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

JEFFREY LICHTENSTEIN, THE MEMPHIS AND WEST TENNESSEE AFL-CIO CENTRAL LABOR COUNCIL, THE TENNESSEE STATE CONFERENCE OF THE NAACP, THE EQUITY ALLIANCE, MEMPHIS A. PHILLIP RANDOLPH INSTITUTE, FREE HEARTS,	)	
Plaintiffs,	)	**No. 3:20-cv-00736** **Judge Richardson** **Magistrate Judge Frensley**
v.	)	
TRE HARGETT, in his official capacity as Secretary of State of the State of Tennessee, MARK GOINS, in his official capacity as Coordinator of Elections for the State of Tennessee, and AMY WEIRICH, in her official Capacity as the District Attorney General for Shelby County, Tennessee,	)	
Defendants.	)	

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

This Court's July 12, 2021 Order recognized that "numerous appellate court opinions involving election laws have been issued" since Defendants filed their motion to dismiss. (Order, D.E. 53, PageID# 512.) And "[a]ccordingly," this Court "permit[ted] the parties to supplement their filings with citation to recent case law that they find relevant to their arguments." (*Id.*) Defendants now offer two relevant, supplemental authorities—the first supports one of Defendants' prior arguments in favor of dismissal and the second gives this Court an alternative reason to dismiss Plaintiffs' claims.

First, Defendants rely on the Supreme Court's decision in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). In *Brnovich*, the Supreme Court considered challenges to two Arizona laws that allegedly violated § 2 of the Voting Rights Act of 1965. *See* 141 S. Ct. at 2330. The first law required voters who choose to vote in person on election day to vote in their own precincts or risk that their ballots not be counted. *Id.* The second law provided that mail-in ballots can be collected only by election officials, mail carriers, or a voter's family members, household members, or caregivers. *Id.* The Court held that neither law violated § 2. *See id.* at 2350.

In upholding Arizona's limits on absentee-ballot collection, the Court gave great weight to Arizona's asserted interests in enforcing the law. *See id.* at 2347–48. The States, the Court pointed out, "indisputably [have] a compelling interest in preserving the integrity of [their] election process[es]." *See id.* at 2347 (quoting *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006) (per curiam)). And "it should go without saying," the Court continued, "that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Id.* at 2348. Finally, the Court recognized that "[l]imiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence." *Id.* at 2347.

Plaintiffs' claims here, of course, do not arise under the Voting Rights Act. Still, these aspects of the Supreme Court's reasoning are instructive. Tennessee, like Arizona, wants to keep its elections free from fraud. Also like Arizona, Tennessee need not wait for fraud to happen before taking steps to prevent it. To be sure, there are differences between the ballot-collection law at issue in *Brnovich* and the law challenged here—Arizona's law focused on who handles absentee ballots after they are completed, while the law at issue here focuses on the earlier stages

of the absentee-voting process. But despite these differences, both laws share the same purpose: to "reduce the risks of fraud and abuse in absentee voting." *See id.* (quoting Report of the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005)). And the two laws seek to further that purpose in much the same way: by limiting outside influence over the absentee-voting process.

Defendants have argued that if the challenged provision is viewed as an "election law," it is subject to the *Anderson-Burdick* framework; a framework that requires consideration of Tennessee's interest in enforcing the provision. (*See* Mem. in Supp. of Mot. to Dismiss, D.E. 47, PageID# 478–82.) This Court has already applied the *Anderson-Burdick* framework once. *See Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 777–86 (M.D. Tenn. 2020). And in doing so, it recognized three things: first, that Tennessee's "interest in election integrity appears especially acute in the area of absentee ballots," *id.* at 781; second, that Tennessee "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively," *id.* at 782 (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 634 (6th Cir. 2016)); and finally, that there is "a plausible connection between prohibiting the distribution of absentee-ballot requests and both increasing election integrity and decreasing voter confusion," *id.* at 783. The Supreme Court's decision in *Brnovich* confirms that this Court was right all three counts. *See* 141 S. Ct. at 2347–48.

Second, Defendants rely on the Sixth Circuit Court of Appeals' decision in *Memphis A. Philip Randolph Institute v. Hargett*, 2 F.4th 548, 2021 WL 2547052 (6th Cir. 2021). There, the Sixth Circuit vacated this Court's preliminary injunction barring the State from requiring first-time voters who registered to vote by mail to cast their ballots in person. *See Memphis A. Phillip Randolph Inst.*, 2021 WL 2547052, at *1. The plaintiffs' standing, the Sixth Circuit observed,

rested on a single identified member of a single plaintiff organization. *See id.* at *2. But because that single member was no longer eligible to vote by mail when the preliminary injunction issued, the Sixth Circuit concluded that his claim—and thus the plaintiffs' claim—was moot. *See id.* at *5–7.

