

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

EARLE J. FISHER, ET AL.,  
*Appellees/Plaintiffs,*

v.

TRE HARGETT, ET AL.,  
*Appellants/Defendants.*

No. M2020-00831-SC-RDM-CV  
No. M2020-00832-SC-RDM-CV

BENJAMIN WILLIAM LAY, ET  
AL.,  
*Appellees/Plaintiffs.*

On Appeal from the Chancery  
Court for Davidson County,  
No. 20-0435-III

v.

MARK GOINS, ET AL.,  
*Appellants/Defendants.*

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**AMICUS BRIEF OF LEAGUE OF WOMEN VOTERS OF  
TENNESSEE, TENNESSEE STATE CONFERENCE OF THE NAACP,  
MEMPHIS CENTRAL LABOR COUNCIL, MEMPHIS A. PHILIP  
RANDOLPH INSTITUTE, THE EQUITY ALLIANCE, AND FREE  
HEARTS IN SUPPORT OF APPELLEES/PLAINTIFFS**

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## INTEREST OF AMICUS CURIAE

The League of Women Voters of Tennessee (the “League”) is a non-partisan, non-profit corporation organized under the laws of Tennessee. The League has over 900 members and seeks to promote civic engagement through informed and active participation in government, including voting. In support of its mission, the League regularly engages in community outreach and education activities, including voter registration drives. The League is committed to ensuring that all Tennesseans are able to exercise their right to vote, and in May and June 2020 alone, engaged with nearly 15,000 Tennesseans on issues including voter registration, early voting and absentee voting. It therefore has a significant interest in this case.

The Tennessee State Conference of the NAACP (“Tennessee NAACP”) is a nonpartisan, multi-racial, non-profit membership organization headquartered in Jackson, Tennessee. The Tennessee NAACP has three regional divisions, as well as the 33 local branch units and 22 college chapters and youth councils. Its mission is to eliminate race-based discrimination through securing political, educational, social, and economic equality rights and ensuring the health and well-being of all persons. The Tennessee NAACP has more than 10,000 members across the state, primarily consisting of African Americans, other people of color, and allies. In support of its advocacy agenda, the Tennessee NAACP engages in voter outreach efforts, including through voter registration, education, and mobilization work in communities that have had historically low voter registration and turnout. In light of the ongoing

COVID-19 pandemic, Tennessee NAACP has dedicated a significant amount of financial resources and volunteer time towards absentee voter engagement. Tennessee NAACP is also a Plaintiff in a federal litigation, *Memphis A. Philip Randolph Institute v. Hargett*, Case No. 20-cv-00374 (M.D. Tenn. 2020), which, among other things seeks an expansion of absentee voting in Tennessee during the coronavirus pandemic, under federal law. It therefore has a significant interest in this related case.

The Memphis and West Tennessee AFL-CIO Central Labor Council, also known as the Memphis Central Labor Council (“MCLC”), is a Memphis, Tennessee-based union that acts as an umbrella organization for 41 affiliate unions based in western Tennessee. MCLC is dedicated to representing the interests of working people at the state and local levels by advocating for social and economic justice. In support of its advocacy agenda, MCLC routinely engages in voter outreach efforts, including of its approximately 20,000 members, through voter identification, education, and mobilization drives. In light of the ongoing COVID-19 pandemic, MCLC has dedicated additional resources towards absentee voter engagement that includes informing eligible absentee voters of their right to vote by mail and helping them obtain and submit their mail-in ballots. MCLC is also a Plaintiff in a federal litigation, *Memphis A. Philip Randolph Institute v. Hargett*, Case No. 20-cv-00374 (M.D. Tenn. 2020), which, among other things seeks an expansion of absentee voting in Tennessee during the coronavirus pandemic, under federal law. It therefore has a significant interest in this related case.

