

No. M2022-00735-SC-RDM-CV

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

ROBERT STARBUCK NEWSOM, aka ROBBY STARBUCK

Plaintiff,

v.

**TENNESSEE REPUBLICAN PARTY and TENNESSEE
REPUBLICAN PARTY STATE EXECUTIVE COMMITTEE,**

Defendants.

**ROBBY STARBUCK'S RESPONSE IN OPPOSITION TO RULE 48
MOTION TO ASSUME JURISDICTION**

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INTRODUCTION

The Rule 48 motion to assume jurisdiction and render a final appellate decision by June 10, 2022, filed by the Tennessee Republican Party and the Tennessee Republican Party State Executive Committee (collectively, the “Party”), should be denied for the following reasons:

1. This case does not satisfy the requirements of Tenn. Code Ann. § 16-3-201(d), which gives this Court the authority to assume jurisdiction over undecided appeals in certain limited classes of cases. This case does not involve “[t]he right to *hold or retain* public office” or “issues of constitutional law,” the only potentially relevant classes of cases under § 16-3-201(d). *Id.* (emphasis added). As explained below, this case involves the right of a single candidate to *appear on a primary ballot* in a single race for a single congressional district, not the right of an individual to “hold or retain” any public office. As also explained below and in Mr. Starbuck’s response filed yesterday in the Court of Appeals (attached to this response as **Exhibit A**), this case involves a straightforward application of a Tennessee statute, the Tennessee Open Meetings Act (“TOMA”), which the Party *has not challenged* as unconstitutional.

2. The Party’s Rule 48 motion also does not comply with Rule 48 and Tenn. Code Ann. § 16-3-201(d). The motion does not appear to be accompanied by a bond for costs as required by Tennessee Supreme Court Rule 48(a)(3). Mr. Starbuck has not been served with a copy of any such bond as of this filing.

3. Even if Tenn. Code Ann. § 16-3-201(d) were satisfied, and even if the Party had complied with the terms of Rule 48, assuming jurisdiction would still be unwarranted. For the same reasons that an extraordinary appeal under Rule 10 and a stay pending appeal under Rule 7 are not warranted, immediate review by this Court is not warranted. The trial court has not “so far departed from the accepted and usual course of judicial proceedings as to require immediate review;” nor is immediate review “necessary for complete determination of the action on appeal as otherwise provided in these rules.” Tenn. R. App. P. 10(a). And the Court of Appeals is actively considering whether to grant the very relief requested by the Party from this Court. The Party filed its Rule 10 Application for Extraordinary Appeal and Rule 7 Stay Motion on Monday, June 6, and only hours later the Court of Appeals ordered Plaintiff Robby Starbuck to respond by 4:00 p.m. the next day, June 7. The parties’ filings are being actively considered by the Court of Appeals at this very moment, and there is no basis to upset the orderly resolution of that process.

4. The trial court did not enjoin non-parties, as the Party repeatedly and incorrectly asserts. The trial court granted the remedy expressly authorized by TOMA: it declared *the Party’s actions* removing Mr. Starbuck from the ballot to be “null and void” because they were taken in violation of TOMA. App. at 011; *see* Tenn. Code Ann. § 8-44-105 (“Any action taken at a meeting in violation of this part shall be void and *of no effect . . .*” (emphasis added)). The obvious consequence of that ruling is that, as the trial court stated, the relevant public officials, who are purely ministerial actors (see below) and have received notice of the court’s

order, are naturally “expected to immediately take steps *to treat the Defendants’ . . . decision as a nullity*,” which will mean restoring Mr. Starbuck to the ballot. App. at 011 (emphasis added). Because the Party’s actions were void and of no effect, it is as if they never happened, and there is no reason to doubt that the relevant State officials will act accordingly.

Mr. Starbuck *could not have joined the State officials as parties in this action* because, as explained in Mr. Starbuck’s previously filed response, only *the Party’s* state executive committee is subject to TOMA, and it was the Party’s state executive committee that violated TOMA, not the State officials. Exhibit A at 20-21, 24-29, 34-36. The relevant public officials that set the primary ballot are purely “ministerial officers performing ministerial acts,” and there is no reason to doubt that they will faithfully apply the trial court’s ruling and treat the Party’s prior actions directing Mr. Starbuck’s removal from the ballot as void and of no effect when discharging their purely ministerial duties. *City of Memphis v. Shelby Cnty. Election Comm’n*, 146 S.W.3d 531, 535 (Tenn. 2004) (holding that the Coordinator of Elections and the county election commissions are ministerial officers when setting ballots).

