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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

EARLE FISHER, et. al.,	) Case No.: M2020-00831-SC-RDM-CV
Plaintiffs/Appellees,	)
v.	) Interlocutory Appeal from the
	) Chancery Court of Tennessee for the
TRE HARGETT, et al.	) Twentieth Judicial District,
Defendants/Appellants.	) Docket No. 20-0435-III
	)
Related with:	)
	)
BENJAMIN LAY, et al.	) Case No.: M2020-00832-SC-RDM-CV
Plaintiffs/Appellees.	)
v.	) Interlocutory Appeal from the
	) Chancery Court of Tennessee for the
MARK GOINS, et al.	) Twentieth Judicial District,
Defendants/Appellants.	) Docket No. 20-0453-III

BRIEF OF *AMICUS CURIAE* THE PUBLIC INTEREST LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Amicus curiae has a significant and long-standing interest in this matter. The Public Interest Legal Foundation is a 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote. The Public Interest Legal Foundation has sought to advance the public's interest in fair elections free from unconstitutional burdens and discrimination. At the state level, this is best done by ensuring that state laws enacted by each state's legislative branch are constitutional. It is also done by monitoring judicial actions that intrude into the delegated responsibilities of the legislative branch. The separation of powers is foundational to elections that are fair and free from partisan manipulation.

Attorneys for *amicus curiae* have extensive experience in election law litigation. Their interest in ensuring that state election laws comply with federal election standards is at the core of their mission of preserving election integrity across the country. When one state fails to protect its election processes in a national general election, then the election loses integrity and the national electorate feels cheated. Attorneys for *amicus curiae* believe their experience, research and comprehensive analysis of Tennessee's voter roll will aid the Court in evaluating the issues presented.

The Liberty Justice Center has experience in constitutional law, having won *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), maintains an election law practice, regularly practices in Tennessee, and serves as local counsel for the Public Interest Legal Foundation in this case.

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SUMMARY OF THE ARGUMENT

The court's ruling violates the Separation of Powers doctrine, which has been followed and established as precedent in this Court. The violation is so egregious that, in response to the chancery court's June 4 injunction ruling, members of the Tennessee Legislature introduced House Resolution HR0352, in which Chancellor Lyle's ruling is denounced as "an untenable usurpation of legislative powers constitutionally belonging to the General Assembly." The ruling is especially egregious because the Tennessee legislature *rejected the exact relief* that the chancery court ordered on each of the following dates: 3/04/2009, 2/23/2011, 4/10/2012, 4/02/2013, 4/21/2015, 3/21/2017, 3/27/2018, 3/06/2019, and even did so as recently as 2/26/20, during the rise of Covid-19 cases. Because the chancery court does not have the power to judicially overrule the Tennessee Legislature on matters governing the conduct of elections, the injunction ruling should be vacated.

Further, the chancery court's ruling is an abuse of discretion because it is an extreme departure from precedent in the United States Supreme Court which holds that there is no federal constitutional right to vote by absentee ballot. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-08 (1969). Its holding also departs from controlling precedent from this Court that absentee voting is a privilege, not a right. *Hilliard v. Park*, 212 Tenn. 588, 596 (1963).

The court further abused its discretion when it rejected all of the evidence in the record of the State's compelling interest in preventing

voter fraud in elections, stating that it was "not a material concern." *See* Appendix (Demster-Vol. VII, p. 884) (Lay-TR Vol. XVIII, p. 2622) June 4 Order ("Order"), p. 10. Because the court did not weigh *any* of this evidence, its assessment of the evidence is erroneous.

Other courts presented with this exact issue have recognized that whether absentee voting statutes encompass those who consider themselves to be at high risk of contracting Covid-19, such laws do not infringe on the constitutional right to vote. *See Clark v. Edwards*, No. 20-308-SDD-RLB, 2020 U.S. Dist. LEXIS 108714, at *3 (M.D. La. June 22, 2020); *Nemes v. Bensinger*, No. 3:20-CV-407-CRS, 2020 U.S. Dist. LEXIS 106969, at *32 (W.D. Ky. June 18, 2020).

