Case No. 20-6141
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS A. PHILLIP RANDOLPH INSTITUTE, et al. *Plaintiffs-Appellees,* v. TRE HARGETT, in his official capacity as Secretary of State of Tennessee, et al. *Defendants-Appellants*.	On Appeal from the United States District Court Middle District of Tennessee District Case No. 3:20-cv-00374

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Appellees certify that no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome. Appellees are nonprofit organizations and an individual with no corporate affiliations.

/s/ *Ravi Doshi*
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STATEMENT REGARDING ORAL ARGUMENT

This case involves weighty considerations of law implicating the fundamental right to vote. Moreover, given that any decision on the merits of Defendants' appeal would be unlikely before the November 3, 2020 election—and a stay of the district court's injunction has already been denied for that election—there is no urgency for this Court to decide this case without the benefit of oral argument. Plaintiffs therefore request oral argument.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in granting Plaintiffs' motion for preliminary injunction as to the First-Time Voter Restriction, Tenn. Code § 2-2-115(b)(7), which prevents first-time voters who are otherwise eligible to vote absentee from doing so.

INTRODUCTION

Tennessee's First-Time Voter Restriction prohibits first-time voters who registered to vote by mail, and who are otherwise statutorily eligible to vote absentee, from doing so. It means that—in the middle of a pandemic that has already killed over 223,000 Americans—mail-registered first-time voters who are over 60 years old, have special vulnerability to COVID-19, or meet any of the State's other statutory eligibility criteria for voting absentee, must nevertheless vote in person or not at all. Such a burden on the right to vote is untenable, particularly when weighed against the State's illusory and minimal interests in enforcing the law. The district court thus properly enjoined enforcement of the First-Time Voter Restriction, and its judgment should not be disturbed here.

Simply put, this Court should not countenance Defendants' effort to make voting *less* accessible to Tennessee citizens, by denying those who are exercising their fundamental right for the first time the same voting opportunities available to all other voters. Defendants present no real argument that the First-Time Voter Restriction does not burden Plaintiffs' or the public's right to vote, and cannot meaningfully argue that enjoining the law will harm the State's interests. Because Plaintiffs carried their burden in the district court of showing that the First-Time Voter Restriction should be enjoined, and in light of the deference that this Court

must afford the district court's well-reasoned order granting a preliminary injunction, the district court's preliminary injunction should be affirmed.

STATEMENT OF THE CASE

Tennessee Code § 2-2-115(b)(7) (the "First-Time Voter Restriction"), prohibits first-time voters who registered to vote by mail—or online[1]—from voting absentee, even when such voters are otherwise statutorily-eligible to do so.[2] *See* Tenn. Code § 2-2-115(b)(7) ("Each person who registers by mail shall appear in person to vote in the first election the person votes in after such registration becomes effective . . . [and] present satisfactory proof of identity."). Many Tennessee voters are burdened by the law. For example, in 2018, over 128,000 voters registered to vote for the first time by mail. *See* PI Order, RE 79, PageID# 2634 n.39. Additionally, over 130,000 new registrants registered online in Tennessee last election cycle.[3]

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[1] As the district court correctly noted, "while the statute textually is applicable only to first-time voters who registered 'by mail,' it plainly has been construed by election officials to apply also to those who registered online." PI Order, RE 79, PageID# 2579 n.2 (quoting Tenn. Code § 2-2-115(b)(7)).

[2] The strict eligibility criteria for voting absentee are outlined in Tennessee Code § 2-6-201. They include, for example, voters over the age of 60, are out of town during the entire voting period, are ill, hospitalized, or disabled, Tenn. Code § 2-6-201, and as a result of state court litigation, voters who have "special vulnerability to COVID-19" and their caretakers. *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020).

[3] U.S. Election Assistance Commission, 2018 Election Administration and Voting Survey, https://public.tableau.com/profile/u.s.election.assistance.commission#!/vizhome/E

These affected first-time voters include Plaintiffs' members and engaged communities—many of whom registered to vote online or by mail as a direct result of Plaintiffs' voter registration efforts, *see, e.g.*, Tennessee NAACP Decl., RE 40-5, PageID# 1557, 59–60 at ¶¶ 19–20, 30–34; MCLC Decl., RE 40-6, PageID# 1573 at ¶ 30—including those who cannot vote in person during the ongoing pandemic due to their high susceptibility or risk from exposure to COVID-19, *see* Tennessee NAACP Decl., RE 40-5, PageID# 1560 at ¶¶ 33–34; MCLC Decl., RE 40-6, PageID# 1570, 73 at ¶¶ 15, 32. For example, one of Plaintiff Tennessee NAACP's members, first-time voter Corey Sweet, did not vote at all in the State's August 6, 2020 primary election because the First-Time Voter Restriction prevented him from being able to vote absentee—even though he was otherwise eligible to do so—and the risk of exposure to COVID-19 prevented him from being able to vote in person. *See* Second Sweet Decl., RE 86-2, PageID# 2670. Other first-time voting Tennesseans are similarly affected. *See, e.g.*, Greenwalt Decl., RE 93-2, PageID# 2717–18 at ¶¶ 2, 5–7 (noting that having registered to vote in September 2020, and despite being otherwise absentee eligible, she would be unable to vote this November if the First-Time Voter Restriction remains in place because she has a

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AVS2018DataViz-Labeld_11_25/EACDataVizTool (select Tennessee and A5c New Registrations: Online).

rare autoimmune disease that puts her at "severe risk of contracting COVID-19," that precludes her from voting in person).

In light of the First-Time Voter Restriction's burdensome impact on their members' and engaged communities' right to vote, Plaintiffs—which include membership organizations that collectively represent over 30,000 Tennesseans, *see, e.g.*, Tennessee NAACP Decl., RE 40-5, PageID# 1556 at ¶ 11; MCLC Decl., RE 40-6, PageID# 1568 at ¶ 4—challenged the law in district court on May 12, 2020 and sought a preliminary injunction. *See* Am. Compl., RE 39, PageID# 123–57; PI Motion, RE 43, PageID# 1656–1701. On September 9, 2020, after full briefing from both parties, the district court enjoined the First-Time Voter Restriction. *See* PI Order, RE 79. Both parties began to immediately implement and advertise the district court's order. *See* Order Denying Stay, App. R. 18-2, Page 4; Pls.' Opp. Mot. Stay, App. R. 12, Page 17 (describing the voter education efforts undertaken by the State and by Plaintiffs (citing Lichtenstein Decl., RE 112-1, PageID# 2824–25; Second Sweet-Love Decl., RE 112-2, PageID# 2828)).[4]

