed at a lower rate than candidates for local offices"). In these cases, the magnitude of the benefit conferred, or the burden imposed, by the statute was not relevant to the decisions. It was sufficient that the statutes at issue did not treat all candidates the same. The same is true in this case. Although the record establishes that there is at least _some_ benefit is conferred on major parties, it is not necessary to rely on this fact to hold that the statute is unconstitutional[27]. The simple fact is that TCA §2-5-208(d)(1) _*does not treat all candidates the same*_, and this alone make the statute unconstitutional.

Appellants emphasize that there is no "constitutional right under the Equal Protection Clause to a favorable ballot position." [Appellants Brief, p-46-47] They are, of course correct. But there _*is*_ a constitutional right, under the Equal Protection Clause, to an equal opportunity to have a favorable ballot position – and TCA §2-5-208(d)(1) denies minor parties this opportunity.

In *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996), the Supreme Court explained:

> "a classification divorced from any factual context from which the court could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id. a*t 635.[28]

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[27] In its Memorandum, the District Court emphasized the positional preference effect of TCA §2-5-208(d)(1) as the basis for its holding that the statute is unconstitutional. [R.E. 97, Memorandum Opinion, ID P: 1448-49].

[28] See also *Holt Civic Club v. City of Tuscaloosa* , 439 U.S. 60, 71, 99 S. Ct. 383, 58 L. Ed. 2d 292 (1978) (A court must strike down a statute if the state's classification "rests on grounds wholly irrelevant to the achievement of the State's objective.") (Citations omitted).

In *TriHealth, Inc. v. Bd. of Comm'rs,* 430 F.3d 783, 790 (6th Cir. 2005), this Court said:

> "Disparate treatment of similarly situated persons who are dissimilar only in immaterial respects is *not rational*." *Id.* at 790. (Emphasis added).

There is no doubt that there are many instances in which states can justifiable treat major and minor parties differently. However, once candidates have qualified to become candidates for the same office, they are all the same – e.g. they are "similarly situated" -- and their party affiliation is immaterial. Appellants have not offered a legitimate justification for listing major party candidates first on the ballot, and there is none. .

Evidence of positional bias resulting from statutes such as TCA §2-5-208(d)(1) is proof of injury to a party what has been denied access to a preferred ballot position. But proof of injury is not the *sine qua non* of an equally protection claim. On its face, TCA §2-5-208(d)(1), gives preference to one class of candidates over another, and this is unconstitutional[29].

D-2: Appellants Have Not Asserted Any Justification for TCA §2-5-208(d)(1);

The *Anderson/Burdick* test, discussed *supra,* requires a balancing of burdens imposed by a statute against the *precise* and *legitimate* state interests in the statute. However, Appellants have not asserted *any* specific state interest that is advanced by the statute.

[29] If the statute had come right out and said, "Republicans and Democrats first, everyone else lower on the list," there wouldn't be any dispute about the unconstitutionality of the statute. The Court should not close its eyes to reality and pretend that minor parties -- who face extraordinary burdens in even getting on the ballot in Tennessee – might ever be either the majority or the minority party in the General Assembly.

As the court said in *Reform Party v. Allegheny County Dep't of Elections*, 174 F.3d 305 (3rd Cir. 1999):

> "When we consider constitutional challenges to specific provisions of a State's election laws, *we cannot speculate about possible justifications for those provisions*. The court "must identify and evaluate the precise interests put forward *by the State* as justifications for the burden imposed by its rule." *Id.* at 312. (Emphasis added)[30]

In *Reform Party*, the court made it clear that the appellate court's analysis is confined to the interests asserted by the Appellants in the district court. 174 F.3d at 316. Appellants cannot now cure the failure to assert a justification for the minor party petition signature requirement.[31]

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[30] This prohibition on speculation about a state's possible justification for its statutes was reiterated in *Belitskus v. Pizzingrilli*, 343 F.3d 632, 644 (3rd Cir. 2003)

[31] This court has consistently held that it will not hear and argument or issue on appeal that was not asserted in the District Court. *See In re Morris*, 260 F.3d 654, 663 (6th Cir. 2001) ("As a general rule, appellate courts do not consider any issue not passed upon below. *citing Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976).") *Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838, 848 (6th Cir. 2002) ("[A] reviewing court will not consider issues raised for the first time on appeal.") (Citations omitted) These standards have little meaning if Appellants were now allowed to assert a justification for Tennessee's ballot order statute that that they failed to assert in the proceedings in the District Court.

Moreover, the lack of a record on which this Court can base its application of the *Anderson/Burdick* test does not justify remand for development of a record. Appellants' have had numerous opportunities to establish their justification for the minor party petition signature requirements. There is no reason to give them yet another opportunity to properly plead their argument.