For each of these reasons, fully presented below, *amicus curiae* urge the Court to vacate the chancery court's injunction and allow the State to proceed with its Emergency Election Plan.

STANDARD OF REVIEW

This Court reviews the grant of injunctive relief for an abuse of discretion. *Gentry v. McCain*, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010). "An abuse of discretion occurs when the trial court applies an incorrect legal standard, reaches an illogical result, resolves the case on a clearly erroneous assessment of the evidence, or relies on reasoning that causes an injustice." *Franklin Square Towne Homeowners Ass'n v. Kyles*, 2017 Tenn. App. LEXIS 300, at *21-22 (Ct. App. May 10, 2017) (internal citations omitted). Because the injunctive relief ordered affects both upcoming elections, there is no further relief that could be granted in a trial of the merits that would not be moot. Thus, the injunction, though

labeled "temporary," should be viewed for what it is: a permanent injunction whose operation ends after the November election.

ARGUMENT

I. The Chancery Court's Ruling Violates the Separation of Powers and Departs from Controlling Precedent that Gives the Legislature Exclusive Authority to Control the Conduct of Elections.

The chancery court's ruling ignores long-standing precedent established by this Court over a century ago that it is the state legislature, not the court, that has the authority to decide how elections in Tennessee are to be run:

> [T]he Legislature of each State has the organic authority for the passage of such laws as will secure [the] purity [of elections] . . . [It] may employ every legislative means, however vigorous, to accomplish the ends contemplated by the framers of the Constitutions. The Legislatures are, as a rule, the judges of the means to be adopted, and their necessity. The power to regulate and reform is theirs. They are presumed to know the condition and wants of the State.

Cook v. State, 90 Tenn. 407, 413-14 (1891) (emphasis added).

This Court has continued to uphold the authority of the legislature to regulate elections. "The authority of the Tennessee Legislature to control the conduct of elections held in this State is manifest." *Trotter v. City of Maryville*, 191 Tenn. 510, 235 S.W.2d 13 (1950). The Tennessee Constitution provides that "the General Assembly shall have power to enact . . . laws to secure the freedom of elections and the purity of the ballot box." Art. IV, § 1, Tennessee Constitution. *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 901 (Tenn. 1987).

More recently, this Court confirmed that the legislature can attach burdens to the right to vote, so long as it does not impose "impossible or oppressive conditions." *City of Memphis v. Hargett*, No. M2012-02141-SC-R11-CV, 2013 Tenn. LEXIS 1101, at *41-43 (Oct. 17, 2013) (citing *Cook v. State*, 90 Tenn. 407, 412-13 (Tenn. 1891)).

Here, the legislature did not attach "impossible or oppressive" conditions on the right to vote. To the contrary, any optional expansion, or contraction, of absentee voting does not affect the right to vote, nor make it harder for someone to vote, as discussed *infra*.

This Court's holding on legislative authority is also consistent with United States Supreme Court precedent. In a case involving Tennessee law, the United States Supreme Court was asked to construe the Endangered Species Act in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The Court was asked to "view the Endangered Species Act 'reasonably,' and hence shape a remedy 'that accords with some modicum of common sense and the public weal.'" 437 U.S. at 194-95. But the Court recognized that interpreting legislation to fit the public's preferences was not its job:

> We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as institutionalized caution.

Id. at 194-95 (internal quotation marks omitted).

The Court held that its "individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute." *Id.* "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *Id.* "We do not sit as a committee of review, nor are we vested with the power of veto." *Id.*

In refusing to judge the wisdom of the Legislature's plans, the Court confirmed "that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *Id.* "Our Constitution vests such responsibilities in the political branches." *Id.* at 195. The Supreme Court has held that even in times of crisis, "[i]t is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *Tenn. Valley Auth.,* 437 U.S. at 185.