In implementing the district court's order, Defendants chose to differentiate, for the first time, between first-time voters who registered to vote by postal mail, and those who registered to vote online. Specifically, with respect to postal mail-

[4] Defendants advertised the district court's order on the Secretary of State's web site. *See* Absentee Voting, Tenn. Sec'y of State, https://sos.tn.gov/products/elections/absentee-voting (last accessed Oct. 23, 2020)

registered first-time voters, Defendants implemented a requirement that such voters must submit a copy of their identification with their absentee ballot, unless they submitted a copy of their identification with their voter registration form.[5] The identification requirement does not apply at all, however, to first-time voters who registered to vote online. *Supra* n.5. For such voters, despite the fact that they are voting for the first time, the absentee voting process is *exactly* identical to the one in place for all other voters. *Id.*

On October 5, 2020, a month after the district court issued its injunction, Defendants filed their Notice of Appeal in this Court, *see* App. R. 1, and four days after that, sought an "emergency" stay of the district court's injunction. *See* Mot. Stay, App. R. 5. Defendants' motion was denied by a motions panel of this Court on October 19, 2020, because, *inter alia*, there would be "no substantial harm to defendants in continuing to comply with" the district court's order. Order Denying Stay, App. R. 18-2, Page 4. This merits appeal follows the denial of Defendants' motion to stay the preliminary injunction.

SUMMARY OF ARGUMENT

On September 9, 2020, the district court enjoined Tennessee's First-Time Voter Restriction, explaining that if enforced, the law would, as a practical matter,

[5] *See Information for First-Time Voters Who Registered by Mail*, Tenn. Sec'y of State, https://sos.tn.gov/products/elections/information-first-time-voters-who-registered-mail (last visited October 23, 2020).

result in some first-time voters being unable to vote because they cannot risk exposure to COVID-19 at an in-person polling location. At the same time, the district court found, the law serves almost no discernible state interest, and whatever interests it does serve are overcome by the burden the law places on voters. Moreover, the district court found the balance of the equities to favor an injunction. The district court's decision to order an injunction was not an abuse of discretion.

On appeal, Defendants first argue that Plaintiffs lack standing to challenge the First-Time Voter Restriction because they failed to show that the exemplar member Plaintiff Tennessee NAACP identified as being harmed by the law, Mr. Sweet, was a member of the organization at the time the claim was filed. Defendants further argue that even if Plaintiffs proved standing at the time the claim was commenced, subsequent events have since mooted Mr. Sweet's claim. Neither argument has merit. First, based on record evidence submitted to, and evaluated by, the district court, Plaintiffs established at least a substantial likelihood of standing, including as to Mr. Sweet's membership status in the Tennessee NAACP at the time the litigation was commenced. Second, even if Mr. Sweet—who is not a party to this litigation—was deprived of standing by events subsequent to Plaintiffs' filing of this claim, his purported lack of continued standing is irrelevant to whether Plaintiff Tennessee NAACP has standing. As confirmed by this Court's precedents, it does.

Defendants next argue that the district court erred in conducting the *Anderson-Burdick* balancing test in two ways. First, Defendants argue that the district court should not have found that the First-Time Voter Restriction imposes a moderate burden on Plaintiffs' right to vote. And second, Defendants contend that the burden imposed by the First-Time Voter Restriction is outweighed by the State's interests in complying with federal law and maintaining election integrity. Defendants' arguments each fall flat. The First-Time Voter Restriction, which effectively prevents some first-time voters from voting at all in light of the ongoing pandemic, imposes at least a moderate burden on Plaintiffs' and the first-time voting public's right to vote. Moreover, Defendants' interests do not overcome that burden. Indeed, the federal law that Defendants argue requires the First-Time Voter Restriction does no such thing, and Defendants' own actions prove that the goal of election integrity is not served by the law.

Finally, Defendants argue that this Court should vacate the injunction of the First-Time Voter Restriction because the equities favor reversal, particularly considering that the injunction was issued close in time to the November 2020 election. But this exact issue was raised with, and rejected by, the stay panel, which found that Defendants would not suffer substantial harm from continuing to comply with the district court's injunction. Moreover, the preliminary injunction—which *reduces* the burden on the public's right to vote, including in the midst of an ongoing

pandemic—serves the public's interest, and ensures that all otherwise statutorily eligible voters may cast an absentee ballot, and in so doing, vote.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion In Granting A Preliminary Injunction.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). On appeal, the district court's ultimate decision to grant a preliminary injunction is reviewed for an abuse of discretion. *See Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). However, its legal conclusions are reviewed *de novo*, and its factual findings for clear error. *Id.* "This standard of review is 'highly deferential' to the district court's decision," and "[t]he district court's determination will be disturbed only if [it] relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (quoting *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007)). A factual finding is "clearly erroneous when, although there is evidence to support it, the reviewing court on the

entire evidence is left with the definite and firm conviction that a mistake has been committed." *Certified Restoration Dry Cleaning Network, LLC*, 511 F.3d at 541.

Defendants argue only that (1) Plaintiffs do not have standing to pursue the First-Time Voter Claim, (2) Plaintiffs are unlikely to succeed on the merits when a proper balancing of the *Anderson-Burdick* factors is undertaken, and (3) a preliminary injunction is not in the public's interest. For the reasons articulated below, each argument fails to demonstrate that the district court abused its discretion in preliminarily enjoining the First-Time Voter Restriction.

II. Plaintiffs Have Demonstrated A Substantial Likelihood of Standing.

"An association has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim requested nor the relief requested requires the participation of individual members in the lawsuit." *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 254–55 (6th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000)). The first element is satisfied where the association shows that "one of its named members (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* At the preliminary injunction stage, the association seeking standing must only demonstrate "a substantial likelihood of

standing." *Id.* at 256 n.4. "When one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable." *See Northeast Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 623 (6th Cir. 2016).

Applying these principles, the district court repeatedly found that Plaintiffs have demonstrated at least a substantial likelihood of associational standing to challenge the First-Time Voter Restriction at this stage of the litigation. *See* PI Order, RE 79, PageID# 2592–600; Order Denying Reconsideration, RE 103, PageID# 2767–70; Order Denying First Mot. Stay, RE 107, PageID# 2789–90. Specifically, it held that Plaintiff Tennessee NAACP demonstrated standing by identifying a member, Corey Sweet, who was injured by the First-Time Voter Restriction. PI Order, RE 79, PageID# 2592–600. The district court made this determination based on record evidence showing that Mr. Sweet was a member of the Tennessee NAACP, a first-time voter who was subject to the First-Time Voter Restriction, and would have voted absentee but for that restriction. *See id.*; *see also* Order Denying Reconsideration, RE 103, PageID# 2767–70. Defendants failed to contradict or impeach Mr. Sweet's Declaration "in any way," and the district court found that "no factual averments in his Declaration [were] inherently non-credible." PI Order, RE 79, PageID# 2597.