Memphis A. Philip Randolph Institute (“APRI”) is a Memphis, Tennessee-based non-profit political advocacy and membership

organization which works to strengthen ties between the labor movement and the community, increase the political impact of Black voters, and implement structural changes through the American democratic process. In support of its advocacy and engagement efforts, APRI sponsors voter education and Get-Out-The-Vote programs in the community. In the upcoming elections, and in light of the challenges and health risks posed by in-person voting during the ongoing public health crisis, APRI has worked to inform its more than 30 members and the labor community more broadly about safe voting options like absentee voting. APRI is also a Plaintiff in a federal litigation, *Memphis A. Philip Randolph Institute v. Hargett*, Case No. 20-cv-00374 (M.D. Tenn. 2020), which, among other things seeks an expansion of absentee voting in Tennessee during the coronavirus pandemic, under federal law. It therefore has a significant interest in this related case.

The Equity Alliance is a Nashville, Tennessee-based nonpartisan, non-profit organization that seeks to equip citizens with tools and strategies to engage in the civic process and empower them to take action on issues affecting their daily lives. The Equity Alliance is dedicated to expanding the electorate, educating communities of color about the political process, and engaging and empowering citizens to vote. It has invested considerable effort towards informing and engaging voters about absentee voting. The Equity Alliance is also a Plaintiff in a federal litigation, *Memphis A. Philip Randolph Institute v. Hargett*, Case No. 20-cv-00374 (M.D. Tenn. 2020), which, among other things seeks an expansion of absentee voting in Tennessee during the coronavirus

pandemic, under federal law. It therefore has a significant interest in this related case.

Free Hearts is a nonpartisan, non-profit organization based in Nashville, Tennessee. Since 2015, Free Hearts has educated, organized, advocated for, and supported the families of individuals impacted by the criminal justice system. Since 2017, Free Hearts has also been working to expand the franchise to those impacted by the criminal punishment system. To that end, Free Hearts registers eligible individuals in jails, advocates for jails to become polling sites, helps restore voting rights to formerly incarcerated individuals, and advocates for reforms around automatic voter registration in Tennessee. Free Hearts works across the state and in coalition with other nonprofit groups to support approximately 426 incarcerated and formerly incarcerated individuals and their families. In light of the ongoing COVID-19 pandemic, Free Hearts has dedicated additional resources, including financial resources as well as staff and volunteer time, towards absentee voter engagement. Free Hearts is also a Plaintiff in a federal litigation, *Memphis A. Philip Randolph Institute v. Hargett*, Case No. 20-cv-00374 (M.D. Tenn. 2020), which, among other things seeks an expansion of absentee voting in Tennessee during the coronavirus pandemic, under federal law. It therefore has a significant interest in this related case.

### **SUMMARY OF ARGUMENT**

The COVID-19 pandemic has dramatically transformed the manner in which Tennesseans live their daily lives. But as the August 6, 2020 and November 3, 2020 elections approach, the State has exhibited

indifference to Tennessee voters’ reasonable fears around how the pandemic will impact their ability to vote. Specifically, many Tennesseans—including *Amici’s* members and served communities—fear the health consequences of voting in person, and as a result, may not vote at all if they are unable to do so safely by mail. But the State has refused to voluntarily expand absentee voting to such voters. At the same time, recognizing the threat posed by the pandemic circumstances, it has encouraged those who are already statutorily-eligible to vote by mail to exercise that right.

In light of the State’s intransigence, on June 4, 2020, the Davidson County Chancery Court provided injunctive relief to Tennessee voters, ordering the State to permit *all* Tennessee voters to vote by mail “during the pendency of pandemic circumstances.” Order, *Fisher v. Hargett*, Case No. 20-0435-I(III) (Davidson Cnty. Ch. Ct. June 4, 2020) (hereinafter, “Op.”). The court’s order is appropriate, lawful, and necessary to secure the fundamental voting rights of all Tennesseans. As *Amici* argue herein, consistent with the Tennessee Constitution’s forceful protection of the right to vote, this Court should adopt and uphold the chancery court’s order using a strict scrutiny standard, and otherwise, do so under the *Anderson-Burdick* framework. Moreover, *Amici* argue that the State’s purported claims that the court’s order will lead to fraud should not be credited by this Court, nor should it credit the State’s argument that it cannot be enjoined because the pandemic, rather than its inaction, is the source of Tennessee voters’ harm. Finally, *Amici* argue that the scope of the chancery court’s injunction is appropriate.