Plaintiffs here do not rely on the standing of a single individual, but their claims do share another flaw with the claims in *Memphis A. Phillip Randolph Institute*: they are "inextricably tied to the COVID-19 pandemic, a once-in-a-century crisis." *See id.* at *6. In concluding that the plaintiffs' claims were moot, the Sixth Circuit pointed out that "[w]hile plaintiffs claimed that the first-time[-voter] restriction burdened all first-time voters simply by making it more difficult for them to vote, [their] central concerns related to the COVID-19 pandemic." *Id.* And "[i]n its order granting the preliminary injunction, the district court also relied on the unique challenges posed by the COVID-19 pandemic." *Id.* (citing *Memphis A. Phillip Randolph Inst. v. Hargett*, 485 F. Supp. 3d 959, 982–83 (M.D. Tenn. 2020)). But "because of advancements in COVID-19 vaccinations and treatment since [the] case began," the Sixth Circuit reasoned, "the COVID-19 pandemic is unlikely to pose a serious threat during the next election cycle." *Id.* This "unique factual situation" made the case "one of the rare election cases where the challenged action is not capable of repetition." *Id.*

So too here. Plaintiffs' complaint is replete with references to the COVID-19 pandemic. Plaintiffs allege, for example, that "in light of the ongoing COVID-19 pandemic," they "will dedicate additional resources towards absentee voter engagement that includes informing eligible absentee voters of their right to vote by mail and helping them apply for absentee ballots." (Compl., D.E. 1, PageID# 3, ¶ 7; *see also id.* at PageID# 4, ¶ 9, PageID# 6, ¶ 12.) Indeed, the pandemic appears to be the driving force behind Plaintiffs' claims. They explain that "[i]n light

of the ongoing COVID-19 pandemic[,] more Tennesseans are expected to want to vote by mail to protect themselves and their family members from exposure to the virus at in-person voting locations." (*Id.* at PageID# 8, ¶ 24.) They further point out that Tennessee's Supreme Court "confirmed that for the November election, Tennesseans who have a special vulnerability to COVID-19, as well as their caretakers, will be eligible to vote absentee." (*Id.* at PageID# 9, ¶ 25.) And it is because "of the COVID-19 pandemic and the shifting voter preference towards voting absentee" that "Plaintiffs will focus significant time and resources on organizing their members and communities, where they are eligible, to vote absentee." (*Id.* at ¶ 26.)

Plaintiffs' claims, then, are focused on an election that has already happened and are "inextricably tied" to a "once-in-a-century crisis." *See Memphis A. Phillip Randolph Inst.*, 2021 WL 2547052, at *6. This means that "the issues presented are no longer live," *see id.* at *4 (citation omitted), and that this is another "one of the rare election cases where the challenged action is not capable of repetition," *id.* at *6. In other words, it means that Plaintiffs' claims are moot.[1] *See id.*; *see also Tigrett v. Cooper*, 595 F. App'x 554, 557–58 (6th Cir. 2014) (concluding that an election-related claim was moot and not capable of repetition when the alleged harms stemmed from a consolidation election—something that "may not occur again for another half-century").

* * *

These two supplemental authorities confirm that Plaintiffs' claims should be dismissed. On the one hand, the Supreme Court's decision in *Brnovich* cements the compelling nature of

[1] While Defendants have not raised mootness before now, the argument may still be considered. Indeed, federal courts have a "continuing duty to ensure that [they] adjudicate[] only genuine disputes between adverse parties, where the relief requested would have a real impact on the legal interests of those parties." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006). "The mootness inquiry," then, "must be made at every stage of a case." *Id.* (quoting *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)).

Tennessee's interest in election integrity and bolsters Tennessee's conclusion that limiting outside influence over the absentee-voting process is a reasonable means of furthering that interest. And on the other hand, the Sixth Circuit's decision in *Memphis A. Phillip Randolph Institute* highlights the unique factual circumstances under which Plaintiffs' claims arose—a national election in the midst of a once-in-a-century pandemic—and explains why changes in those circumstances mean that Plaintiffs' claims are now moot. So for these reasons, as well as those set out in Defendants' previous filings, this Court should dismiss Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to the parties named below. Parties may access this filing through the Court's electronic filing system.

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