Moreover, like all injunctions, the trial court’s order is binding not only upon “the parties to the action,” but also upon “other persons in active concert or participation with them who receive actual notice of the . . . injunction by personal service or otherwise.” Tenn. R. Civ. P. 65.02(2). Thus, while public officials may not act in concert with the Party to knowingly violate the trial court’s order by refusing to treat *the Party’s*

actions removing Mr. Starbuck from the ballot as void and of no effect, that is true of *every* injunction a trial court enters under Rule 65. Both the parties to the action (who are enjoined) *and* those who would act in concert with them to undermine the court's ruling are bound by the injunction. *Id.*; see also *Metro. Gov't of Nashville v. Printer's Alley Theater, LLC*, 2008 WL 199849, at *7 (Tenn. Ct. App. Jan. 23, 2008) (“[A]n injunction binds not only the parties to an action, but also their servants or agents and those acting in collusion or combination with them.”).

5. The trial court's ruling does not implicate, let alone violate, the Party's First Amendment rights. The trial court merely voided a direction from the Party to the State that failed to comply with TOMA's procedural requirements. Under the trial court's ruling, the state executive committee must allow members of the public to attend certain meetings when it is acting as the state primary board and exercising the powers delegated to it by the State of Tennessee to regulate primary elections.

In these appellate proceedings, the Party belatedly asserts a First Amendment right to exclude members of the public from this limited set of meetings, but that is a novel and unprecedented proposed application of the First Amendment. None of the decisions the Party cites in its appellate filings give political parties the right to hold secret meetings when exercising state-delegated power to determine who appears on a primary ballot. See Exhibit A at 38-42. Under the trial court's ruling, the Party is free to speak and associate with whomever it pleases, and it has unfettered discretion to determine who is a bona fide member of the

Party. The one thing it cannot do under TOMA is exercise its power to exclude candidates from the state primary ballot outside of the public view. When it violates TOMA in that manner, its actions are void and of no effect.

FACTUAL AND PROCEDURAL BACKGROUND

The record in this case, including Mr. Starbuck’s verified complaint and its exhibits, App. at 012-181, contains many details about his commitment to Republican ideas and his life-long commitment to conservative causes, as well as details about the many procedural and other irregularities by the Party during the past year. But because the only issue the Party is seeking to appeal is whether the state executive committee’s secret meeting violated TOMA, the relevant facts can be succinctly stated.

I. Statutory Background

For most public offices, Tennessee law gives political parties wide discretion in choosing how to select their nominees. *See* Tenn. Code Ann. § 2-13-203(a)(1) (allowing for nomination of candidates for positions not listed in § 2-13-202 “by any method authorized under the rules of the party”). When political parties nominate candidates for these offices, they are permitted, but not required, to follow the statutory procedures governing “primary election[s] under [Title 2].” *Id.* The statutory primary election process is optional, and political parties may choose to forego that process in favor of nominating candidates “by any method authorized under the rules of the party.” *Id.*

But for a handful of particularly important offices—President of the United States, General Assembly, United States Senator, and United States House of Representatives—Tennessee law mandates that a primary election be conducted under Title 2 of the Tennessee Code, at which the voters of Tennessee are allowed to cast votes for their primary candidate of choice. *See* Tenn. Code Ann. § 2-13-202. This process is heavily regulated by statute. Candidates first qualify by filing nominating petitions. Tenn. Code Ann. § 2-5-101. The nominating petitions must follow a prescribed form and meet certain requirements. *Id.*; Tenn. Code Ann. § 2-5-102. And once a candidate files his or her nominating petition, that candidate is statutorily entitled to have his or her name on the ballot for the state-administered primary unless certain specifically enumerated events occur. *See* Tenn. Code Ann. § 2-5-204(a).

Tennessee law—in particular Title 2, the Elections Code—grants political parties an important but limited role to play in the primary election process. Title 2 creates state executive committees for the parties, “which shall be the state primary board for the party.” Tenn. Code Ann. § 2-13-102(a). Those executive committees, when exercising the powers granted by Title 2, function as primary boards. Tenn. Code Ann. § 2-13-102(b) (“The state primary board shall perform the duties and exercise the powers required by this title for its party.”). For example, the executive committees, acting as primary boards pursuant to § 2-13-102(b), are empowered to exclude a primary candidate’s name from the ballot if that candidate does not qualify as a bona fide member of the party under party rules. *See* Tenn. Code Ann. §§ 2-5-204(a), 2-13-104. When a political party’s executive committee acts as a primary

board in exercising its powers and performing its duties under Title 2, it is subject to the Tennessee Open Meetings Act (“TOMA”). *See* Tenn. Code Ann. § 2-13-108(a)(2) (“Meetings of each state primary board shall be open and subject to title 8, chapter 44.”); *see also* Tenn. Code Ann. § 8-44-101 *et seq.*

When it applies, TOMA forbids secret meetings and votes by covered bodies. Tenn. Code Ann. § 8-44-104. With one exception not relevant here, “[a]ny action taken at a meeting in violation of [TOMA] shall be void and of no effect.” Tenn. Code Ann. § 8-44-105. TOMA expressly confers jurisdiction on chancery courts “to issue injunctions, impose penalties, and otherwise enforce the purposes of this part upon application of any citizen of this state.” Tenn. Code Ann. § 8-44-106(a).

