IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JEFFREY LICHTENSTEIN, et al., Plaintiffs, v. TRE HARGETT, et. al., Defendants.	Civil No. 3:20-cv-0736 Judge Eli J. Richardson Magistrate Judge Frensley

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

To prevail on their Rule 12(b)(6) motion,[1] Defendants must demonstrate the facial implausibility of the allegations in the Complaint, drawing all reasonable inferences from Plaintiffs' pleadings in their favor. Applying that standard, Defendants must show that the allegations in the Complaint do not plausibly support the notion that Tennessee Code § 2-6-202(c)(3)'s absolute ban on the distribution of absentee ballot applications ("the Law") infringes on protected expressive speech. This they cannot do because the key issue of whether the prohibited conduct is "expressive" is fact-sensitive, and, indeed, one already described by this Court as a "close one." Order, ECF No. 44, at 30.

Further, even if Defendants were able to meet that threshold burden, they would still have to show that their justifications for the Law—and its undeniable infringement, however it is quantified, on Plaintiffs' chosen vote engagement activities—meet the appropriate constitutional standard, which is at least the *Anderson-Burdick* standard. And even if the appropriate constitutional standard

[1] Plaintiffs note that Defendants' motion, filed in lieu of an Answer, is untimely. Defendants' responsive pleading was due on September 18, 2020. *See* Fed. R. Civ. P. 12 (requiring service of a responsive pleading or an appropriate motion within 21 days of service). Plaintiffs effectuated service of their complaint on State Defendants on August 28, 2020.

is the lowest one possible—rational basis—Defendants cannot overcome that standard by way of this motion because they cannot put forth their justification for the Law without going beyond the four corners of the Complaint.

In denying Plaintiffs' motion for a preliminary injunction, this Court took pains to explain that it "does not intend to suggest that any of its findings herein are not subject to potential change at later stages in this case based on a changing record." Order, ECF No. 44, at 7. Such a caveat would have been unnecessary if Plaintiffs' Complaint failed to state a claim at all, as Defendants now contend. The Court was correct in recognizing that the allegations in the Complaint will benefit from full fact-finding. That recognition—supported by the governing case law—precludes the finding of implausibility essential to Defendants' success on their motion.

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LEGAL STANDARD

Rule 12(b)(6) motions are governed by the facial plausibility standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). To establish "facial plausibility," a complaint need plead only "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678–79. Examining whether a complaint states a "plausible claim for relief" is a "context-specific task." *Id.* Courts must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015) (citation omitted). In addition, courts "may not consider matters beyond the complaint." *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008). A motion to dismiss brought under Rule 12(b)(6) should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012) (internal quotation omitted).

ARGUMENT

Plaintiffs have plausibly alleged that the Law violates their First and Fourteenth Amendment rights by prohibiting them from engaging in expressive conduct and core political speech and infringing their associational rights, and that it serves no legitimate state interest, much less a compelling one. Defendants' motion should be denied.

I. Plaintiffs have pled sufficient facts to allege the Law unlawfully infringes on their expressive conduct, core political speech, and associational activities.

The Supreme Court and the Sixth Circuit have long recognized that the protection of free speech "does not end at the spoken or written word," *Texas v. Johnson*, 491 U.S. 397, 404 (1989), and that the Constitution protects "many non-verbal forms of communication," *Am. United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1542 (6th Cir. 1992), specifically, conduct that is "inherently expressive." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *see also Buckley v. Valeo,* 424 U.S. 1, 17 (1976) (noting that "[e]ven if the categorization of the expenditure of money as conduct were accepted," the regulation restricting such conduct involves "suppressing communication" (internal quotations omitted)).

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Construing all reasonable inferences in Plaintiffs' favor, Plaintiffs have plausibly alleged that the Law prohibits Plaintiffs from engaging in expressive conduct. The Law criminalizes the act of giving anyone an application for an absentee ballot in any context. Compl., ECF No. 1, ¶ 21. As Plaintiffs have alleged, this prohibition burdens Plaintiffs' ability to engage fully with eligible absentee voters who are unlikely or unable to vote in person and deprives them of their chosen method to convey a particularized message encouraging them to vote absentee. *Id.* ¶¶ 22–24. Plaintiffs' chosen means of conveying this particularized message—by including the means of voting absentee in their voter engagement materials—is not only inherently expressive but substantially more effective than other methods of conveying the same message. *Id.* ¶¶ 26–27. Specifically,