In the instant case, the chancery court ignored the separation of powers doctrine, rejected controlling precedent, and took it upon itself to judicially legislate changes that Plaintiffs sought. Because it was not within the power to so legislate, the court's ruling is an abuse of discretion and should be reversed.

II. The Tennessee Legislature Rejected the Exact Relief Ordered by the Chancery Court in Every Legislative Session Since at Least 2009, including During the COVID-19 Pandemic.

The chancery court's also violates separation of powers because it contradicts decisions made by the Tennessee legislature during its last

five General Assemblies (the 106th, 107th, 108th, 109th, 110th), as well as during the current 111th Assembly. Each Assembly repeatedly rejected an amendment that would have extended absentee voting to all registered voters, the same remedy ordered by the Chancellor:

- On 3/04/2009, it rejected HB 2071/SB 1817
- On 2/23/2011, it rejected HB 1136/SB 597
- On 4/10/2012, it rejected HB 2709/SB 2692
- On 4/02/2013, it rejected HB 1010/SB 87
- On 4/21/2015, it rejected HB 0553/SB 1210
- On 3/21/2017, it rejected HB 0423/SB 0422
- On 3/27/2018, it rejected HB 2119/SB2074
- On 3/06/2019, it rejected HB 0214/SB 0762
- On 2/26/2020, it rejected HB2862/SB 2266

See Exhibit 1, legislative records. The last rejection occurred in February 2020. Even *after* the state declared an emergency on March 12, the legislature refused to alter the absentee voting statute, most recently on June 2, when it rejected efforts to give first-time voters absentee ballots. See Exhibit 2, rejection of HB 0145/SB 0193. The record could not be any clearer that the Tennessee Legislature considered and rejected the relief the lower court ordered.

III. Tennessee House Resolution HR0352 Denounces the Chancellor's Ruling as Violating the Separation of Powers.

The ruling of the Chancellor triggered a legislative response. Members of the Tennessee Legislature responded to the June 4 injunction by filing a House Resolution on June 15, which states that:

- The Chancellor "unreasonably infringed upon the authority of the General Assembly to be the sole source of legislation in Tennessee";

- The House of Representatives "denounces" the ruling and subsequent injunction;
- The ruling is "an untenable usurpation of legislative powers constitutionally belonging to the General Assembly"; and,
- It demanded that Chancellor Lyle "vacate the order of June 4, 2020, and withdraw the subsequent temporary injunction exceeding the constitutional authority of her office."

See Exhibit 3, June 15 HR0352, p. 2.

The Chancellor's remedy also exercised powers of the purse and requires over $1,000,000 in state funds to be spent consistent with the Chancellor's remedial mandate. The State produced evidence that it could *not afford* the relief. *See* Exhibit 4, Supplemental Goins Declaration, filed in the record on 6/01/20, paragraph 3.

Such a mandate intrudes on Article II, Section 24 of the Tennessee Constitution which provides that "no law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost." In this case, the State did not pass a law authorizing any state monies to be spent on an expansion of absentee voting, rather, it rejected it numerous times. The Estimated Fiscal Note of the last proposed bill to expand absentee voting stated that local expenditures would increase by $1,834,500 this year alone. *See* Exhibit 5, Fiscal Note.

This Court has previously refused to "judicially legislate" in such a situation. In *Pollard v. Knox County*, the Court was asked to interpret a workers' compensation statute that would broaden the definition of earnings. 886 S.W.2d 759, 760 (Tenn. 1994). This Court refused, holding that "it would be inappropriate for this Court to judicially legislate what

would amount to a large increase in compensation costs never contemplated by employers, carriers *or the Legislature*." *Id.* (emphasis added). It further held that "[i]f the definition of average weekly wage is to be broaden[ed] to include the value of fringe benefits it is a function of the Legislature, not the Judiciary." *Id.*

Here, the General Assembly expressly rejected spending state monies on expanding absentee voting to all registered voters. *See* Exhibits 1-2, 5. Further, even though the lower court surmised that not everyone would actually request an absentee ballot if provided the chance, state election officials cannot make that same assumption. Once a privilege is extended, it cannot discriminate between those who respond first and those who do not request one until the money has run out. Given that this Court has refused to "judicially legislate" in cases where the relief sought would expend state monies *that the legislature did not authorize*, it should do so here as well.

