IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ROQUE "ROCKY" DE LA FUENTE, Plaintiff, v. DEMOCRATIC PARTY OF TENNESSEE, and TRE HARGETT, SECRETARY OF STATE OF TENNESSEE, Defendants.	)	Case No. 3:16-cv-00189

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SECRETARY OF STATE HARGETT'S MOTION TO DISMISS

Comes the Defendant, Tre Hargett, Secretary of State for the State of Tennessee, and hereby submits memorandum of law in support of his motion to dismiss Plaintiff's amended complaint (D.E. 14) in its entirety and with prejudice for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

INTRODUCTION AND BACKGROUND

This is an action challenging the constitutionality of Tennessee's statute governing the access of potential candidates to the Tennessee Presidential Preference Primary ballot. Plaintiff, a resident of San Diego, California, is candidate for the Democratic Party's nomination for President. As such, Plaintiff sought to appear on the Democratic Party's ballot in the Tennessee Presidential Preference Primary.

Tennessee's election laws currently provide two methods for obtaining access to a political party's primary ballot. Tenn. Code Ann. § 2-5-205 provides as follows:

> (a) The names of candidates for president of the United States shall be printed on the ballot for the presidential preference primary only if they are:
>
> (1) The names of persons whom the secretary of state, in the secretary of state's sole discretion, has determined are generally advocated or recognized as candidates *in national news media through the United States*. The secretary of state shall submit the names to the state election commission no later than the first Tuesday in December of the year before the year in which the election will be held. . . .
>
> (2) The names of persons for whom nominating petitions, signed by at least two thousand five hundred (2,500) registered voters of the party whose nomination is sought and by the candidate, are filed not later than twelve o'clock (12:00) noon, prevailing time, on the first Tuesday in December of the year before the year in which the election will be held. The nominating petitions shall be filed with the state election commission and certified duplicates with the coordinator of elections and with the chair of the candidate's party's state executive committee. No candidate may enter the presidential primary of more than one (1) statewide political party.
>
> ***
>
> (b) The secretary of state shall certify to the county election commissions on the third Thursday in December the names which this section requires to be on the ballot for each political party. (emphasis).

Plaintiff chose not to obtain primary ballot access through the second method, *i.e.*, obtaining the requisite 2,500 signatures of registered voters. Instead, on November 23, 2015, Plaintiff sent a letter to Secretary Hargett requesting that he be placed on the primary ballot for the Democratic Party. In support of his request, Plaintiff attached a list of news media reports, which he asserted reflected his recognition as a nationally recognized candidate for the office of President. The list of news media reports included a number of news media reports from San

Diego, California and a few other cities in California, one report from Miami, Florida, and a few reports from online news services such as PR Newswire and Yahoo Noticias. The remaining reports were from news media in foreign countries, such as Mexico, Uruguay, Panama and Honduras. *See* Exhibit A to Complaint (DE 1-1 Page ID# 10-24).

Secretary Hargett subsequently determined that Plaintiff had not meet either of the methods for obtaining access to the Democratic Party primary ballot set forth in Tenn. Code Ann. § 2-5-205(a). Accordingly, when Secretary Hargett issued a memorandum on December 17, 2015 to the county election commissions certifying the names of candidates to appear on the ballot in the Republican and Democratic Presidential Preference Primary, he did not include Plaintiff's name as a candidate to appear on the Democratic Party's primary ballot.

On February 5, 2016, Plaintiff filed this lawsuit challenging the constitutionality of Tenn. Code Ann. § 2-5-205 arguing that the statute is unconstitutionally vague. Plaintiff further argues that Secretary Hargett's refusal to place his name on the Democratic Party's primary ballot resulted in de facto discrimination against him based on national origin (Plaintiff alleges that he is Hispanic), as well as against all voters in Tennessee who wish to vote for a Hispanic candidate. Plaintiff seeks an injunction requiring Secretary Hargett to include his name on the March 1, 2016 Presidential Preference Primary Ballot for the Democratic Party. Secretary Hargett was served with the complaint on February 19, 2016. While the complaint requests injunctive relief, no separate motion for injunctive relief has been filed.

Pursuant to Tenn. Code Ann. § 2-6-503(a)[1], absentee ballots for the Tennessee Presidential Preference Primary were mailed to military and overseas voters on January 15, 2016. In-person

[1] This statute requires that absentee ballots be mailed out to military and overseas voters not later than forty-five days before a federal election.

early voting for the Presidential Preference Primary began on February 10, 2016 and continued through February 24, 2016, pursuant to Tenn. Code Ann. § 2-6-102(a).[2] The Tennessee Presidential Preference Primary election for the Republican and Democratic parties was subsequently held on March 1, 2016, pursuant to Tenn. Code Ann. § 2-13-205.

