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, Secretary of State, et al.,
Defendants-Appellants

On Appeal from the United States District Court for the
Middle District of Tennessee
(No. 3:20-cv-00374)

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

The district court issued a preliminary injunction that prevents the State from enforcing a decades-old election law during the upcoming November election. Because that election is now less than a month away and the legal issues in this appeal are straightforward, Defendants request that this Court reverse the district court without oral argument.

STATEMENT OF JURISDICTION

Plaintiffs asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 1357 and 42 U.S.C. § 1983. Am. Compl., R. 1, PageID# 130. Defendants argued below that the district court lacked jurisdiction because Plaintiffs failed to establish Article III standing, and they opposed Plaintiffs' preliminary-injunction motion and moved to dismiss Plaintiffs' claims on that basis. *See* Prelim. Inj. Resp., R. 46, PageID# 1776-87; Mot. to Dismiss Mem., R. 62, PageID# 2330-33. The district court concluded that a single organizational plaintiff had associational standing and granted Plaintiffs' preliminary-injunction motion in relevant part on September 9, 2020. Prelim. Inj. Order, R. 79, PageID# 2458-99. Defendants filed a notice of appeal on October 5, 2020. Notice of Appeal, R. 108, PageID# 2791-93. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Less than two months before the November election, the district court enjoined the State from enforcing its requirement that mail-registered voters appear in person to provide proof of identification the first time they vote. *See* Tenn. Code Ann. § 2-2-115(b)(7). If sustained, the injunction will harm the State and the public. The provision the district court enjoined is one piece of a broader framework of State election laws that, together, act to combat fraud and to ensure the integrity of the election process. By eliminating a critical piece of that framework, the district court has opened the door to voter fraud and confusion on the eve of an election.

The issue presented in this appeal is whether the district court abused its discretion by granting this extraordinary relief.

INTRODUCTION

Just last week, the Supreme Court stayed an injunction that barred South Carolina from enforcing its absentee-ballot witness requirement. *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (mem.). In a concurring opinion, Justice Kavanaugh explained that "for many years, [the Supreme Court] has repeatedly emphasized that federal courts should not alter state election rules in the period close to an election." *Id.* (Kavanaugh, J., concurring). "By enjoining South Carolina's witness requirement shortly before the election," he continued, "the District Court defied that principle and this Court's precedents." *Id.*

Andino was no outlier. In recent years, the Supreme Court and this Court have repeatedly reversed or stayed injunctions that made federal courts "overseers and micromanagers" of "the minutiae of state election processes." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016); *see also, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1206 (2020) (per curiam). That is because "the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections." *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020).

Yet less than two months before the November election, the district court enjoined Tennessee from enforcing its requirement that persons who register to vote by mail appear in person to provide "satisfactory proof of identity" the first time they

vote, even if they would otherwise be eligible to vote by mail in that election. Tenn. Code Ann. § 2-2-115(b)(7)(A). This requirement is necessary because voters are not required to submit proof of identity when registering by mail, and absentee ballots are verified only by comparing the signature that appears on the ballot affidavit with the signature in the voter's registration record. *See* Goins Decl., R. 46-1, PageID# 1827-28; *see also* Tenn. Code Ann. § 2-6-202(b)-(d).

Because the district court lacked jurisdiction to issue the injunction, and because its eleventh-hour injunction rested on a misapplication of Supreme Court precedent and disregarded inevitable harm to the State and the public interest, this Court should reverse the injunction to restore the status quo and return to the State the authority to administer its elections without interference from the federal courts.

STATEMENT OF THE CASE

I. Statutory Background

Both the federal and state Constitutions grant the Tennessee legislature broad authority to regulate Tennessee's elections. *See* U.S. Const. art. I, § 4, cl. 1 (providing that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"); Tenn. Const. art. IV, § 1 (granting the legislature authority to enact laws to "secure the freedom of elections and the purity of the ballot box"). The legislature's regulatory authority over elections is "manifest." *Fisher v. Hargett*, 604 S.W.3d

381, 400 (Tenn. 2020) (quoting *City of Memphis v. Hargett*, 414 S.W.3d 88, 103 (Tenn. 2013)).

Exercising this manifest authority, the legislature has established three methods for registered voters to cast their ballots. *Id.* at 400-01. The first—and default— method is in-person voting at the voter's assigned polling place on election day. *See* Tenn. Code Ann. § 2-3-101. The second method is early in-person voting at the county election commission's office or any polling place designated for early voting during a 15-day period ending five days before election day. *See id.* § 2-6-102(a)(1). The third method—the one at issue in this appeal—is absentee-by-mail voting. *See id.* § 2-6-201.

In Tennessee, voting by mail is a "special privilege." *City of Memphis*, 414 S.W.3d at 110 (cleaned up). This privilege has historically been granted only to specific, statutorily defined groups such as voters who are out of their county of residence, ill, or otherwise unable to appear in person. *See* Tenn. Code Ann. § 2-6-201. The Tennessee Supreme Court has expressly declined to expand this privilege to all voters during the pandemic. *See Fisher*, 604 S.W.3d at 400-05 (permitting only those who are particularly vulnerable to COVID-19 and their caretakers to vote by mail).

Voting by mail poses a greater risk of fraud than in-person voting. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc) (recognizing that the

"potential and reality of fraud is much greater in the mail-in ballot context than with in-person voting"); *Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (observing that "[v]oting fraud is a serious problem in U.S. elections generally . . . and it is facilitated by absentee voting"). Indeed, while in-person voters are required to present a photo ID, *see* Tenn. Code Ann. § 2-7-112(a)(1), absentee voters are not, *see* Goins Decl., R. 46-1, PageID# 1827. So to "avoid potential fraud," the legislature has established a "set of procedural safeguards" to ensure that persons who vote by mail are who they say they are. *City of Memphis*, 414 S.W.3d at 110.

The first-time-voter requirement is one such safeguard. It requires voters who registered to vote by mail—even those who would otherwise be eligible to vote absentee—to appear in person the first time they vote to verify their identity. *See* Tenn. Code Ann. § 2-2-115(b)(7)(A). This requirement is necessary because absentee voting, "by its nature," "deprives the State of the ability to efficiently verify a voter's identity." Goins Decl., R. 46-1, PageID# 1827. Because "no proof of identity is required under Tennessee's absentee voting laws, a voter could fraudulently fill out and sign a voter registration form and an absentee application using the same information." *Id.* At that point, "the signatures will match, and that voter will receive a ballot without the State ever having an opportunity to verify that voter's identity"—a scenario that "could lead to 'ghost voting.'" *Id.*

The first-time-voter provision is also Tennessee's chosen means of complying with the Help America Vote Act ("HAVA"), which 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* 52 U.S.C. § 21083(b). And it is consistent with the National Voter Registration Act ("NVRA"), which provides that a State may require a voter to vote in person if the voter "registered to vote in a jurisdiction by mail" and "has not previously voted in that jurisdiction." 52 U.S.C. § 20505(c)(1)(A)-(B).