Plaintiffs cite numerous authorities for the proposition that states have a legitimate interest in having an organized and intelligible ballot. [Appellants Brief, P-57].[32] Appellants do not dispute this proposition – but it is irrelevant. A statute mandating nothing more than the order of candidate listing on the ballot does not contribute to a more organized or intelligible ballot.

Appellants have made no attempt to argue or show that there is no positional bias in TCA §2-5-208(d)(1). The best that can be said for the authorities cited by Appellants [See Appellants Brief, p-49] is that positional bias is "minimal."[33] But the question is not (or should not be) "*How great is the positional bias?*" The only relevant question is "*Is there any bias at all?*" While it is true that positional bias has not been conclusively established by

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[32] In *New Alliance Party v. New York Bd. of Elections*, 861 F. Supp. 282 (1994), one of the authorities relied on by Appellants, the Court said:

> "Identifying candidates who can demonstrate the support to qualify for party affiliation and separating them from those who cannot is one method of keeping the ballot in a format that the voter can easily read and assimilate. *Id.* at 296.

But in *New Alliance Party* the statute at issue did not discriminate between the candidates of political parties. Rather, it treated the candidates of political parties differently from *independent candidates*. To the extent that *New Alliance Party* is relevant, it actually *emphasizes* the importance of being the candidate of a political party and gives additional weight to Appellees claim that Tennessee's onerous party petition signature requirement burdens candidates.

[33] It is hardly surprising that there is significant variance in the results of empirical studies based on actual elections. There are so many variables that effect voting behavior – including everything from a candidate's name recognition independent of ballot position to the effect of the weather on voter turnout – that can only be accounted for by complex statistical analysis that empirical studies will always have some a margin of error. The only truly meaningful studies of positional bias are those that are based on controlled experiments. While these studies are obviously not elections, these controlled studies have consistently found a positional bias.

every study, *__not a single published study has concluded that there is **no** positional bias__*.[34]

Candidates do not care about such mundane things as statistical margins of error. They only care about votes. In close elections, even a small fraction of a percent of positional bias can determine the results of an election. As the Supreme Court so succinctly put it in *Morse v. Republican Party*, 517 U.S. 186, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996),

> "While the research is not conclusive, it is reasonable to assume that candidates would prefer positions at the top of the ballot if given a choice." At 197, fn. 13[35]

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[34] In considering Appellants arguments, it is also important for the Court to bear in mind the procedural posture of this appeal. Specifically, this is an appeal from a grant of summary judgment. In *Bell v. Ohio State Univ*., 351 F.3d 240 (6th Cir. 2003) this Court explained:

> "A mere scintilla of evidence is insufficient [to withstand summary judgment]; there must be evidence on which the jury could reasonably find for the non-movant. Entry of summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 247.

Appellees have clearly satisfied their burden of proof. However, Appellants have offered nothing more than a few limited cases where the courts have held that positional bias is minimal. This is plainly insufficient to justify overturning the District Court's holding.

[35] In commenting on the research on positional bias, in *Morse* the Court said:

> "Research has shown that placement at the top of a ballot often confers an advantage to candidates so positioned. The classic study of the phenomenon is H. Bain & D. Hecock, Ballot Position and Voter's Choice: The Arrangement of Names on the Ballot and its Effect on the Voter (1957). See also Note, California Ballot

The *Anderson/Burdick* test requires the court to weight this interest against the "precise" and "legitimate" interests of the state and the "necessity" of a statute to satisfy these interests. Appellants have not made any attempt to show that *any* legitimate *state*[36] interest is advanced by §2-5-208(d)(1). In the absence of *any* justification for the statute, even a slight burden on Appellees requires that the statute be held to be unconstitutional.

D-3: No Deference is Owed To the General Assembly:

As a general principle, courts are inclined to defer to a state legislature's determination of the justification for its enactments. However, where voting rights are involved, deference is neither necessary nor appropriate. *See Seamon v. Upham*, 536 F. Supp. 931, 940 (E.D. Tex. 1982) ("This deference to the state legislature's lawmaking prerogative is not without limitations, however. If adherence to the state's proposals would result in the district court's being unable to satisfy either of its coterminous constitutional goals -- providing voter equality or racial fairness -- the court should not defer."). *See also Landmark Communications v. Va.,* 435 U.S. 829, 843, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) (Stating that "deference to a legislative finding cannot limit judicial

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Position Statutes: An Unconstitutional Advantage to Incumbents, 45 S. Cal. L. Rev. 365 (1972) (listing other studies); Note, Constitutional Problems with Statutes Regulating Ballot Position, 23 Tulsa L. J. 123 (1987). Some studies have suggested that the effect of favorable placement varies by type of election, visibility of the race, and even the use of voting machines. See id., at 127. While the research is not conclusive, it is reasonable to assume that candidates would prefer positions at the top of the ballot if given a choice."

