

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

HUNTER DEMSTER, EARLE J.)
FISHER, JULIA HILTONSMITH,)
GINGER BULLARD, JEFF BULLARD,)
ALLISON DONALD, and)
#UPTHEVOTE901,)

Plaintiffs,)

vs.)

No. 20-0435-I(III)

TRE HARGETT, MARK GOINS,)
WILLIAM LEE, and HERBERT)
SLATERY III, each in his official)
capacity of the State of Tennessee,)

Respondents)

AND

BENJAMIN WILLIAM LAY, CAROLE)
JOY GREENAWALT, and SOPHIA)
LUANGRATH,)

Plaintiffs,)

vs.)

No. 20-453-IV(III)

MARK GOINS, TRE HARGETT, and)
WILLIAM LEE, each in his official)
capacity for the State of Tennessee,)

Defendants.)

**MEMORANDUM AND ORDER GRANTING TEMPORARY INJUNCTION TO
ALLOW ANY TENNESSEE REGISTERED VOTER TO APPLY FOR A BALLOT
TO VOTE BY MAIL DUE TO COVID-19**

In this time of the worldwide COVID-19 pandemic and its contagion in gatherings of people, almost all states – both Republican and Democrat – are providing their citizens the health protection of a voting by mail option. This includes southern states such as Alabama, South Carolina and Arkansas, and Tennessee’s neighboring state of Kentucky and nearby West Virginia. The governors, state officials and legislators in those states have spearheaded efforts to expand access to voting by mail to protect the health of their citizens during the pandemic.

The Plaintiffs in Case No. 20-453 include some Tennessee registered voters who have or who reside with persons who have autoimmune conditions or other heightened susceptibility to the COVID-19 virus. The Plaintiffs in Case No. 20-435 are all Tennessee registered voters, except for Jeff Bullard. The Plaintiffs in case No. 20-435 do not allege personal conditions of heightened susceptibility. They do allege that they have determined that it is impossible or unreasonable for them to vote in-person at a polling place in upcoming elections due to the risk of contracting or transmitting the COVID-19 virus. None of these Plaintiffs, in either case, qualifies to vote by mail under the Defendant State Officials’ interpretation and application of Tennessee’s law, Tennessee Code Annotated section 2-6-201. Therefore, in upcoming elections, as the pandemic continues, these Plaintiffs must go to a polling place and vote in-person to exercise their right to vote. They are not eligible to vote by mail.

With situations such as those presented by the Plaintiffs, the Defendant State Officials (hereinafter referred to as the “State”) have been asked to implement measures,

like the majority of states, to temporarily suspend, in upcoming elections, restrictive construction and application of voting by mail law to take into account the pandemic. To be clear, the Plaintiffs do not seek for the State to permanently switch to universal and automatic vote by mail in Tennessee. The Plaintiffs instead seek a temporary easing off on the restrictions of voting by mail limited to the time of the pandemic. The State has refused. It is maintaining the requirements for in-person voting. The State's response to the pandemic is to provide social distancing and sanitation measures at polling places. Significantly, however, one of the most prominent features of social distancing—wearing masks—cannot be compelled of voters, but only encouraged, at polling places. Thus persons who choose not to wear masks cannot be denied access to the polling place and present exposure to others.

Having met with refusal by the State, the Plaintiffs have filed these separate lawsuits to obtain during the pandemic access to voting by mail in upcoming elections.

The Plaintiffs rest their case on Article I, section 5 and Article IV, section 1 of the Tennessee Constitution which is more explicit in guaranteeing Tennesseans the right to vote than the counterpart federal Constitution. The Tennessee Constitution provides that, “the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto”

The State's position is unapologetic. It claims that unlike the can-do approach of two-thirds of the U.S. States who have for years allowed any voter to vote by mail and eleven more states that have relaxed voting by mail restrictions for the 2020 elections due

to the pandemic, it is impossible for the State of Tennessee, in a state of emergency, to expand access to voting by mail on a temporary basis. The State provides scenarios and calculations of lack of money, personnel and equipment for increased voting by mail, and they cite to their fear of increased voter fraud from voting by mail.

The issue, then, for this Court is whether, in this time of the pandemic, the States' construction and application of Tennessee law constitutes an unreasonable and discriminatory burden on the fundamental right to vote vigorously guaranteed by the Tennessee Constitution.

The Plaintiffs are presently before the Court on applications for a temporary injunction. They seek for the Court to enjoin the States' restrictive application of the law and for a mandate that the State must provide the Plaintiffs access to voting by mail.

On June 3, 2020, a hearing was conducted on the temporary injunction applications based upon evidence filed by all parties and oral argument of Counsel. At the conclusion of the hearing the Court took the matter under advisement.

After studying the evidence and the law, and considering argument of Counsel, the Court finds that the evidence does not support the State's claims that it is impossible for it to provide expanded access to voting by mail. Respectfully, the evidence is that the assumptions the State has employed in its fiscal and resource calculations are oddly skewed and not in accordance with the methodology of its own expert and industry standards. When, however, normal industry-recognized assumptions are used, the

evidence establishes that the resources are there to provide temporary expanded access to voting by mail in Tennessee during the pandemic if the State provides the leadership and motivation as other states have done.¹ As to voter fraud, the State’s own expert debunks and rejects that as a reason for not expanding access to voting by mail.

From this evidence and upon using the legal standard of *Anderson-Burdick*,² the Court concludes that the State’s restrictive interpretation and application of Tennessee’s voting by mail law (Tennessee Code Annotated section 2-6-201), during the unique circumstances of the pandemic, constitutes an unreasonable burden on the fundamental right to vote guaranteed by the Tennessee Constitution. Accordingly the Plaintiffs are entitled to issuance of a temporary injunction.

¹ See, for example, websites in Alabama and West Virginia where banners on absentee voting during the pandemic are displayed with informative links and instructions.

² The Tennessee Supreme Court has explained the *Anderson-Burdick* doctrine as follows:

Notably, however, the United States Supreme Court has rejected the notion that strict scrutiny applies to every statute imposing a burden on the right to vote under the United States Constitution. Instead, addressing claims arising under the First and Fourteenth Amendments, the Court has adopted a “more flexible standard,” pursuant to which a showing of important governmental regulatory interests may justify lesser restrictions on the right to vote, whereas strict scrutiny is reserved for laws that impose “‘severe’ restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)); see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion) (holding that any burden upon the right to vote “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation’ ” (quoting *Norman*, 502 U.S. at 288–89, 112 S.Ct. 698)); *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

City of Memphis v. Hargett, 414 S.W.3d 88, 102 (Tenn. 2013).