providing absentee-eligible voters with an absentee ballot application is a more effective method of conveying Plaintiffs' core political message than directing them to a website that they may be unable to access to obtain a form they may be unable to print. *Id.* ¶ 27. This is particularly so for the organizational Plaintiffs, who have thousands of members statewide, and for whom the distribution of absentee ballot applications "is crucial to effectively reaching and encouraging as many of their eligible members as possible to vote absentee." *Id.* ¶ 30. Many of Plaintiffs' members and people in the communities they serve lack the technological tools to be able to print out absentee ballot applications themselves, such that distribution of the applications is essential to encouraging these voters to vote absentee. *Id.* ¶¶ 28–29.

The test for whether conduct falls within the ambit of First Amendment protection is when (1) "[a]n intent to convey a particularized message was present" and (2) "the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. The Court has already accepted that Plaintiffs' intent in distributing the applications is to convey a particularized message of encouraging people to vote and to vote by mail in particular. Order, ECF No. 44, at 30. And while at the preliminary injunction stage this Court did not find that Plaintiffs carried their burden of showing a great likelihood that the message would be understood by its recipients, this Court recognized that the question was a "fairly close one." *Id.* At this stage of litigation, it is far from unreasonable to infer that a potential voter receiving such an application would understand Plaintiffs' message.

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Moreover, it is reasonable to infer that the distribution of an application, alongside a message encouraging voters to use it to obtain and then submit an absentee ballot, would strengthen and underscore the core political message that Plaintiffs wish to deliver—that voting is important and that eligible voters should take advantage of their entitlement to an absentee ballot if they do not wish to or are unable to vote in person. And while this Court correctly noted that not every action that

might support political speech is protected by the First Amendment (i.e. the Court's example of the tax protestor paying his taxes), there is substantial case law stating that speakers can chose the most effective means of communicating their message. *See Citizens for Tax Reform v. Deters*, 518 F.3d 375, 386 (6th Cir. 2008) (holding "the First Amendment protects [plaintiffs'] 'right not only to advocate their cause but also to select what they believe to be the most *effective* means for so doing'" (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (emphasis added)). Here, Plaintiffs allege that voter engagement speech that includes an absentee voter application is far more effective in communicating the seriousness of their message than mere instructions for a voter to go searching elsewhere for voting materials.

At the preliminary injunction stage, this Court was required to make a preliminary judgment about this factual inquiry in order to rule on the presented motion. But even this Court noted it was "not predisposed to resolve close issues in favor of one side or the other" and acknowledged that its judgment was subjective: "The Court has to call it as it sees it, trying to place itself in the position of a hypothetical intended recipient, trying to objectively gauge whether there is a great likelihood that such a person would understand the message." Order, ECF No. 44, at 30–31; *see also id.* (noting it "would be hubristic to assert that [the Court] can pronounce the undeniably 'right' answer on this issue"). As such, this Court's preliminary injunction opinion only underscores how improper a ruling on the expressiveness of Plaintiffs' conduct would be at the motion to dismiss stage. Plaintiffs intend to develop a record that will persuade the Court that their conduct is inherently expressive, including through testimony and other evidence gathered from those who regularly and professionally conduct voter engagement and thus are well-situated to explain from experience how different voter engagement messages are received in the field. In other words, Plaintiffs plan to show "[a]s a matter of simple behavioral fact," the distribution of absentee ballot applications as part and parcel of a voter engagement strategy "is intertwined with speech and association." *League of Women Voters v.*

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Hargett, 400 F. Supp. 3d 706, 720 (M.D. Tenn. 2019). Certainly, this Court would benefit from a full record before making this important judgment about whether voter engagement conduct falls within or outside the scope of the Fourteenth Amendment.

Indeed, substantial case law supports Plaintiffs' position that the distribution of absentee ballot applications is not only inherently expressive but also core political speech[2] that also implicates the right to freedom of association. Although this Court correctly noted that no court appears to have addressed this precise question dispositively, Order, ECF No. 44, at 34, this Court also correctly noted that is because no other state in the nation has such a law as the one challenged here, *id.* at n.34. But the Supreme Court and courts across the country have repeatedly held that closely analogous activities are inherently expressive and implicate the right to freedom of association. *See, e.g.*, *Democracy N.C. v. N.C. State Bd. of Elections,* 2020 WL 4484063 at *50 (M.D.N.C. Aug. 4, 2020) ("The court therefore finds that assisting voters in filling out a request form for an absentee ballot is 'expressive conduct' which implicates the First Amendment.").[3] Given that Defendants do not even seek to address separately Plaintiffs' associational rights, *see* Compl., ECF No. 1, ¶¶ 26–32, 38, their motion is due to be denied for that reason as well.

