

NO. 13-5975

**IN THE UNITED STATES COURT OF APPEALS
FOR THE 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 DEFENDANTS-APPELLANTS

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STATEMENT RE: SIXTH CIRCUIT RULE 26

Pursuant to Rule 26.1(a), because the Defendants-Appellants Tre Hargett, Secretary of State of Tennessee, and Mark Goins, Coordinator of Elections of the State of Tennessee, are officials of the State of Tennessee and its political subdivisions, no corporate affiliate/financial interest disclosure statement is required.

STATEMENT OF JURISDICTION

The Plaintiffs brought this lawsuit in the United States District Court for the Middle District of Tennessee at Nashville under 42 U.S.C. § 1983 alleging that certain of Tennessee's election statutes are facially unconstitutional in violation of Plaintiffs' rights under the First and Fourteenth Amendment of the United States Constitution. The district court found that the challenged statutes as applied were unconstitutional and enjoined the Defendants from enforcing them. This Court has appellate jurisdiction to review a final judgment entered by the district court under 28 U.S.C. § 1291.

STATEMENT REGARDING ORAL ARGUMENT

This case involves facial challenges to the constitutionality of certain Tennessee election laws. The district court determined that all of the challenged laws were unconstitutional. This Court reversed that decision and remanded for consideration of one issue in light of recent legislative amendments and for development of an appropriate evidentiary record for consideration of a second issue. On remand, the district court did not correctly resolve these two issues. Accordingly, the Defendants respectfully submit that oral argument will assist this Court in the resolution of the constitutional issues presented for review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in ruling that Tennessee's statutory requirements for ballot access for minor parties that choose to nominate their candidates by primary election are unconstitutional.

II. Whether the district court erred in ruling that Tenn. Code Ann. § 2-5-208(d)1), which establishes ballot order on Tennessee's partisan general-election ballot, violates Plaintiffs' rights under the Equal Protection Clause.

III. Whether the district court erred in ruling that Plaintiffs have the requisite standing to challenge these election laws.

STATEMENT OF THE CASE

Plaintiffs, the Green Party of Tennessee (“GPT”) and the Constitution Party of Tennessee (“CPT”), filed suit on July 20, 2011, asserting a facial challenge to a number of Tennessee’s election statutes concerning minor-party ballot access. (R.E. 1, Complaint Page ID# 1-7). On September 13, 2011, Plaintiffs filed motions for summary judgment on all counts of their Complaint. (R.E. 19, Motion for Summary Judgment on Counts I-A and I-B Page ID#37-72; R.E. 20, Motion for Summary Judgment on Counts II, III and IV Page ID# 73-106). Defendants filed their response on December 12, 2011. (R.E. 36, Response In Opposition Page ID# 180-243; R.E. 39, Notice of Filing of Attachments to Response in Opposition Page ID# 437-623). Plaintiffs’ filed their reply on December 16, 2011. (R.E. 42, Reply Page ID# 626-663).

On February 3, 2012, the district court issued an order and memorandum opinion upholding Plaintiffs’ facial challenges and ruling that all of the election statutes were unconstitutional. (R.E. 45, Memorandum Page ID# 678-767). Specifically, the district court determined that the 2.5% signature requirement, standing alone and in combination with the party- primary and filing deadlines, was unconstitutional. (*Id.* Page ID# 765). The district court further found that “any deadline in excess of sixty (60) days prior to the August primary for the filing of petitions for recognition as a political party is unenforceable” and enjoined the

Defendants “from enforcement of the state statutes requiring Plaintiffs to select their nominees by primary, awarding ballot preference to the majority party and the use of Independent or Nonpartisan in a political party’s name.” (*Id.* Page ID# 765-766). The court also determined that Plaintiffs had made a significant showing of support to justify their recognition as political parties and to have their parties’ names next to their candidates on the general-election ballot. Finally, the court ordered the Defendants to “conduct a public random drawing for the order of placement of the political parties’ candidates’ names on the general election ballot” and to revise the “Nomination Petition” to delete the reference that the signatory is a member of the party. (*Id.*).

On March 2, 2012, the Defendants timely filed a notice of appeal with this Court. (R.E. 53, Notice of Appeal Page ID# 870-871). While the case was on appeal, the Tennessee General Assembly enacted legislation that eliminated the party-primary requirement for minor parties and provided minor parties an alternative method for obtaining ballot access. *See* 2012 Tenn. Pub. Acts Ch. 955, § 6.

On November 30, 2012, this Court issued an opinion reversing the district court and remanding the case for reconsideration of two issues: (1) Plaintiffs’ facial challenge to the ballot-access requirements for minor parties that choose to nominate their candidates by primary election within the larger framework of

Tennessee's scheme for minor-party ballot access and (2) Plaintiffs' facial challenge to Tennessee's provisions regarding general-election ballot order. *See Green Party of Tennessee v. Hargett*, 700 F.3d 816 (6th Cir. 2012).

On remand, Plaintiffs immediately filed a motion for summary judgment on their facial challenges to these two statutory provisions on February 2, 2013. (R.E. 73 Supplemental Motion for Summary Judgment Page ID# 1092-1111). On March 25, 2013, Defendants filed a response in opposition to the motion and to Plaintiffs' statement of undisputed facts. (R.E. 80 Response in Opposition Page ID# 1123-1164; R.E. 81 Response to Plaintiffs' Statement of Facts Page ID# 1170-1174). Defendants also filed their own motion for summary judgment and statement of undisputed facts. (R.E. 82, Motion for Summary Judgment Page ID# 1175-1177; R.E. 83 Statement of Undisputed Facts Page ID# 1178-1185). On March 30, 2013, Plaintiffs filed a reply in support of their motion for summary judgment (R.E. 85 Reply Page ID# 1187-1202), as well as a response in opposition to the Defendants' motion for summary judgment. (R.E. 86 Response in Opposition Page ID# 1203-1204). Plaintiffs did not, however, file any response to Defendants' statement of undisputed facts.

The district court issued its memorandum opinion on June 18, 2013, once again ruling that Tennessee's statutes requiring a minor political party to submit signatures of eligible voters equal to 2.5% of the total voters in the last

gubernatorial election violates Plaintiffs' First Amendment rights and the rights of Tennessee voters to competition in general elections. (R.E. 97 Memorandum Opinion Page ID# 1383-1449). The district court further ruled that Tennessee' ballot-placement statute for general-election ballots awarded a preferential ballot placement to the candidate of the majority political party in violation of the Equal Protection Clause of the Fourteenth Amendment. (*Id.*).

Defendants timely filed a notice of appeal on July 17, 2013. (R.E. 103 Notice of Appeal Page ID# 1552-1553).

STATEMENT OF FACTS

A. Tennessee's Party Ballot-Access Requirements

The State of Tennessee provides two routes for members of political parties to have access to the general election ballot: as the nominee of a “statewide political party” or as the nominee of a “recognized minor party.” Both of these routes have different requirements.

Statewide-Political-Party Nominee

Under Tennessee's election statutes, a “statewide political party” is defined as

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

Tenn. Code Ann. § 2-1-104(a)(31). Statewide political parties are the only parties required to nominate their presidential candidates by primary, Tenn. Code Ann. § 2-13-205(a); they are also required to nominate their candidates for governor, general assembly members, U.S. Senator, and U.S. Representative, Tenn. Code Ann. § 2-13-202.

To qualify as a candidate in a statewide-political-party primary other than the presidential primary, Tennessee's election laws require the filing of a

nominating petition with the signatures of 25 or more registered voters by the first Thursday in April. Tenn. Code Ann. § 2-5-101(a)(1) and (b).

With respect to presidential-primary candidates, there are two methods by which candidates may qualify to appear on the ballot in the State's Presidential Preference Primary. First, a candidate may be named by the Tennessee Secretary of State, who is required to submit a list of the names to the State Election Commission not later than the first Tuesday in December of the year before the year in which the election will be held. Tenn. Code Ann. § 2-5-205(a)(1). Second, the candidate can submit a nominating petition with the signatures of at least 2,500 registered voters no later than noon on the first Tuesday in December of the year before the year in which the election will be held. Tenn. Code Ann. § 2-5-205(a)(2).