It is therefore ORDERED that the Plaintiffs' motion for a temporary injunction is granted to the extent that, until further order of the Court, the Defendants are enjoined from:

- enforcing their current construction of the “excuse requirement” for absentee voting stated in Tennessee Code Annotated section 2-6-201(5)(C) and (D), and

are mandated to:

- provide any eligible Tennessee voter, who applies to vote by mail in order to avoid transmission or contraction of COVID-19, an absentee ballot in upcoming elections during the pendency of pandemic circumstances; and
- implement the construction and application of Tennessee Code Annotated section 2-6-201(5)(C) and (D) that any qualified voter who determines it is impossible or unreasonable to vote in-person at a polling place due to the COVID-19 situation shall be eligible to check the box on the absentee ballot application that, “the person is hospitalized, ill or physically disabled and because of such condition, the person is unable to appear at the person’s polling place on election day; or the person is a caretaker of a hospitalized, ill or physically disabled, person,” and have that absentee voting request duly processed by the State in accordance with Tennessee law.³

In addition it is ORDERED that the Defendants are mandated to:

- prominently post on their websites and disseminate to County Election Officials that voters who do not wish to vote in-person due to the COVID-19 virus situation are eligible to request an absentee ballot by mail or that such voters still have the option to vote in-person during Early voting or on Election Day.

Not ordered herein is a requirement that the State must automatically mail absentee ballots to all Tennessee registered voters, a practice being implemented in some states

³ This wording is derived from election instructions posted on the State of Alabama and West Virginia’s websites.

before and in response to the pandemic. The difference is that the injunction issued above keeps in place and tracks the requirement of Tennessee law that to obtain a mail-in ballot, a voter must first apply for one so that it is only voters who apply to vote by mail that the State must print and mail absentee ballots to as the applications come in.

Also not granted herein is the alternative request for relief in Case No. 20-453 for a Tennessee licensed physician to certify the entire population of a county to be “medically unable to vote” because of the pandemic.

In addition, it is ORDERED that no bond is required to secure this temporary injunction.

The findings of fact and conclusions of law on which this decision is based are as follows.

Tennessee Voting Law

The Tennessee Constitution is more explicit than the federal constitution in guaranteeing Tennesseans the right to vote. Article I, section 5 and Article IV, section 1 of the Tennessee Constitution expressly guarantee the right to vote in federal, state and local elections to all adult persons duly registered in a county district and precinct. As quoted above and requoted herein, the Tennessee Constitution contains the vigorous guarantee that, “The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto” Under the

provisions of the Tennessee Constitution, voting is a fundamental right. *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 901 (Tenn. 1987).

The Legislature has enacted laws to allow for the fundamental right to vote to be exercised by mail-in/absentee ballot, but only for a limited set of circumstances. Tennessee Code Annotated section 2-6-201 provides for voting by mail for nine categories of persons. An otherwise eligible voter who does not fall into one of these enumerated categories as construed by State is not permitted to “vote by mail absentee” and must instead cast their ballot in person. The pertinent category in this case is 5, quoted as follows.

(5) PERSONS OVER 60--PERSONS HOSPITALIZED, ILL OR DISABLED.

(A) A person sixty (60) years of age or older when the person requests to vote absentee;

(B) The person is a voter with a disability as defined in § 2-3-109, and the voter's polling place is inaccessible;

(C) The person is hospitalized, ill or physically disabled, and because of such condition, the person is unable to appear at the person's polling place on election day; or

(D) The person is a caretaker of a hospitalized, ill or disabled person;

State’s Interpretation and Application of Section 2-6-201(5)(C) and (D)

With respect to the pandemic, it is the State’s construction and application of section 2-6-201(5)(C) and (D) that only individuals who have “quarantined because of a

potential exposure [to COVID-19] or who ha[ve] tested positive [for] COVID-19” are considered “ill” for the purposes of “vot[ing] by mail absentee.” Steiner Decl. Ex. 63, Tenn. Sec. of State, *Tennessee Election COVID-19 Contingency Plan*, (April 23, 2020), <https://bit.ly/3g7WrUN>.

Putting aside the ambiguity of the State’s construction of “quarantining” (self-quarantine vs. contact tracing), the issue for the Plaintiffs in this case is the following. Even voters, who are at higher risk of contracting COVID-19 and/or at a higher risk of severe complications should they contract the illness and voters who live with individuals who have pre-existing medical conditions that place them at higher risk for severe complications should they contract COVID-19, such as the Plaintiffs in Case No. 20-453, do not have the option to “vote by mail absentee.” Further rendered ineligible for voting by mail are Tennesseans, like the Plaintiffs in Case No. 20-435, who have determined that it is impossible or unreasonable to vote in-person at a polling place due to the risk of contracting or transmitting the COVID-19 virus. Thus all of the Plaintiffs in the cases before the Court are ineligible to vote by mail during the pandemic based upon the State’s application of Tennessee law.

State’s Justification for Denying Expanded Access to Voting by Mail

The reasons the State has refused to allow more access to voting by mail during the pandemic are (1) that it is not fiscally nor logistically feasible for the State to do so and (2) voter fraud. But the evidence presented to the Court does not support these reasons.

The evidence shows that it is feasible for the State to provide registered voters a vote by mail option and that increased voter fraud is not a material concern. The following are the findings of fact made by the Court based upon the record developed thus far for the temporary injunction.⁴

Evidence on Feasibility

1. Quick Expansion of Voting by Mail in 10 States—Within a timeframe of just a few months, ten states have expanded an “excuse required” statute, like Tennessee’s to “no excuse” absentee rules. These include the neighboring states of: Alabama, Arkansas, South Carolina, Kentucky and Virginia. Three states: Kentucky, Virginia and Indiana have provided this option in a shorter timeframe than is present in this case.

Several of the remaining minority of states that, under normal circumstances, require an excuse to vote by mail have interpreted their disability or illness basis for absentee voting broadly during the ongoing COVID-19 pandemic. For example, West Virginia now permits all registered voters to vote absentee in forthcoming elections due to “[i]llness, injury or other medical reason which keeps [the voter] confined,” defining “other medical reason” as “any threat to a person’s health posed by an epidemic, pandemic, outbreak, disease, virus, or other emergency, which creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters.” W. Va. Code R. §§ 153-53-2–153-53-3. {{Steiner Decl. Ex. 69, W. Va. Sec’y of State Mac Warner, Admin. Law Div., Notice Of An Emergency Rule (Mar. 20, 2020), <https://bit.ly/2zbwRO3>.}} Further, West Virginia construes “confined” as being “restricted to a specific location for reasons beyond that person’s control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or close contact with other persons.” W. Va. Code R. § 153-53-2. Per issued rules, West Virginia’s action “cannot violate or alter clear statutory requirements” but rather, simply construes existing state law “in favor of enfranchisement, not disenfranchisement.” W. Va. Code R. § 153-53-1. Similarly, Alabama has allowed “any qualified voter who determines it is impossible or unreasonable to vote at their voting place” as a result of COVID-19 to vote by mail in primary runoff elections being held in July by reason that “a physical illness or infirmity [] prevents [the voter’s] attendance at the polls.” {{Steiner

⁴ The findings of fact made herein are preliminary for purposes of issuance of the temporary injunction and are not binding as ultimate findings of fact. Those will be determined in the trial of the case. This is because as the case progresses the parties will develop a complete factual record.