For the reasons articulated in the chancery court’s order, and as affirmed by the experience of *Amici’s* members and served communities, this Court should affirm the temporary injunction.

## ARGUMENT

### I. **This Court Should Adopt a Strict Scrutiny Standard of Review as a Matter of State Constitutional Law in Cases Alleging the Denial of the Right to Vote.**

As a matter of Tennessee law, this Court should adopt a strict scrutiny standard of review in cases—like this one—alleging the denial or abridgment of the fundamental right to vote. Application of that standard is supported by this Court’s approach to this State’s constitutional jurisprudence. *See, e.g., Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992) (noting that the Court “is always free to expand the minimum level of protection mandated by the federal constitution.”). Indeed, just a few years ago, in a case dealing with voting rights, the State conceded that strict scrutiny analysis applied to review of the State’s new voter ID law, and this Court applied that standard based on the concession. *City of Memphis v. Hargett*, 414 S.W.3d 88, 102 (Tenn. 2013). In so doing, this Court recognized that the flexible balancing test for analyzing right to vote claims under federal constitutional law, set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992) (referred to as “*Anderson-Burdick*”), is “the *minimum* level of protection mandated by the federal constitution,” and that expanding the scope of the right under the State Constitution could

very well be appropriate. *City of Memphis*, 414 S.W.3d at 102 (emphasis added).

Given the strong protection Tennessee law affords the right to vote, adopting a strict scrutiny standard under the Tennessee Constitution makes sense. The Tennessee Constitution affirmatively safeguards the right to vote as both a positive right belonging to its citizens, Tenn. Const. art. IV, § 1 (“Every person” meeting qualifications “shall be entitled to vote in all federal, state, and local elections . . . and there shall be no other qualification attached to the right of suffrage”), and as a negative right that shall not be infringed by the State, *see* Tenn. Const. art. I, § 5, (“[E]lections shall be free and equal, and the right of suffrage . . . shall never be denied to any person entitled thereto.”). In so doing, Tennessee has firmly and fundamentally guaranteed a right to vote for its citizens. *See May v. Carlton*, 245 S.W.3d 340, 347 (Tenn. 2008) (“The right to vote, so precious to Tennesseans during the Reconstruction Era, qualifies today as a fundamental liberty in a representative government . . . .”); *Bemis Pentecostal Church v. State of Tennessee*, 731 S.W.2d 897, 901 (Tenn. 1987) (holding that the right to vote is a “fundamental” right under the Tennessee Constitution). And under Tennessee law, fundamental rights are entitled to strict scrutiny protection. *See Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000); *see also Johnston v. Davidson Cnty. Election Comm’n*, No. M2011-02740-COA-R3-CV, 2014 WL 1266343, at \*3 (Tenn. Ct. App. March 26, 2014) (applying strict scrutiny in a challenge to Tennessee election law).

Tennessee’s strong and independent voting protections in the State Constitution dictate that courts closely scrutinize burdens on the right to

vote. Tennessee law need not be tethered to the federal standard, which necessarily provides some deference to states in ordering their elections. Other states, in applying similar state constitutional provisions, have adopted stricter standards on the right to vote independent of the flexible *Anderson-Burdick* federal standard. *See Weinschenk v. State of Missouri*, 203 S.W.3d 201, 212, 215 (Mo. 2006) (“Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.”) (applying strict scrutiny to “substantial burden[s]” on the right to vote); *Guare v. State*, 117 A.3d 731, 667-68 (N.H. 2014) (applying “intermediate scrutiny” to voting burdens that are not severe and untethering the test from the *Anderson-Burdick* balancing analysis); *Martin v. Kohls*, 444 S.W.3d 844, 853 (Ark. 2014) (striking down a voter ID provision and differentiating federal court decisions because “we address the present issue solely under the Arkansas Constitution”). In light of the Tennessee’s strong affirmative protections of the right to vote—“so precious to Tennesseans,” *May*, 245 S.W.3d at 347—this Court should follow suit and apply strict scrutiny.

