

STATE OF TENNESSEE

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May 22, 2023

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 letter responding to Plaintiffs-Appellants' Rule 28(j) letter earlier today concerning *VoteAmerica v. Schwab*, No. 21-2253-KHV, 2023 WL 3251009 (D. Kan. May 4, 2023).

The newest *VoteAmerica* decision confirms what Appellees have already argued: "*VoteAmerica* expressly distinguished the conduct at issue there from the conduct Plaintiffs seek to engage in here." Appellees' Br. 16. As the *VoteAmerica* decision from earlier this month explains: "By personalizing the mail ballot applications," which is what the Kansas law specifically prohibited, "plaintiff engages in expressive conduct which is distinguishable from distributing blank absentee ballot applications," as prohibited under Tennessee law. 2023 WL 3251009, at *9. Appellants in this case were clear that their concern with the challenged Tennessee law was that it prohibited them from "provid[ing] potential absentee voters with the blank absentee ballot applications," (Compl., R. 1, PageID#9), or distributing "a blank absentee ballot application" to Organizational Plaintiffs' members, (Compl., R. 1, PageID#10), not with circulating personalized absentee ballot applications.

Appellants pooh-pooh the challenged Tennessee law because it “sweeps even further than the Kansas Prohibition.” Appellants’ Rule 28(j) Letter at 2. That criticism ignores the reasoning in *VoteAmerica* finding the Kansas law insufficiently tailored precisely because the Kansas law “does not limit the number of advance mail ballot applications a third party may send to a voter.” 2023 WL 3251009, at *17. “[T]he real problem” in Kansas was “not pre-filled applications but duplicate applications.” *Id.*; *see also id.* at *18 (“The prohibition does nothing to address duplicate application concerns.”). Unlike the Kansas law, Tennessee law completely restricts the ability of third parties to send absentee ballot application forms to voters. In Tennessee, only election officials may distribute copies of the State’s absentee ballot application form to prospective voters. Tenn. Code Ann. § 2-6-202(c)(3).

The district court correctly granted Appellees’ motion to dismiss Appellants’ sole claim, which was premised on Appellants’ supposed First Amendment right to disseminate “blank absentee ballot applications.” (Comp. R. 1, PageID#12.)

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 May 22, 2023, a copy of the foregoing letter responding to Plaintiffs-Appellants' 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

Senior Counsel

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