On April 1, 2016, Plaintiff filed an amended complaint in which he asserted a claim for nominal and compensatory damages against the Defendants "in an amount reasonable and commensurate with the losses imposed upon him by Defendants' unlawful acts." (D.E. 14 PageID# 81).

ARGUMENT

I. Plaintiffs' Cause of Action is Moot and Should Be Dismissed

Under Article III of the Constitution, federal courts may only adjudicate live controversies. *Honig v. Doe*, 484 U.S. 305, 317 (1988). Thus, the issue of mootness is a threshold jurisdictional issue, *WJW-TV, Inc. v. City of Cleveland*, 878 F.2d 906, 909 (6th Cir. 1989), which cannot be waived or conceded by the actions or omissions of the parties. *See Speer v. City of Oregon*, 847 F.2d 310, 311 (6th Cir. 1988) ("We must first consider the threshold question of mootness in addressing this appeal, since it appears that no actual controversy still exists between the parties."); *Rettig v. Kent City School Dist.*, 788 F.2d 328, 330 (6th Cir. 1986). The doctrine of mootness has two aspects: (1) the issues presented are no longer "live" or (2) the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (citation omitted); *see also Tigrett v. Cooper*, 595 Fed. Appx. 554, 557 (6th Cir. 2014) (quoting *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006)).

[2] This statute authorizes in-person early voting not more than twenty days nor less than five days before the day of the election.

> [T]he second aspect of mootness, that is, the parties' interest in the litigation . . . has [been] referred to . . . as the "personal stake" requirement. . . . *E.g., Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755, 96 S.Ct. 1251, 1259, 47 L.Ed.2d 444 (1976); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).
>
> The personal-stake requirement relates to the first purpose of the case-or-controversy doctrine--limiting judicial power to disputes capable of judicial resolution. . . .
>
> The "personal-stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator had defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973).

Brock v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, 889 F.2d 685, 693 (6th Cir. 1989) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396-97 (1980)).

Thus to satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1972); *see also WJW-TV, Inc.*, 878 F.2d at 910 ("To satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, and not simply on the date the action is initiated."). If events occur during the pendency of a litigation which render the court unable to grant the requested relief," the case becomes moot and thus falls outside the federal court's jurisdiction. *Demis v. Sniezek*, 558 F.3d 508, 512 (6th Cir. 2009).

Plaintiff initiated this action on February 5, 2016, seeking a declaratory judgment as to the constitutionality of Tenn. Code Ann. § 2-5-205, and an injunction requiring Secretary Hargett to place his name on the ballot of the Democratic Party for the Tennessee Presidential Preference Primary election. At that time, absentee ballots for the election had already been printed and sent

to military and overseas voters.[3] Only five days after Plaintiff initiated this action, in-person early voting began to occur across the state. And, finally, the Tennessee Presidential Preference Primary election occurred on March 1, 2016, less than thirty days after Plaintiffs filed his complaint (and less than two weeks after Secretary Hargett was served with the complaint).

Thus, given that for all intents and purposes, voting had already begun in the Tennessee Presidential Preference Primary election when Plaintiff filed his complaint, it is questionable whether an actual controversy existed between the parties. However, with the election now having occurred, clearly no controversy exists between the parties and Plaintiff no longer has a legally cognizable interest in this case, i.e., no personal stake. The Sixth Circuit has stated that "[t]he test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (*en banc*) (internal quotations and citations omitted). In this case, neither the declaratory nor the injunctive relief sought by the Plaintiff in his Complaint will have any impact on his legal interests. In other words, neither a declaration that the Tenn. Code Ann. § 2-5-205 is unconstitutional or an injunction requiring Secretary Hargett to place Plaintiff's name on the ballot of the Democratic Party's Presidential Preference Primary will change the fact that that election has already occurred.