[36] While *incumbent candidates* have an obvious interest in gaining any advantage they can, the *State* has no interest

inquiry when First Amendment rights are at stake.”). Also, deference is not justified where the legislature has its own interests in the legislation. See M*ascio v. Public Emples. Retirement Sys*., 160 F.3d 310 (6th Cir. 1998) (Deference is not appropriate when the state has a beneficial interest in the legislation.).

As Justice Thomas said in his dissenting opinion in *Colo. Republican Fed. Campaign Comm. v. FEC*, , 518 U.S. 604**,** 629, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996)*,* “[w]hat the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it. Courts must police inhibitions on . . . political activity because we cannot trust elected officials to do so.” quoting J. Ely, *Democracy and Distrust* 106 (1980)).” Fn. 9, 518 U.S. at 643. In *Siegel v. LePore*, 234 F.3d 1163 (11th Cir, 2000), the Eleventh Circuit also confronted the question of judicial intervention is states’ regulation of elections. There, the Court said:

> “The Supreme Court was presented in *Reynolds* [v. *Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 1378, 12 L. Ed. 2d 506 (1964)] with the argument that it ought to stay its hand and keep out of the political thickets involved in that case. To that suggestion the Court responded: ‘Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.’" *Id.* at 104 (Citation omitted)

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

> “[W]hile states enjoy a wide latitude in regulating elections and in controlling ballot content and ballot access, they must exercise this

> power in a reasonable, nondiscriminatory, *politically neutral fashion*." 459 F.3d at 590

By its terms, TCA §2-5-208(d)(1) guarantees that the candidates of majority and minority parties in the General Assembly will *always* occupy the top two places on the ballot – and the candidates of minor parties will *never* have a chance at occupying these favored positions. Thus, on its face, TCA §2-5-208(d)(1) is not a politically neutral statute because it favors major parties over minor parties. 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).

When ballot-access limiting statutes are also viewed from the perspective of their impact on voters, it is important to recognize that, as the Sixth Circuit said *Libertarian Party of Ohio v. Blackwell*:

> "A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates-*and of particular importance-against those voters whose political preferences lie outside the existing political parties*." 462 F.3d 589. [Emphasis added.]

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

> "[J]ust as the government is not permitted to level the playing field by removing advantages from certain candidates, it is equally prohibited from advantaging certain candidates, i.e., slanting the

playing field, so that it enhances the relative position of one candidate over another."

The authorities relied on by Appellees are sufficient to satisfy their burden entitling them to summary judgment. When the moving party has carried this burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) The non-moving party also may not rest upon its mere allegations or denials of the adverse party's pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial. *Id.* "The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient to defeat a motion for summary judgment; there must be evidence on which the jury could reasonably find for the non-moving party." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009) (Citations omitted)

D-4: "*Tennessee*" Studies Are Not Required:

Appellants argue that the District Court erred in basing its decision on studies from other states. According to Appellants, only studies conducted in Tennessee can permissibly be used in determining the effect of a particular statutory schema. [Appellants Brief, P: 51] If the court were to accept this proposition, it would render meaningless – for litigation purposes – the entire body of political science research on issues relevant to any legal action. It would also render meaningless the opinions of any expert whose research was not conducted in Tennessee – or any particular state whose statutes were being challenged. But most importantly, any ruling requiring plaintiffs to base their claims on "local" research would make constitutional challenges so prohibitively expensive as to make it all but impossible to challenge even the most blatantly unconstitutional statute.

E: APPELLEES HAVE STANDING TO CHALLENGE RELEVANT STATUTES:

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E-1: Procedural Issues Relating to Appellants' "Lack of Standing" Claim:

Before addressing the "standing" argument presented in Appellants' Initial Brief, it is important to remember the procedural circumstances that lead to the District Court's decision that is the subject of this appeal.

The District Court originally ruled for Appellees in February, 2012. In April, 2012, the Tennessee General Assembly made significant changes to the law relating the filing requirements for minor party petition signatures and provided alternative filing dates for minor parties that wanted to nominate their candidates by primary elections and those that did not. In lieu of these changes, this Court remanded the case for a determination, by the District Court, of whether the April filing "option" – which mirrored the statute that had been held unconstitutional – was unconstitutional in the context of a statute that provided a filing date that was clearly constitutional.