II. Procedural Background

On May 1, 2020, Plaintiffs—two individual voters and five voter-outreach organizations—filed a complaint challenging several of Tennessee's absentee-voting safeguards.[1] *See generally* Compl., R. 1, PageID# 8-13, 30-31. That initial complaint did *not* challenge the first-time-voter provision. Six weeks later, on June 12, 2020, Plaintiffs amended their complaint to challenge the first-time-voter provision and sought a preliminary injunction. *See* Am. Compl., R. 39, PageID# 129-30, 148-49; Mot for Prelim. Inj., R. 40, PageID# 160-62. Plaintiffs argued that the requirement that first-time, mail-registered voters appear in person "severely

[1] The district court recently granted Plaintiffs' motion to voluntarily dismiss their claim challenging Tennessee's absentee-voting eligibility criteria and the claims of Kendra Lee—one of the two individual voters. *See* Order Dismissing Pls.' First Claim for Relief, R. 106, PageID# 2786-87; Mot. to Voluntarily Dismiss First Claim for Relief, R. 104, PageID# 2780-83.

burdens the fundamental right to vote" and asked the district court to enjoin its enforcement. Am. Compl., R. 39, PageID# 149; Mem. in Supp. of Mot. for Prelim. Inj., R. 40, PageID# 1679-85.

Defendants, the Tennessee Secretary of State, Tennessee Coordinator of Elections, and District Attorney General for Shelby County, opposed the request for preliminary injunctive relief on several grounds. *See* Prelim. Inj. Resp., R. 46, PageID# 1765-1822. Defendants argued that Plaintiffs lacked Article III and third-party standing, *id*. at PageID# 1776-80, 1785-87, 1808 n.27; that Plaintiffs' claims were barred by laches, *id*. at PageID# 1770-76; that Plaintiffs were unlikely to succeed on the merits of their claims, *id*. at PageID# 1803-16; and that the harm an injunction would cause to the State and the public interest outweighed Plaintiffs' alleged harms, *id*. at PageID# 1816-21.

On September 9, 2020, just over seven weeks from the November election, the district court granted the preliminary injunction.[2] *See* Prelim. Inj. Order, R. 80, PageID# 2636-38. The court concluded that one organizational Plaintiff—the Tennessee Conference of the NAACP—had associational standing through a single purported member: Corey Sweet. *See* Mem. Op., R. 79, PageID# 2596. The district

[2] The district court addressed Plaintiffs' claims for injunctive relief in separate orders, one of which was the subject of another appeal. *See Memphis A. Phillip Randolph Inst. v. Hargett*, --- F.3d---, No. 20-6046, 2020 WL 6074331 (6th Cir. Oct. 15, 2020) (affirming district court's decision to deny preliminary injunction related to Tennessee's signature-verification procedures for absentee ballots).

court acknowledged that Plaintiffs' evidence of Sweet's membership in the NAACP was "far from strong" but concluded that the NAACP had made the "bare minimum" showing of standing. *See id*. at PageID# 2596 n. 10, 2600. The district court also concluded that Sweet's alleged injury was "directly connected" to the challenged law and that this injury would be redressed by an injunction. *Id*. at PageID# 2598-99.

Next, the district court analyzed Plaintiffs' claims under the *Anderson-Burdick* framework. *See id*. at 2600. The court concluded that the law imposed a "moderate" burden on the right to vote, reasoning 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." *See id*. at PageID# 2611. The court further concluded that this moderate burden was not outweighed by any asserted State interest. *See id*. at PageID# 2609, 2621-32.

The very next day, Defendants moved to stay the injunction pending resolution of their previously filed—and still unresolved—motion to dismiss for lack of standing. *See* Mot. to Stay, R. 83, PageID# 2650-51. And a day after that, Defendants filed a motion to reconsider the injunction. *See* Mot. to Reconsider, R. 87, PageID# 2672-73. Defendants did so because Plaintiffs had submitted Sweet's declaration—on which the court had relied to find standing—for the first time with

a reply brief, to which Defendants could not respond. *See* Sweet Decl., R. 54-4, PageID# 2299-2302. The district court denied both motions. *See* Mem. Op. Denying Mot. to Reconsider, R. 103, PageID# 2754-79; Order Denying Mot. to Stay, R. 107, PageID# 2788-90.

Defendants then immediately appealed, *see* Notice of Appeal, R. 108, PageID# 2791-92, and asked the district court to stay the injunction pending the appeal, *see* Mot. to Stay Pending Appeal, R. 109, PageID# 2794-2807. On October 8, 2020, the district court denied Defendants' motion to stay. *See* Order Denying Mot. to Stay, R. 113, PageID# 2829-32. Defendants promptly sought a stay from this Court, *see* Doc. 4-1, and now ask this Court to reverse the district court's injunction.

SUMMARY OF ARGUMENT

This Court should reverse the district court because Plaintiffs did not show an entitlement to the extraordinary remedy of a preliminary injunction—a remedy that is all the more extraordinary in this case given the impending November election.

I. Plaintiffs are unlikely to succeed on the merits because their claims are nonjusticiable, they lack prudential standing, and the challenged law is constitutional.

A. Plaintiffs' claims are nonjusticiable because they lack Article III standing and their claims are moot.

1. The district court concluded that a single organizational plaintiff—the Tennessee Conference of the NAACP—had associational standing to assert the injury of a single purported member of that organization: Corey Sweet. But Plaintiffs failed to establish that Sweet was a member of the NAACP at the relevant time. That failure is fatal to the NAACP's claim of associational standing.

2. Even if Sweet were a member of the NAACP at the relevant time, any claim based on his injury is now moot. Sweet is not eligible to vote absentee because he does not meet any of the statutory eligibility criteria. Thus, while it is true that he will be unable to vote by mail in the coming election, that inability stems not from the first-time-voter requirement but from other state election laws that are not challenged here. Nothing in the district court's injunction can remedy Sweet's asserted injury, so the NAACP's claim is moot.

B. Even if the NAACP had Article III standing, it still would lack prudential standing to assert the voting rights of others. This court has held that voting-rights organizations lack the "close relationship" with voters necessary to support third-party standing.

