

STATE OF TENNESSEE

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October 18, 2022

Deborah S. Hunt, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202-3988

Re: *Jeffery Lichtenstein, et al. v. Tre Hargett, et al.*, No. 22-5028

Dear Ms. Hunt:

Defendants-Appellees respectfully submit this Rule 28(j) letter concerning two decisions issued after the parties filed their briefs in this case: (1) *Priorities USA v. Nessel*, No. 2:19-cv-13341, 2022 WL 4272299 (E.D. Mich. Sept. 15, 2022); and (2) *VoteAmerica v. Raffensperger*, No. 1:21-cv-01390, 2022 WL 2357395 (N.D. Ga. June 30, 2022).

Plaintiffs-Appellants had relied on previous decisions from those lawsuits to support the proposition that “distribution of absentee ballot applications[] constitute[s] expressive conduct.” (Opening Br. at 16-17.) Defendants-Appellees pointed out that the cited decisions made no attempt to apply *Texas v. Johnson*, 491 U.S. 397 (1989), to determine whether the conduct prohibited in those cases was inherently expressive. (Response Br. at 15 & n.2.) Both courts have now applied *Johnson*. And both courts agreed that the prohibited conduct was “non-expressive conduct” not subject to First Amendment protections. *Priorities USA*, 2022 WL 4272299, at *4-6; *see VoteAmerica*, 2022 WL 2357395, at *8-9.

First, in granting motions for judgment on the pleadings, the Eastern District of Michigan repeatedly adopted the analysis of the Middle District of Tennessee in this case. See *Priorities USA*, 2022 WL 4272299, at *5, *8, *15 (citing *Lichtenstein v. Hargett*, No. 3:20-cv-00736, 2021 WL 5826246 (M.D. Tenn. Dec. 7, 2021)). Although the challenged Michigan law only prohibits possession of a signed absent voter ballot application, “returning a completed absentee-ballot application for a voter is not inherently expressive; speech must accompany the act to convey a particularized message.” *Id.* at *5. Otherwise, taking a completed application from a voter might simply mean “throw this away.” *Id.*

Second, the Northern District of Georgia rejected the idea that distributing absentee ballots constitutes core political speech, expressive conduct, or associational advocacy. *VoteAmerica*, 2022 WL 2357395, at *5-10. Georgia law, among other restrictions, prohibits sending absentee ballots to individuals who have already requested, received, or voted an absentee ballot. *Id.* at *2-3. “[C]ombining speech,” such as a cover letter encouraging a voter to vote absentee, “with the conduct of sending an application form, . . . is not sufficient to transform the act of sending the application forms into protected speech.” *Id.* at *9.

Respectfully submitted,

/s/ Clark Lassiter Hildabrand

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CERTIFICATE OF SERVICE

I, Clark Lassiter Hildabrand, counsel for Defendants-Appellees and a member of the Bar of this Court, certify that, on October 18, 2022, a copy of the foregoing Rule 28(j) letter was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

/s/ Clark Lassiter Hildabrand

Clark Lassiter Hildabrand
Assistant Solicitor General

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