At that point in time, Appellees had already prevailed on their claim. They had received the relief they had initially requested – e.g. ballot inclusion and a determination that Tennessee's requirement that minor parties nominate their candidates by primary elections is unconstitutional – and they had forced a change in the relevant statute. Therefore, *in the context of their initial claim*, they had no inherent interest in the "alternative filing date" provisions of the new law. The subsequent (e.g. on remand) examination of the constitutionality of the amended statute was not undertaken because it had any implications for Appellees. Rather, it was undertaken by the District Court *solely because this Court had requested it*.

Appellants contend that Appellees had no standing to challenge the provisions of the amended statute because there is no indication that Appellees intend to nominate candidates by primary elections [Appellants' Brief, p-59]. But this is irrelevant. As the Supreme Court explained in *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979):

> "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)

Therefore, the fact that Appellees might choose to nominate candidates via primary elections is sufficient to give then standing. But even this is not the most important thing to be considered by the Court

Standing is, of course, a jurisdictional requirement. If Appellees are found to have lacked standing to argue the constitutionality of the amended statute*, the District Court would not have had jurisdiction to do what this court had instructed it to do.* This would be an absurd consequence of a determination that Appellees lacked standing.

E-2: Appellees' Have Standing to Assert a Renewed Challenge to the Statutes at Issue in this Case:

The 2012 election is over. By virtue of the District Court's initial ruling, Appellees were able to fully participate in that election and their candidates

appeared on the ballot with their party label. However, they did not do well. As a result, by operation of TCA §2-13-107(f)[37], they have lost their status as a "recognized minor party" and must satisfy the minor party petition signature requirements to regain ballot inclusion. That is, they will once again be required to satisfy the statutory requirements challenged in this action.

Appellees are national political parties with long histories. They, and their counterparts in other states, have consistently fought for ballot inclusion, and there is no doubt about their intention to continue to seek ballot access in Tennessee. Therefore, the burdens of the statutes at issue in this case pose the risk of imminent harm, and Appellees have standing to challenge their constitutionality.

<u>E-3: Appellees' Have Standing Under the Doctrine of "Capable of Repetition but Evading Review":</u>

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[37] TCA §2-13-107(f) provides, in relevant part, that:

> To maintain recognition beyond the current election year, a minor party must meet the requirements of a statewide political party as defined in § 2-1-104. A recognized minor party who fails to meet such requirements shall cease to be a recognized minor party. Such party may regain recognition only by following the procedures for formation of a recognized minor party."

TCA §2-1-104(30) defines a "Statewide political party" as:

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

Appellants specifically argue that Appellees lack standing to challenge the ballot listing provisions of TCA §2-5-208(d)(1) on the grounds that (a) TCA §2-5-208(d)(1) only has relevance to parties that already have ballot statue and (b) because Appellees have lost their status as "recognized minor parties" they do not have standing to challenge the constitutionality of TCA §2-5-208(d)(1). This is a classic case of an issue that is capable of repetition but evading review.

Pursuant to the amended minor party petition filing statute, discussed *supra*, a new minor party has until 90 days before the general election to file the signature petitions needed to qualify for ballot access – and thereby have standing to challenge the constitutionality of TCA §2-5-208(d)(1). However, by then it is too late to bring suit challenging the constitutionality of TCA §2-5-208(d)(1) in time to obtain relief with respect to the upcoming election. Moreover, if they fail to obtain sufficient votes to gain "Statewide political party" status in the pending election, they will, for reasons discussed in the preceding section, lose their status as "recognized minor parties" and will have no standing to maintain any lawsuit that they may bring.

The courts have repeatedly held that challenges to election laws fall under the "capable of repetition, yet evading review" exception to the mootness doctrine. *See Norman v. Reed*, 502 U.S. 279, 287-88, 112 S. Ct. 698, 704-05, 116 L. Ed. 2d 711 (1992); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S. Ct. 1493, 1494, 23 L. Ed. 2d 1 (1969). "This doctrine applies when (1) the challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation or a demonstrated probability that the controversy will recur." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). Appellees' challenge to the constitutionality of TCA §2-5-208(d)(1) presents just such a case.

F: CONCLUSION:

For all the reasons stated herein, the Court should affirm the rulings of the District Court.

___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 18th day of September, 2013.

___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, Certificate of Service, Certificate of Compliance and Addendum, is 13, 659 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

ADDENDUM:
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to 6 Cir. R. 30(b), the Appellees hereby designate the following relevant district court documents:

Record Entry #:	Document Description	Page ID #
36	Response to Motion for Summary Judgment	180-243
45	Memorandum Opinion	678-787
46	Order	856-588
97	Memorandum Opinion	1383-1449