Decl. Ex. 3, Ala. Leg. Servs. Agency, Absentee Voting During State of Emergency, 17-11-3(e) (Mar. 18, 2020), <https://bit.ly/3cUhOqN>; *see also* Steiner Decl. Ex. 4, Press Release, Alabama Secretary of State, 100 Days Left to Apply for Absentee Ballot for the Primary Runoff Election (Mar. 31, 2020), <https://bit.ly/2ygoArG>; *see also* Ala. Code § 17-11-3(a)(2).}} And, because of COVID-19, Arkansas has determined that Ark. Code Ann. §§ 7-5-402, which only allows absentee voting for people who are “absent or unable to attend an election due to illness or physical disability,” should be read “so that all eligible qualified electors currently entitled to vote in the March 31, 2020 election may request the appropriate absentee ballots from their county of residence.” {{Steiner Decl. Ex. 6, Governor of Arkansas, Exec. Order No. 20-08, (Mar. 20, 2020), <https://bit.ly/2TheWwc>. }}

Virginia, Delaware, and Massachusetts have likewise clarified that all registered voters in their respective states can use existing reasons related to illness and physical disability to vote by mail in the upcoming elections. {{*See* Steiner Decl. Ex. 68, *Absentee Voting*, Va. Dep’t of Elections, <https://bit.ly/3dU4YbW> (last visited May 18, 2020) (Virginia Department of Elections statement clarifying that “[v]oters may choose reason ‘2A My disability or illness’” to vote absentee in upcoming elections due to COVID-19); Steiner Decl. Ex. 23, Governor of Delaware, Exec. Dep’t, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), <https://bit.ly/3bKVfTM> (Delaware executive order providing that for upcoming primary and special elections “the qualification of ‘sick or physically disabled’ [in Delaware vote-by-mail provisions] shall apply to and include any such voter who is asymptomatic of COVID-19 . . . and who herself or himself freely chooses to use such qualification to vote by absentee ballot.); Steiner Decl. Ex. 5, *An Act Granting Authority to Postpone 2020 Municipal Elections in the Commonwealth and Increase Voting Option in Response to the Declaration of Emergency to Respond to COVID-19*, ch. 45 (2020), <https://bit.ly/2LFSZTc> (new Massachusetts law clarifying that “any person taking precaution related to COVID-19 in response to a declared state of emergency or from guidance from a medical professional, local or state health official, or any civil authority shall be deemed to be unable by reason of physical disability to cast their vote in person,” which is one of the reasons set forth in the state constitution that permits a Massachusetts voter to vote by mail).}} And New Hampshire has interpreted its “physical disability provision to “appl[y] equally to voters who are experiencing symptoms of COVID-19 . . . and those who are self-quarantining as a preventative measure.” {{Steiner Decl. Ex. 28, Memorandum from the Sec’y of State and Att’y General to New Hampshire Election Officials re: Elections Operations During the State of Emergency 2 (Apr. 10, 2020), <https://bit.ly/2ZdZ8xV>.}}

2. Sufficient Ballots Are Ready— The Tennessee Secretary of State’s Division of Elections has already accounted for increased mail-in voting for eligible voters (*Goins Declaration*, May 22, 2020, ¶¶ 3-4). The State is already printing 1.4 million ballots for the August 2020 election, and it has on hand four million of the three envelope sets necessary to process these ballots through the mail. (*Goins Decl* ¶ 11).

Thus, even if turnout increased 17% from August 2018, and 100% of voters chose to case absentee ballots, the State has enough ballots right now.

The facts are that a total of 1.23 million Tennessean—30% of the 4.16 million registered voters in Tennessee—voted in the August 2018 election. Tenn. Sec’y of State, *Statistical Analysis of Voter Turnout for the Nov. 6, 2018 Election as Submitted by the Counties*, available at <https://sos-tn-govfiles.tnsosfiles.com/2018%20November.pdf> (last visited May 22, 2020). This was the highest August turnout in 15 years (Tenn. Sec’y of State *Election Statistics*, available at <https://sos.tn.gov/products/elections/election-statistics> (last visited May 22, 2020)). Conditions which are likely to decrease voting turnout in 2020 are the pandemic and, unlike the August 2018 elections, the August 2020 generally lacks county general elections. Historically, according to Coordinator of Elections Goins, “less than 2.5% of Tennessee voters have voted using the absentee by-mail voting process.” However, as admitted by Coordinator Goins, the State is presently prepared for 1.4 million Tennesseans to vote by mail which represents 36% of the total registered voters.

The situation is little different for November. In the last November presidential election, 2.5 million persons voted, for a turnout of 62%. Tennessee Secretary of State website, *Statistical Analysis of Voter Turnout for the Nov. 8, 2016 Election as Submitted by the Counties*, available at https://sos-tn-gov-files.s3.amazonaws.com/2016_November_PPP_Turnout.pdf (last visited May 22, 2020). If Tennessee prints a total of 4 million ballots, as it has already done for August, *see* Goins Decl. ¶¶ 11-12, it will have enough ballots for every single current active Tennessee voter to vote absentee, assuming 100% turnout and 100% of voters choosing to vote by mail. *See* Goins Decl. ¶ 5 (3,930,381 active Tennessee voters).

3. \$1 Million is Available—The State has received \$10 million in federal funds dedicated to 2020 election costs (*Goins Decl.*, May 22, 2020, ¶ 19), and has \$1 million of that remaining and available to provide expanded access to voting by mail.
4. Measures Already in Place in Some Counties for Expanded Voting by Mail—Some counties have already implemented measure for an increased mail-in vote.

Rutherford County plans to hire two extra full-time and four extra part-time workers solely dedicated to processing absentee ballot requests and prestuffing 50,000 absentee ballot envelopes (*Goins Decl.* May 22, 2020, ¶ 16).