Recognized-Minor-Party Nominee

A "recognized minor party" is defined as

any group or association that has successfully petitioned by filing with the coordinator of elections a petition which shall conform to requirements established by the coordinator of elections, but which must at a minimum bear the signatures of registered voters equal to at least two and one-half percent (2.5%) of the total number of votes cast for gubernatorial candidates in the most recent election of governor, and on each page of the petition, state its purpose, states its name, and contain the names of registered voters from a single county.

Tenn. Code Ann. § 2-1-104(a)(24).

Pursuant to legislation adopted in 2012, recognized minor parties are permitted to nominate their candidates for any office by any method authorized under the rules of the party or by primary election. Tenn. Code Ann. § 2-13-203(a)(2). If a minor party chooses to nominate its candidates by a method other than by primary election, then the petition required in Tenn. Code Ann. § 2-1-104(a)(24) is to be filed ninety (90) days prior to the general election. Tenn. Code Ann. § 2-13-107(a)(2).

If, however, a minor party chooses to nominate its candidates by primary election, the petition required in Tenn. Code Ann. § 2-1-104(a)(24) is to be filed on the same deadline for candidates to qualify for the August primary election. Tenn. Code Ann. § 2-13-107(a)(1). There is a 30 day period allowed for verification of the petition signatures. Tenn. Code Ann. § 2-13-107(b). Once this petition is filed, candidates seeking to represent the minor party in the primary election must file nominating petitions as any other candidate for the desired office. Tenn. Code Ann. § 2-13-107(c). Additionally, in order to ensure that candidates have full ballot access, if the petition submitted by a minor party does not have enough valid signatures, any candidates seeking to represent such minor party in the August primary election who had timely filed nominating petitions are placed on the November general-election ballot as independent candidates. *Id.*

B. Tennessee's Ballot Process

The State of Tennessee has a population of approximately 6,346,105, with approximately 4,030,861 registered voters. The State Election Office is staffed with eight full-time employees, who perform a host of duties, including: (1) implementing various federal and state election regulations, including the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301, *et seq.*, and the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973, *et seq.*; (2) processing candidate nominating petitions for statewide and multi-county candidacies; (3) approval of ballots for all 95 counties; (4) training local election officials regarding state election procedures; and (4) maintaining and updating the statewide voter-registration database and candidate databases. (R.E. 80-1 Affidavit of Beth Henry-Robertson Page ID# 1166) ("H-R Affidavit").

The State has 95 counties, and each county has a five-member county election commission. The county election commission appoints an Administrator who is the chief administrative officer for the election commission and is responsible for conducting elections in that county. For twelve counties, the Administrator is the only full-time employee. Additionally, six county-election-commission offices are regularly open less than five days a week. (*Id.*).

There are three major elections held every four years in Tennessee: (1) the Presidential Preference Primary and County Primary Elections held the first

Tuesday in March; (2) the County General Election and the State and Federal Primary Elections held the first Thursday in August; and (3) the State and Federal General Election held the first Tuesday after the first Monday in November. In non-presidential years, County Primary Elections are held the first Tuesday in May. The ballot for the August election is generally the largest and most complicated ballot since it includes offices for the County General Election and the State and Federal Primary Election, as well as the State General Election for any judicial vacancies. Additionally, every eight years the offices for all state trial court and appellate judges, District Attorneys General, and Public Defenders are included on the August ballot. (*Id.* Page ID# 1166-67; *see also* R.E. 39-7, Koelman Affidavit Page ID# 485-86; R.E. 39-9, Tieche Affidavit Page ID# 501). The November general election ballot is usually the least complicated ballot because it includes only State and Federal offices.

Each county election office prepares the ballots for that county. With respect to primary elections, the counties must prepare a ballot for each primary and for each type of system they use. Thus, for the August election each county prepares at least five different ballots: paper ballots for the Republican and Democratic primaries; machine ballots for the Republican and Democratic primaries; and a paper ballot for the August general election. If a recognized minor party decides to nominate its candidates by primary election, the counties

will be required to prepare two additional ballots—a paper and a machine ballot—for the recognized minor party’s primary. With respect to the November general election, counties must only prepare two ballots: a paper ballot and a machine ballot. (R.E. 80-1, H-R Affidavit Page ID# 1167).

Once a county has prepared its ballots, samples of each ballot are sent to the State Election Office for review and approval. Tenn. Code Ann. § 2-5-207(e). For the August election, the State Election Office will review at least 475 ballots as compared to 190 ballots for the November election. It takes approximately 20 to 30 minutes to review each ballot. Once a ballot has been approved, it is scanned and forwarded to the county and its printer/vendor, and each ballot approval and notification is recorded in the State Election Office’s records. (*Id.* Page ID# 1168).

Upon approval, the paper ballots can be printed, and the voting machines can be programmed. Each voting machine has to be programmed for the specific precinct in which it will be used. Early voting machines have to be programmed for all precincts in the county, as they may be used by any registered voter. After programming, the machines have to be tested, which includes testing each candidate for each office on the ballot on every machine to ensure that all buttons and machines are in proper working order. (R.E. 39-7, Koelman Affidavit Page ID# 492-93). Since the August election includes offices for the County General Election and the State and Federal Primary Elections, as well as the State General

Election for any judicial offices, the programming and testing of the machine ballots for that election take considerably longer than the programming and testing of the machine ballots for the November election, which include only state and federal offices. (R.E. 80-1 H-R Affidavit Page ID# 1168-69).

During this same time period, the county election offices are preparing ballots for military and overseas voters, responding to requests for absentee ballots from other voters, and processing voter-registration applications. (R.E. 39-7, Koelman Affidavit Page ID# 494-95; R.E. 39-8, Tieche Affidavit Page ID# 510). Additionally, during non-presidential election years, the county election offices will be conducting the County Primary Election during May and may be conducting municipal elections in both presidential and non-presidential election years. (R.E. 39-7, Koelman Affidavit Page ID# 495; R.E. 39-8, Tieche Affidavit Page ID# 510).

STANDARD OF REVIEW

The district court granted Plaintiffs’ motion for summary judgment, ruling that the challenged state election laws at issue were unconstitutional. This Court reviews a district court’s grant of summary judgment de novo. *Binay v. Bettendorf*, 601 F.3d 640, 646 (6th Cir. 2010). Summary judgment is appropriate when 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). “In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party.” *Salling v. Budget Rent–A–Car Sys., Inc.*, 672 F.3d 442, 444 (6th Cir. 2012) (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

Plaintiffs have challenged Tennessee's statutory scheme governing minor-party ballot access to the general-election ballot. Under current law, a minor party has the choice whether to nominate its candidates by primary or not. If a minor-party chooses to nominate its candidates by primary election, then the minor party is required to file a petition with signatures of registered voters equal to 2.5% of the votes cast in the last gubernatorial election by the first Thursday in April preceding the August primary election. Alternatively, if a minor party chooses not to nominate by primary, then in order to gain access to the general-election ballot, a minor party needs to file such a petition only 90 days before the general election. This signature requirement and filing deadline are clearly within the constitutional parameters established by the Supreme Court. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974), and *Jenness v. Fortson*, 403 U.S. 431, 438 (1971).

In light of these alternative avenues for access to the general-election ballot, Tennessee's ballot-access scheme as a whole is a reasonable, non-discriminatory regulation that does not restrict a minor party's ability to describe itself as a political party, to endorse candidates, to campaign and/or raise funds on behalf of candidates or issues, or to otherwise engage in the political process. Thus, the

State's ballot-access scheme does not unduly burden a minor party's First Amendment rights. The district court, therefore, erred in concluding otherwise.