II. Mr. Starbuck Qualifies for and Is Placed on the Republican Primary Ballot.

Mr. Starbuck, the son of Cuban refugees, is a lifelong Republican who has devoted immense energy over the years to a myriad of conservative causes. App. at 17-20. On June 22, 2021, Mr. Starbuck announced his intention to run for Congress in Tennessee’s 5th Congressional District. App. at 20. Mr. Starbuck then gave up his career and spent the next year of his life running for Congress.

Knowing that he would need to show that he is a bona fide Republican, Mr. Starbuck submitted a letter to the Party on March 18, 2022, that contained five letters vouching for him, in accordance with the Party’s bylaws. App. at 23, 57-58, 84-110. On March 22, 2022, Mr. Starbuck filed his nominating petition with the requisite twenty-five

Republican signatures with the State Election Commission and a certified duplicate with the Coordinator of Elections. App. at 20. At that point, he was on the ballot to run in the Republican primary for the open seat in the 5th Congressional District. See Tenn. Code Ann. § 2-5-204 (“Each qualified candidate’s name *shall* be placed on the ballot as it appears on the candidate’s nominating petitions” unless certain specified events occur.”) (emphasis added).

III. The Party Removes Mr. Starbuck from the Ballot at a Secret Meeting and Communicates that Decision to the State.

Between March 22, 2022, and April 11, 2022, Mr. Starbuck provided additional vouching letters and information to the Party to establish that he is a bona fide Republican under the Party’s bylaws. App. at 23. Nevertheless, on April 11, 2022, a sub-set of the state executive committee held a non-public meeting and decided that Mr. Starbuck is not a bona fide Republican. App. at 3, 23-24, 154-55.

Mr. Starbuck was informed that he had seven days to provide more information, and he submitted additional vouching letters from qualified party officials. App. at 24. By April 19, he had submitted hundreds of letters vouching for him from Republicans around the state and the country. App. at 25.

Although this appeal centers on the illegal secrecy of the meetings, it is worth highlighting the nine qualified party leaders who ultimately submitted vouching letters on Mr. Starbuck’s behalf. The Party’s bylaws require only a *single* vouching letter from “an officer of the [Tennessee Republican Party] or a member of the [County Executive Committee]” of

the County and/or District where the candidate resides. App. at 57. As noted by the bold text below, the county chairs of the Republican party in four of the six counties that comprise the new 5th Congressional District vouched for Mr. Starbuck.

- Mr. Sean A. Raesemann, First Vice Chairman of the Williamson County Republican Party;
- Mr. Jim Garrett, ***Chairman of the Davidson County Republican Party;***
- Ms. Julie Quan, ***Chairwoman of the Marshall County Republican Party;***
- Ms. Wendi Strauch, Davidson County Executive Committee Communications Secretary;
- Ms. Shannon McGuffin, Davidson County Republican Party Treasurer;
- Mr. Cody Mitchell, ***Chairman of the Lewis County Republican Party;***
- Ms. Debbie Matthews, ***Chairwoman of the Maury County Republican Party;***
- Mr. Bart Smith, Second Vice Chairman of the Davidson County Republican Party; and
- Mr. Nathan Green, Chairman of the Nashville Young Republicans.

App. at 4-5.

Mr. Starbuck was told by Chairman Scott Golden of the Tennessee Republican Party that no candidate had ever received more vouching letters. App. at 26. The Party's secret vote to end Mr. Starbuck's

candidacy because he is allegedly not a Republican is impossible to understand, which is why Republicans across the country have expressed confusion and anger over the Party's actions.

Despite this record level of support, the state executive committee held another non-public meeting on April 19, 2022 and, exercising its power under Title 2, voted to remove Mr. Starbuck from the ballot. App. at 25-26.

Originally, the April 19, 2022 meeting was to be public. App. at 3. Then a few days before the meeting, Mr. Starbuck was told the meeting would not be public, but he could participate via Zoom. *Id.* Then, within 24 hours of the meeting, Mr. Starbuck was told his representatives could not participate. *Id.* And then finally, on the day of the meeting, the Party told Mr. Starbuck that he could not participate either. *Id.*

In the end, despite all of the support that he had, Mr. Starbuck was removed in a meeting in which there was no public notice of the meeting, no opportunity for the public to attend, and no opportunity for Mr. Starbuck to be present or observe the discussion of his candidacy, much less answer questions or provide information in response to the matters discussed. App. at 25-26. Furthermore, there is no evidence of an official record of the subcommittee's deliberations or an explanation of its reasoning. App. at 26. To this day, no one knows why a candidate with as much support as Mr. Starbuck was removed. App. at 228.