IV. The Court Erred By Rejecting the United States Supreme Court's Holding in *McDonald v. Bd. of Election Comm'rs* That There is No Constitutional Right to Vote by Absentee Ballot.

The court's ruling is also inconsistent with the United States Supreme Court's holding in *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969). There, the Court considered whether an Illinois statute that governed who was eligible to vote absentee was constitutional. The statute excluded the plaintiffs, who were inmates, from being able to cast an absentee ballot. The Court upheld the state law, clarifying that "[t]here is nothing in the record to indicate that the Illinois statutory

scheme has an impact on appellants' ability to exercise the fundamental right to vote." 394 U.S. at 807. "It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id.* Indeed, "the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise." *Id.* at 808.

Significantly, the *McDonald* Court asked the proper question which is whether the *state of Illinois* "ha[d] in fact, precluded appellants from voting." *Id.* at 808. It did not ask whether something or someone else precluded the appellants from voting. Thus, the proper inquiry is whether an affirmative state action is preventing or hindering someone from voting. Contrary to the lower court's approach, the inquiry is not whether a plaintiff is burdened by any number of things that the state has *not* done to make it easier for people to vote. By extension of that reasoning, anything NOT enacted could be deemed an unconstitutional burden on the right to vote, which is an absurd result. The Court "must construe statutes so as to avoid results [that are] glaringly absurd." *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

In Tennessee, the absentee ballot statute grants the privilege of absentee voting to fifteen different categories of Tennessee voters. Tenn. Ann. Code § 2-6-201(1-9). However, none apply to those who are fearful of catching a virus or believe themselves more susceptible to catching one. The Plaintiffs argued that because they are fearful of catching Covid-19, it was "impossible or unreasonable" for them to go to a polling place during the pandemic. Despite evidence in the record that at least one of

the plaintiffs was out in public participating in protests,[1] the lower court agreed that it was "impossible or unreasonable" for the plaintiffs to go to a polling location. *See* Exhibit 4, Supplemental Goins Declaration testifying that he viewed the Facebook page of Hunter Demster, who posted videos of himself attending multiple outdoor protest rallies without a mask or following social distance measures on May 21, May 27, May 31; *see* Order, at p.9.

The court's ruling erroneously conflates the right to vote with the right to be able to vote absentee. The Supreme Court made clear that no one has a constitutional right to vote by absentee ballot. *McDonald*, 394 U.S. at 807-08. Further, even though some might find it "practically impossible" to vote, the Court did not find the inmates' lack of ability to cast an absentee ballot a burden on their constitutional right to vote. *Id.* If being physically incarcerated is not a burden on the right to vote, then under the reasoning of *McDonald*, the plaintiffs' fears of going to the polls should not be deemed a burden on the right to vote.

Regardless, even if there was a constitutional right to vote by absentee, which there is not, the Supreme Court has held that "weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence." *Crawford v. Marion Cnty. Election Bd.*, 551 U.S. 181, 207 (2008) (refusing to invalidate Indiana's voter ID law even though it affected some voters more than others, including elderly people born out of state who may find

[1] Upon discovering this information, Demster was non-suited.

it difficult to obtain a birth certificate, others who may have difficulty getting their birth certificate, homeless people, and people with a religious objection to being photographed). This is exactly what the lower court has done: determined that the statute is invalid because it affects some voters more than others, specifically, those who are afraid to leave home to vote. However, not all voters in Tennessee are staying home; indeed, not all the Plaintiffs in this case are even staying home, as the record in this case indicates. *See* Exhibit 4.