C. Plaintiffs' constitutional claims also fail on the merits. The first-time-voter requirement easily survives *Anderson-Burdick* review. The requirement

imposes at most a minimal burden on the right to vote. Tennessee offers a range of opportunities for voters to cast their ballots. Thus, while the first-time-voter requirement means that some voters will be unable to cast their ballots by mail, it does not prohibit any Tennessean from voting. This minimal burden is more than justified by the State's compelling interests in election integrity and in enforcing its chosen means of complying with HAVA. In concluding otherwise, the district court overstated the burden imposed by the first-time voter requirement and understated the State's interests in enforcing that requirement.

II. Finally, the equities weigh strongly against Plaintiffs. The district court's injunction will inflict immediate and irreparable harm on the State and the public. By enjoining enforcement of the first-time-voter requirement on the eve of an election, the district court deprived the State of a crucial means of combating voter fraud and disregarded the Supreme Court's oft-repeated admonition that lower federal courts should not change the rules close to an election.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs must prove "that the circumstances clearly demand" that extraordinary relief. *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). Both the Supreme Court and this Court have made clear that federal courts should not

issue injunctions that "alter the election rules on the eve of an election." *Kishore v. Whitmer*, 972 F.3d 745, 751 (6th Cir. 2020) (quoting *Republican Nat'l Comm.*, 140 S. Ct. at 1207); *see also Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam).

To determine whether a plaintiff has cleared that high bar, courts ask "(1) whether the plaintiffs are likely to succeed on the merits, (2) whether the plaintiffs will suffer irreparable injury in the absence of an injunction, (3) whether granting the injunction will cause substantial harm to others, and (4) whether the issuance of the injunction is in the public interest." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997). Failure to satisfy the first part of the test is fatal: a preliminary injunction may not issue "where there is simply no likelihood of success on the merits." *Id.* And where, as here, the government is the defendant, "the public-interest factor 'merges' with the substantial-harm factor," and "neither of these factors can be satisfied when the challenged provisions are constitutional." *Daunt v. Benson*, 956 F.3d 396, 422 (6th Cir. 2020) (alteration omitted) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

On appeal, the district court's "ultimate determination as to whether the four preliminary injunction factors weigh in favor of granting" a preliminary injunction is reviewed for abuse of discretion. *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (internal quotation marks omitted). But its legal conclusions, including its determination of the likelihood of

success on the merits, are reviewed de novo, and its factual findings for clear error. *Id*.

ARGUMENT

The decision below was an abuse of discretion. Plaintiffs did not establish a likelihood of success on the merits, both because their claims are nonjusticiable and because they cannot prove a violation of their constitutional rights. These failures alone should have been fatal to their request for preliminary injunctive relief. And even if Plaintiffs had shown a likelihood of success, the equities weigh against injunctive relief because the injunction irreparably harms both the State and the public interest.

I. Plaintiffs Are Unlikely to Succeed on the Merits.

To obtain a preliminary injunction, Plaintiffs were required to prove *both* a substantial likelihood of standing to seek an injunction, *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 254-56 & nn.3-4 (6th Cir. 2018), *and* a substantial likelihood of success on the merits of their claims, *Miller*, 103 F.3d at 1249. Because they proved neither, the district court's order granting a preliminary injunction must be reversed.

A. Plaintiffs' claims are nonjusticiable.

"Article III of the Constitution limits federal courts to deciding cases and controversies." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493 (2019) (cleaned

up). This "bedrock requirement," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982), means that plaintiffs seeking to invoke federal jurisdiction must show that they have standing—that is, they must show an injury in fact that is fairly traceable to the challenged action of the defendants and redressable by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

But there's more—an "actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (cleaned up). When "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," the "case becomes moot—and is therefore no longer a 'Case' or 'Controversy' for purposes of Article III." *Id.* Here, both of these doctrines—standing and mootness—render Plaintiffs' claims nonjusticiable.

1. Plaintiffs lack standing.

Federal courts are powerless to grant a preliminary injunction unless a plaintiff proves "a substantial likelihood of establishing" Article III standing. *Waskul*, 900 F.3d at 256. To carry this burden, a plaintiff must prove: (1) an injury in fact that is (2) fairly traceable to the challenged action of the defendants and (3) redressable by a favorable decision. *Lujan*, 504 U.S. at 560-61. Each element of standing "must be supported in the same way as any other matter on which the

plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. At the preliminary-injunction stage, that means plaintiffs must go beyond the allegations of the complaint and submit evidence that, if credited, would establish their standing to seek the requested relief. *See id.*; *Waskul*, 900 F.3d at 255 n.3.

Organizational plaintiffs "must follow these same black-letter rules." *Waskul*, 900 F.3d at 255. Any other approach "would make a mockery" of the Supreme Court's standing jurisprudence. *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)). Thus, like an individual Plaintiff, an organizational plaintiff "must show 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.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016), *as revised* (May 24, 2016)).

The district court's conclusion on standing cannot be squared with these black-letter rules. The district court ruled that one organizational plaintiff—the Tennessee Conference of the NAACP—had associational standing through Sweet, a single purported member. *See* Mem. Op., R. 79, PageID# 2596, 2600. To be sure, a single member may be enough to establish standing, but that member must be just that—a *member*. *See Summers*, 555 U.S. at 498 (explaining that to prevail on the theory of associational standing, an organization must present evidence that "at least

one identified *member*" would have standing) (emphasis added). And because standing is assessed at the time the complaint is filed, *see Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008), an organizational plaintiff must show that a member had standing as of that date.

Plaintiffs have not made this showing. Indeed, when Plaintiffs filed their amended complaint, they did not submit any declarations demonstrating that a member of any organizational plaintiff would have standing in his or her own right. Plaintiffs attempted to remedy this problem by filing Sweet's declaration alongside a reply brief in support of their preliminary-injunction motion. *See* Sweet Decl., R. 54-4, PageID# 2299-2302. In that reply, Plaintiffs alleged that Sweet was a "first-time voter and member of the Tennessee NAACP" who was otherwise eligible to vote by mail, but "registered to vote online earlier this year." Pls.' Reply in Supp. of Mot. for Prelim. Inj., R. 54, PageID# 2270. But that's not what Sweet's declaration said—the word "member" appears nowhere in the declaration. Instead, Sweet claimed only that he "occasionally attend[s] events of the [NAACP]." Sweet Decl., R. 54-4, PageID# 2300. Plaintiffs thus failed to demonstrate that Sweet was a member of the NAACP when the amended complaint was filed.[3] Because the

[3] Litigation over Sweet's membership in the NAACP continued even after the district court issued the preliminary injunction. Shortly after the injunction was issued, Plaintiffs submitted a second declaration from Sweet as well as a declaration from Gloria Jean Sweet-Love, his grandmother and the president of the Tennessee

NAACP's purported standing rests solely on Sweet's membership, the injunction should not have issued.