Notwithstanding the district court's factual findings, which were not clearly erroneous, Defendants first argue that Plaintiffs do not have standing because they

did not show that Mr. Sweet was a member of Tennessee NAACP at the time the first-time voter claim was filed. *See* Defs.' Br. at 18–19 n.3. But the record evidence demonstrates otherwise. Indeed, Mr. Sweet has attested that he "attend[s] events of the [Tennessee NAACP]," Sweet Decl., RE 54-4, PageID# 2300 at ¶ 1, and that he is a "member of the [Tennessee NAACP]," Second Sweet Decl., RE 86-2, PageID# 2670 at ¶ 5; *see also* Sweet-Love Decl., RE 86-1, PageID# 2667 at ¶ 3 (declaration of the President of the Tennessee NAACP, attesting that Mr. Sweet is a member of the organization). At a minimum, these attestations show a "substantial likelihood" that Mr. Sweet—and so, the Tennessee NAACP—had standing to pursue the first-time voter claim at the time it was filed, and the district court's findings of fact to that effect were not clearly erroneous.[6]

Defendants next argue that, even if Mr. Sweet had standing to sue at the commencement of the litigation, subsequent events have changed his position such that he, personally, now "lacks a 'legally cognizable interest' in the outcome of this

[6] Defendants' complaint that at least some of these attestations were made after the district court ruled on the preliminary injunction is of no consequence. In ruling on the preliminary injunction, the district court found—based on Mr. Sweet's first declaration, Plaintiffs' representations, and Defendants' failure to contest Mr. Sweet's standing—that Mr. Sweet was a member of Tennessee NAACP. *See* PI Order, RE 79, PageID# 2596–97; *see also* Order Denying Reconsideration, RE 103, PageID# 2759–60. That finding was not clearly erroneous, and indeed, was only strengthened by Mr. Sweet's and Ms. Sweet-Love's additional declarations affirming Mr. Sweet's membership in the Tennessee NAACP. *See* Second Sweet Decl., RE 86-2, PageID# 2670 at ¶ 5, Sweet-Love Decl., RE 86-1, PageID# 2667 at ¶ 3.

appeal because he is no longer eligible to vote absentee," *i.e.*, *his* claim is moot. Defs.' Br. at 20. By implication, Defendants suggest—though provide no support for the proposition—that because non-party Mr. Sweet's claim is moot, so too is the claim of Plaintiff Tennessee NAACP. *Id.* That argument is not logically sound, and in any event, has been foreclosed by this Court's precedents.

"The heavy burden of demonstrating mootness rests on the party claiming mootness." *Cleveland Branch, N.A.A.C.P. v. City of Parma, OH*, 263 F.3d 513, 531 (6th Cir. 2001) (citing *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)). Defendants' argument—which is presented for the first time on appeal, *see* Order Denying Reconsideration, RE 103, PageID# 2779 n.24—fails to carry their heavy burden. Importantly, Mr. Sweet is not a party to this litigation, nor is he otherwise participating in it except to the extent that he was identified by Plaintiff Tennessee NAACP as an exemplar member who was harmed by the First-Time Voter Restriction. Thus, regardless of whether Mr. Sweet's individual claim has been mooted by subsequent events (it has not),[7] Defendants have not made *any* effort to

[7] Plaintiffs maintain, as argued below, that Mr. Sweet's own claim is not moot due to the fluid nature of absentee voting eligibility in Tennessee. *See* Opp. to Mot. Reconsideration, RE 92, PageID# 2701–02 (explaining that "no matter his circumstances this Fall, [Mr. Sweet] (like every other first-time voter, including those who are presently eligible to vote absentee) will be unable to vote by mail without an injunction from the Court," and that given the changing nature of absentee eligibility in Tennessee, Mr. Sweet could be eligible to vote absentee this Fall); *supra* at 16. The district court did not rely on this argument in finding standing,

show that Plaintiff Tennessee NAACP, which represents over 10,000 members in the State—including other mail-registered first-time voters, *see* Tennessee NAACP Decl., RE 40-5, PageID# 1556–57, 59–60 at ¶¶ 11, 19–20, 30–34, does not continue to maintain standing to sue on behalf of its members, *see Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012) ("As long as the *parties* have a concrete interest, however small, in the outcome of the litigation, the case is not moot." (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984) (emphasis added)). That is, Defendants do not challenge that other members of Plaintiff Tennessee NAACP will be similarly affected by the First-Time Voter Restriction, such that as to it, there remains a live case and controversy to be adjudicated.[8] *Id.*

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because as explained herein, the *ongoing* justiciability of Mr. Sweet's *individual* claim is not relevant to the justiciability of Plaintiff Tennessee NAACP's claim.

[8] The district court cited record evidence to quantify that there would be a large number of affected voters, because in the last election cycle over twenty percent of all new registrations were completed by mail, amounting to over 128,000 new registrations. PI Order, RE 79, PageID# 2634 n.39. Additionally, over 130,000 new registrants registered online in Tennessee last election cycle. U.S. Election Assistance Commission, 2018 Election Administration and Voting Survey, https://public.tableau.com/profile/u.s.election.assistance.commission#!/vizhome/EAVS2018DataViz-Labeld_11_25/EACDataVizTool (select Tennessee and A5c New Registrations: Online). Plaintiffs' declarations show that they were continually registering members to vote through the deadline. *See, e.g.*, Tennessee NAACP Decl, RE 40-5, PageID# 1556–57 at ¶¶ 17, 19, 28, 29, 30; MCLC Decl., RE 40-6, PageID# 1572–73 at ¶ 30. Since the voters that Plaintiffs—including Tennessee NAACP—help to register to vote necessarily must all do so by either mail or online (as opposed to at the DMV, where, of course, Plaintiffs could not help them register), all of Plaintiffs' newly registered voters—including their own members—will be subject to this restriction the first time that they vote.

(holding a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing *party*." (emphasis added) (internal quotation marks omitted)).