In sum, because there is not a constitutional right to a certain method of voting, the court's ruling is contrary to *McDonald*. Even if there were such a right, the ruling is inconsistent with *Crawford*, which held that even a law's "unjustified burden on some voters" did not make a nondiscriminatory law invalid. *Id.* at 203-04.

Because the chancery court's ruling erroneously presumed that Plaintiffs have a constitutional right to vote by absentee ballot, its ruling followed an incorrect standard and should be reversed.

V. The Chancery Court Erred When It Refused to Follow this Court's Controlling Precedent that Absentee Voting is a Privilege, Not a Constitutional Right.

The Supreme Court of Tennessee has also held that voting by absentee ballot is "a special privilege [that] requires a stricter adherence to the legislative conditions imposed upon its exercise." *Hilliard v. Park,* 212 Tenn. 588, 597 (Tenn. 1979). "It is not mere absence from the county that entitles a voter to vote by absentee ballot; instead, he is entitled to so vote only if he is absent for one or more of the specific reasons *prescribed by the statute*." *Id.* at 600-01 (emphasis added). Notably, the Court held that

the privilege is extended based on legislative decisions ("prescribed by statute") and not based on a constitutional right. The *Hilliard* court explained that "under the law as we construe it, and it was the intention of the Legislature to make this law mandatory or to have a strict construction of it, these people seeking to vote by absentee ballot were seeking to exercise a privilege and they must comply with the conditions of this privilege as a condition precedent to the exercise of such privilege." *Id.* at 608.

Implicit in this holding is that absentee voting rules are not to be construed as infringing on the right to vote. "Election laws should be construed liberally in favor of the right to vote but this is not the rule as to absentee voting laws." *Emery v. Robertson Cnty. Election Comm'n*, 586 S.W.2d 103, 107-08 (Tenn. 1979). This Court recognized that absentee ballot rules are "in derogation of the common law" and should be "strictly construed." *Hilliard*, 212 Tenn. at 596. "The reason for the difference is that purity of the ballot is more difficult to preserve when voting absent than when voting in person." *Emery*, 586 S.W.2d at 107-08.

This Court's reasoning in both *Hilliard* and *Emery* requires that the lower court strictly construe the absentee voting rules against the voter, which it did not do, making its ruling an abuse of discretion.

VI. The Chancery Court Erred When It Rejected *All* Evidence of the State's Interest in Preventing Voter Fraud Because Its Interest Is Well-Established and Supported in the Record.

The lower court erred when it refused to weigh any of the State's interest in preventing voter fraud, stating that it was "not a material

concern." Order, p. 10. The court further stated that "justifications for imposing the burden of in-person voting" were shown "not to exist." Order, p. 25. The court's position is not supported by the record.

First, the record contains numerous citations to legal authority asserted by the State that it does indeed have a cognizable interest in preventing voter fraud. It presented legal authority for this argument in its Response in Opposition to a Preliminary Injunction filed on 5/22/20. The State argued that the Tennessee Constitution authorizes the General Assembly "to enact . . . laws to secure . . . the purity of the ballot box." Art. IV, § 1. This Court held that "[t]hese constitutional provisions underscore the magnitude of the state interest at issue in this appeal." *City of Memphis v. Hargett*, 2013 Tenn. LEXIS 1101, at *36 (holding that the photo ID requirement was not an impermissibly intrusive method for the state to achieve its interest in preventing voter fraud). This Court recognized "that the purity of the ballot is more difficult to preserve when voting absent than when voting in person." *Hilliard,* 212 Tenn. at 596. And in *Emery v. Robertson Cnty. Election Comm'n.*, the Court held that the "purpose" of Tennessee's 1963 Absentee Voting Act and its restrictions was to "prevent fraud in elections." 586 S.W.2d at 108. The Court's holding confirms that absentee voting is associated with voter fraud, which justifies the restrictions that accompany it. The lower court was wrong to rule that no such justifications existed.