State's Scenarios and Calculations Not Supported by the Evidence

In support of their position that providing expanded access to voting by mail is impossible in Tennessee, the State provided the Declarations of:

- five Election Officials across rural and urban Tennessee,
- Mark Goins, Coordinator of Elections for the State of Tennessee, and
- Kim Wyman, Secretary of State of Washington State.

The State assert these Declarations prove their proposition that the State of Tennessee does not have the money, personnel or equipment to expand voting by mail in Tennessee, and that the only measures that are feasible in Tennessee are to stick to in-person voting and provide social distancing and sanitation at polling places.

This position is not supported by the evidence. That is because the State provided incredible assumptions to the Declarants which assumptions are not supported by the historical voting patterns and turnout in Tennessee, and which do not comport with industry standards on planning for elections. These faulty facts and assumptions are as follows.

- Each of the five Tennessee County Election Officials was told to assume in stating feasibility in their counties that 100% of all registered voters in their county will vote. This has never happened in the entire history of Tennessee voting. The turnout in the Nov. 2018 elections was high and it was 54% of all registered voters. The percentage of turnout for the 2016 presidential election (Trump/Clinton) was 61%. This same unprecedented number of 100% turnout of all Tennessee registered voters was also used by Defendant Goins. Such an extreme assumption carries no weight as evidence. Moreover this skewed assumption so permeates and

underlies the State's calculations that the assumption substantially detracts from the weight of State's entire evidence on lack of feasibility.

- The kind of voting by mail Secretary of State Wyman was told to address is a model where the State initiates the process and automatically sends all registered voters absentee ballots. This is not the model ordered herein. The model used in the above temporary injunction requires the voter to initiate the process. The voter must take the first step to print off a request form and submit it to County Election Officials to be provided a mail-in ballot. This is the model currently in place under Tennessee Code Annotated section 2-6-201. The Plaintiffs are not seeking a permanent change to automatic, universal voting by mail as is the case in Washington State and is addressed in the Wyman Declaration. This distinction is material.

Requiring a voter to request an absentee ballot eliminates many of the change of address or faulty address problems Secretary of State Wyman mentions. Also, requiring a voter to request an absentee ballot saves the State time and money in sending out request forms to all registered voters and provides some governor on demand for absentee ballots.

The difference in the absentee voting model Secretary of State Wyman addresses and the one contemplated by the Plaintiffs and ordered herein is so material that the Wyman opinions on feasibility are not weighty evidence.

The flaws in the State's calculations are well explained by Plaintiffs' Counsel, quoting as follows, and are adopted by the Court.

The fundamental assumption underlying all of the State's arguments that relief in this case would be expensive and impractical is its insistence that it must print enough ballots, and hire enough staff, to accommodate 100% of its voters choosing to vote by mail, and also assuming that 100% of its registered voters participate in each election. *See* Defs.' Resp. at 13; Pls.' Reply, at 27 & n.37 (citing to affidavits attached to State's initial Response). But the State points to no legal requirement for this. And indeed, they acknowledge that they have not been doing it in past elections. Their plan to be ready for all eligible over-60 registered is a new one made in response to the Pandemic. *See* Resp. at 2-3 (acknowledging the Plan

contemplates a “dramatic increase” in absentee voters). This is an entirely discretionary decision that is no less novel than the Virus.

The State says it would be “reckless” to estimate need based on past electoral performance. Sur-Reply 13. But this is precisely what Kim Wyman now advocates, albeit using dubious projections. *See* Supp. Wyman Decl., ¶11. She estimates the “requested absentee ballot rate” to be between 23% and 60% should an injunction be granted, and she recommends that “[p]lanning and operations for the mail preparation *should be based upon these percentages.*” Wyman Supp. Decl. ¶ 11(emphasis added). It appears that Coordinator Goins’s extreme devotion to over-preparedness is not only just as novel as—[sic]

Even more important, the State’s expert now recommends that “the return ballot processing *should be based upon the projected voter turnout in the August and November elections.*” Wyman Supp. Decl. ¶ 11 (emphasis added); *see also id.* (“For the success of these operations, *it is critical to estimate this turnout...*”) (emphasis added). This is precisely what Plaintiffs have been arguing all along. On this point (basing cost and feasibility estimates based on projected turnout), Plaintiffs’ experts agree. *See* Supp. McReynolds Decl., ¶ 6.

Based on any reasonable estimate of turnout using historical data, the 1.4 million ballots Tennessee *has already printed* are enough to cover the August election. *See* Plaintiffs’ Reply, at 27-29. And if the State prints a total of 4 million ballots for November (as it has already done for August), that would be enough for all voters to vote absentee, *even assuming (absurdly high) 100% turnout.* *Id.* Similarly, the State is staffing up to handle 1.4 million absentee votes this August, so staffing will be sufficient as well. *See* Plaintiffs’ Reply, at 30.

Other logistical overstatements are also influenced by this unwarranted “100%” approach. The State makes much of change-of-address issues, citing Davidson County’s rate of 10% of notifications of polling location changes being returned as undeliverable. Sur-Reply 11–12. But location-change mailings go out to all voters registered within a certain geographical subset of the county. *See also* Roberts Decl. ¶7 (describing address problem as “Mailing an absentee ballot request form *to every registered voter . . .* would result in a significant amount of undeliverable mail”) (emphasis added). Tennessee’s election-specific absentee-ballot application process would obviate concerns of undeliverable mail: individual voters apply to vote absentee using their

current addresses. This is not the case for absentee voting in Washington State, nor for mass mailings in Davidson County, where the address information relied on may be several years' out of date.

This distinction—between an absentee-application system like Tennessee's and a pure "by-mail voting" system like Washington's—also explains the various allegedly contradictory statements Plaintiffs' expert Amber McReynolds has made. In these statements, she was referring to a pure "vote by mail" system, in which each voter is automatically mailed a ballot, not the "no excuse" system sought by Plaintiffs.

The same flawed assumption colors the State's inflated cost estimates, when it cries budgetary constraints as an excuse to curtail a fundamental right and put voters at risk of their health. Sur-Reply at 14–15. Coordinator Goins estimates a cost of \$34.5 million to implement relief, then acknowledges that assumes "100 percent of registered voters vote by-mail." Goins Supp. Decl. ¶3. But the State fails to acknowledge that it currently has \$55 million in available federal funds dedicated to election costs which could be drawn upon to pay whatever costs the State incurs (above and beyond what it has already spent to be ready for 117% of August 2018's record-high turnout, *see* Reply at 29). The State has publicly acknowledged that it has portions of this \$55 million amount unencumbered, but wishes to reserve it for later elections.