2. Even if Plaintiffs had standing at one time, their claims are now moot.

When Plaintiffs filed their amended complaint challenging the first-time-voter provision on June 12, 2020, Sweet was eligible to vote absentee under a June 4, 2020 state-court injunction that enabled "any qualified voter who determines that it is impossible or unreasonable to vote in person at a polling place due to the COVID-19 situation" to vote absentee. *See* Temporary Inj. Order, *Fisher v. Hargett*, No. 20-453-III (Tenn. Ch. Ct., 20th Jud. Dist. Jun. 4, 2020). At that time, the only impediment Sweet faced to voting absentee was the first-time-voter provision. Thus, had Sweet been a member of the NAACP at that time, the organization might have had associational standing to challenge the first-time-voter provision. As discussed above, Plaintiffs failed to submit any evidence that Sweet was a member of the NAACP at the relevant time, so the NAACP cannot establish associational standing based on Sweet. But even if the NAACP had shown that Sweet was a member when Plaintiffs filed their amended complaint, a second justiciability doctrine—mootness—would doom Plaintiffs' request for preliminary relief.

State Conference of the NAACP. *See* Sweet-Love Decl., R. 86-1, PageID# 2665-67; Sweet Decl., R. 86-2, PageID# 2668-71. Yet these declarations do not solve Plaintiffs' problems—at most, they show that Sweet is *currently* a member of the NAACP. Neither declaration shows that Sweet was a member when the amended complaint was filed. That failure is fatal to the NAACP's associational standing.

Mootness has been described as "the doctrine of standing set in a time frame." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). Put another way, "[t]he doctrines of standing and mootness are similar," but there is a "temporal distinction: standing applies at the sound of the starting gun, and mootness picks up the baton from there." *Sumpter v. Wayne Cnty.*, 868 F.3d 473, 490 (6th Cir. 2017). This means that a case "becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC*, 568 U.S. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)).

Sweet lacks a "legally cognizable interest" in the outcome of this appeal because he is no longer eligible to vote absentee and thus has no need for preliminary relief. *See id.* The state-court injunction that once made Sweet eligible to vote absentee was vacated by the Tennessee Supreme Court on August 5, 2020, *see Fisher*, 604 S.W.3d at 405, before the district court enjoined the first-time-voter provision. Plaintiffs have not shown that Sweet satisfies any of the statutory eligibility criteria for absentee voting. *See* Tenn. Code Ann. § 2-6-201.[4] So even

[4] Sweet's initial declaration stated that he was a "rising junior at Xavier University in Louisiana," Sweet Decl., R. 78-8, PageID# 2575, but his next declaration stated that he "transferred from Xavier University to the University of Memphis" in July 2020, Second Sweet Decl., R. 86-2, PageID# 2670. Because Sweet is not "enrolled

with the first-time-voter provision now enjoined, Sweet still cannot vote by mail. *Cf. Murphy*, 455 U.S. at 481-82 (explaining that a dispute "was no longer live because even a favorable decision" would not have remedied the plaintiff's injury). In other words, the cause of his inability to vote by mail is not the first-time-voter provision but Tennessee's statutory eligibility criteria—which are not challenged here. So the district court's injunction cannot redress Sweet's asserted injury.

Plaintiffs do not seriously argue otherwise and instead speculate that Sweet might at some future time become eligible to vote absentee. They argue that Sweet "remains harmed" because—even if he is not eligible to vote absentee now—he "does not know if he will be out of the county during the relevant period, will be ill (particularly given the ongoing COVID-19 crisis), will be called to jury duty, or will otherwise be eligible to vote absentee." *Id.* at PageID# 2702.

This sort of speculation cannot save Plaintiffs' claim for preliminary relief from mootness. As this Court recognized just days ago when it held that Plaintiffs lacked standing to challenge Tennessee's signature-verification procedures, "speculative allegations of . . . harm" are insufficient to confer jurisdiction. *Memphis A. Philip Randolph Inst.*, 2020 WL 6074331, at *6. The "test for mootness is whether the relief sought would, if granted, make a difference to the legal interests

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as a full-time student" in an institution "outside the county where [he] is registered," he is not eligible to vote absentee under Tenn. Code Ann. § 2-6-201(2).

of the parties." *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019) (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)). Sweet is not eligible to vote absentee in the November election, and the district court's preliminary injunction did not change this fact. As a result, the injunction made no "difference to the legal interests of the parties." *Id.*

Nor does the exception from mootness for claims that are capable of repetition yet evade review help Plaintiffs. To invoke this narrow exception, a party must show that "(1) the challenged action is too short to be fully litigated prior to its cessation or expiration; and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). And while the second prong of this analysis is "somewhat relaxed in election cases," *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005), the Supreme Court has "never held that a mere physical or theoretical possibility was sufficient to satisfy th[is] test." *Murphy*, 455 U.S. at 482.

Thus, a plaintiff—even in the election context—must show that he or she is likely to be subjected to the same harm again. Plaintiffs here cannot make this showing. Absent any evidence that Sweet is or will become eligible to vote absentee under Tennessee law, *see* Tenn. Code Ann. § 2-6-201, there is only one way that "the same controversy will recur involving the same complaining party." *Murphy*, 455 U.S. at 482. A court would have to again suspend Tennessee's statutory

eligibility criteria for absentee voting. Given that the impetus for the earlier state-court injunction was a "once-in-a-century pandemic," *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 930 (6th Cir. 2020), Plaintiffs cannot demonstrate that future judicial intervention of this nature is at all likely. That means their claim for preliminary relief is moot. *See Tigrett v. Cooper*, 595 F. App'x 554, 557-58 (6th Cir. 2014) (concluding that plaintiffs were unlikely to suffer the same harm again where the alleged harms stemmed from a consolidation election—something that may "not occur again for another half-century").

* * *

The district court's jurisdiction to issue the injunction rises or falls on whether the NAACP established associational standing to assert an injury on behalf of Corey Sweet. Plaintiffs failed to prove that Sweet was a member of the NAACP when the amended complaint was filed. And even if they had, any challenge to the first-time-voter provision on Sweet's behalf is now moot because Sweet cannot vote absentee whether or not the first-time-voter provision is enjoined. Either way, Plaintiffs' claims are nonjusticiable, and their request for injunctive relief should have been denied.

B. Plaintiffs lack prudential standing to challenge the first-time voter requirement.

The NAACP—again, the only plaintiff the district court found to have Article III standing—also failed to establish that it has prudential standing to assert the rights

of others. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). After all, the NAACP seeks to vindicate not its own right to vote but the rights of third-party voters not before the Court. *See Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014). This Court has held that voting-rights organizations lack the "close relationship" with voters that is required for third-party standing. *Id*. As Defendants argued below, this means the organizations lack third-party standing and cannot obtain a preliminary injunction. Prelim. Inj. Resp., R. 46, PageID# 1780, 1785, 1808 n.27.