The State also argued that the United States Supreme Court has held that states have a "valid interest in protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 204 (citation omitted). In *Crawford*, preventing voter fraud was the first reason listed

by the state and was accepted by the Supreme Court, despite the lack of evidence of "any such fraud actually occurring in Indiana." *Id.* at 195. Instead, Indiana presented evidence of the state's inflated voter rolls as further support for the state's enactment of a photo ID requirement. *Id.* at 196. The Court held that "the fact of inflated voter rolls []provide[s] a neutral and nondiscriminatory reason supporting the State's decision to require photo identification." *Id.* at 196-97.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 (1989). The State's interest in preventing voter fraud has been found to be "compelling." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Evidence of the State's interest in preventing voter fraud was in the record.

Second, the record contains testimony from the State's expert witness, Washington Secretary of State Wyman, warning that rushing to expand absentee voting will undermine election integrity. In her first declaration, Wyman testified that due to the time and money it takes for a state to expand absentee voting, it would be "impossible" for Tennessee to do so for the August election "without it resulting in total chaos and compromising the integrity of the elections." See Exhibit 6, First Wyman Declaration, filed on 6/01/20, p. 5, ¶ 19. Wyman also testified that when Washington ran both a high percentage mail-in ballot and in-person election in 2004, "ineligible ballots were counted" and "hundreds of absentee ballots were found after election day." Exhibit 6, p. 4, ¶ 12. She testified that it triggered ten lawsuits and two recounts. *Id.*

Despite this testimony, the court's ruling appears to be based not on the record, but on a single, unidentified "recent national news article" in which Secretary Wyman allegedly responds to an interview question that vote by mail and absentee voting does not lead to "more fraud." Order, p. 17. Unfortunately, the court does not identify the article, so neither its context, nor its veracity, can be confirmed. But even if the statement is accurate, Secretary Wyman currently manages elections in an all mail-in ballot state, which she testified took 27 years to develop. *See* Exhibit 6, p. 3, ¶ 10.

Regardless of the alleged statement, a news report should not have been given more weight as "evidence" than Secretary Wyman's actual testimony filed in this case via her two sworn declarations. And it certainly should not be deemed as "debunking" the State's interest in preventing voter fraud. Order, p. 5 ("As to voter fraud, the State's own expert debunks and rejects that as a reason for not expanding access to voting by mail."). This is especially true because Secretary Wyman testified that election integrity *would be compromised* if Tennessee tried to expand absentee voting for this year's elections. She did not "debunk" the State's interest in preventing voter fraud; to the contrary, she warned against it, explaining in detail the issues that should be addressed in order to preserve election integrity. *See* Exhibit 7, Supp. Declaration of Sec. Wyman.

Last, it is well-established in Tennessee and elsewhere that a state is not required to submit evidence of voter fraud before it can pass legislation protecting against it. As this Court held in *City of Memphis v. Hargett*, "protection of the integrity of the election process empowers the

state to enact laws to prevent voter fraud before it occurs, rather than only allowing the state to remedy fraud after it has become a problem." 2013 Tenn. LEXIS 1101, at *39.

The court's refusal to weigh any evidence of the State's interest in preventing voter fraud is a "clearly erroneous assessment of the evidence" and an abuse of discretion. *See Franklin Square Towne Homeowners Ass'n*, 2017 Tenn. App. LEXIS 300, at *21-22. As such, the ruling should be reversed.

VII. The Court's Assessment of Evidence Was Erroneous Because It Failed to Consider Evidence in the Record of Problems with Absentee Ballots in the 2018 General Election.

In its ruling, the chancery court stated that "voter fraud is not a material reason to refuse to expand absentee voting by mail" because "many safeguards are already in place" to prevent it. Order, p. 17. The court then recited parts of the absentee voting statutes that it determined were sufficient to prevent voter fraud, such as signature matching and having laws in place that criminalize voter fraud.