Plaintiffs' Surreply in Support of Their Application for Temporary Injunction, June 2, 2020, Case No. 20-435, pp. 8-10.

Thus, the evidences does not support the State's claims and calculations that expanded voting by mail is not feasible in Tennessee. To the contrary, Tennessee's track record of voting turnout and the preparations already in place and the \$1 million of available federal funds establish temporarily expanding voting by mail during the pandemic is feasible in Tennessee

Voter Fraud

The evidence established that voter fraud is not a material reason to refuse to expand voting by mail during the pandemic on several bases.

First, many safeguards are already in place. Election officials check to make sure an absentee ballot application is made on behalf of a registered voter at the proper address. Tenn. Code Ann. § 2-6-202(d). They verify that the voter's signature on file matches both the signature on each absentee ballot request, § 2-6-202(b), which must be signed under penalty of perjury, as well as the absentee ballot itself, § 2-6-202(g). To guard against "ballot harvesting," only election-commission employees may distribute absentee ballots, or furnish an unsolicited absentee ballot application, to any person, § 2-6-202(c), and election officials routinely visit nursing homes to personally collect ballots from vulnerable elderly voters, § 2-6-601. In addition, there are numerous criminal laws against various types of voter fraud. *See* Tenn. Code Ann. §§ 2-19-104 through 2-19-117.

Further, the State's expert witness, Washington Secretary of State Wyman answered explicitly in a recent national news article that she is confident that voter fraud is not a material concern with expanded absentee voting, "Doesn't vote by mail and absentee voting lead to more fraud? I am confident that the answer is no."

There is also the consideration that Tennessee's in-person voting requires showing a picture ID at polling locations to verify identity. Yet the COVID-19 plan for polling locations, promulgated by the State, requires that if a voter is wearing a face covering to mitigate COVID exposure and contagion those face coverings should not be removed in

public. These conditions obscure identity and undercut the defense that in-person voting during the pandemic poses less of a threat of voter fraud.

The Pandemic and In-Person Voting

As to the effect of the pandemic on in-person voting at polling places, the Court makes the following findings of fact based upon the record developed thus far for the temporary injunction.⁵

1. Mail-in voting methods are encouraged by the Centers for Disease Control and Prevention (“CDC”) to “minimize direct contact with other people and reduce crowd size at polling stations” where mail-in voting is allowed in the jurisdiction (Recommendations for Election Polling Locations, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/electionpolling-locations.html> (last visited May 7, 2020)).
2. The duration of in-person voting in Tennessee is a two week early voting period, and a twelve hour election day.
3. Requiring in-person voters to remain at least six feet apart will elongate lines.
4. Providing broader access to mail-in voting will lessen the number of persons gathering for in-person voting.
5. Other State institutions are using remote participation options to avoid in-person gatherings. The Tennessee State Senate is not assembling. The Tennessee Secretary of State’s customer counter is closed to the public (Tenn. Sec’y of State, <https://sos.tn.gov/> (last visited May 26, 2020)). The State Attorney General is accepting service of process by mail. The State Election Commission is holding meeting by telephone (Tennessee Sec’y of State, *State Election Commission Meetings*, <https://sos.tn.gov/products/elections/state-election-commission-meetings> (last visited May 19, 2020)).

⁵ As stated in an above footnote, the findings of fact made herein are preliminary for purposes of issuance of the temporary injunction and are not binding as ultimate findings of fact. Those will be determined in the trial of the case. This is because as the case progresses the parties will develop a complete factual record.

6. The Pandemic has so far killed over 340 Tennesseans and hospitalized over 1600.⁶ The state experiences over 300 new cases every day. The virus continues to spread. As of May 21, 2020, the State had 18,961 confirmed cases. (Steiner Decl. Ex. 34, *Tenn. Dep't of Health, Coronavirus Disease (COVID-19)*, <https://bit.ly/36ba80L> (last visited May 21, 2020)). As has been the case nationally, Tennesseans of all ages have tested positive for and died from COVID-19. Members of all age groups have contracted the disease.
7. The Court finds the testimony of the following physicians weighty. Dr. Sandra Arnold is Director of the Infectious Disease Department at LeBonheur Hospital in Memphis and on the faculty of the University of Tennessee Health Sciences Center. Arnold Decl. ¶ 2. Dr. James Gurney is an epidemiologist and Dean of the University of Memphis' College of Public Health. Gurney Decl. ¶ 1. Dr. Michael Threlkeld is an infectious-disease specialist and former director of the Infection Control and Employee Health at Baptist, St. Francis, and St. Joseph Hospitals in Memphis. Threlkeld Decl. ¶¶ 1, 2. Dr. Jeff Warren is a general practitioner with several decades' experience who currently serves on the Memphis City Council and the Memphis-Shelby County Coronavirus Response Task Force. Warren Aff. ¶¶ 2, 3. Drs. Arnold and Threlkeld's testimony has guided courts, juries, or both in the past. *See* Arnold Decl. ¶ 6; Thelkeld Decl. ¶ 3.

All of these doctors support Plaintiffs' requests for temporary and permanent injunctive relief. These doctors maintain that continued enforcement of the excuse requirement during the Pandemic would be "medically inadvisable," Threlkeld ¶ 6; Warren ¶ 6, "would create significant, unwarranted risks to individuals and communities," Arnold Decl. ¶¶ 11, 14, or alternatively, that "it is prudent from a public health perspective to reduce unnecessary gatherings and allow all registered voters to mail ballots . . . if they so choose," Gurney Decl. ¶ 9. All of them conclude that while plexiglass screens, hand sanitizers, instructions to stay six feet apart, and the like may help contain poll-site transmission of the Virus, these measures will not abate the significant, objective medical risk posed by the Virus enough to make voting in person medically reasonable. *See* Arnold Decl. ¶ 13; Gurney Decl. ¶ 10; Threlkeld Decl. ¶¶ 6, 7; Warren Decl. ¶¶ 6, 8.

These experts opine that although Tennessee is starting to reopen, the Pandemic is still with us, and its severity will persist through the summer, as well as the fall. Dr. Gurney states:

⁶ Tenn. Dep't of Health, *Coronavirus Disease (COVID-19)*, <https://www.tn.gov/health/cedep/ncov.html> (last visited May 26, 2020).

I want to emphasize that the public health situation today is essentially the same as it was in mid-March . . . the [Virus] is still highly virulent and circulating unencumbered through the State’s population [D]iagnostic testing is now adequate for those with symptoms or known exposure but not adequate for reaching the general population or for repeat population testing; thus we do not know the true infection rate . . . we do not have a vaccine . . . and we do not yet have an effective treatment for curing those with serious disease symptoms.