**II. If This Court Does Not Adopt a Strict Scrutiny Standard, It Should Apply the *Anderson-Burdick* Test.**

Notwithstanding the Tennessee Constitution’s firm protection of citizens’ right to vote, the State nevertheless argues that heightened scrutiny of *any kind*—including under the more flexible *Anderson-Burdick* standard—is inappropriate here, because absentee ballot

restrictions *per se* impose “no restriction or burden on the exercise of the franchise.” Tenn. Br. at 14. This position, however, ignores the factual circumstances under which this case arises.

In an election held during a global pandemic, for many voters, the denial of the right to vote by mail will necessarily mean the denial of the right to vote at all. *Amici* are each community-based organizations, which represent and serve tens of thousands of Tennesseans, many of whom—like the *Fisher* and *Lay* Plaintiffs—are qualified to vote but do not qualify for absentee ballots under the State’s interpretation of the law. *See* Dkt. Nos. 40-5–40-9, *Memphis A. Philip Randolph Institute v. Hargett*, Case No. 20-cv-00374 (M.D. Tenn. 2020) (declarations of *Amici* Tennessee NAACP, MCLC, APRI, The Equity Alliance, and Free Hearts, describing their members and served communities fears around voting during an ongoing pandemic) (hereinafter “*Amici* Declarations”). Their members and served communities consistently report that they fear the health consequences of having to vote in person during an ongoing pandemic, and so seek the right to vote by mail to safeguard their health while exercising their fundamental rights. *See id.* Their fears are reasonable: since early May, 2020, when the underlying action was first filed in the Davidson County Chancery Court, the number of cases of COVID-19, and the rate of positive cases and deaths, has dramatically increased. *See* Tennessee COVID-19 Epidemiology and Surveillance Data, TN Dep’t of Health (July 9, 2020) (hereinafter “TN COVID-19 Data”), <https://www.tn.gov/health/cedep/ncov/data.html> (showing a steady increase daily COVID-19 case rates); *see also* Sheryl Gay Stolberg, *As Virus Spreads, States Face a Truth: We Cannot Test Our Way Out of*

*This*, N.Y. TIMES, July 8, 2020, <https://www.nytimes.com/2020/07/08/us/politics/tennessee-covid-testing.html> (noting that daily confirmed infections in Tennessee nearly quadrupled between early June and early July, and the virus positivity rate increased from 5 percent to nearly 8 percent). The State has further confirmed that it is powerless to undertake minimally-necessary precautionary health measures, such as mandating the wearing of masks, to protect voters who physically go to the polls. Jim Shulman & Tre Hargett, *A Convo w SOS Tre Hargett*, YOUTUBE (May 24, 2020) (hereinafter “Hargett Interview”), <https://www.youtube.com/watch?v=AsfH1NlmUt8>, despite acknowledging that “[m]asks have become an essential accessory to reduce the spread of COVID-19,” Tenn. Office of the Governor, *TN Strong Mask Movement*, <https://www.tn.gov/governor/covid-19/economic-recovery/mask-movement.html> (last visited July 9, 2020). Under such circumstances, many Tennesseans will likely elect—out of personal and familial necessity, not choice—to not vote at all. *See Amici Declarations*.

*Amici’s* experience thus confirms that the right to vote is *directly* impeded by Tennessee’s absentee voter eligibility requirements. *See also infra* at \_\_ (describing the heavy burden the enforcement of absentee voting eligibility requirements places on *Amici’s* members and served communities). Under such circumstances, there can be no question that both the fundamental right to vote is implicated, and that this Court

should, *at a minimum*, apply the *Anderson-Burdick* test in considering challenges to laws regulating absentee voting.<sup>1</sup>

### III. Tennessee’s Continued Enforcement of Its Excuse Requirement for Absentee Voting During the COVID-19 Pandemic Fails the *Anderson-Burdick* Test.