In short, "[t]he problem with Defendants' mootness argument . . . is that it boils down to an assertion that *Plaintiffs* lack a 'legally cognizable interest' because *Sweet* is no longer qualified to vote absentee by mail such that he has an interest in the outcome of the case." Order Denying Stay, App. R. 18-2, Page 13–14 (Moore, J., concurring). But this Court has directly foreclosed Defendants' argument. In *Cleveland Branch*, the Cleveland Branch of the Ohio NAACP ("Cleveland NAACP") brought suit challenging recruitment practices of the City of Parma as racially discriminatory. 263 F. 3d at 529. The court found that the Cleveland NAACP had standing through one of its members even though, after suffering harm from the City-Defendant's policies, the member did "not express a present concrete interest in obtaining employment" with the City-Defendant (*i.e.*, was not presently being harmed) and ended his membership in the Cleveland NAACP after the commencement of the litigation. *See id.* (explaining the harmful consequences—and incentives for gamesmanship for a defendant—of requiring a plaintiff's member to maintain standing throughout the litigation, rather than just at its commencement). The Court also rejected the notion that the litigation had become moot, noting that the defendant had made no showing that the complained-of harm could not

reasonably be expected to recur. *See id.* at 530–31 ("[A] case becomes moot only when subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur."). Instructively, the court evaluated the mootness question not as to the individual member that the Cleveland NAACP had identified as having been harmed at the commencement of the litigation—indeed, that individual was no longer a member of the organization, nor continuing to seek employment with the City-Defendant—but rather, more generally as to any affected individual (including Cleveland NAACP's other members). *See id.*; *see also Waskul*, 900 F.3d at 257 (construing *Cleveland Branch* as "appearing to hold that even if a named member's claims had become moot, the association retained standing because the named member had standing at the outset of the litigation"). This result is in accord with the Sixth Circuit's previous treatment of associational standing and the mootness doctrine. As the Court said in *Gillis v. U.S. Dept. of Health & Human Services*, "once an organization has alleged actual injury to its members, *or any one of them*, it may then argue on behalf of the public interest." 759 F.2d 565, 572 (6th Cir. 1985) (internal citations and quotation marks omitted) (emphasis in original).

Even if the changing of non-party Mr. Sweet's personal circumstances to render his claim moot somehow affected Tennessee NAACP's standing, this case would nevertheless present a justiciable case and controversy. Cases "in the election

field fall within the narrow exceptions to mootness because they are peculiarly capable of repetition, yet evading review." *Am. Civil Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 646–47 (6th Cir. 2004); *see also In re: 2016 Primary Election*, 836 F.3d 584, 588 (6th Cir. 2016) ("Challenges to election laws quintessential[ly] evade review because the remedy sought is rendered impossible by the occurrence of the relevant election."). This case is no different.

The very nature of this claim depends on circumstances that come and go, *i.e.*, whether people fall under one of the excuses to vote absentee, and whether they remain first-time voters at all. Tennessee permits applications for absentee ballots until seven days before Election Day, and absentee eligibility may change up until that time. And a first-time voter who chooses to vote in person rather than forgo their right to vote while a claim is pending will lose their "first-time" qualification. It would be untenable to require that only voters who were eligible to vote absentee up to and through every election day that passes during the pendency of a litigation, and who also remain first-time voters, could support associational standing of an organization with many affected members whose identity will necessarily change with each passing week and each passing election. Common sense and case law reject that outcome, and this Court should as well.

Finally, there is no prudential standing bar to Tennessee NAACP's pursuing this litigation on behalf of its members. Plaintiffs are asserting the rights of their

members, meaning that *Fair Elections Ohio v. Husted*, in which the plaintiffs purportedly sought to represent the interests of true third parties who were not its own members, *see* 770 F.3d 456, 461 (6th Cir. 2014), is inapplicable. Indeed, this Court has regularly permitted membership organizations to pursue voting rights claims on behalf of their members. *See, e.g.*, *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (granting associational standing in an election case to a membership organization). It is proper to do so again here.

III. Plaintiffs Are Likely to Succeed on the Merits of Their Claim That the First-Time Voter Restriction Unduly Burdens Their Right to Vote.

The District Court properly found that Plaintiffs are likely to succeed on the merits of their claim.[9] Defendants' challenge to the merits of the district court's

[9] Importantly, the standard at the preliminary injunction stage is not success on the merits but *likelihood* of success on the merits. Plaintiffs have easily cleared that bar, particularly at this stage of the litigation. *Anderson-Burdick* is a fact-intensive inquiry. *See Obama for America*, 697 F.3d at 429; *see also Libertarian Party v. Herrera*, 506 F.3d 1303, 1308 (10th Cir.2007); *Gill v. Scholz*, 962 F.3d 360, 364–65 (7th Cir. 2020). The district court correctly assessed the record at the preliminary injunction stage, but both parties will have an opportunity to develop a full record before any final merits stage ruling is made. While this Court must review the district court's likelihood of success on the merits finding, it should not prejudge the outcome of the *Anderson-Burdick* inquiry until after the facts are fully developed. Moreover, given the strong showing Plaintiffs made on the remaining preliminary injunction factors—*see infra* Part IV and Order Denying Stay, App. R. 18-2, Page 3—the district court's injunction was particularly sound. *See, e.g., S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co*., 860 F.3d 844, 849 (6th Cir. 2017) ("We have often cautioned that these are factors to be balanced, not prerequisites to be met."); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) ("No single factor will be determinative as to the appropriateness of equitable relief, . . . and the district court's weighing and balancing of the equities is

decision is limited to two points: (1) the district court erred in finding the burden on voters to be "moderate," and (2) the district court did not properly weigh Defendants' assertion of preventing fraud as a justification for the prohibition against first-time voters voting absentee. Defs.' Br. at 14–17. The district court did not abuse its discretion in these regards. Indeed, Defendants failed to even fully articulate below the positions that now form the centerpiece of their merits attack.

In analyzing Plaintiffs' first-time voter claim, the district court properly applied the *Anderson/Burdick* balancing test, which requires it to:

> [1] consider the character and magnitude of the plaintiff's alleged injury, [2] identify and evaluate the *precise* interests put forward by the State as justifications for the burden imposed by its rule, . . . [and 3] assess the legitimacy and strength of each of those interests, as well as the extent to which those interests make it necessary to burden the plaintiff's rights.