Moreover, this case does not fit within the exception to the mootness doctrine, *i.e.*, where the defendant's conduct is "capable of reptition, yet evading review." *Corrigan v. City of Newaygo*, 55 F.3d 1211, 1213 (6th Cir. 1995). This exception is quite narrow and available only in "exceptional cases." *See Tigrett v. Cooper*, 595 Fed. Appx. at 557; *Thomas Sysco Food Services v. Martin*, 983 F.2d 60, 62 (6th Cir. 1993). The Supreme Court has held that this exception is

[3] Additionally, many regular absentee ballots had been mailed out by that date in accordance with the provisions of Tenn. Code Ann. § 2-6-202.

limited to the situation where two elements are combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. *Murphy v. Hunt*, 455 U.S. at 482 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Both of these conditions must be met if a case is to be saved from mootness. In addition, a "mere physical or theoretical possibility" is insufficient to satisfy this test. Rather, the Supreme Court has said that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. *Id*. *See also Sandison v. Michigan High School Athletic Association, Inc.*, 64 F.3d 1026, 1029-30 (6th Cir. 1995). Furthermore, it is the burden of the Plaintiff to establish that the issue is "capable of repetition yet evading review." "Capable of repetition" is not a synonym for "mere speculation;" it is a substantive term on which the Plaintiff must provide a reasonable quantity of proof. *New Jersey Turnpike Authority v. Jersey Central Power and Light*, 772 F.2d 25, 33 (3rd Cir. 1985).

Admittedly, in cases involving disputes over election laws, courts have invariably found that the first prong of the exception is met. "Legal disputes involving election laws almost always take more time to resolve than the election cycle permits." *Libertarian Party of Ohio*, 462 F.3d at 584. Here, the election was actually ongoing when the lawsuit was filed and election day itself occurred less than one month after filing. However, the second prong is not met as the record is completely devoid of any proof that there is a reasonable expectation that Plaintiff will be subjected to this same action again, *i.e*., Plaintiff will seek to be a candidate for the Democratic Party's nomination for President of the United States. Clearly, the possibility that Plaintiff will decide to be such a candidate in four years—despite the fact the complaint is devoid of any such allegations—along with the possibility that Plaintiff will again choose not to seek access to the

ballot through the petitioning method, and the possibility the Secretary of State will determine that Plaintiff is not "generally advocated or recognized as candidates in national news media through the United States" does not constitute the "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party" required by the Supreme Court in order to avoid mootness. *See Murphy v. Hunt*, 455 U.S. at 482; *see also Tigrett v. Cooper*, 595 Fed. Appx. at 558; *LaRouche v. Crowell*, 709 S.W.2d 585, 588 (Tenn. 1985).

Given that there is no relief that this Court can grant that will make a difference to the Plaintiff's' legal interests, Secretary Hargett submits that Plaintiff's amended complaint for declaratory and injunctive relief has been rendered moot as a result of the March 1, 2016 Presidential Preference Primary Election in Tennessee. Thus, any declaration by this Court as to the constitutionality of Tenn. Code Ann. § 2-5-205 would be nothing more than an advisory opinion. Accordingly, Plaintiff's amended complaint should be dismissed in its entirety and with prejudice for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

II. Plaintiff's Amended Complaint Fails to State a Claim That Tenn. Code Ann. § 2-5-205 is Unconstitutionally Vague and Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6).

Even if this Court determines that Plaintiff's cause of action has not been mooted as a result of the Tennessee Presidential Preference Primary held on March 1, 2016, Plaintiff's amended complaint still fails to state a claim upon which relief can be granted. Plaintiff asserts that Tenn. Code Ann. § 2-5-205 is unconstitutionally vague. A statute will be struck down as facially vague only if the plaintiff has "demonstrate[d] that the law is impermissibly vague in all its applications." *Vill of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). The purpose of this doctrine is to ensure that both those who enforce a statute and those who must comply with it "know what its prohibited"; it is not "to convert into a constitutional dilemma the practical

difficulties" of crafting a law that is "general enough to take into account a variety of human conduct" yet specific enough "to provide fair warning." *Green Party of Tenn., et al. v. Hargett, et al.*, 700 F.3d 816, 825 (6th Cir. 2012) (internal citations omitted).

A number of statutes and requirements similar to Tenn. Code Ann. § 2-5-205 have been found to be "capable of narrow and reasonable applications" and, therefore, valid and reasonable restrictions on ballot access. For example, in *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980), the plaintiff, a candidate for the Democratic presidential nomination, challenged a similar provision in the Michigan election code on the grounds that it was unconstitutionally vague. That statute provided as follows:

> (1) By 4:00 p.m. of the first Friday in March in each presidential election year, the secretary of state shall issue a list of the individuals generally advocated by the national news media to be potential presidential candidates for each party's nomination by the political parties for which a presidential primary election will be held pursuant to section 613.

Id. at 810. In finding that the statute was constitutional, the Sixth Circuit first noted that "[w]hen the constitutionality of a statute is challenged, it is the court's obligation in determining validity not to destroy, but to construe it, if possible, consistently with the will of the legislature, so as to comport with constitutional limitations." *Id*. at 812 (citing *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 571 (1973)). The Sixth Circuit ultimately concluded that the statute, when considered as a whole, can be reasonably applied, particularly as the statute does not take away a right or burden any candidate but confers a benefit. *Id*.