The district court similarly erred in finding a "positional advantage" accruing to majority-party candidates in Tennessee as a result of Tenn. Code Ann. § 2-5-208(d)(1)'s ballot order provisions, as there is no evidence in the record to support such a finding with respect to partisan general elections in Tennessee. As such, any injury to Plaintiffs' constitutional rights is clearly outweighed by the State's important and vital interest in maintaining an orderly ballot, avoiding voter confusion and assuring the integrity and reliability of the election.

Accordingly, the district court's rulings as to the facial unconstitutionality of these election statutes should be reversed. The district court's rulings should also be reversed and Plaintiffs' claims dismissed for lack of standing, as Plaintiffs have failed to demonstrate that they have or will suffer any "injury in fact" as a result of these statutory provisions.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT THE STATUTORY REQUIREMENTS FOR MINOR PARTY RECOGNITION ARE UNCONSTITUTIONAL.

A. The District Court erred in finding that the signature percentage requirement of Tenn. Code Ann. § 2-1-104(a)(24) violates Plaintiffs' First Amendment rights.

This Court has previously characterized Plaintiffs' ballot-access challenge as comprising two separate claims: “(1) that the party-primary requirement impermissibly burdened their right to select their own nominees; and (2) that the party-primary requirement, the 119-day filing deadline, and the 2.5% signature provisions combined to deny them access to the ballot.” *Green Party v. Hargett*, 700 F.3d 816, 823 (6th Cir. 2012). Because Tennessee amended its statutes to eliminate the party-primary requirement, this Court found the first of these claims to be moot. *Id.*

Since the 2.5% signature requirement and 119-day filing deadline are still in effect and a “core component” of the controversy, this Court determined that Plaintiffs' second claim was not moot. *Id.* Accordingly, this Court remanded the second claim to the district court “to evaluate the various components of Tennessee's election laws as part of the larger framework for providing ballot access to minor political parties.” *Id.* at 824. In doing so, this Court noted that Tennessee's framework had fundamentally changed since the district court had

decided the case; the Court further noted that as part of its reconsideration, “the district court must take into account that the 2.5% signature requirement, standing alone, is not unconstitutional on its face.” *Id.*

On remand, the district court again ruled that the 2.5% signature requirement, standing alone, is unconstitutional; accordingly, the court ruled that this signature requirement, in combination with either the 119-day or 90-day filing deadline, unconstitutionally burdened Plaintiffs’ First Amendment rights. (R.E. 55 Memorandum Opinion Page ID# 1437). The district court acknowledged that the 2.5% signature requirement is facially constitutionally under established Supreme Court precedent,¹ but the court purported to distinguish this precedent by again viewing Plaintiffs’ challenge as an “as-applied” challenge. (R.E. 55 Memorandum Opinion n. 13 Page ID# 1421) (“The Court considers Plaintiffs’ challenges to be as applied challenges.”). Among other things, the district court relied on the empirical evidence submitted by Plaintiffs’ experts regarding the financial burden the 2.5% signature requirement places on minor political parties to find that the signature requirement unconstitutionally burdened Plaintiffs’ First Amendment rights. (*Id.* Page ID# 1433).

¹In an earlier case, the same court found the 2.5% signature requirement to be a reasonable state regulation. *See Libertarian Party of Tennessee v. Goins*, 793 F.Supp.2d 1064, 1086 (M.D. Tenn. 2010).

But Plaintiffs’ challenge to Tennessee’s minor-party ballot access statutes is clearly a facial challenge. A facial challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself. *United States v. Frandsen*, 212 F.3d 1231, 1235 (11th Cir. 2000). Thus, a party that asserts a facial challenge to a statute is seeking not only to vindicate its own rights, but also those of others who may be adversely impacted by the statute. *Horton v. City of St. Augustine*, 272 F.3d 1318, 1331 n.12 (11th Cir. 2001) (citing *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999)). Furthermore, the Supreme Court has held that where the relief requested would “reach beyond the particular circumstances of these plaintiffs,” they must “satisfy our standards for a facial challenge to the extent of that reach.” *John Doe No. 1 v. Reed*, 130 S.Ct. 2811, 2817 (2010) (citing *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010)).

Here, Plaintiffs’ complaint sought to invalidate Tenn. Code Ann. § 2-4-107(a) (119-day filing deadline) and § 2-1-104(24) (2.5% signature requirement) and to enjoin the State from enforcing these statutes with respect to all minor parties—not just the Plaintiffs. (R.E. 1 Complaint Page ID# 1-7). Thus, Plaintiffs’ challenge to the constitutionality of these ballot-access statutes is and always has been a facial challenge, as this Court previously recognized. *See also Green Party v. Hargett*, 700 F.3d at 818 (“This case involves a facial challenge to several aspects of Tennessee’s statutory scheme for providing ballot access to

minor political parties in state and federal elections.”). Accordingly, the district court erred in finding the 2.5% signature requirement unconstitutional based upon an “as-applied” challenge.

Furthermore, even under an “as-applied” analysis, the district court’s ruling was in error. The district court offered four bases for its ruling: (1) the signature requirement imposes a financial burden on minor parties, (2) the Supreme Court has ostensibly set 22,000 signatures as the outer limit a state can require for ballot access, (3) Tennessee requires only 2,500 signatures to qualify as a candidate in a statewide political party’s presidential primary and (4) other states require fewer signatures for recognition of a political party. (R.E. 55 Memorandum Opinion Page ID# 1433-36). The district court’s reliance on these reasons, however, was misplaced.

The Supreme Court has held unequivocally that states may require minor-party candidates to demonstrate a modicum of support among potential voters in order to qualify for a place on the ballot. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986); *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983); *American Party*, 415 U.S. at 782; *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). But what constitutes a “modicum of support”—in terms of the precise numbers and percentages that would constitute the least restrictive means to advance a state’s compelling interests—is “beyond judicial competence to identify, as an objective

and abstract matter.” *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1222 (4th Cir. 1995). *See also American Party*, 415 U.S. at 783 (recognizing that any percentage or numerical requirement is “necessarily arbitrary”). Thus, as a general proposition, the Supreme Court has upheld as much as a 5% signature requirement. *See, e.g., Storer v. Brown*, 415 U.S. 724, 739-740 (1974) (upholding 5% requirement equaling approximately 325,000 signatures); *Jenness v. Fortson*, 403 U.S. at 442 (upholding Georgia statute requiring signatures of 5% of registered voters).

Furthermore, numerous courts have upheld ballot-access systems with signature requirements more onerous than that of Tennessee (either in terms of percentage or overall number of signatures). *See, e.g., Swanson v. Worley*, 490 F.3d 894, 905 (11th Cir. 2007) (3% of vote in last gubernatorial election); *Rogers v. Corbett*, 468 F.3d 188, 195 (3d Cir. 2006) (2% of votes in last election equaling 67,070 signatures); *Cartwright v. Barnes*, 304 F.3d 1138, 1141-42 (11th Cir. 2002) (reaffirming Georgia’s 5% signature requirement); *McLaughlin v. North Carolina Board of Elections*, 65 F.3d at 1225 (2% of vote in last gubernatorial election equaling 51,904 signatures); *Rainbow Coalition of Okla. v. Oklahoma State Election Bd.*, 844 F.2d 740, 742-42 (10th Cir. 1988) (5% of votes in last election); *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 792-95 (11th Cir. 1983)

(3% of all registered voters); *Block v. Mollis*, 618 F.Supp.2d 142, 150 (D.R.I. 2009) (5% of votes in last election).

These cases reflect that federal courts, including the Supreme Court, have upheld as constitutional a broad range of signature-requirement schemes. Tennessee's 2.5% signature requirement clearly falls within this range. In addition, Tennessee's petition statute is free of the kind of restrictive features that can be found elsewhere, *e.g.*, (1) there are no restrictions on the free circulation of petitions; (2) voters may sign more than one petition; (3) a voter who has signed a petition is free to vote in a party primary and vice versa; (4) the signer of a petition is not required to state that he intends to vote for that party's candidate; (5) there is no requirement that signatures be notarized; (6) there is no restriction on how many signatures may come from a specific geographical area; (7) there are no time restrictions on when signatures may be gathered; and (8) there is no restriction on how many signatures can be submitted. *See Jenness*, 403 U.S. at 438-39. *See also Swanson v. Worley*, 490 F.3d at 904; *LaRouche v. Kezar*, 990 F.2d 36, 40 (2d Cir. 1993); *Libertarian Party of Florida*, 710 F.2d at 794.