Green Party of Tenn. v. Hargett, 767 F.3d 533, 546 (6th Cir. 2014) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). The district court found that the burden imposed by the First-Time Voter Restriction was "moderate" or "intermediate," PI Order, RE 79, PageID# 2609, falling below "severe," which

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overruled 'only in the rarest of cases." (internal quotation marks and citations omitted)); *Doe v. Sundquist*, 106 F.3d 702, 707 (6th Cir. 1997) ("[W]e have observed that the degree of likelihood of success that need be shown to support a preliminary injunction varies inversely with the degree of injury the plaintiff might suffer.").

would have triggered strict scrutiny, and above "minimal" or "slight," which would have triggered a rational basis test. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The district court correctly concluded that Defendants' minimal asserted interests did not outweigh the burden on Plaintiffs. Indeed, the district court concluded they failed to meet even rational basis review. RE 79, PI Order, PageID# 2631. Its analysis was based on factual findings that were not clear error, and its overall conclusion was not an abuse of discretion.

A. The district court correctly characterized the burden as intermediate or moderate.

As the district court stated, "Defendants have not argued in favor of the standard lower than moderate—*i.e.*, rational basis review—or indeed any standard at all with respect to this claim." *Id.* at PageID# 2610. Based on their omission in the court below, Defendants should not now be heard to argue that the *burden* the First-Time Voter Restriction imposes on Plaintiffs is anything less than moderate.[10] But even if this Court were to consider Defendants' belated arguments, it should find—

[10] In this context, Defendants' criticism of the district court's 20-page analysis of the level of the burden—a discourse so detailed that the district court apologized for its length, explaining that it did so "because it is important to reach a sound conclusion on this issue," PI Order, RE 79, PageID# 2621—is not credible.

as the district court did—that the First-Time Voter Restriction imposes at least a moderate, or intermediate, burden on Plaintiffs' right to vote.[11]

In evaluating Plaintiffs' First-Time Voter claim, the district court found—based on the evidence in the record—that "at least some first-time, mail-registered voters are currently prevented from voting in the manner (*i.e.*, by mail) in which they must vote, as a practical matter, in order to vote at all, given their COVID-19-related concerns that remove voting in person as a viable option." PI Order, RE 79, PageID# 2611. That finding was not clearly erroneous. It was supported by numerous declarations submitted by Plaintiffs. *See, e.g.*, Tennessee NAACP Decl., RE 40-5, PageID# 1560 at ¶¶ 32–34,; MCLC Decl., RE 40-6, PageID# 1572–73 at ¶¶ 30–32; Equity Alliance Decl., RE 40-8, PageID# 1591–92 at ¶¶ 42–44. It was further confirmed when Corey Sweet—the member identified by Plaintiff Tennessee NAACP as harmed by the First-Time Voter Restriction—did not vote in the August primary because of his COVID-19 concerns.[12] Second Sweet Decl., RE 86-2, PageID# 2670 at ¶ 6.

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[11] Plaintiffs' claim, and the district court's injunction, relate only to first-time voters who are otherwise already eligible to vote absentee under Tennessee law. *See* Prelim. Inj. Order, RE 80, PageID# 2637–38.

[12] The district court's finding of a moderate burden is particularly apt in Tennessee, where the only voters eligible to vote absentee (and thus the only voters affected by this restriction) are those that are able to provide an "excuse" for not voting in-person—*i.e.*, that they will not be in the county or state during the voting period or have a disability. Tenn. Code § 2-6-201. Thus, those voters affected by this restriction are those the State has recognized as *needing* to vote by mail.

The record evidence was *not contested* by Defendants below. *See generally* Defs.' Opp. to PI, RE 46. Indeed, the State itself *voluntarily expanded* its absentee eligibility criteria to include voters with "special vulnerability to COVID-19 and [their] caretakers," *see Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020), in recognition of the heightened burden that voting in person will impose on such voters. The State has also actively encouraged voters over 60 years old—who constitute the majority of voters absentee eligible under Tennessee law—to vote absentee this Fall.[13] Such actions strongly suggest the State's own recognition that for absentee eligible voters—including the first-time voters who benefit from the district court's injunction—the burden of not being able to vote absentee is more than "minimal," as the State now argues in this Court. *See* Defs.' Br. at 27. At the very least, it further strengthens the conclusion that the district court's factual finding—that some first-time mail-registered voters will not be able to vote at all if they cannot vote absentee—was not clear error.

Based on its factual findings, the district court determined that the burden imposed by the First-Time Voter Restriction is "moderate." That conclusion is consistent with this Court's precedents. For example, in *Obama for America*,

[13] *See* Jim Shulman & Tre Hargett, *A Convo w SOS Tre Hargett*, YouTube (May 24, 2020) at 32:25–33:40, https://www.youtube.com/watch?v=AsfH1NlmUt8 (interview in which Defendant-Secretary of State Tre Hargett encourages all voters over 60 to vote absentee).

plaintiffs challenged a state law that provided non-military voters with three fewer days to vote early in-person than it did military voters. *See* 697 F.3d at 423. This Court found the burden imposed by the law to be moderate, noting that while plaintiffs had other means of voting, they "did not need to show that they were legally prohibited from voting, but only that 'burdened voters have few alternate means of access to the ballot.'" *Id.* at 440 (quoting *Citizens for Legislative Choice v. Miller,* 144 F.3d 916, 921 (6th Cir. 1998)). Similarly, in *Mays v. LaRose*, this Court found a moderate burden on the right to vote where a voter was jailed—and therefore unable to vote by any means other than by absentee ballot—after the state's absentee ballot request deadline had already passed. 951 F.3d 775, 784 (6th Cir. 2020). The burden here, as in *Mays* and *Obama for America*, is at least moderate.

Defendants seek to avoid this necessary conclusion by alluding to *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), for the proposition that Plaintiffs' burden is less than moderate because there is no constitutional "right to vote absentee." Defs.' Br. at 26. Their reliance is misplaced. *McDonald* is of questionable precedential value and has repeatedly been limited to its facts by the Supreme Court. *See Goosby v. Osser*, 409 U.S. 512, 521 (1973) (declining to follow *McDonald*); *O'Brien v. Skinner*, 414 U.S. 524, 529, 531 (1974) (again declining to follow *McDonald* and holding that it "rested on failure of proof" rather than absence of a right to equal protection); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974)

(abandoning *McDonald*'s reasoning and finding that minor party voters had a right to vote absentee in their primary where that right had been extended to major party voters, notwithstanding that minor party voters had the alternative option to vote in-person). Moreover, *McDonald* was decided before *Anderson v. Celebrezze* and presumes a world where courts may only apply either a strict scrutiny or rational basis test. *See McDonald*, 394 U.S. at 809 (discussing only a rational basis test). But the subsequent development of the *Anderson*/*Burdick* framework rejected *McDonald*'s dichotomy, creating the intermediate range of burden, where the district court comfortably found a place for this case, and which this Court has regularly applied. *See Obama for America*, 697 F.3d at 440 (distinguishing *McDonald* to find a moderate burden on plaintiffs' right to vote); *see also Mays*, 951 F.3d at 786 (finding a moderate burden on the right to vote where absentee voting was effectively unavailable).[14]

[14] At best then—though even this interpretation may be too deferential—*McDonald* stands for the proposition that where other voting options are available, denial of one option is not entitled to strict scrutiny review, not that such denial is *only* entitled to rational basis review. Even if *McDonald* were entitled to more deference, the district court properly distinguished the case. Whereas in *McDonald*, plaintiffs' failure to present evidence that they were being prevented from voting entitled them to only rational basis review, *id.* at 809 & n.6, here, as noted above, the district court made a factual determination that "at least some first-time, mail-registered voters are currently prevented in the manner (*i.e.*, by mail) in which they must vote, as a practical matter, in order to vote at all, given their COVID-19-related concerns that remove voting in person as a viable option." Mem. Op. & Order, RE 79, PageID# 2611.