Similarly, in *Belluso v. Poythress*, 485 F.Supp. 904, 907 (N.D. Ga. 1980), the court upheld a statute that required candidates to be "generally advocated or recognized in news media through the United States" as facially reasonable, and in *LaRouche v. Sheehan*, 591 F.Supp. 917, 918 (D. Md. 1984), the court upheld a statute granting sole discretion to Secretary of State to place

candidates whose "candidacy is generally advocated or recognized in the news media through the United States or in Maryland" on the ballot. *See also LaRouche v. Kezer*, 990 F.2d 36, 41 n.1 (2d Cir. 1993) (upholding "media recognition" statute as having some rational relationship to the seriousness of particular candidates). More recently, in *De La Fuente v. South Carolina Democratic Party*, CA No. 3:16-cv-00322-CMC, 2016 WL 741317, at *6 (D. S.C. Feb. 25, 2016), the court upheld a requirement of the South Carolina Democratic Party's rules that candidates be "generally acknowledged or recognized in news media through the United States as viable candidates for that office". In doing so, the court found a news media recognition standard provides a sufficiently clear standard that is not arbitrary, but instead serves to assist in evaluating a candidate's seriousness in running for election. The court further found that the standard is capable of narrow and reasonable application. *Id*.

In light of this pertinent case law, and in particular, the Sixth Circuit's decision in *Kay v. Austin*, the "national media recognition" provision in Tenn. Code Ann. § 2-5-205 provides a sufficiently clear standard that is capable of narrow and reasonable application and that provides a "permissible means of gauging the subjective desire of a candidate." *De La Fuente*, 2016 WL 741317, at *6 (quoting *LaRouche*, 591 F.Supp. at 928). Accordingly, Plaintiff's claim that Tenn. Code Ann. § 2-5-205 is unconstitutionally vague fails and such claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

III. Plaintiff's Amended Complaint Fails to State A Claim For De Facto Discrimination under the Civil Rights Act of 1964 and Should Be Dismissed Pursuant To Fed. R. Civ. P. 12(b)(6).

Plaintiff's complaint also alleges that Secretary Hargett's decision not to certify Plaintiff for inclusion on the Democratic Party's ballot in Tennessee's Presidential Preference Primary was due to racial discrimination against voters in Tennessee who wish to vote for a Hispanic candidate.

(D.E. 14 PageID # 80 ¶¶ 26-27). When considering a Rule 12(b)(6) motion, a Court must treat all of the well-pleaded allegations of the complaint as true and construe all of the allegations in the light most favorable to the nonmoving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Saylor v. Parker Seal Co*., 975 F.2d 252, 254 (6th Cir. 1992). However, legal conclusions or unwarranted factual inferences need not be accepted as true. *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Furthermore, in order to state a claim upon which relief can be granted, a complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005); *Wittstock v. Mark A Van Sile, Inc*., 330 F.3d 889, 902 (6th Cir. 2003).

The United States Supreme Court has recently addressed the appropriate standard that should be applied in considering a motion to dismiss for failure to state a claim, stating in part:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of the cause of action, supported by mere conclusory statements, do not suffice. . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals, observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "show[n]" – "that the pleader is entitled to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-679 (2009) (citations omitted). Thus, while the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League*

of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-95 (2007)).

Plaintiff's complaint fails to meet this standard. The only allegation in the complaint in support of this claims is that

> [t]he Defendant's refusal to include the Plaintiff's name on the list of approved candidates to appear on the Tennessee Presidential Preference Primary Ballot on March 1, 2016, has resulted in de facto discrimination against the Plaintiff based on national origin. Further, by excluding Plaintiff from the Democratic Party Ballot Defendant Hargett's actions have resulted in de facto discrimination against all voters in Tennessee who wish to vote for a Hispanic candidate.

(D.E. 14 PageID # 80 at ¶ 26). This allegation does not otherwise allege any basis on which this Court might infer, or even analyze, any discriminatory action by Secretary Hargett. Nor does Plaintiff allege that Tenn. Code Ann. § 2-5-205 was enacted with a discriminatory purpose and that the "media recognition" provision is wholly "unrelated to the achievement of any combination of legitimate purposes." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *see also Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (noting that for Equal Protection violation, challenged legislation must have been pursuant "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

Plaintiff's conclusory allegation at best allow the Court to infer the mere possibility of misconduct but certainly do not establish any entitlement to relief. Accordingly, Plaintiff's amended complaint is insufficient to mount a challenge based on discrimination and such claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

IV. Plaintiff's Claims For Nominal and Compensatory Damages Under 42 U.S.C. § 1983 Against Secretary Hargett in His Official Capacity are Barred by the Eleventh Amendment.