Nor is the 2.5% signature requirement unconstitutionally burdensome simply because other states may impose a lesser requirement. *See Green v. Mortham*, 155 F.3d 1332, 1339 (11th Cir. 1998) ("There is a range of fees and signature requirements that are constitutional, and [a state] legislature is free to choose its

ballot access requirements from that constitutional spectrum.”); *Libertarian Party of Florida v. Florida*, 710 F.2d at 794 (recognizing that a “court is no more free to impose the legislative judgments of other states on a sister state than it is free to substitute its own judgment for that of the state legislature”); *Patriot Party of Pennsylvania v. Mitchell*, 826 F.Supp. 926, 937 (E.D. Pa. 1993) (recognizing that “a ballot access provision is not unconstitutional simply because it is more burdensome than a similar provision of another state”).

The district court was wrong to conclude that the Supreme Court has set 22,000 signatures as the outer limits of support a state can require for ballot-access. The Supreme Court did not uphold a 22,000 signature requirement in *American Party of Texas v. White*, 415 U.S. 767 (1974); it upheld a requirement of 1% of the votes cast in the last gubernatorial election, which, in 1974, was approximately 22,000 signatures. *Id.* at 783. This 1% signature requirement is still in effect in Texas today and for 2012 required 49,729 signatures—an amount significantly more than that required under Tennessee’s 2.5% signature requirement. (R.E. 19 Motion for Summary Judgment Page ID # 72). Further evidence that the Supreme Court has not established 22,000 as the outer limit is provided by its decision in *Storer v. Brown*, 415 U.S. 724, 740, in which the Court upheld a 5% signature requirement that would require 325,000 signatures. *See id.*, 415 U.S. at 740

(“Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden.”).

The district court was also wrong to rely on the fact that Tennessee requires only 2500 signatures to be a candidate in a statewide political party’s presidential primary, because this reasoning compares the ballot-access requirements for a *candidate* with the ballot-access requirements for a *political party*. Furthermore, even a statewide political party is required to have at least one candidate who has received a number of votes equal to 5% of the vote in the last gubernatorial election. Tenn. Code Ann. § 2-1-104(a)(31). And a state can impose “different routes to the printed ballot” for new and smaller political organizations than it does for established political parties. *Libertarian Party of Maine v. Dunlap*, 659 F.Supp.2d 215, 222 (D. Me. 2009).

Finally, with respect to the district court’s reliance on the imposition of a financial burden, there is no evidence in the record as to the costs that these specific Plaintiffs have incurred or will incur in order to comply with the 2.5% signature requirement. The evidence related in general to “the costs and difficulties inherent in collecting signatures as a general matter.” *Green Party v. Hargett*, 700 F.3d at 821. See R.E. 20, Ex. A to Motion for Summary Judgment Page ID# 67. Based upon this general evidence, Plaintiffs argued, and the district

court agreed, that the 2.5% signature requirement is unduly burdensome because it costs too much to satisfy.

But such reasoning is founded entirely on the assumption that the only way to successfully satisfy the signature requirement is to hire a professional to solicit signatures. The Supreme Court has recognized, however, that “[m]any features of our political system—*e.g.*, single-member districts, ‘first past the post’ elections, and the high costs of campaigning—make it difficult for third parties to succeed in American politics.” *Timmons*, 520 U.S. at 362. Thus, the mere fact that minor parties *may* incur some costs because of their choice to hire individuals to collect petition signatures is not sufficient to establish that the 2.5% petition signature requirement “is unconstitutional in all of its applications,” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) and Tennessee need not collapse every barrier to ballot access. *See Green Party of Arkansas v. Martin*, 649 F.3d 675, 683 (8th Cir. 2011) (citing *Am. Party of Texas v. White*, 415 U.S. at 794 (noting that the States need not “finance the efforts of every nascent political group seeking to organize itself”)).

B. The filing deadline established by Tenn. Code Ann. § 2-13-107(a) in combination with the signature requirement for minor parties that nominate their candidates by primary does not unduly burden Plaintiffs’ First Amendment rights.

This Court remanded this case for evaluation of whether the 2.5% signature requirement in combination with the April filing deadline for minor parties that

choose to nominate their candidates by primary election, within the context of the State's larger framework for providing ballot access to minor political parties, unconstitutionally burdens Plaintiffs' First Amendment rights. The district court did not make such an evaluation, but instead found that because the 2.5% signature requirement is unconstitutional, any filing deadline in combination with that signature requirement unconstitutionally burdened Plaintiffs' First Amendment rights. (R.E. 55 Memorandum Opinion Page ID# 1437).

Had the district court conducted such evaluation, however, it necessarily would have found that the petition and filing-deadline requirements set forth in Tenn. Code Ann. § 2-1-104(a)(24) and § 2-13-107(a), when viewed in the context of Tennessee's overall ballot-access scheme, do not unduly burden minor parties and are supported by a number of important state interests, including: (1) requiring potential candidates to show some minimum level of support for their candidacy, (2) halting the waste and confusion that might otherwise result from a lack of such a showing, (3) avoiding disruption of the ballot and election preparation process, and (5) avoiding disruption of ongoing voter education, poll-worker training, and efforts to assure ballot accuracy and timely distribution of absentee ballots. Each of these interests finds strong support in settled case law and the undisputed evidentiary record established by the Defendants.

Plaintiffs made no attempt to identify, nor did the district court express how the petition signature requirement in combination with the April filing deadline placed any burden on Plaintiffs in light of the alternative method of obtaining ballot access. Nothing in Tennessee's election laws requires Plaintiffs to nominate their candidates by primary, and there is no evidence that Plaintiffs intend or desire to do so. (R.E. 1 Complaint Page ID# 5-6). Instead, Plaintiffs argued that there is no justification for requiring a party qualifying petition to be filed 119 days before a primary election if 90 days is sufficient for participation in a general election. But, this argument ignores the fact that there are significant differences between the August and November deadlines that necessitate the additional time.

Federal courts have recognized that any choice of a filing deadline is "necessarily arbitrary." *U.S. Taxpayers of Florida v. Smith*, 871 F.Supp. 426, 432 (N.D.Fl. 1993) (citing *Libertarian Party of Florida v. Florida*, 710 F.2d 790, 793 (11th Cir. 1983)). Thus, any filing deadline, like any percentage or other numerical requirement, could be challenged *ad infinitum*, with the challenging party contending that allowing parties to file a few days later would not leave the State's interest unprotected. *Id.* Consequently, the state is not required to pick a perfect deadline, just one that is essentially reasonable in light of the burdens imposed. *Barr v. Ireland*, 575 F.Supp.2d 747, 760 (S.D.W.Va. 2008); see also *See North Carolina Constitution Party v. Bartlett*, No. 3:12-cv-00192-GCM, 2013 WL

785353, at *6 (W.D.N.C. March 1, 2013) (court upheld May 17 filing deadline finding that minor party had failed to demonstrate that deadline had any impact on its First and Fourteenth Amendment rights); *Stein v. Chapman*, No. 2:12-cv-42-WKW, 2012 WL 2935637, at *8 (M.D. Ala. July 19, 2012) (on motion for preliminary injunction, court upheld March 13 filing deadline finding that Plaintiffs had “failed to provide an evidentiary basis to conclude that the deadline is providing unique burdens that are unconstitutional.”).²

A number of courts have found a filing deadline to be justified based upon a showing by state and local election officials of the need for that deadline in order to perform their election-related duties, including, in particular, the timely distribution of absentee ballots. *See, e.g., Nader v. Keith*, 385 F.3d 729, 734 (7th Cir. 2004) (recognizing that time has to be allowed between the deadline for petitions and the election to enable challenges to the validity of the petitions to be made and adjudicated and then to enable a ballot to be printed that will contain the names of all the candidates and that can be distributed to registered voters who vote by absentee ballot); *Libertarian Party of Maine v. Dunlap*, 659 F.Supp.2d 215, 224 (D. Me. 2009) (noting that “Elections Division staff needs to know which