C. The first-time-voter requirement is constitutional under *Anderson-Burdick*.

The Supreme Court adopted the *Anderson-Burdick* framework as a more deferential alternative to strict scrutiny for state election laws. *See Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Id*. at 433. Because "[e]lection laws will invariably impose some burden upon individual voters," subjecting "every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id*. Accordingly, "[a] court considering a challenge to a state election law" should apply "a more flexible standard." *Id*. at 434. And this standard applies whenever a "law respecting the right to vote" is challenged—"whether it governs voter qualifications, candidate selection, or the voting process." *Crawford*

v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008) (Scalia, J., concurring in the judgment).

1. Compelling state interests outweigh any minimal burdens the first-time voter requirement imposes.

Under *Anderson-Burdick*, the level of scrutiny courts apply to an election law depends on the severity of the burdens it imposes. Severe restrictions on the right to vote must be narrowly tailored to advance a compelling state interest. *Burdick*, 504 U.S. at 434. But "reasonable, nondiscriminatory restrictions" are usually justified by "the State's important regulatory interests" in conducting orderly elections. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). And when the burden on voting rights is "moderate," courts "must weigh that burden against the precise interests put forward by the State as justifications for the burden imposed by its rule" and determine whether the State's interests outweigh that burden. *Mays v. LaRose*, 951 F.3d 775, 784 (6th Cir. 2020) (quotation marks omitted). Tennessee's first-time-voter requirement imposes at most a minimal burden on the right to vote and is justified by the State's compelling interest in election integrity. As a result, it easily passes this test.

Begin with the burdens. Plaintiffs allege that the State's requirement that first-time, mail-registered voters appear in person "severely burdens the fundamental right to vote." Am. Compl., R. 39, PageID# 149; Mem. in Supp. of Mot. for Prelim. Inj., R. 40, PageID# 1679-85. The burden is severe, Plaintiffs insist, because "first-

time voters who registered by U.S. mail will have *no alternative* but to vote in person in August and November." Pls.' Mem. in Supp. of Prelim. Inj., R. 43, PageID# 1684 (emphasis in original).

But Plaintiffs' arguments miss the mark. By arguing that voters will have "no alternative but to vote in person," they confirm that this case is not about the right to vote but instead about the claimed "right" to vote absentee. As this Court has repeatedly recognized, there is no such right.[5] *See, e.g.*, *A. Philip Randolph Inst. of Ohio v. LaRose*, No. 20-4063, 2020 WL 6013117, at *2 (6th Cir. Oct. 9, 2020) (quoting *Mays*, 951 F.3d at 792) (observing that "there is no constitutional right to an absentee ballot"). The only burden that matters, then, is the burden on the right to vote evaluated in light of "all available opportunities to vote." *Mays*, 951 F.3d at 785.

Tennesseans have a range of voting opportunities. Voters may vote in person at their assigned polling place on election day. *See* Tenn. Code Ann. § 2-3-101. Or they may cast their ballots in-person during a 15-day period ending five days before election day. *See id.* § 2-6-102(a)(1). And finally, eligible voters may vote by mail.

[5] The Sixth Circuit is not alone in reaching this conclusion. Just last week, the Seventh Circuit explained that, in *McDonald v. Board of Election Commissioners of Chicago*, "the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail." *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020) (citing *McDonald*, 394 U.S. 802, 807 (1969)). "And unless a state's actions make it harder to cast a ballot at all," the court reasoned, "the right to vote is not at stake." *Id.*

See id. § 2-6-201. First-time voters who are unable to vote by mail may still vote in person either during the 15-day early voting period or on election day.[6] *See* Tenn. Code Ann. §§ 2-3-201, 2-6-102. The State "cannot be faulted for [some] voters' choice not to take advantage of [these] other avenues available to them to cast their ballot." *A Phillip Randolph Inst. of Ohio*, 2020 WL 6013117, at *2 (citing *Mays*, 951 F.3d at 786). The burden on Plaintiffs' right to vote, then, is minimal at most. *See id.*; *see also Mays*, 951 F.3d at 785.

That some people might be "unwilling to vote in person" during the COVID-19 pandemic "does not make an otherwise-valid [requirement] unconstitutional." *Common Cause Ind. v. Lawson*, --- F.3d ---, No. 20-2911, 2020 WL 6042121, at *1 (7th Cir. Oct. 13, 2020). It is up to the States "to decide what sort of adjustments" to their election procedures "would be prudent" during the pandemic. *Id.* Tennessee has decided to retain its restrictions on absentee voting—including the first-time-voter requirement—while implementing extensive measures to ensure the safety of voters who vote in person. *See* Goins Decl., R. 46-1, PageID# 1824; Tennessee Election COVID-19 Contingency Plan, R. 40-2, Ex. 5, PageID# 214-95. If voters nevertheless choose to stay home rather than vote in person, that decision is not

[6] Voters in this situation also have another option: they may convert their mail registration to an in-person registration, thus enabling them to vote by mail. *See* Tennessee Election COVID-19 Contingency Plan, R. 40-2, Ex. 5, PageID# 230. A voter may do this by presenting a valid photo ID in-person to the county election commission office. *Id.*

attributable to Tennessee and is not a constitutionally cognizable burden. *See Thompson*, 959 F.3d at 810 ("[W]e cannot hold private citizens' decisions to stay home for their own safety against the State.").

Now consider the State's interests. The State's "compelling interest in preventing voter fraud," *Purcell*, 549 U.S. at 4, is especially strong in the absentee-by-mail voting context. *See, e.g.*, *Crawford*, 553 U.S. at 225 (Souter, J., dissenting); *Veasey*, 830 F.3d at 239; *Griffin*, 385 F.3d at 1130-31. And there "is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters." *See Crawford*, 553 U.S. at 196 (plurality opinion).

The first-time-voter requirement directly furthers these interests. While "[i]n-person voting easily facilities the checking of voter identification and, thus, aids in the prevention of fraud," absentee voting, "by its nature," "deprives the State of the ability to efficiently verify a voter's identity." Goins Decl., R. 46-1, PageID# 1827. And because no proof of identity is required under Tennessee's absentee voting laws," a voter could fraudulently obtain a ballot without the State ever having an opportunity to verify that voter's identity—a scenario that can lead to "ghost voting." *Id*. Thus, it is crucial for the State to verify the identity of absentee voters. And for first-time voters who register to vote by mail, the State does so by requiring those voters to appear in person the first time they vote.

The first-time-voter requirement also brings the State into compliance with federal law. 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* 52 U.S.C. § 21083(b). And while HAVA permits States to follow this mandate in multiple ways, the State surely has an interest in enforcing its chosen means of following Congress's mandate. *See generally Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted).