Under the *Anderson-Burdick* framework, “the rigorousness of [a court’s] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick*, 504 U.S. at 434. Thus, the

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<sup>1</sup> The State relies on *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802 (1969), for the proposition that this Court should look outside the *Anderson-Burdick* framework and adopt a lesser standard of scrutiny in absentee voting cases. *See* Br. at 14. This reliance is misplaced. Not only does *McDonald* predate the *Anderson-Burdick* test, but, in *McDonald*, the Court determined voters were not entitled to absentee ballots because “plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting.” *See Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012). Indeed, the Supreme Court has acknowledged that “[e]ssentially the Court’s disposition of the claims in *McDonald* rested on failure of proof,” *see O’Brien v. Skinner*, 414 U.S. 524, 529 (1974), and that *McDonald* suggested a different result if plaintiffs had presented evidence that they would be unable to vote without absentee ballot access, *see Goosby v. Osser*, 409 U.S. 512, 520–22 (1973). As the chancery court held based on the evidentiary record, and as Amici’s experience confirms, there is no such failure of proof here: in the context of an election held during a global pandemic, the denial of the right to vote by mail will place a heavy burden on the ability of many voters to vote altogether. *See supra* at 16–17, 19–22. For similar reasons, *Texas Democratic Party v. Abbott*, which relied on *McDonald* to support its conclusion, is also inapposite. *See* 961 F.3d 389, 403 (5th Cir. 2020) (applying *McDonald* to find that “rational-basis review will probably apply”).

Court must first weigh “the character and magnitude of the asserted injury to the rights . . . 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.” *Id.* Election laws that impose severe restrictions on plaintiffs First and Fourteenth Amendment rights will be subject to strict scrutiny review, while “the State’s important regulatory interests are generally sufficient to justify” “reasonable, nondiscriminatory restrictions” upon those rights. *Id.* (internal quotation marks omitted).

By continuing to heavily restrict access to absentee ballots during an ongoing pandemic, Tennessee assures that non-absentee eligible voters will be forced to either risk their health by voting in-person during a global pandemic or forgo their fundamental right to vote altogether. There is no question (1) that this will, in effect, exclude thousands of non-absentee eligible Tennessee voters from the franchise, heavily burdening their right to vote; (2) that *Tennessee* caused this harm; and (3) that Tennessee has failed to provide adequate justifications for the burden its law imposes on voters during this pandemic.

*First*, Tennessee’s continued enforcement of its restrictive absentee ballot law during the COVID-19 pandemic places heavy burdens upon thousands of non-absentee eligible Tennesseans’ right to vote. *Amici* have seen firsthand that non-absentee eligible voters across the State fear for their health and will forgo their fundamental right to vote in light of the COVID-19 pandemic. *See supra* at 16 (citing *Amici* Declarations). And because COVID-19 threatens the lives of *all* Tennesseans, Tennessee’s

absentee ballot restrictions impose an extremely heavy burden on every non-absentee eligible Tennessee voters' right to vote. *See supra* at 16–17. Indeed, while underlying health conditions *increase* the risks associated with contracting COVID-19, this disease impacts everyone. More than 55,000 Tennesseans of all ages, races, and states of health have contracted COVID-19, and at least 660—including *Amici's* members—have died from it. *See* TN COVID-19 Data; *see also Amici* Declarations. The average age of virus onset is 39, and about 87 percent of cases and 18 percent of deaths are among individuals who are under 60 years old (*i.e.*, the State's minimum required age to vote by mail without an excuse). *See id.* This case, then, does not implicate “some small group of voters who, despite ‘reasonable effort,’ simply cannot vote in person on election day or during the 10-day early voting period and who have no excuse to vote absentee,” HEP Br. at 17, but rather the many thousands of non-absentee eligible voters who are being told they must put themselves at risk of contracting this deadly disease in order to exercise their fundamental right to vote.