²The district court subsequently granted the state’s motion for summary judgment concluding that Alabama’s 3% signature requirement and March filing deadline for minor-party ballot-access did not unconstitutionally burden minor parties First and Fourteenth Amendment rights. *Stein v. Bennett*, No. 2:12-cv-42-WKW (M.D. Ala. Sept. 5, 2013).

candidates' name are to appear on the ballot no later than 11 weeks ahead of the election" to ensure that ballots can be printed and sent to absentee voters in time); *Barr v. Ireland*, 575 F.Supp.2d 747, 751 (S.D.W.Va. 2008) (finding that filing deadline was tied directly to the date when absentee ballots must be distributed to the military and other citizens); *United States Taxpayers Party of Florida v. Smith*, 871 F.Supp. 426, 437 (N.D. Fla. 1993) (finding that filing deadline was justified and recognizing that in addition to verifying signatures, election officials must also conduct primaries in addition to overseeing voter registration and performing other regular duties).

Here, the April filing deadline for minor parties that choose to nominate their candidates by primary is tied directly to the date by which absentee ballots must be distributed to military and overseas voters under federal and state law. The Military and Overseas Voters Empowerment Act ("MOVE" Act) mandates a 45-day deadline for the mailing of military absentee ballots. Specifically, the Act states that "[e]ach State *shall* transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election." 42 U.S.C. 1973ff-1(a) (8) (emphasis added). *See* Tenn. Code Ann. § 2-6-503(a). This deadline is one that both the United States government and the federal courts have zealously sought to enforce, recognizing that "[i]t is unconscionable to send men and women overseas to preserve our democracy while

simultaneously disenfranchising them while they are gone.” *United States v. State of New York*, No. 1:10-cv-1214, 2012 WL 254263, at *1 (N.D. N.Y. Jan. 27, 2012); *see United States v. Alabama*, 857 F.Supp.2d 1236, 1242 (M.D. Ala. 2012); *United States v. Georgia*, 892 F.Supp.2d 1367, 1375 (N.D. Georgia 2012)

The undisputed evidence in the record establishes that the April filing deadline is necessary in order for state and local election officials to meet the 45-day deadline and that any delay would significantly increase the risk of Tennessee’s noncompliance with the MOVE Act and would jeopardize the integrity of the election process itself. (R.E. 39-7 Koelman Affidavit Page ID# 494, 498; R.E. 39-8, Tieche Affidavit Page ID# 509-510, 514).

Additionally, the August election is both a County General Election and a State and Federal Primary Election, whereas the November election is only a State and Federal Election. Thus, for the August election, each county is required to prepare at least five different ballots, thus generating a total of 495 ballots (5 ballots x 95 counties) that must be reviewed and approved by the State Election Office. For November elections, however, counties have to prepare only two ballots creating a total of only 190 ballots for review and approval. The difference in time just for preparing the ballots for the two different elections is substantially different. *See* R.E. 80-1H-R Affidavit Page ID# 1167. In many instances preparation of the November ballot is a fairly simply process because there are

significantly fewer offices listed on the ballot. For example, in gubernatorial election years, most counties will only have five offices listed on the ballot: governor, U.S. Senate, U.S. House of Representatives, State Senate, and State House. (*Id.*).

The difference in the time necessary for the State Election Office to review and approve the 495 ballots for the August election versus the 190 ballots for the November election is also substantially different. (*Id.* Page ID# 1168). And the difference in time needed to program and test the voting machines for the August elections is substantially greater than the time needed for the November election. With respect to the August election, the voting machines have to be programmed for each party primary and for the County General election, whereas the machines have to be programmed only for the General election in November. (*Id.* Page ID# 1168-69). These time differences alone are enough to justify the earlier filing deadline for minor parties that choose to nominate their candidates by primary election.

This Court's remand for evaluation of the April filing deadline in combination with the 2.5% petition signature requirement in light of Tennessee's overall minor-party ballot access scheme is consistent with Supreme Court directives for the assessment of state election regulations. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (burdens of ban on write-in votes assessed in light of

state's comprehensive election code); *Storer*, 415 U.S. at 738-40 (constitutionality of state petition requirement determined by interaction with other election statutes); *American Party of Texas v. White*, 415 U.S. at 786-87 (constitutionality of statute limiting petition time determined in conjunction with statute specifying total number of signatures required). The Supreme Court has further observed that when viable alternative methods of obtaining access to the ballot exist, an election regulation enjoys a strong presumption of constitutionality. *Storer*, 415 U.S. at 746, n.16. Indeed, under the totality approach, if either alternative would be constitutional standing alone, the other must be viewed as broadening the opportunities for ballot access and is *a fortiori* constitutional. *LaRouche v. Kezer*, 990 F.2d at 39. Here, Tennessee law provides a viable alternative method for Plaintiffs to obtain access to the November general-election ballot that is clearly within the constitutional parameters established by the Supreme Court. *See Jenness v. Fortson*, 403 U.S. 431 (1970) (upholding Georgia's ballot access scheme which required petition signed by at least 5% of number of registered voters to be filed approximately 120 days prior to general election).

Tennessee has an important interest "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot." *Munro*, 479 U.S. at 193-94. While unrecognized political parties representing minority views are vital to the

continuation of a representative government, this interest must be balanced with the state's important interests in controlling fractionalism, avoiding voter confusion, and reducing the burden of additional administrative costs. *Nader v. Keith*, 385 F.3d 729, 732-33 (7th Cir. 2004); *Constitution Party of Kansas v. Biggs*, 813 F.Supp.2d 1274, 1282 (D. Kan. 2011). When viewed in the totality of Tennessee's minor-party ballot access scheme, Tennessee's 2.5% petition signature requirement and April filing deadline, operating separately and in tandem with each other, do not unnecessarily restrict or infringe upon the associational rights of Plaintiffs and are reasonable and justified by legitimate state interests. The district court erred in ruling otherwise.

II. THE DISTRICT COURT ERRED IN RULING THAT TENN. CODE ANN. § 2-5-208(d)(1)'S BALLOT-ORDER PROVISIONS UNCONSTITUTIONALLY DISCRIMINATE AGAINST PLAINTIFFS.

Tenn. Code Ann. § 2-5-208(d)(1) provides, in pertinent part, as follows:

[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.

“Majority party” is defined as the political party whose members hold the largest number of seats in the combined houses of the general assembly, and “minority party” is defined as the political party whose members hold the second largest number of seats in the combined houses of the general assembly. Tenn. Code Ann. § 2-1-104(a)(11), (12).

Plaintiffs challenged the facial constitutionality of this statute on the grounds that it denies them an equal opportunity to win votes, thus violating their equal-protection rights under the Fourteenth Amendment. Finding that there was no relevant evidence in the record to support Plaintiffs’ claims, this Court remanded for further development of the factual record. Among other things, this Court noted that while the statute contemplated use of party block ballot, the evidence in the record concerning the form of the ballot used by Tennessee was insufficient. *Green Party v. Hargett*, 700 F.3d 816, 827 (6th Cir. 2012).

On remand, Plaintiffs did not present any evidence demonstrating that ballot placement under Tenn. Code Ann. § 2-5-208(d) conferred any benefit, such as additional votes or voter recognition, or that it prevented voters from locating them on the November general-election ballot. Plaintiffs did submit copies of the November 2012 general-election ballots from the 95 Tennessee counties, which appeared to reflect use of an office-block ballot, as opposed to a party block ballot. (R.E. 88-96 Notice of Filing Attachments Page ID# 1205-1382). The district court

did not rely on these ballots, however, in determining that Tenn. Code Ann. § 2-5-208(d)(1) is unconstitutional. Instead, the district court once again relied upon decisions from other jurisdictions and various studies concerning ballot placement. In doing so, the district court failed to engage in the sort of balancing test required by the Supreme Court in reviewing election laws that allegedly burden the right to vote. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992). As a result, the district court erred in concluding that Tenn. Code Ann. § 2-5-208(d)(1) is facially unconstitutional.