At bottom, Plaintiffs allege at most the inability to vote by mail—not the loss of access to the right to vote. This alleged burden cannot outweigh the State's long-recognized and compelling interests in preventing fraud and protecting the integrity of the election process—interests that carry even greater weight in the absentee-voting context. Nor can Plaintiffs' alleged burden outweigh the State's interest in complying with federal law. HAVA allows States to ensure compliance in different ways, and federal courts should not second-guess Tennessee's chosen means of compliance—much less second-guess those means on the eve of an election.

2. The district court erred in enjoining the challenged laws.

The district court correctly recognized that Plaintiffs' challenge to the first-time-voter provision must be analyzed under the *Anderson-Burdick* framework. *See*

Mem. Op., R. 79, PageID# 2600. But while the district court invoked the proper analytical framework, it misapplied it in two ways.

First, the district court significantly overstated the burden imposed by the first-time-voter provision. The court rightly rejected Plaintiffs' arguments that the burden imposed by the first-time-voter requirement was severe. *See, e.g.*, Mem. Op. R. 79, PageID# 2609 (explaining that because Tennessee law "permit[s] other ways to vote beyond voting absentee," the burden cannot be severe). The court, however, went on to deem the burden moderate because "at least some" mail-registered, first-time voters will have no "viable option" for voting if "COVID-19-related concerns" prevent them from voting in person. *See* Mem. Op., R. 79, PageID# 2611.

But even moderate was too high.[7] This is because "there is no constitutional right to an absentee ballot." *A. Philip Randolph Inst. of*, 2020 WL 6013117, at *2 (quoting *Mays*, 951 F.3d at 792). As a result, the only burden that matters is the burden on the right to vote, evaluated in light of "all available opportunities to vote." *Mays*, 951 F.3d at 785. And because first-time voters in Tennessee may vote in

[7] The district court faulted Defendants for not arguing for a "standard lower than moderate—i.e., rational basis review—or indeed any standard at all with respect to this claim." Mem. Op., R. 79, PageID# 2610. But because parties cannot waive the correct interpretation of the law simply by "fail[ing] to invoke it," *EEOC v. Fed. Labor Relations Auth.*, 476 U.S. 19, 23 (1986) (per curiam), this Court may consider Defendants' arguments about the proper standard. *See Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008); *Jefferson v. Sewon Am.*, Inc., 891 F.3d 911, 923 (11th Cir. 2018).

person either during the 15-day early voting period or on election day, *see* Tenn. Code Ann. §§ 2-3-201, 2-6-102, the burden on Plaintiffs' right to vote is minimal at most, *see A Phillip Randolph Inst. of Ohio*, 2020 WL 6013117, at *2 (citing *Mays*, 951 F.3d at 786). That some voters may not consider voting in person a "viable option"—even with the robust safety measures the State has implemented—does not change the analysis. *See Thompson*, 959 F.3d at 810; *Common Cause Ind.*, 2020 WL 6042121, at *1.

Second, by ignoring record evidence that the first-time-voter requirement exists to combat voter fraud, the district court vastly *understated* the State's interests in enforcing the requirement. The court erroneously concluded that Defendants had asserted only three interests furthered by the first-time voter provision: "(1) complying with NVRA Section 20505(c) and HAVA Section 21083; (2) effectuating congressional intent that states impose a first-time voter restriction; and (3) effectuating congressional intent that first-time, mail-registered voters show identification." *Id.* at PageID# 2623. The court ultimately found those interests insufficient to justify any burden and inexplicably faulted Defendants for making no argument that the challenged law "helps preserve the integrity of the voting process by somehow contributing to the detection of voter fraud." *Id.* at PageID# 2628.

But Defendants did, in fact, argue that the first-time voter provision furthers the State's interest in the "integrity of [the] election process" and the prevention of

fraud. *See* Defs.' Resp. to Mot. for Prelim. Inj., R. 46, PageID# 1791-92. Defendants explained that "legislative conditions imposed upon those voting by mail are necessary because 'the purity of the ballot is more difficult to preserve when voting absent than when voting in person.'" *Id.* at PageID# 1792 (citing *Emery v. Robertson Cnty. Election Comm'n*, 586 S.W.2d 103, 108 (Tenn. 1979)). And Defendants also pointed out that the Tennessee Supreme Court has "expressly recognized that the integrity of the ballot is jeopardized upon violation of *any* of the 'procedural safeguards' that the General Assembly has included in the election laws." *Id.* at PageID# 1791 (emphasis added) (citing *Foust v. May*, 660 S.W.2d 487, 489 (Tenn. 1983)).

Defendants also supported this argument with a sworn declaration from Tennessee's Coordinator of Elections, Mark Goins. Coordinator Goins warned that "Plaintiffs' requested relief could reduce the integrity of the election process." Goins Decl., R. 46-1, PageID# 1827. This is because, he explained, while "[i]n-person voting easily facilities the checking of voter identification and, thus, aids in the prevention of fraud," absentee voting, "by its nature," "deprives the State of the ability to efficiently verify a voter's identity." *Id.* And because no proof of identity is required under Tennessee's absentee voting laws," a voter could fraudulently obtain a ballot without the State ever having an opportunity to verify that voter's identity—a scenario that can lead to "ghost voting." *Id.*

The bottom line is that the State has well-settled interests in the integrity of its election process. *See, e.g.*, *Crawford*, 553 U.S. at 196 (plurality opinion). And as this Court recognized only days ago, States' interests in election integrity and security "taken together," can justify burdens placed on "one method of voting." *A Phillip Randolph Inst. of Ohio*, 2020 WL 6013117, at *3. The district court erred by failing to consider these interests and ignoring the record evidence that substantiated them. *See* Mem. Op., R. 79, PageID# 2627-29. The State's compelling interest in preventing voter fraud was more than enough to justify the slight burden imposed by the first-time voter provision.

II. The Equities Weigh Strongly Against Plaintiffs.

Defendants' likelihood of success on the merits is reason enough for this Court to reverse the preliminary injunction. But in all events, the remaining preliminary-injunction factors confirm that reversal is warranted.

A. The preliminary injunction will cause irreparable harm to the State.

The State always has a strong interest in enforcing its laws. And it is well settled that the State's sovereignty is irreparably harmed any time action taken by its democratically elected leaders is enjoined. *See Abbott*, 138 S. Ct. at 2324; *King*, 133 S. Ct. at 3. It follows that in the election context, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm" the State. *Abbott*, 138 S. Ct. at 2324.