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[2] The issue of whether the expressive conduct constitutes "core political speech" does not control whether Plaintiffs have stated an actionable First Amendment claim, but rather the precise standard to be applied to the State's justification for the restrictions on protected activity. *See, e.g.*, *Valeo*, 424 U.S. at 45 (limitation on "political expression" subjected to exacting scrutiny); *Meyer*, 486 U.S. at 421–22 (political speech "involves the type of interactive communication concerning political change"). Since Defendants only argue that the Law survives rational basis review or something like it under the lowest level of scrutiny under the *Anderson-Burdick* framework, this Court need not decide this question at this stage to deny Defendants' motion. However, to the extent Plaintiffs' conduct is expressive, Plaintiffs' voter engagement message involves "the expression of a desire for political change" and the Law's restriction reduces the "total quantum of speech" that Plaintiffs will engage in on this front. *Meyer*, 486 U.S. at 421, 423.

[3] Although this Court distinguished *Democracy N.C.* by explaining that Plaintiffs can assist voters with completing their absentee ballot applications, it is axiomatic that Plaintiffs cannot assist voters in filling out a form that voters are not in possession of. The first step in helping a voter complete a form is to give them the form at issue. The First Amendment does not countenance this fine slicing and dicing of First Amendment activity.

Most notably, courts have consistently held that the distribution of voter registration forms and petitions for signature is inherently expressive *and* associational activity. They have done so even though the proposed distributors of those forms or petitions maintained all other available means of expressing their point of view—i.e. that the potential voter should register to vote or that they should support the petition—absent the restrictions at issue.[4] *See, e.g., Meyer*, 486 U.S. 414 (holding that restrictions on the actual distribution of petitions for signature infringed on core political speech even though proposed distributors were free to discuss the petition, direct the public to the petition, urge the public to sign the petition, etc., without restriction); *Buckley v. Amer. Const. L. Found., Inc.,* 525 U.S. 182 (1999) (same); *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 386 (6th Cir. 2008) (same); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 723–24 (M.D. Tenn. 2019) (holding that the "'entire voter registration activity' implicates the 'freedom of the plaintiffs to associate with others for the advancement of common beliefs [that] is protected by the First and Fourteenth Amendments,'" including the distribution and collection of registration forms); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006) (holding that restrictions on distribution and collection of voter registration forms "implicate[d] a number of both expressive and associational rights which are protected by the First Amendment" even though speakers were welcome to encourage voter registration by all other means); *League of Women Voters of Fla. v. Browning (Browning I)*, 575 F. Supp. 2d 1298 (S.D. Fla. 2008) (same); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012) (same); *League of Women Voters of Fla. v. Cobb*,

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[4] As such, Plaintiffs respectfully disagree with this Court's preliminary determination that the voter registration drive cases they cite "are inapplicable because they dealt with restrictions on interacting with potential voters." Doc. 44 at 35-36. That is not the case. In each of those cases, the speakers would have been free to interact with potential voters to their hearts' desire if they did not distribute and collect voter registration forms. Nonetheless, the courts recognized that the entire voter engagement activity of voter registration drives is covered by the First Amendment. Likewise, here, Plaintiffs seek to interact with potential voters and do so, in part, through the distribution and collection of absentee voter applications. That activity is covered by the First Amendment and the fact that the Law only prohibits part of it does not save it.

447 F. Supp. 2d 1314, (S.D. Fla. 2006) (same); *see also Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013) (noting that distribution of voter registration forms is protected speech while finding collection is not). Plaintiffs are entitled to the opportunity to demonstrate, on a full record, that their voter engagement activity—*including* the distribution of absentee voter applications—is just as expressive and associational as the plaintiffs' activities in these cases.[5]

Defendants contend that Plaintiffs' First Amendment claim is due to be dismissed because this Court found that Plaintiffs did not establish a likelihood of success on their claim to entitle them to a preliminary injunction. Defs.' Br. at 5–6. But Plaintiffs faced a substantially higher burden at the preliminary injunction stage. At *this* stage, Plaintiffs must only show that their claim, as pleaded, is plausible. *Ashcroft*, 556 U.S. at 678–79.[6] The fact that this Court determined, on a preliminary record, that Plaintiffs were not entitled to the "extraordinary relief" of a preliminary injunction, Order, ECF No. 44, at 6, does not mean that Defendants are entitled to dismissal of this action.