States are granted authority to substantially regulate elections to ensure that they are fair, honest, and orderly. *Storer v. Brown*, 415 U.S. 724, 730 (1974). With respect to such election laws, the Supreme Court has established a framework for examining them. Under that framework, a court must weigh the character and magnitude of the injury to rights protected by the First and Fourteenth Amendments against the state's interests in justifying the requirements imposed by its election laws. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The level of scrutiny applied to the state's requirements depends on the extent to which the challenged regulation burdens First and Fourteenth Amendment rights. *Burdick*, 504 U.S. at 434. If the state's requirements severely restrict those rights, then the requirements may be upheld only if they are narrowly tailored to advance a compelling state interest. *Id.* If, however, state law imposes only reasonable,

nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the state's important regulatory interests are generally sufficient to justify the restrictions imposed. *Id.* See *Anderson*, 460 U.S. at 788.

Restrictions that do not affect a political party's ability to perform its primary functions of organizing, developing, recruiting supporters, choosing a candidate, or voting for that candidate in a general election have been held not to impose a severe burden on protected rights. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369-70 (1997) (laws prohibiting an individual from appearing on the ballot as the candidate for more than one party are valid); *Burdick v. Takushi*, 504 U.S. at 437-38 (an election system prohibiting write-in candidates is valid); *Clingman v. Beaver*, 544 U.S. 581, 597 (1992) (state's semi-closed primary system allowing only registered members of a party and registered independents to vote in primary election is valid). Each case, however, must be resolved on its own facts; due consideration must be given to the practical effect of the election laws of a given state, viewed in their totality. *Clements v. Fashing*, 457 U.S. 957, 963 (1982).

To date, neither the Supreme Court nor this Court has held that there is a constitutional right under the Equal Protection Clause to a favorable ballot position. See *New Alliance Party v. New York State Board of Elections*, 861 F.Supp. 282, 287 (S.D.N.Y. 1994) (rejecting constitutional right of independent

party to a better position on the ballot); *Clough v. Guzzi*, 416 F.Supp. 1057, 1067 (D. Mass. 1976) (rejecting challenge to an incumbent-first ballot placement and ruling that there is no constitutional right to a better ballot position). Thus, under the balancing test, the first question is whether and to what extent Tenn. Code Ann. § 2-5-208(d)(1) burdens the right to vote.

Tennessee Code Ann. § 2-5-208(d)(1) does not restrict access to the ballot or deny any voters the right to vote for candidates of their choice. Instead, it merely allocates any possible benefit of positional bias on the basis of upon historical support. Additionally, there is nothing in Tenn. Code Ann. § 2-5-208(d)(1) that prevents recognized minority parties from attaining “majority party” or “minority party” status; therefore, the statute “in no way freezes the status quo, but implicitly recognize[s] the potential fluidity of American political life.” *Board of Election Com’rs of Chicago v. Libertarian Party of Illinois*, 591 F.2d 22, 26 (7th Cir. 1979). Whatever the burden this statute imposes on the right to voter, it is certainly less onerous than that imposed by election laws that have been subjected to a lower level of scrutiny. *See, e.g., Timmons*, 520 U.S. at 367 (upholding constitutionality of “anti-fusion” law prohibiting candidates from associating with more than one party on a ballot); *Burdick*, 504 U.S. at 434-40 (requiring only legitimate state interest to uphold state’s prohibition on write-in voting); *Libertarian Party of Colo. v. Buckley*, 938 F.Supp. 687, 693 (D. Colo. 1996)

(requiring only legitimate interests to uphold ballot positioning statute which divided major and minor parties into two groups and determined placement within the groups by random drawing); *O'Callaghan v. State*, 914 P.2d 1250, 1263 (Alaska 1996) (requiring only showing of legitimate state interests to uphold blanket primary requirement against First Amendment challenge).

Indeed, the ballot format established by Tenn. Code Ann. § 2-5-208(d)(1) is akin to the two-tier ballot-placement system that was upheld by the Seventh Circuit in *Board of Election Comm'rs of Chicago*. Under that system, the first two places on the ballot went to “established political parties,” i.e., parties that polled at least 5% of the vote in the last election. “New political parties,” which became eligible to appear on the ballot by filing petitions, were placed below the established political parties. *Bd. of Election Comm'rs*, 591 F.2d at 23. The Seventh Circuit first noted that the Supreme Court has recognized that distinctions between major and minor political parties do not necessarily violate the Equal Protection Clause.

Different treatment of minority parties that does not exclude them from the ballot, prevent them from attaining major party status if they achieve widespread support, or prevent any voter from voting for the candidate of his choice, and that is reasonably determined to be necessary to further an important state interest does not result in a denial of equal protection.

Id. at 25 (citing *Buckley v. Valeo*, 424 U.S. 1, 93-97 (1976)). The court further recognized that the state’s interest in avoiding voter confusion is “important” and

“admittedly vital,” and unless it is protected, the result may be “frustration of the democratic process.” *Id.* at 26 (citing *Jenness*, 403 U.S. 431, 442 (1971); *American Party*, 415 U.S. 782, 767 n.14 (1974)). The Seventh Circuit concluded that the different treatment of minority parties and their candidates under this two-tier system was not a barrier to a candidate’s placement on the ballot, nor was it restrictive of voters’ or candidates’ rights; therefore, the court concluded that the “relatively slight disadvantage that might result from placement below the top two ballot positions is more than outweighed by the state’s interest in assuring the quality of the election.” *Id.* at 27.

Like the two-tier system in *Bd. of Comm’rs*, Tenn. Code Ann. § 2-5-208(d) does not exclude Plaintiffs from the ballot, does not prevent them from attaining majority party status, and does not prevent any voter from voting for the candidate of his choice. Thus, it has at most only a slight effect on Plaintiffs’ constitutional rights. *Id.* See also *Libertarian Party of Colo.*, 938 F.Supp. at 692-693 (finding that Colorado’s ballot-placement statute had “a slight, and probably de minimis effect on voters’ constitutional rights”); *Democratic-Republican Organization of New Jersey v. Guadagno*, 900 F.Supp.2d 447, 459 (D.N.J. 2012) (finding that Plaintiffs’ burden, if any, from New Jersey’s ballot placement is negligible); *New Alliance Party v. New York State Bd. of Elections*, 861 F.Supp. at 295 (finding that Plaintiff suffered no injury to its constitutional rights as a result of New York’s

ballot- placement statute); *Sonneman v. State*, 969 P.2d 632, 638 (Alaska 1998) (finding that Alaska’s ballot-placement statute imposed only a “minimal, reasonable nondiscriminatory burden on the right to vote”).

Moreover, since the effect of ballot placement on voting is a matter of fact, virtually every court that has found prejudice resulting from preferential ballot placement has done so based upon significant evidence demonstrating such prejudice. *See Democratic-Republican Organization of New Jersey v. Guadagno*, 900 F.Supp.2d at 458 (noting that in virtually all of the federal- court decisions addressing similar constitutional challenges to ballot placement, formatting, or layout, “courts have required evidence demonstrating that ballot placement confers a benefit *prior* to determining whether the plaintiffs have been burdened, let alone harmed”) (emphasis in original); *New Alliance Party v. New York State Bd. of Elections*, 861 F.Supp. at 291 (finding that no court has ever based a finding of position bias on judicial notice). Thus, whether positional bias exists should be decided on the basis of persuasive empirical evidence. *See New Jersey Conservative Party, Inc. v. Farmer*, 753 A.2d 192, 199 (N.J. Super. Ct. Ch. Div. 1999). *See also* R. Michael Alvarez, Betsy Sinclair, and Richard L. Hasen, *How Much is Enough? The “Ballot Order Effect” and the Use of Social Science Research in Election Law Disputes*, 5 Election L.J. 40, 52-53 (2006) (“[F]or a plaintiff to prevail [on a claim that ballot-order laws violate equal protection], she

should have to come forward with significant evidence that the ballot order effect is likely to change election outcomes.”).