. . . .

Unfortunately, *there is little reason to believe that any of the above circumstances that characterize the severe outbreak in Tennessee, or our ability to combat it, will change by August when primary voting will occur. We also do not expect the COVID-19 pandemic to be resolved by November when the general elections will take place.*

Gurney Decl. ¶¶ 4-6 (emphasis added). *See also* Threlkeld Decl. ¶ 4 (“The [V]irus continues to spread here in Tennessee, requiring ongoing efforts to protect people from exposure. This situation is likely to continue through July and the first week of August.”); Warren Decl. ¶5 (“[T]he threat from COVID-19 continues and is serious. In my opinion, the threat will continue through August of 2020. It is likely there will be a resurgence this fall.”).

The only medical opinion submitted to the Court by the State is the opinion of Dr. Tim Jones who is employed by the State of Tennessee. His testimony is not accorded weight by the Court based upon the following analysis of Plaintiffs’ Counsel which is adopted by the Court.

Only one medical opinion, of the five now before this Court, says that voting in person during the Pandemic will be safe. Only one these five opinions says that the precautions set forth in the State’s COVID-19 Election Contingency Plan (the “Plan”), Goins Decl. Ex. 2, are acceptable precautions, sufficient to protect voters from exposure to the novel coronavirus (the “Virus”). This is the opinion of Dr. Tim Jones, who reports and owes his position to one or more of the named Defendants in this case. An independent opinion would be more persuasive.

Jones opines that because restrictions are being lifted, preventive measures are going unenforced, and many people are not wearing

masks or social distancing, general “congregate environments” may be riskier than polling sites abiding by the Plan’s safeguards. Jones Decl. ¶ 8. This observation may be true, as far it goes. But it is hardly responsive here, because polling places are still unacceptably dangerous from a medical standpoint. See Gurney Supp. Decl. ¶ 3; Arnold Supp. Decl. ¶ 3. Tennesseans have the right to increase their risk of exposure to the Virus if they so choose. All Plaintiffs maintain in this suit is that they also have the right to self-isolate and abide by recommended preventive measures, and that they should not have to abandon these medically recommended guidelines in order to exercise a fundamental right.

Jones also relies on the fact that the CDC has updated its guidance to suggest that contracting COVID by touching a surface or object “isn’t thought to be the main way the virus spreads,” even though such things are still “possible” vectors. Jones Decl. ¶ 7. But airborne infection at the polling place seems more likely than ever, Supp. Arnold Decl. ¶4, especially in light of recent studies [footnote omitted].

And, while correlation is not necessarily causation, correlative epidemiological evidence is still probative. See Supp. Arnold Decl. ¶5. This includes the most recent epidemiological study of the April 2020 Wisconsin election. Here again, what Dr. Jones’s words may strictly be true, but they are beside the point: the Wisconsin study considered more than “one outbreak” which “happens to be associated with a polling site.” See Jones Decl. ¶8. The study involved the measurement of multiple case trajectories throughout the State of Wisconsin, by county, cross-referenced with the rate of absentee voting, and density of polling places, by county [footnote omitted].

Plaintiffs’ Surreply, June 2, 2020, Case No. 20-435 at 2-3.

8. COVID-19 can severely damage lung tissue, cause a permanent loss of respiratory capacity, and also damage tissues in the kidney, heart, and liver. (Steiner Decl. Ex. 15, *Ctrs. for Disease Control & Prevention, Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, <https://bit.ly/3cDvlCN> (last visited May 18, 2020)). COVID-19 also poses greater risks for people with preexisting heart and respiratory conditions, diabetes, individuals with compromised immune systems, and those with many other

conditions. (Steiner Decl. Ex. 12, *Ctrs. for Disease Control & Prevention, Groups at Higher Risk of Severe Illness*, <https://bit.ly/2zKcqrw> (last visited May 18, 2020)).

9. The health consequences of in-person voting are plainly evident after recent primaries. *See, e.g.* Reingold Decl. ¶ 18. During Florida’s recent primary, two Broward County poll workers tested positive for COVID-19, one of whom was handling driver’s licenses as part of the identification verification process. (Steiner Decl. Ex. 65, Anthony Man, *Two Broward poll workers, including one who handled voters’ driver licenses, test positive for coronavirus*, S. FLA. SUN SENTINEL (Mar. 26, 2020), <https://bit.ly/2AGGnZZ>). And on April 13, Chicago officials reported that a poll worker for the city’s March 17 election died of COVID-19, prompting officials to send letters notifying voters, poll workers, field investigators, and cartage companies who were present at the same polling site. (*See* Steiner Decl. Ex. 32, Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, NBC CHICAGO (Apr. 13, 2020), <https://bit.ly/3dXsxk9>). Likewise, elections held on April 7 in Wisconsin saw multi-hour waits and lines stretching blocks upon blocks in places like Milwaukee and Green Bay. (*See, e.g.*, Steiner Decl. Ex. 24, Kati Anderson, *Green Bay Voters wait in line past midnight to cast ballot in primary election*, WBAY-TV (Apr. 7, 2020), <https://bit.ly/369FVit>). By April 29, health officials in Wisconsin had identified more than 52 people “who voted in person or worked the polls during the state’s presidential primary” who “tested positive [for COVID-19] in the two weeks after the election.” (Steiner Decl. Ex. 1, Scott Bauer, *52 Who Worked or Voted in Wisconsin Election Have COVID-19*, WUWM (Apr. 29, 2020), <https://bit.ly/3bHdBoI>). On May 5, the Milwaukee County COVID-19 Epidemiology Intel Team issued a report stating they were able to identify 54 county residents who had voted curbside, voted in-person, or who had worked at a polling site during the April 7 primary election who “ha[d] symptom onset or lab report confirmation dates indicating that they could have been infectious or infected at the time of voting.” (Steiner Decl. Ex. 29, *Milwaukee County COVID-19 Epidemiology Intel Team, Descriptive Analysis of COVID-19 Infections in Milwaukee County after the Wisconsin Election and Easter/Passover Holidays*, 4 (May 5, 2020), <https://bit.ly/2Zf2IYQ>). And of those individuals, 29 “did not have any other known potential exposures to COVID-19.” (*Id.* at 5).

From the foregoing, the Court finds that for persons with an autoimmune disease or other conditions or who reside with someone with these conditions, such as the Plaintiffs in Case No. 20-453, they are more susceptible to contracting the virus. For all persons, such

as the Plaintiffs in Case No. 20-435, there are the risks of the higher level of contagion of the virus as compared to others viruses or flu, and that contagion is exacerbated indoors where there are gatherings of individuals. Lastly, for all persons there are various consequences of contracting the virus including fatality or long-term health issues.