Defendants have not shown that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Handy-Clay*, 695 F.3d at 538. Nor

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[5] Plaintiffs will show, on a full record, that their distribution of absentee ballot applications is easily understood by their audiences as encouraging voter participation and supportive of voters utilizing all methods available to them, including absentee voting (the support of which is anything but apolitical in today's world). But, importantly, none of these courts considered the distribution of petitions or voter registration forms in a vacuum in determining whether the conduct was inherently expressive. Thus, this Court need not decide whether a person on the street might be confused by a random distribution of an absentee ballot application absent any context. *See* Order, ECF No. 44, at 32. Just as context matters to knowing whether a burning flag is an act of protest or respect, *id.*, context matters here. There is no risk that Plaintiffs' distribution of absentee ballot applications, as part and parcel of a larger voter engagement effort, would be met with musings as to whether the "message is 'please throw this away,' or 'what is this?' or 'I don't understand this piece of paper and was hoping you could explain it to me[.]'" *Id.* (cleaned up).

[6] For this reason, the cases cited by Defendants—which were decided under the preliminary injunction standard—are inapposite. *See, e.g.*, *Cf. See Voting for Am., Inc. v. Andrade*, 488 Fed. App'x. 890 (5th Cir. 2012)); *Voting for Am., Inc. v. Steen*, 732 F.3d 382 (5th Cir. 2013); *Feldman v. Ariz. Sec'y of State's Office*, 840 F.3d 1057 (9th Cir. 2016); *DCCC v. Ziriax*, 2020 WL 5569576 (N.D. Okla. Sept. 17, 2020); *Democracy N.C v. N.C State Bd. of Elections*, 2020 WL 4484063 (M.D. N.C. Aug. 4, 2020); *New Georgia Project v. Raffensperger*, 2020 WL 5200930 (N.D. Ga. Aug. 31, 2020) (all addressing preliminary injunction motions).

can they show that it would be unreasonable to infer that the challenged law restricts protected speech. *Cf. Wesley*, 779 F.3d at 428 (noting that all reasonable inferences must be drawn in plaintiffs' favor). As this Court has already noted, even at the preliminary injunction stage the question at issue was "a fairly close one," and it turns on a question of fact with respect to what message intended recipients would understand Plaintiffs to convey by distributing absentee ballot applications. Order, ECF No. 44, at 30. For purposes of the motion to dismiss, the question must be resolved in favor of the Plaintiffs. And since Defendants' motion to dismiss hinges on the application of rational basis and Plaintiffs' inability to show the Law infringes on First Amendment conduct, the motion must be denied.

II. At minimum, the *Anderson-Burdick* framework applies to Plaintiffs' claim and is not amenable to resolution at the motion to dismiss stage.

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Even if upon a full record this Court determines that the exacting scrutiny applied in *Meyer* does not apply to Plaintiffs' case, the appropriate framework for adjudicating Plaintiffs' claim would not be rational basis, as Defendants argue in their motion. Instead, the *Anderson-Burdick* framework would apply. As this Court has already recognized, the Sixth Circuit has applied the *Anderson-Burdick* "to 'election laws' generally." Order, ECF No. 44, at 41; *see also id.* at 44–49. This is for good reason: whether an election regulation "governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, [it] inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *League of Women Voters of Fla. v. Browning* (*Browning II),* 863 F. Supp. 2d 1155, 1158–59 (N.D. Fla. 2012). And, in the case of groups and individuals like Plaintiffs focused on voter engagement, all such restrictions impact their ability to associate and make their members' and communities' voices heard. *See, e.g., Hernandez v. Woodard*, 714 F. Supp. 963, 973 (N.D. Ill. 1989) ("Where groups, formal or informal, seek to advance their goals through the electoral process,

regulations preventing their members from [engaging absentee voters] impair their ability effectively to organize and make their voices heard.").