Importantly too, the burdens of the denial of the right to vote by mail will not fall equally on all Tennesseans. *But see* Tenn. Const. art. I, § 5 (“[E]lections shall be free and *equal*” (emphasis added)). Rather, because the State permits all voters over the age of 60 a categorical excuse to vote by mail, *see* Tenn. Code § 2-6-201, the burden of not being eligible to do so falls disproportionately on the State's racial and ethnic minority voters who tend to be younger, and therefore, unable to access vote by mail under the State's existing eligibility criteria. In fact, whereas approximately 29.8 percent of White potential voters in Tennessee are

older than age 60, the same is true for only 19.7 percent of Black potential voters, 11.7 percent of Hispanic potential voters, and 18.5 percent of all other potential voters. *See* Chris Warshaw, *Allowing Only Older Americans to Vote by Mail Leads to Severe Racial Disparities*, ELECTION LAW BLOG, July 1, 2020, <https://electionlawblog.org/?p=112733>. As a result, White voters in Tennessee represent 85.5 percent of the potential voter population over 60, as compared to 11.7 percent for Black voters, and 1.0 percent for non-White Hispanic voters.<sup>2</sup> *See id.*

The fact that the State has made in-person voting available does not alleviate this burden. In order to vote in-person, Tennessee voters must ignore months of *state issued* guidance that instructs them to minimize all third-party contact to keep themselves and their communities safe. *See, e.g.*, Governor Bill Lee, *Executive Order No. 38: An Order Expanding the Number of Tennesseans Who May Return to Work Safely While Urging Continued Adherence to Health and Social Distancing Guidelines to Limit the Spread of COVID-19*, May 22, 2020, <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee38.pdf>; Tenn. Office Of Governor, *General Guidelines for Businesses*, <https://www.tn.gov/governor/covid-19/economic-recovery/general->

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<sup>2</sup> By comparison, White voters constitute 76.3 percent of Tennessee’s total voting population (of any age over 18), meaning they are disproportionately overrepresented in the absentee-eligible pool of voters. *See id.* In contrast, Black voters are 16.3 percent of the total voting population, and non-White Hispanic voters are 2.2 percent of the total voting population. *See id.* These racial and ethnic groups are therefore disproportionately underrepresented in the absentee-eligible pool of voters. *See id.*

guidelines-for-businesses.html (last visited July 9, 2020) (encouraging employers to “allow employees to work from home as much as possible,” and to implement “social distancing guidelines” in workplaces, under the mantra that “further is safer”). That guidance corroborates the very real risk that the virus poses for those voters who are required to enter into polling places.

Plaintiffs, *Amici’s* members and served communities, and others like them who are unwilling or unable to risk their health while voting, then, are not merely “mak[ing] the choice to stay at home,” Tenn. Br. at 15; they are being excluded from the ballot box by a State that has both informed them that they can only avoid contracting a potentially fatal, highly-contagious disease by avoiding in-person contact, but also failed to provide them with any means of casting a ballot aside from in-person voting. *Cf. Barry v. Lauck*, 45 Tenn. 588, 597 (Tenn. 1868) (finding officials’ failure to provide notices about how to participate in a special election, adequate polling places, or sufficient polling hours “operate[d] as a practical disfranchisement of the legal voters”).

***Second***, the State—not the virus—has imposed this heavy burden on non-absentee eligible voters. While “Tennessee’s two-hundred-year-old tradition of requiring in-person voting” may ordinarily survive constitutional muster, Tenn. Br. at 13, restricting access to absentee ballots during a global pandemic in which disease is believed to spread in part through in-person respiratory transmission imposes a heavy burden on non-absentee eligible voters’ rights to vote. *See supra* at 16–17, 19–22. This is the nature of Plaintiffs’ as-applied challenge: Plaintiffs allege that, while this “requirement is constitutional in general, its

application to [these] particular circumstances creates an impermissible burden on their right to vote.” *City of Memphis*, 414 S.W.3d at 107.

The State and *amicus* Honest Elections Project (“HEP”) nevertheless maintain that COVID-19 should have no impact on this Court’s analysis. In their view, “Tennessee is not responsible for COVID-19 or private citizens’ responses to it,” HEP Br. at 10, and, therefore, “any inconvenience or burden claimed by Plaintiffs is not attributable to the State” but instead “is caused only by COVID-19,” Tenn. Br. at 20. But this is just not how the law works.