In his amended complaint, Plaintiff has asserted a claim for "nominal and compensatory damages against Defendants based on the Defendants' determination to exclude Plaintiff's name on the list of approved candidates n Tennessee's Presidential Primary Ballot on March 1, 2016." (D.E. 14 PageID# 81). However, such claims for damages against Secretary Hargett are barred by the Eleventh Amendment.

The Eleventh Amendment has been construed by the Supreme Court to bar actions by citizens against their own state or one of its agencies in federal court unless there has been a waiver by the state. *Hans v. Louisiana*, 134 U.S. 1 (1890); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468 (1987); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Alden v. Maine*, 527 U.S. 706 (1999). Tennessee has not waived its immunity under the Eleventh Amendment with respect to civil rights suits. Tenn. Code Ann. § 20-13-102(a); *American Civil Liberties Union v. Tennessee*, 496 F.Supp.2d 218 (M.D. Tenn. 1980); *Hair v. Tennessee Consol. Ret. Sys.*, 790 F. Supp. 1358 (M.D. Tenn. 1992). The State is absolutely immune from liability under the Eleventh Amendment. *Id.*; *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989). The immunity afforded by the Eleventh Amendment prohibits even suits against states for injunctive relief. *Alabama v. Pugh*, 438 U.S. 781 (1978); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989) (the Eleventh Amendment bars a claim against the State, plus the State is not a person pursuant to 42 U.S.C. § 1983); *Lawson v. Shelby Cnty.*, 211 F.3d 331 (6th Cir. 2000) (injunctive relief is not available against the State). Furthermore, a suit against a state official in his official capacity is considered to be a suit against the state. *Will*, 491 U.S. at 66; *Wells*, 891 F.2d at 591.

In *Kentucky v. Graham*, the Supreme Court stated that "absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." 473 U.S. 159, 169 (1985), citing, *Ford Motor Co. v. Dept. of Treasury of Ind.*, 323 U.S. 459, 464 (1945). The Court found that "[t]his bar remains in effect when State officials are sued for damages in their official capacity." *Id.*, citing, *Cory v. White*, 457 U.S. 85, 90 (1982); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). This is because "a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents...." *Brandon v. Holt*, 469 U.S. 464, 471 (1985).

Defendant Tre Hargett is state official who has been sued for damages only in his official capacity as Secretary of State for the State of Tennessee. (D.E. 8 PageID # 2 at ¶ 5). As such, Plaintiff's claim for nominal and compensatory damages against Secretary Hargett in his official capacity is barred by the Eleventh Amendment.

In addition, 42 U.S.C. § 1983 only authorizes the imposition of liability against every "person" who, acting under color of state law, violated another person's rights. As a matter of law, the term "person" in Section 1983 does not include states, state agencies, or state employees sued in their official capacities. *Will*, 491 U.S. at 71; *Howlett v. Rose*, 496 U.S. 356, 365 (1990). While "state officials literally are persons[,] . . . a suit against the official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself." *Will*, 491 U.S. at 71. As a result, Secretary Hargett is not deemed to be a "person" subject to suit under 42 U.S.C. § 1983, and all causes of action against him in official capacity must be dismissed. *Will*, 491 U.S. at 71; *Wells*, 891 F.2d at 592; *Walker v. Norris*, 917 F.2d 1449, 1457 (6th Cir. 1990).

CONCLUSION

For these reasons, Secretary Hargett respectfully requests that this Court dismiss Plaintiff's amended complaint in its entirety and with prejudice for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER (BPR 13889)
Deputy Attorney General
Public Interest Division
Office of Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 741-7403
Janet.kleinfelter@ag.tn.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 15th day of April 2016 that a copy of the above document has been served upon the following persons by U.S. Mail, postage prepaid:

Roque De La Fuente
5440 Morehouse Drive
Suite 45
San Diego, CA 92121

The undersigned further certifies that on the 15th day of April, 2016 a copy of the above document has been served upon the following persons by:

X Electronic Case Filing (ECF) System to:

J. Gerard Stranch, IV
Branstetter,Stranch & Jennings, PLLC
223 Rosa L. Parks, Suite 200
Nashville, TN 37203

/s/ Janet M. Kleinfelter
JANET M. KLEINFELTER