On April 21, 2022, Mr. Golden sent a letter to Mark Goins, the Tennessee Coordinator of Elections, instructing him to remove Mr. Starbuck and two other candidates from the ballot. App. at 30, 175-76.

IV. Mr. Starbuck Promptly Seeks Relief from the Party.

Evidence immediately emerged of suspicious activity at the secret state executive committee meeting. First, Party Chairman Scott Golden stated publicly that Mr. Starbuck was removed because he had not lived in Tennessee long enough, suggesting the Party had violated its own bylaws by failing to consider the vouching letters. App. at 26. Chairman Golden was then seconded by three state executive committee members who made similar statements suggesting they had misapplied the Party's own rules and ignored Mr. Starbuck's vouching letters. App. at 26-27, 29. Finally, an additional executive committee member contacted Mr. Starbuck directly and told him that she had changed her mind and voted to remove him after the executive committee members had been placed "under an oath of confidence not to disclose information about the meeting" and "blindsided by powers much greater than ours." App. at 228, 251-255. Based on the limited information that has been made publicly available, something very odd appears to have happened at the April 19, 2022 state executive committee meeting. But because it was secret, no one knows what happened.

Mr. Starbuck immediately took steps to reverse the Party's decision. On April 23, 2022—two days after Chairman Golden's letter directing Coordinator Goins to remove him from the ballot, App. at 175-76—Mr. Starbuck filed a formal appeal with the Party. App. at 32-33. The Party never took up that appeal.

Mr. Starbuck then prepared a federal lawsuit which he shared with the Party to try to reach a resolution. When that failed, he promptly filed suit.

V. Mr. Starbuck Promptly Seeks Relief in Federal Court.

Mr. Starbuck lodged an appeal with the Party on April 23, 2022. App. at 32-33. After waiting for a response that was due to him but never came, just nine days later, Mr. Starbuck filed suit in the United States District Court for the Middle District of Tennessee. *Newsom v. Golden*, No. 3:22-cv-00318, 2022 WL 1500860, at *2 (M.D. Tenn. May 12, 2022). The next day, he filed a motion for a preliminary injunction. *Id.*

When Mr. Starbuck filed his federal suit, he was operating under the impression that the ballots had to be finalized approximately 90 days before the August 4, 2022 election. Mr. Starbuck had both federal claims and state law claims, including the TOMA issue now on appeal. Mr. Starbuck filed in federal court because if he had filed in state court, the Party could have simply removed the case, 28 U.S.C. § 1441(a), and Mr. Starbuck believed that delay alone would make it too late to get the relief he needed.

On May 5, 2022, pursuant to an order by the federal judge, Coordinator of Elections Mark Goins and Secretary of State Tre Hargett filed a Notice of Election-Related Deadlines in the federal case and identified June 10, 2022 as the actual deadline for finalizing the ballots. App. at 258 (explaining that Mr. Starbuck’s name “can be added to the August 4, 2022, primary election ballot [as late as] June 10, 2022”). Until

May 5, Mr. Starbuck was not aware that he actually had until June 10 to obtain injunctive relief.

The federal court held a hearing on the motion for a preliminary injunction on May 10, 2022, and issued a decision denying the injunction on May 12. In its decision, the federal court found that Mr. Starbuck was not likely to succeed on his federal claims, but as to the state law claims the court noted that it had discretion whether to consider state law claims and stated that it would “not issue an injunction based on state law claims that it may not retain.” *Newsom*, 2022 WL 1500860 at *5.

VI. After the Federal Court Declines to Resolve His State Law Claims, Mr. Starbuck Promptly Seeks Relief in State Court.

Given that the federal court had denied the injunction but had decided not to rule on his state law claims, Mr. Starbuck evaluated his options and realized that his only recourse was to dismiss the federal action and refile in state court.

Mr. Starbuck voluntarily dismissed the federal action without prejudice on May 17, 2022. *See* Notice of Voluntary Dismissal, D.E. 41, *Newsom v. Golden* (M.D. Tenn. May 18, 2022). Just three days later, on May 20, 2022, Mr. Starbuck filed his verified complaint and motion for a temporary injunction in Davidson County Chancery Court. App. at 12. Mr. Starbuck’s TOMA, contract, and promissory estoppel claims that he filed in state court are the same state law claims he had filed in his federal lawsuit. Moreover, Mr. Starbuck is not seeking a state-wide change to election procedures. He simply seeks to enforce TOMA’s

requirement of transparency regarding the Party's action as to one race for one election impacting a small sub-set of counties in the State.