Furthermore, because the facts and circumstances peculiar to each jurisdiction’s elections are unique, as well as the practical effect of each state’s election laws, factual findings from other jurisdictions, though they may provide some guidance, do not provide an ultimate resolution to the question of whether the alleged “positional advantage” of Tenn. Code Ann. § 2-5-208(d)(1) has played any quantifiable role in Tennessee’s partisan general elections. For example, in *McClain v. Meir*, 637 F.2d 1159 (8th Cir. 1980), a case substantially relied on by the district court, the Eighth Circuit held North Dakota’s incumbent-first-ballot placement statute unconstitutional based upon expert testimony that an advantage of at least 5% accrued to the candidate whose name appeared first and that election results in recent North Dakota races suggested the potential ramifications of ballot advantage (e.g., evidence that the U.S. Senate race had been won by a margin of less than .08%). *Id.* at 1166, n.13.

Similarly, in *Cough v. Guzzi*, 416 F.Supp. 1057 (D.Mass. 1976), the court reviewed a study that analyzed the effects of both ballot position and incumbency in Massachusetts primary elections for three offices during the years 1926 to 1970. This study covered over 20,000 candidates and included elections that occurred both before and after the challenged incumbent-first legislation was enacted in

1938. *Id.* at 1063. After reviewing all of this evidence, the *Cough* court concluded:

[t]he range of expert opinion demonstrates that the advantage conferred by incumbency and by first position on the ballot is not one which is easily susceptible to measurement. Voter familiarity with the candidates, the importance of the office, ethnic affiliation, and the educational level of the electorate, to name but a few factors, make it difficult to isolate with confidence the effects of incumbency and first position. Measurement is made more difficult by the fact that studies cannot be made in controlled laboratory conditions.

Id. at 1065. Accordingly, the court determined that the plaintiff had failed to prove a substantial advantage inherent in first ballot position alone. The court further concluded that “[v]oters have no constitutional right to a wholly rational election based solely on reasoned consideration of the issues and the candidates’ positions, and free from other ‘irrational’ considerations as a candidate’s ethnic affiliation, sex, or home town” and that Massachusetts’ incumbent-first statute served the legitimate state interest of eliminating the possibility of voter confusion. *Id.* 1067-68.

In *Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978), the Minnesota Supreme Court found the expert testimony concerning the role of positional bias in an election to be “somewhat imprecise and inconclusive” and that studies involving nonpartisan elections were “particularly ill-suited” to an examination of the

Minnesota statute, which applied only in partisan general elections. 212 N.W.2d at 414, n.5.

[T]he fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election. And whether for purposes of a more absolute fairness that advantage warrants a different statutory scheme is properly a legislative consideration.

Id. at 418 (quoting *Cough v. Guzzi*, 416 F.Supp. at 1068).

Here, there is no evidence in the record that ballot placement under Tenn. Code Ann. § 2-5-208(d) has conferred any benefit or has played any quantifiable role in Tennessee’s partisan general elections. As previously noted, the district court found that such benefit exists based upon findings from other jurisdictions and various studies concerning the prejudicial effects of ballot order. But Tenn. Code Ann. § 2-5-208(d) applies only to ballots for Tennessee’s partisan general elections, and a majority of the studies concerning the prejudicial effects of ballot order have consistently found that there is little, if any, ballot-order effect in partisan general elections. *See, e.g.*, Laura Miller, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. Legis. & Pub. Pol’y 373, 376, 387-88 (2010) (acknowledging that there are a “number of gaps in our knowledge of the nature of ballot order effects” and concluding that the effect of ballot order “is likely relatively small for major party candidates in general

elections”); Ho & Imai, *Estimating Causal Effects of Ballot Order from a Randomized Natural Experiment: The California Alphabet Lottery, 1978-2002*, 72 Pub. Opinion Q. 216, 227 (2008) (finding little systematic evidence that major-party candidates in general elections are favored by being first on the ballot); R. Michael Alvarez, Betsy Sinclair, and Richard L. Hasen, *How Much is Enough? The “Ballot Order Effect” and the Use of Social Science Research in Election Law Disputes*, 5 Election L.J. 40, 41 (2006) (finding that empirical evidence of ballot order effect is “muddled” and that it is unclear if the effect exists at all in general elections); Mark E. Dreyer, Note, *Constitutional Problems with Statutes Regulating Ballot Position*, 23 Tulsa L.J. 123, 127 (1987) (position bias is most evident in low-visibility contests insofar as fewer voters in those races actually cast their votes out of preferences for particular candidates); Robert Darcy, *Positional Effects with Party Column Ballots*, 39 W. Pol. Q. 648, 661 (1986) (determining that position effect does not occur at all in American general elections in which party listings serve as a cue on the ballot and where voters were asked to pick only one candidate among those running in a contested election). *See also Libertarian Party of Colorado v. Buckley*, 938 F.Supp. 687, 693 (D. Col. 1996) (expert’s testimony failed to reach any conclusion regarding position bias in upcoming partisan general election other than to state that position bias in such an election is “minimal”); *Gould v. Grubb*, 14 Cal.3d 66, 668 (1975) (limiting its finding of

position bias to the “so-called ‘low visibility’ races, in which voters are more likely to be unfamiliar with many of the candidates” and noting that experts would not go so far as to state that positional bias existed in presidential or gubernatorial elections).

Furthermore, courts have recognized that a candidate’s party affiliation is the single most important factor influencing a voter³, *Ulland v. Growe*, 262 N.W.2d at 414-15, and that the existence of positional bias can also depend on such factors as the amount of “information and encouragement [voters receive] on how they should vote” and voters’ “motivation,” *Koppell v. New York State Bd. of Elections*, 108 F.Supp.2d 355, 385 (S.D.N.Y. 2000), as well as a candidate’s incumbency status. *New Jersey Conservative Party, Inc. v. Farmer*, 753 A.2d 192, 198-99 (N.J. Super. Ct. Ch. Div. 1999). *See also* Laura Miller, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. Legis. & Pub. Pol’y at 387-388 (2010) (recognizing that ballot order interacts with incumbency); Byrne & Pueschel, *But Who Should I Vote for for County Coroner?* 36 Journal of Politics, 778, 781 (1974) (“[C]ontrary to much popular opinion and several earlier studies, first place on a ballot gives a candidate no advantage. One of the primary

³Indeed, Plaintiffs’ expert testified that “[h]aving a party affiliation designated on the ballot is essential to the candidacy of a minor party candidate” and that for candidates with limited name recognition, “having a party affiliation designated on the ballot is an extremely important ‘voter cue’ to the positions and political philosophy of the candidate.” (R.E. 19 Exh. A to Motion for Summary Judgment Page ID# 68).

reasons for this discrepancy between our data and some of the earlier works, we suspect stems from the failure to disentangle the effects of incumbency from the effects of ballot position.”).

A state clearly has a legitimate interest in maintaining an orderly ballot and assuring the integrity and reliability of the election process. *See Timmons*, 520 U.S. at 358 (“States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”). The Supreme Court has further recognized that the states’ important interest in preventing election-related disorder “permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system.” *Id.* at 367. Additionally, states have a legitimate interest in basing ballot placement upon a showing of past strength amongst the electorate. *See Board of Election Comm’rs*, 591 F.2d at 23, 27 (Preferential ballot-order placement avoids voter confusion, “mak[ing] the ballot as convenient and intelligible as possible for the great majority of voters, who, history indicated, would wish to vote for a candidate of one of the two major parties.”).