Both this Court and Defendants appear to acknowledge that the Law inhibits Plaintiffs' voter engagement goals. Order, ECF No. 44, at 39 ("The Court does not deny that the Law might interfere to some extent with how Plaintiffs might like to encourage voting or that it poses an obstacle to their ultimate goal of getting absentee ballot applications submitted."); Defs.' Br. at 5 (describing distributing absentee ballot applications as a "key part of [Plaintiffs'] voter engagement"). Even if indirect, the burdens the Law places on Plaintiffs' ability to associate with members and community members, on Plaintiffs' successful voter engagement, and on Plaintiffs' members ability to cast their votes absentee mandates the application of the *Anderson-Burdick* standard.

As this Court is aware, under the *Anderson-Burdick* framework, this Court

> must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

Burdick, 504 U.S. at 434. This inquiry is necessarily fact-intensive and not ripe for disposition at the motion to dismiss stage. *See Anderson*, 460 U.S. at 789 (rejecting any "litmus-paper test" for electoral regulations, in favor of a fact-specific analysis); *Gill v. Scholz*, 962 F.3d 360, 364-365 (7th Cir. 2020) ("These cases reject cursory or perfunctory analyses; precedent requires courts to conduct fact-intensive analyses when evaluating state electoral regulations."); *Libertarian Party of NM v. Herrera*, 506 F.3d 1303, 1308 (10th Cir. 2007) (noting the "highly fact specific inquiry" demanded by the *Anderson-Burdick* test); *League of Women Voters v. Hargett*, 400 F. Supp. 722 ("Both sides of the *Anderson-Burdick* balancing formula, moreover, can be fact-intensive, requiring the court to evaluate the severity of actual burdens and the importance of actual state interests."). Thus, it is not surprising that Defendants cite no *Anderson-Burdick* case in their favor decided at the motion to

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dismiss stage. This Court should not deviate from federal courts' ordinary practice of developing a record in election law cases before passing on the relative burdens and state interests involved.

Defendants' motion relies on its assertion that the restriction is reasonable and non-discriminatory, the burden on Plaintiffs and their members is minimal, and thus something akin to rational basis review still applies. Defs.' Br. at 14. But once again, that assertion relies on this Court's preliminary findings as determinative, which is improper at this stage. As this Court acknowledged, "a colorable argument could be made that the law is not both reasonable and non-discriminatory." Order, ECF No. 44, at 51. At this stage, that is enough. And Plaintiffs have alleged a more than minimal burden on their activities. At this stage, all inferences must be construed in their favor and Plaintiffs must have the opportunity to build a record that supports those allegations.

Likewise, it is not possible for this Court to engage in the second two steps of the *Anderson-Burdick* inquiry—identification of state interests and weighing their necessity in light of Plaintiffs' burdens—at this stage without the benefit of a more developed factual record. Although Defendants offer a few thin justifications for the Law in their motion, they cannot be assessed properly in the context of this Rule 12(b)(6) motion. While Defendants submitted declarations to explain the Law's justification in response to Plaintiffs' motion for a preliminary injunction, no such evidence is permissible on a 12(b)(6) motion. *See Sims v. Mercy Hosp. of Monroe*, 451 F.2d 171, 173 (6th Cir. 1971) ("A motion under Rule 12(b)(6) is directed solely to the complaint itself . . ."); *see also, e.g., Washington v. Davis*, 416 Fed. App'x. 563, 564 (6th Cir. 2011) (vacating lower court's grant of motion to dismiss because "broad[] allegations" of First Amendment claim concerning restrictions on prisoners' mail was "plausible on its face" and because "there is nothing in the record" to support state's purported justification for the restrictions). And even if Defendants' alleged justifications for the Law were properly before the Court on this motion, Plaintiffs would have a right to challenge their legitimacy and vitality in the context of a complete factual record.

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CONCLUSION

In sum, Defendants' cursory motion to dismiss largely relies on this Court's preliminary judgments—which required both factual findings and application of law to facts—as if they were final judgments. But this Court took pains to disclaim any finality, and for good reason: Plaintiffs' First Amendment claims require full factual development for resolution. Plaintiffs' claims raise crucial questions about the scope of expressive conduct and the protections of the First Amendment for core political engagement activity. This Court should not decide those questions without the benefit of a record. For the foregoing reasons, the Court should deny Defendants' motion to dismiss on Rule 12(b)(6) grounds.

Dated: January 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christina López, certify, pursuant to Local Rule 5.01, that on this 8th day of January, 2021, the foregoing Opposition was served via the Court's CM/ECF filing system on the following:

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