Mr. Starbuck filed his action in Chancery Court a full *three weeks* before the June 10, 2022 ballot deadline. In other words, having filed a federal action within nine days of his appeal of the Party's decision (an appeal the Party never responded to), and then having litigated a federal preliminary injunction proceeding in just over a week, and then having filed a state court action just three days after dismissing the federal case, Mr. Starbuck still filed this action *three full weeks* before the June 10 deadline. The fact that the Chancery Court addressed the entire motion and issued a thorough decision a full week before the ballot deadline shows that Mr. Starbuck's complaint was timely.

VII. The Trial Court Voids the Party's Decision to Remove Mr. Starbuck from the Ballot.

On June 2, 2022, just thirteen days after Mr. Starbuck filed his complaint, the trial court held a non-evidentiary hearing on the motion for a temporary injunction. App. at 2. The very next day, the trial court granted Mr. Starbuck's motion. App. at 1-11.

The trial court provided thorough findings of fact and conclusions of law in support of its decision, as required by Tenn. R. Civ. P. 65.04(6). In its decision, the trial court made findings of fact that Mr. Starbuck had been removed from the ballot based on decisions made in non-public meetings. App. at 3-5. The trial court then considered and disposed of the Party's jurisdictional and laches arguments. App. at 6-8.

As to jurisdiction, the trial court noted that “[b]y its terms, TOMA confers jurisdiction on this Court” and that the matter is justiciable because “[i]f Defendants violated TOMA, then Defendants’ challenged decision is void; that is, it is treated, as a matter of law, as if it were never made.” App. at 6. The court also disposed of the Party’s mootness argument by noting that the argument “makes no sense and would operate to improperly close the courts to Mr. Starbuck,” especially in light of the June 10 deadline to finalize the ballots communicated by State officials. App. at 6-7.

As to laches, the trial court found that “Mr. Starbuck brought his federal lawsuit with reasonable dispatch and then refiled his state claims fairly quickly in this Court after the federal court indicated that it was not going to entertain the state law claims.” App. at 7-8.

Finally, the trial court addressed the TOMA claim at issue in this appeal. After noting that TOMA is “subject to liberal construction to promote openness and accountability in government,” App. at 8 (citing *Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 434 (Tenn. Ct. App. 1990)), the court considered the Party’s proposed distinction between the state executive committee and the primary board but found that Defendants “were admittedly acting under powers granted to them under Title 2 of the Tennessee Code.” App. at 8. Given that admission, the trial court went on to apply the plain language of Title 2 and TOMA to find that, when exercising its Title 2 powers to regulate state-run elections, the state executive committee is subject to TOMA. App. at 9. The trial court thus concluded that the decision to have a candidate removed from the ballot for U.S. House of Representatives on the ground that he is not

a bona fide Republican “is, accordingly, public business within the meaning of TOMA.” App. at 10.

The trial court then made conclusions of law, including that Mr. Starbuck will suffer irreparable harm if he is “excluded from the ballot via a procedure that violates the law,” and that the Party is not harmed because enforcing TOMA “does not disturb Defendants’ prerogative and autonomy to decide who is, or who is not, a bona fide Republican.” App. at 10. Because the ballot deadline is June 10, the trial court further found that the decision does not cause undue harm to Defendants or the public officials preparing the ballots, such that the balancing of harms weighs in favor of the injunction. App. at 10-11.

The trial court concluded that because the Party’s actions purporting to remove Mr. Starbuck from the ballot were void and of no effect under TOMA—and thus Mr. Starbuck was never validly removed from the ballot—public officials would be “expected to immediately take steps to treat [the decision] as a nullity and restore” Mr. Starbuck to the ballot. App. at 11.

On the same night that the trial court issued its ruling (Friday, June 3), Mr. Starbuck sent notice of the ruling and a copy of the order to Secretary of State Tre Hargett and Coordinator of Elections Mark Goins through their counsel. Two days later, Mr. Starbuck followed up with their counsel with a formal letter and additional copy of the order to apprise the State officials of their obligations under Tenn. R. Civ. P. 65.02. Those communications were made part of the trial court record through a Notice of Filing filed on June 7, 2022 and served on counsel for the Party and counsel for Secretary Hargett and Coordinator Goins. The

Notice of Filing and accompanying communications are contained in Mr. Starbuck's appendix filed in the Court of Appeals, which is also being filed with this Court. Plaintiff's App. at 1-30.

ARGUMENT

I. The Party's Rule 48 Motion Should Be Denied.

The requirements of Tenn. Code Ann. § 16-3-201(d) and Rule 48 for assuming jurisdiction over an undecided case in the Court of Appeals are not satisfied. This case does not involve “[t]he right to hold or retain public office” or “[i]ssues of constitutional law.” Tenn. Code Ann. § 16-3-201(d)(2). And for the same reasons that an extraordinary appeal under Rule 10 is not warranted (and others), assuming jurisdiction and rendering a final appellate decision by June 10 under Tennessee Supreme Court Rule 48 is likewise unwarranted.