A. Philip Randolph Institute of Ohio v. LaRose, 2020 WL 6013117 (6th Cir. Oct. 9, 2020) [hereinafter *APRI Ohio*], is likewise distinguishable. In *APRI Ohio*, a motions panel of this Court held that Ohio's decision to limit absentee ballot drop boxes to one per county—a generally applicable rule—posed only a minimal burden on plaintiffs' right to vote. 2020 WL 6013117, at *2. The Court's decision was based, at least in part, on finding that (1) "Ohio voters are not required to use a ballot drop box to vote," and (2) the restriction at issue was "non-discriminatory." *Id.* But here, as noted above, the district court found—as a matter of fact—that at least some first-time voters could *only* vote absentee or not at all. *See* PI Order, RE 79, PageID# 2611. The burden of restricting one method of voting absentee (*i.e.*, drop boxes) is plainly less burdensome than eliminating any option to vote absentee whatsoever. Moreover, the First-Time Voter Restriction is not "non-discriminatory"—it applies only to *first-time* voters who are otherwise eligible to vote absentee, not all voters who are eligible to vote absentee.

Ultimately, the burden on Plaintiffs in this case is more akin to *Obama for America* than it is to *APRI Ohio* or *McDonald*. Accordingly, this Court should affirm the district court's determination that the burden imposed by the First-Time Voter Restriction is moderate.

B. The district court properly concluded that Defendants' interests were either illusory or unsupported and did not outweigh the burdens on Plaintiffs.

In the district court, Defendants argued that their *only* interest in maintaining the First-Time Voter Restriction was that it is required by federal law. *See* Defs.' Opp. to PI, RE 46, PageID# 1787 (arguing that the First-Time Voter Restriction "do[es] *nothing more* than implement Congress's intent" (emphasis added)). The district court properly rejected that argument as a mistaken understanding of federal law. *See* PI Order, RE 79, PageID# 2622–28. Now, for the first time before this Court, Defendants also argue that the First-Time Voter Restriction is necessary to combat voter fraud. *See* Defs.' Br. at 31–33*; but see* PI Order, RE 79, PageID# 2629 (noting that "Defendants have not shown, or even asserted, that the first-time voter restriction serves the interest of preventing fraudulent votes"). But neither asserted interest holds water in context here, and in any case, they do not outweigh the burden that the First-Time Voter Restriction imposes on Plaintiffs. Indeed, as the district court found, they do not even survive rational basis review. PI Order, RE 79, PageID# 2631.

First, Defendants' argument that the First-Time Voter Requirement is necessary because the Help America Vote Act of 2002 (HAVA) "mandates that States require first-time voters who register by mail to either vote in person with proof of identity or to submit a photocopy of identifying information when voting

absentee," *see* Defs.' Br. at 29, fails in two respects. First, it would be impossible for the First-Time Voter Requirement, which was enacted by the Tennessee Legislature in at least 1994, *see* 1994 Tennessee Laws Pub. Ch. 919, to "bring the State into compliance" with HAVA, which was enacted by Congress in 2002. Second, HAVA simply does not restrict first-time voters to only voting in-person. PI Order, RE 79, PageID# 2623–26.[15] Rather, the law requires only that a first-time mail-registered voter must present identification when voting for the first time in the State—either in person *or* by mail—*unless* they submit requisite identifying information (*e.g.*, appropriate ID, their driver's license number, or the last four digits of their Social Security Number) with their mail registration form, in which case, nothing further is required. *See* 52 U.S.C. § 21083(b). Thus, HAVA explicitly contemplates that a first-time voter may vote either in-person or absentee, and demonstrates—by its own text—that Defendants' interest in complying with federal law is hardly served by First-Time Voter Restriction.[16]

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[15] Tennessee is one of only three states in the nation with the arcane requirement that first-time voters who register to vote by mail must appear to vote in person; thus, it is plainly not federally *required*.

[16] The district court also properly rejected Defendants' supposed interest in "effectuating congressional intent that first-time, mail-registered voters show identification," observing that "[i]t is one thing to intend that voters show identification, and it is quite another to intend that voters vote in person." PI Order, RE 79, PageID# 2623, 2627. Of course, on appeal, Defendants do not challenge *any* of the district court's additional findings with respect to the requirements or intent of federal law—except the sole argument re-articulated and rebutted above—and therefore, have waived all such arguments even if they had any merit.

As to Defendants' newly-articulated interest, that the First-Time Voter Restriction is necessary to combat voter fraud, Defendants' failure to assert such an interest below calls into question the import of such an interest at all. Recognizing that conundrum, Defendants now argue that they did assert an election integrity interest in the district court by pointing to a cherry-picked excerpt of their merits brief below in which they discussed the "purity of the ballot." Defs.' Br. at 32 (citing Defs.' Opp. to PI, RE 46, PageID# 1791–92). But Defendants' cited section had nothing to do with the First-Time Voter Restriction and did not specifically discuss risk of fraud. *See* Defs.' Opp. to PI, RE 46, PageID# 1791–92. Rather, it addressed the importance of Tennessee's absentee voting eligibility *criteria* as "necessary" for the "purity of the ballot."[17] *Id.* Defendants' argument was unrelated to the First-Time Voter Restriction. *Id.* Even if it were, Defendants do not explain how the First-Time Voter Restriction, which prevents only a subset of individuals who are otherwise eligible to vote absentee from voting in that manner, serves that interest.