B. The preliminary injunction will also cause harm to the public interest.

The preliminary injunction—if allowed to remain in effect—will harm the public interest as well. Both the Supreme Court and this Court have recognized that while the preliminary-injunction analysis usually entails consideration of the harm to the opposing party and a weighing of the public interest, these two factors "merge when the Government is the opposing party." *Wilson v. Williams*, 961 F.3d 829, 844 (6th Cir. 2020) (quoting *Nken*, 556 U.S. at 435). This means that all of the harms to the State caused by the preliminary injunction—voter confusion, reduced election integrity, and a loss of certainty in election results, to name just a few—extend to the public too.

These shared harms to the State and the public interest are rendered even more acute by the proximity of the November election. The Supreme Court has "repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. at 1207 (citing *Purcell*, 549 U.S. at 4-6). This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. As this Court has warned, "rewriting a state's election procedures or moving deadlines rarely ends with one court order." *Thompson*, 959 F.3d at 813. The risk of

confusion, then, is high and will only increase as the election draws nearer. *Purcell*, 549 U.S. at 5.

In its preliminary injunction order, the district court recognized this possibility. It observed that "enjoining a state election law at this juncture could otherwise be deemed to cause some harm or negative impact to the State, and thus the public it serves." Mem. Op., R. 79, PageID# 2633. Nevertheless, the district court granted extraordinary injunctive relief because it concluded that the "negative impact" that might result from the injunction "would be substantially attenuated" by two "fact[s]": first, that allowing first-time, mail-registered voters to vote by mail would not require the State to change its procedures; and second, that a considerable amount of time still exists for election officials to "adjust to this change and manage its consequences." *Id.*

But these "facts"—even if true—do not eliminate the harm to the State and are irrelevant under *Purcell*. The Supreme Court's instruction in *Purcell* stems from prudential concerns about judicial intervention in elections—more specifically, intervention when an election is looming. *See Purcell*, 549 U.S. at 4-5. *Purcell* is not concerned with the possibility that the requested relief would be sound public policy or that it might not result in administrative difficulty. As this Court recognized only months ago in denying a pre-election request for injunctive relief, "[i]t may well be that [Plaintiffs' requested relief] will prove workable. But [it] may

also pose serious security concerns and other, as yet unrealized problems." *Thompson*, 959 F.3d at 812.

What matters under *Purcell* is not whether the court or the parties believe the relief will be workable, but that "the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections." *Id.*; *see also Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359, at *1 (7th Cir. Oct. 8, 2020) (staying a district court's injunction of a Wisconsin election law because federal courts "should not change the rules so close to an election" and because "political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid").

At the end of the day, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4. And for this reason, the Supreme Court and the courts of appeals have repeatedly underscored the importance of leaving the management of elections to the States.

Just this year, the Supreme Court has signaled at least seven different times—including in cases arising from the COVID-19 pandemic—that federal courts should refrain from interfering with state election rules unless doing so is absolutely necessary. *See, e.g.*, *Andino*, 2020 WL 5887393, at *1 (staying injunction against South Carolina's witness requirements for absentee ballots); *Clarno v. People Not*

Politicians Or., No. 20A21, --- S. Ct. ---, 2020 WL 4589742 (U.S. Aug. 11, 2020) (mem.) (granting stay of district court's injunction relaxing Oregon's requirements for ballot initiatives); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (mem.) (granting stay of district court's injunction relaxing Idaho's rules for ballot initiatives); *Merrill v. People First of Ala.*, No. 19A1063, --- S. Ct. ---, 2020 WL 3604049 (U.S. Jul. 2, 2020) (mem.) (granting stay of district court's injunction of Alabama's photo-ID and witness requirements for absentee voting); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020) (mem.) (denying application to vacate Fifth Circuit's stay of district court's injunction requiring Texas to implement no-excuse absentee voting); *Thompson v. DeWine*, No. 19A1054, --- S. Ct. ---, 2020 WL 3456705 (U.S. June 25, 2020) (mem.) (denying application to vacate Sixth Circuit's stay of district court's injunction relaxing Ohio's citizen-initiative and ballot-access requirements); *Republican Nat'l Comm.*, 140 S. Ct. at 1208 (granting stay of district court's injunction requiring Wisconsin to count late-postmarked absentee ballots for primary election).

The courts of appeals—including this Court—have similarly relied on the *Purcell* principle to avoid changes to state election laws when an election was imminent. *See, e.g.*, *Common Cause Ind.*, 2020 WL 6042121; *Tex. League of United Latin Am. Citizens v. Hughs*, No. 20-50867, 2020 WL 6023310, at *1 (5th Cir. Oct. 12, 2020); *A. Phillip Randolph Inst. of Ohio*, 2020 WL 6013117, at *3; *Bostelmann*,

2020 WL 5951359, at *1; *Crookston*, 841 F.3d at 397-98; *Veasey v. Perry*, 769 F.3d 890, 891-96 (5th Cir. 2014); *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012); *Respect Maine PAC v. McKee*, 622 F.3d 13, 14, 16 (1st Cir. 2010); *Ne. Ohio Coal. for Homeless and Serv. Emps. Int'l Union*, 467 F.3d 999, 1003-04, 1012 (6th Cir. 2006); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 916-17, 919-20 (9th Cir. 2003) (en banc) (per curiam); *Page v. Bartels*, 248 F.3d 175, 195-96 (3d Cir. 2001).

Because the district court's injunction has already caused voter confusion by changing the rules of the election while absentee voting is underway, the State will attempt to minimize any further confusion that a reversal of the injunction might cause by counting valid absentee ballots that first-time voters have returned in reliance on the injunction while it has been in effect. *See* Doc 4-2, Goins Decl., ¶ 4. Accordingly, if this Court reverses the injunction, it may wish to create an exception for any absentee ballots cast by first-time voters while the injunction was in effect. *Cf. Andino*, 2020 WL 5887393, at *1 (staying injunction of absentee-ballot witness requirement "except to the extent any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement"). Even if the Court does not create this exception, the State will count any absentee ballots cast by first-time voters while the injunction was in effect.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the district court's injunction.

Respectfully submitted,

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October 16, 2020

ADDENDUM

Page

DESIGNATION OF COURT DOCUMENTS

Memphis A. Phillip Randolph Institute v. Hargett, No. 3:20-cv-00374 (M.D. Tenn.)