A. Section 16-3-201(d) is not satisfied.

This case does not satisfy the requirements of Tenn. Code Ann. § 16-3-201(d), which gives this Court the authority to assume jurisdiction over undecided appeals in certain limited classes of cases. This case does not involve “[t]he right to *hold or retain* public office” or “issues of constitutional law,” the only potentially relevant classes of cases under § 16-3-201(d). *Id.* (emphasis added). Instead, this case involves the public's right to transparency which impacts the ability of a single candidate to *appear on a primary ballot* in a single race for a single congressional district, not the right of an individual to “hold or retain” any public office. And this case involves a straightforward application of

a Tennessee statute, the Tennessee Open Meetings Act (“TOMA”), which the Party *has not challenged* as unconstitutional.

1. This case does not involve “the right to hold or retain public office.”

Tenn. Code Ann. § 16-3-201(d) allows this Court to assume jurisdiction over undecided appeals that involve “[t]he right to *hold or retain* public office.” (emphasis added). This is not such an appeal. Mr. Starbuck does not currently hold any public office and thus is not seeking to “retain” public office. And Mr. Starbuck is not seeking “the right to hold” public office in this case. He is seeking to have the decision removing him from the primary ballot voided because the decision was held in secret, in violation of the plain and unambiguous meaning of Tennessee statutory law. Applying TOMA will impact Mr. Starbuck’s ability to appear *on a primary ballot*, which will give him the ability to allow the Republican voters of Tennessee to decide whether he should represent them in the General Election for the 5th Congressional District. In the context of holding public office, the term “hold” means “to have as a privilege or position of responsibility,” as in to “hold a professorship.” *Hold*, Merriam-Webster.com Dictionary.¹ If Mr. Starbuck wins the Republican primary, and then wins the General Election, he could then seek the right to hold the public office of United States Representative, as he would be legally entitled to hold that office. But he is not legally entitled to hold that public office at this time, and he is not seeking the right to hold that office in this case.

¹ <https://www.merriam-webster.com/dictionary/hold> (accessed June 8, 2022).

2. This case does not involve “issues of constitutional law.”

There is no constitutional claim or defense at issue in this appeal. Mr. Starbuck asserted claims for violations of TOMA, breach of contract, and promissory estoppel in the trial court. The trial court granted a temporary injunction only on Mr. Starbuck’s TOMA claim, and only that claim is the subject of the Party’s request for extraordinary appellate relief. The Party never argued in the trial court that TOMA is unconstitutional on its face or as applied, and its First Amendment argument on appeal is directed at a supposed order the trial court never issued.

The Party’s attempt to insert a First Amendment argument into these appellate proceedings depends on repeatedly mischaracterizing the trial court’s ruling as a determination that Mr. Starbuck is a bona fide Republican, or an order for the Party to declare that Mr. Starbuck is a bona fide Republican. The trial court did no such thing. To the contrary, it conscientiously avoided any such determination. The trial court applied TOMA—it did not “substitute[] [its] judgment for the judgment of the [Party] about who should be the party’s standard-bearer,” as the Party claims. Application at 12. Indeed, the lower court was careful to limit its ruling to ensure that it was not “determin[ing] who is, and who is not, a bona fide member of that party.” App. at 002.

Instead, the trial court merely voided a direction from the Party to the State that failed to comply with TOMA’s procedural requirements, as required by TOMA itself. Tenn. Code Ann. § 8-44-105 (“Any action taken at a meeting in violation of this part shall be void and of no effect . . .”).

The Party argued below that ordering the Party to “*declare that Starbuck is a bona fide Republican . . . when it believes that he is not would directly violate the [Party’s] Freedom of Association rights.*” App. at 222. The trial court did no such thing, and the Party never argued that TOMA *itself* is unconstitutional under the First Amendment on its face or as applied here. The Party’s failure to mount a constitutional challenge to TOMA in the trial court also means that the Attorney General was never given notice of any constitutional challenge to state law as required by Tenn. R. Civ. P. 24.04. Accordingly, the Party should not be permitted to insert a constitutional challenge to TOMA in these appellate proceedings, and particularly not in an effort to find a hook for this Court to assume jurisdiction over an appeal that the Court of Appeals is already expeditiously considering.

B. Rule 48 is not satisfied.

Tennessee Supreme Court Rule 48(a)(3) provides that, “[u]nless the moving party has already filed a bond for costs or is otherwise exempt by statute or rule from the obligation to file a bond in accordance with Tenn. R. App. P. 6, the motion shall be accompanied by a bond for costs with sufficient surety in the amount of \$1,000.” The Party’s Rule 48 motion does not appear to be accompanied by a bond for costs; the Party has not served Mr. Starbuck with any such bond. The Party’s failure to comply with Rule 48 is an additional reason to deny its motion.