Defendants' invocation of Election Coordinator Mark Goins' declaration is similarly unavailing. Defs.' Br. at 28. First, the articulated interests were, at best, presented only "obliquely" below, and only in the context of "effectuating

[17] The strict eligibility criteria are outlined in Tennessee Code § 2-6-201. The district court's injunction of the First-Time Voter Restriction does not disturb these eligibility criteria, and instead, only permits those first-time voters *who are otherwise eligible to vote absentee* to do so. *See* Prelim. Inj., RE 80, PageID# 2636–38.

congressional intent that first-time, mail-registered voters show identification," not to support an independent interest in preventing fraud. *See* PI Order, RE 79, PageID# 2630. But as the district court correctly concluded, this asserted interest would not even pass the rational basis test given that Congress already requires first-time voters to submit identification—resolving any fraud concerns—and expressly provided that first-time voters can prove their identity by providing identification with their absentee ballot. *Id.*

In short, Defendants' argument that the district court judge somehow missed Defendants' assertion of this interest in his meticulous discussion of the claims is not credible. Rather, it is the obscurity with which Defendants presented this interest below that necessarily colors how much weight should be given to the supposed newfound importance of that interest.

Defendants' own actions, after entry of the district court's injunction, confirm the district court's analysis, and reinforce the finding that Defendants' interest in combatting voter fraud through the First-Time Voter Restriction is only a weak one. In implementing the injunction, Defendants created an identification requirement for first-time, mail-registered voters, but exempted first-time voters who registered

online.[18] Thus, first-time voters who registered to vote using the State's online system "do not have to submit ID in order to vote absentee by-mail." *Supra* n.18.

Defendants' new identification rules for First-Time Voters appear intended to implement the first-time voter identification requirements of HAVA, 52 U.S.C. § 21083, which as discussed above are less demanding. Those who register online in Tennessee must provide their driver's license or state identification information, which satisfies HAVA. Postal mail registrants also submit either their social security number or their state identification number with their application, which can often satisfy HAVA. *Id.* Thus, it is only necessary, under HAVA, for postal mail registrants to submit a copy of their identification with their absentee ballot when that identification number fails to match with the state or social security database. *Id.* Regardless, whether or not HAVA requires Tennessee's postal mail registrants to submit a copy of their identification or not, Defendants' newly implemented rules necessarily confirm their understanding that HAVA does not require first-time online registered voters to do so. Defendants could have, of course, gone beyond the requirements of HAVA to also require online registered first-time voters to submit a copy of their identification with their absentee ballot. Their decision not to do so, and to instead treat first-time online-registered absentee voters the same as all other

[18] *See Information for First-Time Voters Who Registered by Mail*, Tenn. Sec'y of State, https://sos.tn.gov/products/elections/information-first-time-voters-who-registered-mail (last visited Oct. 21, 2020).

absentee voters, further undercuts Defendants' newly-articulated argument that election integrity is harmed any time first-time voters vote absentee.

In any event, while the State has a legitimate interest in combatting voter fraud, *see Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008), it still must connect that interest to the specific law at issue, which Defendants fail to do here. But even assuming the requisite connection, especially in light of the extensive federal statutory scheme that governs identification and verification requirements for first-time voters, *see* 52 U.S.C. § 21083, Defendants' *misapplication* of federal law surely does not overcome the burden that the First-Time Voter Restriction unnecessarily imposes on Plaintiffs. Indeed, despite now having had three attempts to do so, Defendants still fail to explain "how requiring first-time, mail-registered voters to submit the required identification in person when voting helps prevent fraudulent voting to any greater extent than requiring the submission of such identification with mailed-in ballots." *See* Order Denying Stay, App. R. 18-2, Page 15 (Moore, J., concurring) (quoting PI Order, RE 79, PageID# 2629 n.37).

Ultimately, the district court appropriately concluded that Defendants' asserted interests in maintaining the First-Time Voter restriction were either illusory or unsupported, and correctly determined that such interests cannot overcome the burden imposed on Plaintiffs. This Court should reach the same conclusion.

IV. The Balance of the Equities Also Favor Plaintiffs

On appeal, "the district court's weighing and balancing of the equities of a particular case is overruled only in the rarest of cases." *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (citation omitted). Here, after careful consideration, the district court held that, in contrast to the irreparable harm Plaintiffs would suffer absent an injunction, and compared to the public's interest in an injunction that "would serve to prevent what . . . likely would be a violation of the First Amendment right to vote," an injunction "would not harm or negatively impact any particular person(s)," including Defendants. PI Order, RE 79, PageID# 2633. That determination was not an abuse of discretion.

This Court has held that "[w]hen constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for America*, 697 F.3d at 436 (citing *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438, 445 (6th Cir. 2003)). "A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Id.* Here, considering that the First-Time Voter Restriction unreasonably burdens first-time voters' right to vote, *see supra* Part III, irreparable injury can be presumed. Indeed, irreparable injury is virtually certain, as was the case for first-time voter Mr. Sweet, who was statutorily eligible to vote absentee in Tennessee's August 6, 2020 election, but ultimately did not vote at all because the First-Time Voter Restriction would have forced him to vote in person in the midst of the

ongoing pandemic. *See* Second Sweet Decl., RE 86-2, PageID# 2670 at ¶ 6. For other first-time voters as well, similar injury—resulting in the *de facto* denial of the right to vote—will occur if the First-Time Voter Restriction is not enjoined, particularly in light of the ongoing pandemic circumstances.[19]

In contrast to the clear and irreparable harms that will befall Plaintiffs absent an injunction, Defendants cannot show—nor have they attempted to show—that they will suffer any significant harm if the preliminary injunction is affirmed. Defendants only make a glancing effort to claim irreparable harm, arguing that "the State's sovereignty is irreparably harmed anytime action taken by its democratically elected leaders is enjoined." *See* Defs.' Br. at 33. But as this Court has clearly established, such generalized and theoretical harm is insufficient to carry Defendants' burden. *See* Order Denying Stay, App. R. 18-2, PageID# 3 ("[T]here is no substantial harm to defendants in continuing to comply with rules they are currently following."); *id.* at 11 (Moore, J., concurring) ("[I]f that alone were

[19] In the proceedings below, in response to Defendants' Motion for Reconsideration of the preliminary injunction, Plaintiffs presented additional declarations from voters who would be unable to vote but for the First-Time Voter Restriction being enjoined. *See, e.g.*, Greenwalt Decl., RE 92-2, PageID# 2717–18 at ¶¶ 2, 5–7 (noting that, having registered to vote in September 2020, and despite being otherwise absentee eligible, she would be unable to vote this November if the First-Time Voter Restriction remains in place because she has a rare autoimmune disease that puts her at "severe risk of contracting COVID-19," including by voting in person). While the district court did not rely on these declarations in reaching its decision to order an injunction, they serve to further demonstrate harmful impact of the First-Time Voter Restriction on Tennesseans' exercise of their fundamental right of franchise.

sufficient to warrant a stay, . . . a state would be entitled to a stay pending appeal any time a lower court enjoined its statutes."); *Graveline v. Johnson*, 747 Fed. Appx. 408, 415 (6th Cir. 2018) (rejecting defendants' theory that the harm associated with enjoining state action alone is sufficient to merit relief).