Docket Entry No.	Description	PageID #
1	Plaintiffs' Complaint	1-33
39	Plaintiffs' Amended Complaint	123-59
40	Plaintiffs' Motion for Preliminary Injunction	160-62
40-2	Plaintiffs' Exhibit A to Motion for Preliminary Injunction, Declaration of Ravi Doshi	167-1517
40-3	Plaintiffs' Exhibit B to Motion for Preliminary Injunction, Declaration of Dr. Arthur Reingold	1518-28
40-4	Plaintiffs' Exhibit C to Motion for Preliminary Injunction, Declaration of Dr. Linton Mohammed	1529-52
40-5	Plaintiffs' Exhibit D to Motion for Preliminary Injunction, Declaration of Tennessee NAACP	1553-65
40-6	Plaintiffs' Exhibit E to Motion for Preliminary Injunction, Declaration of Memphis and West Tennessee AFL-CIO Central Labor Council	1566-74
40-7	Plaintiffs' Exhibit F to Motion for Preliminary Injunction, Declaration of Memphis A. Phillip Randolph Institute	1575-81
40-8	Plaintiffs' Exhibit G to Motion for Preliminary Injunction, Declaration of the Equity Alliance	1582-92
40-9	Plaintiffs' Exhibit H to Motion for Preliminary Injunction, Declaration of Free Hearts	1593-1600
43	Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction	1656-1703
44-1	Plaintiffs' Declaration of Lisa Helton	1706-61
46	State's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction	1765-1822
46-1	State's Exhibit A to Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, Declaration of Mark Goins	1823-35
46-2	State's Exhibit B to Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, Declaration of Wendy McCormack	1836-52

46-3	State's Exhibit C to Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, Declaration of Phillip Warren	1853-55
46-4	State's Exhibit D to Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, Declaration of Alan Farley	1856-58
46-5	State's Exhibit E to Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, Declaration of Linda Phillips	1859-62
46-6	State's Exhibit F to Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, Declaration of Leigh Ann Apple-Jones	1863-1968
46-7	State's Exhibit G to Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, Declaration of Michael F. Jameson	1969-2007
54	Plaintiff's Reply in Support of Preliminary Injunction	2258-2286
54-1	Plaintiffs' Exhibit A to Reply in Support of Motion for Preliminary Injunction, Supplemental Declaration of Ravi Doshi	
54-2	Plaintiffs' Exhibit 17 to Reply in Support of Motion for Preliminary Injunction, Absentee Ballot Application	2290-91
54-3	Plaintiffs' Exhibit 18 to Reply in Support of Motion for Preliminary Injunction, Shelby County Election Commission Absentee Voting Webpage	2292-98
54-4	Plaintiffs' Exhibit B to Reply in Support of Motion for Preliminary Injunction, Supplemental Declaration of Corey Sweet	2299-2302
54-5	Plaintiffs' Exhibit C to Reply in Support of Motion for Preliminary Injunction, Supplemental Declaration of Tennessee NAACP	2303-06
54-6	Plaintiffs' Exhibit D to Reply in Support of Motion for Preliminary Injunction, Supplemental Declaration of Memphis and West Tennessee AFL-CIO Central Labor Council	2307-09
54-7	Plaintiffs' Exhibit E to Reply in Support of Motion for Preliminary Injunction, Supplemental Declaration of Dr. Linton Mohammed	2310-13
61	State's Motion to Dismiss	2316-18

62	State's Memorandum in Support of Motion to Dismiss	2319-45
62-1	State's Exhibit A to Motion to Dismiss, Tennessean Article RE: Absentee Voting in Tennessee	2346-50
62-2	State's Exhibit B to Motion to Dismiss, Declaration of Mark Goins	2351-52
78	Plaintiffs' Response to the State's Motion to Dismiss	2500-18
78-1	Exhibit 1 to Plaintiffs' Response to the State's Motion to Dismiss, Declaration of Tennessee NAACP	2519-31
78-2	Exhibit 2 to Plaintiffs' Response to the State's Motion to Dismiss, Declaration of Memphis and West Tennessee AFL-CIO Central Labor Council	2533-2540
78-3	Exhibit 3 to Plaintiffs' Response to the State's Motion to Dismiss, Declaration of Memphis A. Phillip Randolph Institute	2541-47
78-4	Exhibit 4 to Plaintiffs' Response to the State's Motion to Dismiss, Declaration of the Equity Alliance	2548-58
78-5	Exhibit 5 to Plaintiffs' Response to the State's Motion to Dismiss, Declaration of the Equity Alliance	2559-66
78-6	Exhibit 6 to Plaintiffs' Response to the State's Motion to Dismiss, Supplemental Declaration of the Tennessee NAACP	2567-70
78-7	Exhibit 7 to Plaintiffs' Response to the State's Motion to Dismiss, Supplemental Declaration of Memphis and West Tennessee AFL-CIO Central Labor Council	2571-73
78-8	Exhibit 8 to Plaintiffs' Response to the State's Motion to Dismiss, Supplemental Declaration of Corey Sweet	2574-77
79	Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction as to Tennessee's First-Time Voter Requirements	2578-2635
80	Preliminary Injunction Order Barring the State from Enforcing its First-Time Voter Requirements	2636-38
82	State's Reply in Support of Motion to Dismiss	2642-49
86	Plaintiffs' Notice of Filing	2660-64
86-1	Second Declaration of Gloria Jean Sweet-Love	2665-67
86-1	Second Declaration of Corey Sweet	2668-71
87	State's Motion to Reconsider Preliminary Injunction as to Tennessee's First-Time Voter Requirements	2672-74

88	State's Memorandum in Support of Motion to Reconsider Preliminary Injunction as to Tennessee's First-Time Voter Requirements	2675-83
92	Plaintiffs' Response to State's Motions to Reconsider and Stay	2692-2709
93-1	Declaration of Dawn Harrington	2713-15
93-2	Declaration of Joy Greenawalt	2717-18
97	State's Reply in Support of Motions to Reconsider and Stay	2726-38
98	Declaration of mark Goins	2739-40
99	Plaintiffs' Request to File Surreply	2741-44
100	State's Sur-response	2745-49
100-1	Declaration of Linda Phillips	2750-51
103	Memorandum Opinion and Order Denying State' Motion to Reconsider	2754-79
107	Order Denying State's Motion to Stay	2788-90
108	State's Notice of Appeal	2791-93
109	State's Emergency Motion for Stay Pending Appeal	2794-2808
112	Plaintiffs' Response to Motion for Stay Pending Appeal	2813-22
112-1	Declaration of Jeffrey Lichtenstein	2823-25
112-2	Declaration of Gloria Jean Sweet-Love	2826-28
113	Memorandum Opinion and Order Denying State's Motion for Stay Pending Appeal	2829-32

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,873 words, excluding the parts of the brief enumerated by Fed. R. App. P. 32(f).

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/s/ Matthew D. Cloutier
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October 16, 2020

CERTIFICATE OF SERVICE

I, Matthew D. Cloutier, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on October 16, 2020, a copy of the foregoing Brief of Appellants was filed electronically through the appellate CM/ECF system. I further certify that all parties required to be served have been served.

/s/ Matthew D. Cloutier
MATTHEW D. CLOUTIER
Assistant Attorney General