Even if the Party had complied with Rule 48, assuming jurisdiction under Rule 48 is unwarranted for the same reasons that an extraordinary appeal under Appellate Rule 10 is unwarranted.

“An extraordinary appeal pursuant to Rule 10 is, as its name suggests, extraordinary.” *Alexandria-Williams v. Goins*, 2018 WL 3198799, at *2 (Tenn. Ct. App. June 26, 2018). Assuming jurisdiction under Rule 48 is even more extraordinary, particularly where the Court of Appeals required Mr. Starbuck to respond to the Party’s Rule 10 Application and Rule 7 Stay Motion in just over 24 hours and is actively and expeditiously considering those requests right now.

Mere disagreement with a trial court’s ruling is never enough to grant an extraordinary appeal: “An appellate court should grant a Rule 10 extraordinary appeal *only* when the challenged ruling represents a fundamental illegality, fails to proceed according to the essential requirements of the law, is tantamount to the denial of a party’s day in court, is without legal authority, is a plain and palpable abuse of discretion, or results in either party losing a right or interest that may never be recaptured.” *Id.* (emphasis added).

This extraordinary remedy is reserved for the rarest circumstances. In *Alexandria-Williams*, the Court of Appeals granted an extraordinary appeal in a ballot-access case because “the order entered by the trial court contain[ed] no findings of fact or conclusions of law whatsoever regarding the foundation for the issuance of the injunction.” 2018 WL 3198799, at *2 (“By granting the injunction without setting forth findings of fact and conclusions of law regarding the grounds of its action, . . . the trial court did not proceed according to the essential requirements of law.”). Nothing of the sort occurred here. Mere disagreement with the trial court’s ruling is not grounds for an extraordinary appeal.

As explained in detail in Mr. Starbuck’s response to the application for extraordinary appeal and stay motion filed in the Court of Appeals, the trial court’s decision is careful, well-reasoned, and supported by the facts and the law. The trial court and the parties acted expeditiously to resolve this dispute in advance of the June 10 deadline to finalize the ballots communicated by the State officials in the federal case. Mr. Starbuck filed his verified complaint and motion for a temporary injunction on May 20, 2022, a full three weeks before the deadline to finalize the ballots. App. at 012. Just over *one hour* later, the trial court immediately set a hearing for June 2 and ordered response and reply briefs to be filed in advance of the hearing. App. at 185. The parties filed their briefs and presented argument on June 2. And the trial court issued a careful, well-reasoned decision *the next day*, June 3. As explained in the Mr. Starbuck’s response brief in the Court of Appeals, the trial court’s decision is correct on all fronts. But at a minimum, the trial court has not “so far departed from the accepted and usual course of judicial proceedings as to require immediate review.” Tenn. R. App. P. 10(a).

The obvious consequence of that ruling is that, as the trial court stated, the relevant public officials, who have received notice of the court’s order, will be “expected to immediately take steps *to treat the Defendants’ . . . decision as a nullity*,” which will mean restoring Mr. Starbuck to the ballot. App. at 011 (emphasis added). Because the Party’s actions were void and of no effect, it is as if they never happened.

Mr. Starbuck *could not have joined the State officials as parties in this action* because, as explained below, only *the Party’s* state executive committee is subject to TOMA, and it was the Party’s state executive

committee that violated TOMA, not the State officials. The relevant public officials that set the primary ballot are merely “ministerial officers performing ministerial acts,” and there is no reason to doubt that they will faithfully apply the trial court’s ruling and treat the Party’s prior actions directing Mr. Starbuck’s removal from the ballot as void and of no effect when discharging their duties. *City of Memphis v. Shelby Cnty. Election Comm’n*, 146 S.W.3d 531, 535 (Tenn. 2004) (holding that the Coordinator of Elections and the county election commissions are ministerial officers when setting ballots).

Moreover, like all injunctions, the trial court’s order is binding not only upon “the parties to the action,” but also upon “other persons in active concert or participation with them who receive actual notice of the . . . injunction by personal service or otherwise.” Tenn. R. Civ. P. 65.02(2). Thus, while public officials may not act in concert with the Party to knowingly violate the trial court’s order by refusing to treat *the Party’s actions* removing Mr. Starbuck from the ballot as void and of no effect, that is true of *every* injunction a trial court enters under Rule 65. Both the parties to the action (who are enjoined) *and* those who would act in concert with them to undermine the court’s ruling are bound by the injunction. *Id.*; *see also Metro. Gov’t of Nashville v. Printer’s Alley Theater, LLC*, 2008 WL 199849, at *7 (Tenn. Ct. App. Jan. 23, 2008) (“[A]n injunction binds not only the parties to an action, but also their servants or agents and those acting in collusion or combination with them.”).