In sum, the case law, including the law of this case, are uniformly aligned against finding irreparable harm to Defendants based *solely* on a generalized claim of theoretical harm. Moreover, as noted above, Defendants face little harm from the injunction of a statute that Defendants claim only serves to bring state law into compliance with their misreading of federal election requirements, and which does not actually serve the election integrity interests Defendants now ascribe to it for the first time on appeal. *See supra* Part III. And Defendants' own actions in this litigation further call into question their claims of purported injury. As Judge Moore aptly noted in her concurring opinion denying Defendants' motion to stay the injunction, Defendants "have not presented any actual evidence of . . . harms commonly argued in election cases, such as an increased risk of voter fraud, confusion, or a disruption to the orderly processing of an election." Order Denying Stay, App. R. 18-2, Page 11 (Moore, J., concurring) ("Given that Defendants had thirty days to marshal such evidence . . . , any harm Defendants may suffer . . . will be relatively

insubstantial.").[20] Nor did Defendants present any such evidence in the district court. *See* PI Order, RE 79, PageID# 2628 ("Defendants could have tried to claim that the first-time voter restriction helps preserve the integrity of the voting process by somehow contributing to the detection of voter fraud. But Defendants did not make, let alone support, such a claim.").

Failing their demonstration of irreparable harm, Defendants fall back upon the tired argument that the public interest is harmed based on the injunction being issued in "proximity [to] the November election." Defs.' Br. at 34. The motions panel already conclusively rejected Defendants' argument: "Considering that both plaintiffs and defendants have widely publicized the district court's order in this case and that voting is well underway in Tennessee, a stay of the district court's preliminary injunction at this point would substantially injure the plaintiffs and is not in the public's best interest." Order Denying Stay, App. R. 18-2, Page 4. It need not be credited here.[21]

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[20] Judge Moore also correctly noted that "Defendants likely would be unable to show a significant risk of voter fraud resulting from leaving the preliminary injunction in place," because "[i]n purporting to comply with the district court's order, Defendants have implemented a requirement by which many first-time mail-registered voters who vote absentee by mail must submit a copy of their identification when they submit their ballot in order to have it counted." Order Denying Stay, App. R. 18-2, Page 11 n.7 (Moore, J., concurring); *see also supra* n.5 (describing Defendants' implementation of the district court's order, including a new identification requirement).

[21] To the extent Defendants seek a reversal of the district court's injunction *before* the November 3, 2020 election—*i.e.*, a second attempt to stay the injunction in

Even if that were not the case, "it is always in the public interest to prevent violation of a party's constitutional rights." *Déjà Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001) (citation omitted). Indeed, "[m]embers of the public . . . have a 'strong interest in exercising the fundamental political right to vote'" and "[t]hat interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Hunter*, 635 F.3d at 244 (quoting *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006)). Here, the district court's injunction *expanded* voting opportunities for the public, and in so doing, served the public's interest.

CONCLUSION

For the reasons articulated herein, the district court's grant of a preliminary injunction should be affirmed.

Dated: October 23, 2020

Respectfully Submitted,

/s/ Ravi Doshi

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advance of Election Day—this Court should decline to provide such relief for the same reasons it did so in its order denying Defendants' motion to stay: a stay (or reversal) of the injunction in advance of November 3, 2020 will *cause* voter confusion and harm the public's interest. Order Denying Stay, App. R. 18-2, Pages 1–4.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,103 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify, that on this 23rd day of October, 2020, the foregoing Brief of Appellees was filed electronically, and will be served upon all counsel of record, via the Court's CM/ECF system.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Appellees designate the following documents from the district court's electronic record as required by Sixth Circuit Rule 30(g).

Date Filed	Document Description	RE.No.; PageID#
6/12/2020	Amended Complaint (Am. Compl.)	RE 39; PageID# 123–59
6/12/2020	Declaration of Tennessee NAACP (Tennessee NAACP Decl.)	RE 40-5; PageID# 1553–65
6/12/2020	Declaration of Memphis Central Labor Council (MCLC Decl.)	RE 40-6; PageID# 1566–74
6/12/2020	Declaration of Memphis A. Philip Randolph Institute (APRI Decl.)	RE 40-7; PageID# 1575–81
6/12/2020	Declaration of The Equity Alliance (Equity Alliance Decl.)	RE 40-8; PageID# 1582–92
6/12/2020	Declaration of Free Hearts (Free Hearts Decl.)	RE 40-9; PageID# 1593–1600
6/15/2020	Plaintiffs' Preliminary Injunction Brief (Prelim. Inj. Br.)	RE 43; PageID# 1656–1703
6/26/2020	Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (Defs.' Opp. to PI)	RE 46; PageID# 1765–1822
7/7/2020	Plaintiffs' Reply Brief in Support of Preliminary Injunction (PI Reply)	RE 54, PageID# 2138–2166
7/7/2020	Declaration of Corey Sweet	RE 54-4; PageID# 2300–02
9/9/2020	Memorandum and Order Granting Preliminary Injunction (PI Order)	RE 79, PageID# 2578–2635
9/9/2020	Preliminary Injunction Order (Prelim. Inj.)	RE 80, PageID# 2636–2638
9/10/2020	Declaration of Gloria Sweet-Love	RE 86-1, PageID# 2666–2667

9/10/2020	Second Declaration of Corey Sweet (Second Sweet Decl.)	RE 86-2, PageID# 2669–2671
9/15/2020	Plaintiffs' Opposition to Motion for Reconsideration	RE 92, PageID# 2692–2707
9/15/2020	Declaration of Joy Greenwalt (Greenwalt Decl.)	RE 93-2, PageID# 2717–18
9/28/2020	Order Denying Reconsideration	RE 103, PageID# 2754–79
9/29/2020	Order Denying Defendants' First Motion to Stay Injunction (Order Denying First Mot. Stay)	RE 107, PageID# 2788–2790
10/7/2020	Declaration of Jeffrey Lichtenstein (Second MCLC Decl.)	RE 112-1, PageID# 2824–2825
10/7/2020	Second Declaration of Gloria Sweet-Love (Second Sweet-Love Decl.)	RE 112-2, PageID# 2827–2828