The Court therefore concludes that for persons with heightened susceptibility to COVID-19, such as the Plaintiffs in Case No. 20-453, the burden placed on them by the State not providing them the mail-in option is severe. For persons who do not fit into this more susceptible category, including the Plaintiffs in Case No. 20-435, the burden placed on them by the State is in the category of somewhat severe to moderate.

Standing, Justiciability, Ripeness

The Court finds that, with the exception of Jeff Bullard (Case No. 20-435-III) and Joy Greenawalt (Case No. 20-453-III), all the Plaintiffs are registered voters who do not fit within one of the categories of Tennessee Code Annotated section 2-6-201 to qualify to vote by absentee ballot. Thus, all, except Jeff Bullard and Joy Greenawalt, have standing to bring these lawsuits.

In addition, the Plaintiffs' claims are ripe and present a justiciable controversy. The fact that, as testified to by Commissioner Goins, elaborate and lengthy plans have been prepared by the State of Tennessee to mitigate the spread and contraction of the COVID-19 virus at polling places establishes that this is not a hypothetical circumstance. In addition, under the State's COVID-19 plan, these Plaintiffs would currently not be eligible to vote

by mail. Also, the evidence of record is that the majority of states, the CDC, and the National conference of State Legislatures are encouraging and advising absentee voting for the elections in 2020.

There is, then, ample evidence in the record for finding all the Plaintiffs, except Mr. Bullard and Ms. Greenawalt, have standing, and that their lawsuits present ripe, justiciable controversies to proceed in this Court.

Application of *Anderson-Burdick* Test

The Tennessee Supreme Court has not yet ruled on whether courts must apply strict scrutiny to restrictions placed on voting where the State must use the least intrusive means to further its interest. *City of Memphis v. Hargett*, 414 S.W.3d 88, 102 (Tenn. 2013). If there are less restrictive, comparably effective means, the law fails strict scrutiny. *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987).

Because the Tennessee Supreme Court has not yet ruled that the standard this Court is to apply is a strict scrutiny analysis, the Court has not done so to avoid error on appeal. The Court has instead applied the more flexible *Anderson-Burdick* test (which in part also involves strict scrutiny) as stated by the Tennessee Supreme Court in *City of Memphis v. Hargett*, which provides,

Notably, however, the United States Supreme Court has rejected the notion that strict scrutiny applies to every statute imposing a burden on the right to vote under the United States Constitution. Instead, addressing claims arising under the First and Fourteenth Amendments, the Court has adopted a “more flexible standard,” pursuant to which a showing of important governmental regulatory interests may justify lesser restrictions on the right to vote,

whereas strict scrutiny is reserved for laws that impose “‘severe’ restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)); see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion) (holding that any burden upon the right to vote “must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation’” (quoting *Norman*, 502 U.S. at 288–89, 112 S.Ct. 698)); *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

414 S.W.3d 88, 102 (Tenn. 2013). This doctrine also provides where the burden on the right to vote is moderate, the court applies an intermediate level of scrutiny weighing the moderate burden against “the precise interests put forward by the State as justification for the burden,” taking into consideration how “necessary” the burden is. *Id.* at 113.

Under *Anderson-Burdick*, the burdens are weighed against the State’s justifications for imposing the burden of in-person voting. Those justifications were shown in this case in the above analysis of the evidence not to exist. The evidence demonstrated that providing a vote by mail option is fiscally and logistically feasible, and that voter fraud is not a material threat. Thus, under these circumstances the State’s actions of requiring in-person voting during the time of the pandemic and not providing an option to vote by mail are an unreasonable burden on the right to vote in violation of the Tennessee Constitution.

Application of Tennessee Injunction Law

In determining whether to issue a temporary injunction courts are instructed to evaluate whether the applicant has demonstrated the following:

- (1) a substantial likelihood of success on the merits;

- (2) immediate and irreparable harm before final judgment can be entered;
- (3) that the equities balance in favor of the applicant; and
- (4) the issuance of the injunction is in the public interest.

South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000) (quoting Robert F. Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 4-3(l) (1999)). See also, *Union Planters' Bank & Trust Co. v. Memphis Hotel Co.*, 139 S.W. 715, 718-19 (Tenn. 1911); *Butts v. S. Fulton*, 565 S.W.2d 879, 882 (Tenn. Ct. App. 1977) (citing *Wilson v. Louisville & Nashville L.R. Co.*, 12 Tenn. App. 327 (Tenn. Ct. App. 1930)); *Henry County v. Summers*, 547 S.W.2d 247, 251 (Tenn. Ct. App. 1976) (citing *King v. Elrod*, 268 S.W.2d 103 (Tenn. 1953)); *Kaset v. Combs*, 434 S.W.2d 838, 841 (Tenn. Ct. App. 1968) (citing *Greene County Tire & Supply, Inc. v. Spurlin*, 338 S.W.2d 597 (Tenn. 1960), *Herbert v. W.G. Bush & Co.*, 298 S.W.2d 747 (Tenn. Ct. App. 1956)).

The above findings of fact and conclusions of law establish that the Plaintiffs prevail over the State on every one of these injunction factors. The Plaintiffs therefore are entitled to issuance of a temporary injunction.

No Injunction Bond Required

In concluding that there should be no injunction bond required in this case, the Court is guided by the federal court's interpretation of the bond requirement under Rule 65 of the Federal Rules of Civil Procedure. "[W]hen interpreting our own rules of civil

procedure, we consult and are guided by the interpretation that has been applied to comparable federal rules of procedure.” *Turner v. Turner*, 473 S.W.3d 257, 268–69 (Tenn. 2015) (citations omitted); *see also Huntington Nat. Bank v. Hooker*, 840 S.W.2d 916, 921 (Tenn. Ct. App. 1991) (“It is proper that Tennessee courts look to the interpretation given comparable federal rules by the federal courts. The appellate courts of Tennessee do look to the federal courts for guidance when the federal courts have interpreted a rule that has not been interpreted by the Tennessee courts.”) (citation omitted).