Unlike in *Moore v. Lee*, the trial court’s temporary injunction impacts a single candidate appearing on the primary ballot for a single congressional district, not a statewide redistricting plan. 2022 WL 1101833, at *1 (Tenn. Apr. 13, 2022). This limited decision affecting a single candidate in a single race does not merit the extraordinary appellate review that is ordinarily reserved for election disputes with state-wide impact. *See id.*

Nor is this a case where the trial court has enjoined the enforcement of a state law passed by the General Assembly, which is an extraordinary exercise of judicial power and often warrants expedited appellate review. *See id.* This is fundamentally a dispute between Mr. Starbuck and the Tennessee Republican Party. The relevant public officials that set the primary ballot are merely “ministerial officers performing ministerial acts.” *City of Memphis v. Shelby Cnty. Election Comm’n*, 146 S.W.3d 531, 535 (Tenn. 2004) (holding that the Coordinator of Elections and the county election commissions are ministerial officers when setting ballots). For all these reasons, there is no sound reason for this Court to depart from the ordinary process for appellate review in this case.

Immediate review is also not “necessary for complete determination of the action on appeal.” Tenn. R. App. P. 10(a). This action will not become moot once the June 10 deadline to finalize the ballot passes. Mr. Starbuck has sought a declaratory judgment that the Party’s actions removing him from the ballot are null and void, App. at 040, and obtaining a final declaratory judgment to that effect would provide enduring value to Mr. Starbuck for *future elections* by preventing the Party from kicking him off the primary ballot in a secret meeting in

future elections. *City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013) (explaining that a case becomes moot only if a later event “prevents the prevailing party from receiving *meaningful relief* in the event of a favorable judgment” (emphasis added)); *see also Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (a case is moot “only if it is impossible for a court to grant any effectual relief whatever” to the prevailing party (quotation marks omitted)). If an extraordinary appeal is denied, this case can continue in the trial court to final judgment on Mr. Starbuck’s claim for declaratory relief (and his other claims and requested relief, including monetary relief). Following the entry of final judgment, the Party can appeal the TOMA issue and any other issues through the ordinary appellate process and obtain a final appellate ruling on those issues.

II. The Party Is Highly Unlikely to Succeed on Appeal.

As explained in Mr. Starbuck’s response filed in the Court of Appeals, the Party is highly unlikely to succeed on appeal and therefore is not entitled to the extraordinary relief a stay pending appeal. Exhibit A at 24-42. That is further reason for the Court not to assume jurisdiction over this case, and Mr. Starbuck refers the Court to that briefing.

As explained in that briefing, the trial court correctly applied the clear text of Title 2 and TOMA to conclude that the Party’s state executive committee is subject to TOMA in certain limited circumstances when it exercises acts as the Party’s primary board by exercising its state-delegated power to exclude a candidate from a state-run election. There are *many* things a state executive committee does that are not

subject to TOMA, including most of its day-to-day operations in supporting the Party. Exhibit A at 27-29. The state executive committee is not acting as the primary board and is not subject to TOMA when it engages in those actions. But when it acts as a primary board by exercising its authority under Title 2 to direct State officials to remove a candidate from the ballot in a state-run primary election that is governed by Title 2, it must comply with TOMA as mandated by the General Assembly. Exhibit A at 24-29.

The trial court also correctly determined that it had subject-matter jurisdiction over the TOMA claim. “Statutes or constitutional provisions confer and define a court’s subject matter jurisdiction” *New v. Dumitrache*, 604 S.W.3d 1, 14–15 (Tenn. 2020). By statute, “[t]he circuit courts, chancery courts, and other courts which have equity jurisdiction, have jurisdiction to issue injunctions, impose penalties, and otherwise enforce the purposes of this part [TOMA] upon application of any citizen of this state.” Tenn. Code Ann. § 8-44-106(a). The Party has not argued that this statute giving the chancery court jurisdiction over Mr. Starbuck’s TOMA claim is unconstitutional. Accordingly, the trial court had no authority *not* to hear Mr. Starbuck’s TOMA claim. It was statutorily obligated to do so. *See* App. at 006 (“By its terms, TOMA confers jurisdiction on this Court.”). The cases the Party cites in its appellate filings do not hold otherwise. Exhibit A at 30-34. And this case satisfies all relevant justiciability doctrines. Exhibit A at 34-36.

Finally, the other stay and injunction factors counsel against extraordinary appellate intervention by this Court. If the trial court’s decision is stayed or vacated, it will irreparably harm the public and Mr.

Starbuck, and forever taint the election for the open seat for the 5th Congressional District by depriving the voters of a choice for Congress in a state-administered primary election based on unknown actions taken during a secret meeting that violated state law. For all the reasons explained in Mr. Starbuck's response in the Court of Appeals, this Court must not allow that to happen. Exhibit A at 43-46.

CONCLUSION

The Court should deny the Rule 48 motion to assume jurisdiction and render a final appellate decision before June 10, 2022

DATED: June 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

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