Unfortunately, the court did not look to the factual record before it when it pronounced that fraud with absentee ballots was not a problem. According to the EAC Survey, which was filed with the court on 5/26/20, evidence shows that only 11% of addresses were confirmed when Tennessee election officials sent out confirmation notices in 2018. Put another way, 89% of the addresses could not be confirmed. *See* Appendix Lay-TR Vol. III, p.366 (EAC Report, at p. 79). Out of 186,429 notices sent, 165,640 address confirmation notices were either returned as invalid,

were undeliverable or their status is simply "unknown." *Id.* This is consistent with the data provided to Secretary Hargett regarding Tennessee's inflated voter roll. *See* Exhibit 9, June 2, 2020 Letter to Sec. Hargett concluding that over 11,000 deceased registrants remained on the voter roll, as well as 383 duplicate registrations.

Further, in the 2018 general election, nationwide there were 425,464 absentee ballots returned *but not counted*. *Id.* (EAC Report, p. 14). Of those instances, 67,223 had non-matching signatures on the ballots, meaning either someone other than the registered voter likely signed the ballot, or signature matching efforts failed to correctly identify the voter's signature. *Id.* (EAC Report, p. 14.) Additionally, 5,956 absentee ballots were rejected because the voter had already voted in person. *Id.* (EAC Report, p. 14).

In sum, the court's assessment of the evidence that voter fraud is not occurring with absentee ballots, is contrary to the record which indicates that absentee ballots are commonly returned with bad signatures or are submitted in addition to an in-person ballot.

VIII. Other Courts Have Rejected Arguments Identical to Plaintiffs.

Although Plaintiffs filed over 50 newspaper articles to support their position, not all courts have responded to the pandemic by replacing legislative or ministerial election contingency plans with court ordered replacement. On June 22, in a case asserting a nearly identical challenge to the one here, the Middle District of Louisiana rejected claims that the state's absentee voting laws were unconstitutional because they "forced" plaintiffs to risk exposure to the virus. *Clark v. Edwards*, No. 20-308-

SDD-RLB, 2020 U.S. Dist. LEXIS 108714, at *3 (M.D. La. June 22, 2020). The court held that plaintiffs' claim was "a difficult needle to thread" and refused to alter the state's election plan, which was only 15 pages in length. *Id.* Here, Tennessee's 80-page plan was already in the process of implementation when the injunction was entered. *See* Exhibit 8, pp. 16-97 (the State's Emergency Election Plan).

Likewise, a court in the 6th Circuit held that unless a procedure was unconstitutional, it could not question the decisions of the state legislature, stating that "[w]hile it may seem intuitive that, when it comes to polling places, more is better, that is not a call for this Court to make, *unless* we first find a constitutional or statutory violation." *Nemes v. Bensinger*, No. 3:20-CV-407-CRS, 2020 U.S. Dist. LEXIS 106969, at *32 (W.D. Ky. June 18, 2020). Other courts have recognized that a nondiscriminatory election law cannot be deemed unconstitutional when equally applied, even though some voters are more affected by it during the pandemic than others. *Acosta v. Wolf*, No. 20-2528, 2020 U.S. Dist. LEXIS 113578, at *8-9 (E.D. Pa. June 30, 2020) (noting that "all" are "constrained by the COVID-19 pandemic" and that "no state law, emergency order, or coronavirus pandemic has demanded that [plaintiff] cease collecting signatures.").

CONCLUSION

The court's ruling departs from established precedent which holds that there is not a constitutional right to vote absentee, which is an incorrect legal standard. It also violates the separation of powers doctrine and is based on an erroneous assessment of the evidence. For these

reasons, *amicus curiae* respectfully urge the Court to reverse the court's order and vacate the temporary injunction.

Respectfully Submitted,

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I hereby certify that on this 9th day of July, 2020, a true and exact copy of the foregoing was served via Tenn. S. Ct. R. 46 (4.01) through the e-filing system and via electronic mail to:

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Pursuant to Section 1.01(b) of Tenn. Sup. Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3.02 of Tenn. Sup. Ct. R. 46.

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