Thus, to the extent that Plaintiffs’ experience any injury to their constitutional rights from their inability to be listed first on the ballot, that minor injury is outweighed by Tennessee’s regulatory interests in organizing a clear and intelligible ballot, presenting an arrangement based on the reasonable and

nondiscriminatory basis of historical strength of support, and displaying candidates in a simple way that avoids voter confusion. See *Meyer v. Texas*, No. H-10-3860, 2011 WL 1806524 at *6 (S.D. Tex. 2011) (finding that any injury to constitutional rights is minor and outweighed by state's regulatory interests in organizing clear and intelligible ballot); see also *Democratic-Republican Organization of New Jersey v. Guadagno*, 900 F.Supp. at 459 (finding that the burden imposed by New Jersey ballot-placement statute to be significantly less onerous than the burdens imposed by statutes the Supreme Court upheld in *Jenness* and *Timmons* and that the statute furthers the state's interest in protecting integrity, fairness, and efficiency of their ballots and election processes); *Koppell v. New York State Bd. of Elections*, 108 F.Supp.2d at 387 (state's regulatory interests more than sufficient to justify minimal burden); *Libertarian Party of Colo.*, 938 F.Supp. at 693 (state's recognized interest in regulating elections is sufficient to outweigh any "position bias" claimed by plaintiffs); *New Alliance Party v. New York State Bd. of Elections*, 861 F.Supp. at 297 (finding that statute that positions parties in all races based on performance in the prior gubernatorial election assists voters by constructing a symmetrical pattern on the ballot, thereby furthering state's compelling interest in organizing a comprehensible and manageable ballot).

III. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS HAD STANDING TO CHALLENGE THESE STATUTES.

Article III of the United States Constitution gives the federal courts jurisdiction only over ‘cases and controversies,’ of which the component of standing is an ‘essential and unchanging part.’ *Hooker v. Sasser*, 893 F.Supp. 764, 766 (M.D. Tenn. 1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (standing to sue is part of the common understanding of what it takes to make a justiciable case). The Supreme Court has set forth three elements of “the irreducible constitutional minimum of standing”:

First, and foremost, there must be alleged (and ultimately proved) an “injury in fact”—a harm suffered by the plaintiff that is “concrete” and “actual or imminent, not ‘conjectural’ or hypothetical.”” Second, there must be causation—a fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant. And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 102-04 (1998) (internal citations omitted).

A plaintiff bears the burden of demonstrating standing and must plead its components with specificity. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

“A threatened injury must be certainly impending to constitute injury in fact,” *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (internal quotation marks omitted), and it “must affect the plaintiff in a personal and individual way,” *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1442 (2011) (internal quotation marks omitted).

Green Party of Tenn. v. Hargett, 700 F.3d 816, 828 (6th Cir. 2012). Furthermore, since these elements are not mere pleading requirements but rather an indispensable part of a plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *Lujan*, 504 U.S. 555, 561 (1992). Thus, at the summary-judgment stage, a plaintiff cannot rest on “mere allegations” contained in the complaint, but must set forth specific facts by affidavit or other evidence. *Id.*; *see* Fed. R. Civ. P. 56(e).

The issue here is whether Plaintiffs have suffered an injury-in-fact resulting from application or threatened application of the petition signature requirement and April filing deadline. This combined restriction applies only to minor parties that choose to nominate their candidates by primary election. There is no evidence in the record that Plaintiffs intend or even desire to nominate their candidates by primary election. Indeed, Plaintiffs specifically challenged Tennessee’s mandatory primary requirement as unduly burdening their First Amendment rights. (R.E.1

Complaint Page ID#5-6). The petition signature requirement and April filing deadline set forth in Tenn. Code Ann. § 2-1-104(a)(24) and § 2-13-107(a) simply do not apply to Plaintiffs and would have no effect on their ability to get on the November general-election ballot under the alternative provisions in Tenn. Code Ann. § 2-13-107(a)(2).⁴ Consequently, Plaintiffs have not suffered any “injury in fact” as a result of these statutory provisions and thus lack standing to challenge their constitutionality. *See Green Party*, 700 F.3d at 829 (“Not one of these cases, however, holds that a plaintiff with standing to challenge certain requirements that affect its ability to get on the ballot also has standing to challenge other requirements that do not so affect its ability.”).

Furthermore, the fact that state law may have required minor parties to nominate their candidates by primary in the past is not sufficient to establish an “injury in fact,” as the Supreme Court has held that “[p]ast exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *see Fieger v. Ferry* 471 F.3d 637, 643 (6th Cir. 2006). And while

⁴Similarly, the relief requested—a declaration that these statutes are unconstitutional—would have no effect on Plaintiffs’ ability to get on the general election ballot under the alternative provisions in Tenn. Code Ann. § 2-13-107(a)(2) and thus would provide no personal benefit to the Plaintiffs. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976) (“The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.”).

it is conceivable that at some point in time Plaintiffs may choose to nominate their candidates by primary, the standing inquiry is not an “exercise in the conceivable”; it “requires . . . a factual showing of perceptible harm.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Accordingly, the district court erred in finding that Plaintiffs had the requisite standing to challenge the constitutionality of the 2.5% signature requirement and April filing deadline for minor parties that nominate their candidates by primary election.

The district court also erred in finding that Plaintiffs had standing to challenge the constitutionality of Tennessee’s ballot-placement statute, Tenn. Code Ann. § 2-5-208(d)(1). By its plain language, this statute applies to a recognized minor party only after such party has obtained the right to have its candidates and party affiliation placed on the general-election ballot. Indeed, in virtually every decision relied upon by the district court, the party or candidate challenging a state ballot-placement statute had already met the statutory requirements to obtain placement on the general-election ballot. Here, Plaintiffs have not met the statutory requirements for placement on the November 2014 general-election ballot as a recognized minor party; therefore, Tenn. Code Ann. § 2-5-208(d)(1) does not apply to them. Plaintiffs have thus not demonstrated that they have suffered an injury-in-fact sufficient to establish standing. *See Green Party v. Hargett*, 700 F.3d at 828-29.

CONCLUSION

For the stated reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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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 11,508 words which is less than the 14,000 words permitted by Fed. R. App. P. 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 6th day of September 2013, that a copy of the above document has been served upon the following persons by:

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ADDENDUM**DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

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

R.E. No.	Document	Page ID#
1	Complaint	1-7
19	Plaintiffs' Motion for Summary Judgment-Counts I-A and I-B	37-72
20	Plaintiffs' Motion for Summary Judgment – Counts II-IV	73-106
21	Memorandum in Support of Plaintiffs' motions for Summary Judgment	107-130
36	Defendants' Response in Opposition to Motions for Summary Judgment	180-243
39	Notice of Filing of Attachments 1-12 to Response in Opposition to Motions for Summary Judgment	437-623
41	Plaintiffs' Reply to Response to Motions for Summary Judgment	626-663
45	Memorandum Opinion	678-767
53	Notice of Appeal	870-871
73	Plaintiffs' Supplemental Motion for Summary Judgment on Counts I-A and IV	1092-1111
80	Defendants' Response in Opposition to Supplemental Motion for Summary Judgment	1121-1164

80-1	Affidavit of Beth Henry-Robertson	1165-1169
81	Response to Plaintiffs' Statement of Undisputed Facts	1170-1174
82	Defendants' Motion for Summary Judgment	1175-1177
83	Defendants' Statement of Undisputed Facts	1178-1185
85	Plaintiffs' Reply to Response to Motion for Summary Judgment	1187-1202
86	Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment	1203-1204
88	Notice of Filing of Attachment to Supplemental Motion For Summary Judgment	1205-1206
88-1	Attachment	1207-1218
89-1	Attachment	1221-1230
89-2	Attachment	1231-1241
90-1	Attachment	1244-1253
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91-1	Attachment	1264-1274
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92-1	Attachment	1287-1296
92-2	Attachment	1297-1305
93-1	Attachment	1308-1317
93-2	Attachment	1318-1326

94-1	Attachment	1329-1339
94-2	Attachment	1340-1450
95-1	Attachment	1353-1362
95-2	Attachment	1363-1373
96-1	Attachment	1376-1382
97	Memorandum Opinion	1383-1449
103	Notice of Appeal	1552-1553