Federal Courts, including the Sixth Circuit, have held that the bond requirement under Rule 65 is discretionary and may be waived under certain limited circumstances such as where a plaintiff alleges the infringement of a fundamental constitutional right or when the litigation is in the public interest. *See, e.g., Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176, 1995 WL 326573 (6th Cir. 1995) (“While we recognize that the language of Rule 65(c) appears to be mandatory, and that many circuits have so interpreted it, the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security.”); *Pharm. Soc. of State of New York, Inc. v. New York State Dep’t of Soc. Servs.*, 50 F.3d 1168, 1174 (2d Cir. 1995) (“Rule 65(c) of the Federal Rules of Civil Procedure provides in part that ‘[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper.’ Although the rule speaks in mandatory terms, an exception to the bond requirement has been crafted for, *inter alia*, cases involving the enforcement of ‘public

interests” arising out of “comprehensive federal health and welfare statutes.’ This exception was relied upon in *Temple University v. White*, 941 F.2d 201 (3rd Cir.1991), where the court upheld the waiver of the bond requirement in a case in which a hospital had brought suit to ensure that Pennsylvania complied with the Medicaid Act. The court there noted that the hospital had ‘pursued a course of litigation clearly in the public interest, i.e., it seeks to preserve its role as a community hospital serving a disproportionate share of low income patients.’) (citations omitted); *Adams & Boyle, P.C. v. Slatery*, No. 3:15-CV-00705, 2020 WL 1905147, at *7 (M.D. Tenn. Apr. 17, 2020), *aff’d as modified*, 956 F.3d 913, 2020 WL 1982210 (6th Cir. 2020), and *modified*, No. 3:15-CV-00705, 2020 WL 2026986 (M.D. Tenn. Apr. 27, 2020) (“However, “the rule in our circuit has long been that the district court possesses discretion over whether to require the posting of security,” *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (internal citation omitted), and “a court has no mandatory duty to impose a bond as a condition for issuance of injunctive relief.” *Stooksbury v. Ross*, No. 3:09-CV-498, 2012 WL 12841901, at *6 (E.D. Tenn. Aug. 1, 2012) (citing *NACCO Materials Handling Grp., Inc. v. Toyota Materials Handling USA, Inc.*, 246 F. App’x 929, 952 (6th Cir. 2007)). “When determining whether to require the party seeking an injunction to give security, courts have considered factors such as the strength of the movant’s case and whether a strong public interest is present.” *I Love Juice Bar Franchising, LLC*, 2019 WL 6050283, at *14 (citing *Moltan Co.*, 55 F.3d at 1176.)”); *United Utah Party v. Cox*, 268 F. Supp. 3d 1227, 1260 (D. Utah 2017) (“Despite the mandatory nature of the language in the Rule,

trial courts have “wide discretion under Rule 65(c) in determining whether to require security.” This preliminary injunction enforces fundamental constitutional rights against the government. Waiving the security requirement best accomplishes the purposes of Rule 65(c).”) (footnotes omitted)); *Bruner v. Zawacki*, No. CIV.A. 3:12-57-DCR, 2013 WL 2903241, at *4 (E.D. Ky. June 13, 2013) (“The Sixth Circuit has long held that a district court “possesses discretion over whether to require the posting of security.” *Moltan Co. v. Eagle. Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir.1995). The security requirement has been waived where an injunction is not likely to result in harm to the party enjoined, where the exercise of constitutional rights is at issue, and where a suit is brought in the public interest. 13 *Moore's Federal Practice*, § 65.52 (3d Ed.). In addition, other circuits have held that in public-interest litigation, the district court has the discretion to dispense with the security requirement or to require nominal security if requiring security would, in effect, deny access to judicial review. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir.2005).”); *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335–36 (M.D. Fla. 2009) (“Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.”) (citation omitted); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 129 (D. Mass. 2003) (“Lastly, the First Circuit has recognized an exception to the security bond requirement in Fed.R.Civ.P. 65(c) in ‘suits to enforce important federal rights or public interests.’”) (citation omitted); *Lamar Advantage GP Co., LLC v. City of Cincinnati*, 114 N.E.3d 805, 831 (Ohio Com. Pl. 2018) (“While Ohio R. Civ. P. 65(C)

appears to require the fixing of a bond in order to effectuate a preliminary injunction, state courts have followed the lead of federal courts holding that the setting of the amount of an injunctive bond is within the discretion of the Court and this includes the discretion to require no bond at all.”).

Based on the foregoing law, the Court concludes that no injunction bond is required to be posted in this case because in issue is the fundamental constitutional right to vote.

Rulings on Motions in Limine

With respect to motions in limine filed by the parties, the Court rules as follows.

Demster v. Hargett (20-435-III)

- May 27, 2020—*Defendants’ Motion in Limine*—**Denied**
- June 3, 2020—*Plaintiffs’ Motion in Limine to Admit Expert Testimony of Alex Padilla and Allison McReynolds*—**Granted**

Lay v. Goins (20-453-III)

- June 2, 2020—*Plaintiffs’ Motion to Strike Pursuant to Tenn. R. Civ. P. 12.06*—**Denied**
- June 3, 2020—*Defendants’ Oral Motion to Exclude Plaintiffs’ June 2, 2020 Reply Brief in Support of Motion for Temporary Injunction* and any supplemental supporting evidence submitted in reply—**Denied**

Conclusion

As stated in the State’s brief, the COVID-19 virus has upended almost all aspects of life—and voting is no exception. The overwhelming response of other states has been to make adjustments in their voting by mail protocol. The Defendants, however, have refused to do this. The effect of the State’s failure to adapt and expand the excuse

requirements for mail-in voting is that it places a severe burden in Case No. 20-453 on the Plaintiffs with heightened susceptibility to the COVID-19 virus and a somewhat severe to moderate burden on all other Plaintiffs, including those in Case No. 20-435. Yet, the State's justifications, for not providing an expansion of voting by mail during the pandemic, are not reasonable, necessary and/or do not exist. Thus, the State's restrictive interpretation and application of Tennessee's voting by mail law (Tennessee Code Annotated section 2-6-201), during the unique circumstances of the pandemic, constitutes an unreasonable burden on the fundamental right to vote guaranteed by the Tennessee Constitution. Accordingly the Plaintiffs are entitled to issuance of a temporary injunction.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the *Twentieth Judicial District of the State of Tennessee In Re: COVID-19 Pandemic Revised Comprehensive Plan* as approved on May 22, 2020 by the Tennessee Supreme Court, through June 30, 2020, this Court shall send copies solely by means of email to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

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Jacob Webster Brown
Melody Dernocoeur
Bruce S. Kramer
Steven J. Mulroy
Attorneys for the Plaintiffs in Case No. 20-435

Alexander S. Rieger
Janet M. Kleinfelter
Steven A. Hart
Matthew D. Cloutier
Kelley L. Groover

Attorneys for the Defendants in Case No. 20-435 and Case No. 20-453

Thomas H. Castelli
Neil A. Steiner
Tharuni A. Jayaraman
Dale E. Ho
Sophia Lin Lakin
Angela M. Liu

Attorneys for the Plaintiffs in Case No. 20-453