The State cannot absolve itself of responsibility for the onerous burden it imposes on non-absentee eligible voters by blaming COVID-19 or voters themselves. The United States Supreme Court has routinely affirmed as-applied relief from government regulations based upon private circumstances not *directly* caused by the government, *see, e.g., Griffin v. Illinois*, 351 U.S. 12 (1956) (requirement to pay appellate transcript fee is unconstitutional as applied to indigent criminal defendant); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006) (parental notification law is unconstitutional as applied to pregnant minor facing medical emergency); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (campaign finance disclosure laws may be unconstitutional as applied to minor parties who prove risk of private harassment), and found causation to be satisfied where the injury arises as an obvious consequence of State action, *see, e.g., Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (injury associated with lower Census response rates was traceable to the State because it was “the predictable effect of Government action”); *Bennett v. Spear*, 520 U.S. 154,

169 (1997) (taking was affected because of the “determinative or coercive effect” of a defendant-agency’s actions). Similar principles also guide Tennessee state courts. *See, e.g.,* Order, *Tennessee Democratic Party v. Davidson Cnty. Election Comm’n*, Case No. 20-0248-III (Davidson Cnty. Ch. Ct. March 3, 2020) (ordering all polling locations in the county to remain open because “voters have been impacted by the inclement and severe weather”).<sup>3</sup>

Here, “[i]t does not face actuality to suggest that” the inability of Tennessee voters to exercise their right to vote during a viral pandemic is not an injury traceable to the State when the State provides them with only risky in-person means of casting their ballots. *Griffin*, 351 U.S. at 23; *see also supra* at 17 (noting that despite acknowledging the public health and safety benefits provided by wearing masks, the State will not mandate that all voters wear masks at polling places).

*Finally*, the State has failed to justify the burden it imposes on non-absentee eligible voters during this pandemic. As discussed *infra*, after the Court determines the burden a challenged law imposes on voters, it must weigh “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 378 (1997). Because “[n]o bright line separates permissible election-related regulation from unconstitutional infringements,” a court must engage in a fact-specific and rigorous analysis to distinguish one from the other. *Id.* at 359. Thus, there is “no

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<sup>3</sup> The Court’s Order is electronically-available at <https://www.documentcloud.org/documents/6793385-Davidson-County-Super-Tuesday-Order.html> (last visited July 9, 2020).

litmus-paper test . . . [and] no substitute for the hard judgments that must be made.” *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Chancellor below engaged in a robust factual inquiry to find that here, given the specific evidence and justifications proffered, Tennessee’s interests in restricting absentee ballot access do not outweigh the significant burden those restrictions imposed on voters during the COVID-19 crisis. Op. at 25 (finding “[t]he evidence demonstrated that providing a vote by mail option is fiscally and logistically feasible, and that voter fraud is not a material threat”).

Instead of engaging with the facts and circumstances material to this case, however, the State and its supporting *amicus* ask this Court to accept without inquiry that enforcement of the law restricting absentee eligibility during a pandemic is justified by the twin interests of guarding against fraud and promoting the efficiency of elections out of deference to the “manifest” “authority of the Tennessee Legislature to control the conduct of elections.” Tenn. Br. at 20; HEP Br. at 19 (asserting that state’s interests should be *per se* regarded as “legislative fact” and that states need not submit any evidence into the record to support their interest). But the words “fraud” and “election administration” are not magic words that, alone, can shield the State from judicial review.

While it is true that states do have *per se* interests in preventing fraud and the efficient administration of elections, the bare invocation of these interests does not provide adequate justification for any and every burden a challenged law imposes on voters. Courts have regularly found that these interests do not outweigh the burden imposed on affected voters. *See, e.g. Obama for Am.*, 697 F.3d at 434 (finding “the State has

not shown that its regulatory interest in smooth election administration is ‘important,’ much less ‘sufficiently weighty’ to justify the burden it has placed on” voters); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1322 (11th Cir. 2019) (finding state’s asserted interests in fraud prevention and the efficient administration of elections did not outweigh the burden a challenged law imposed on mail-in voters).

The State’s claim that the expansion of absentee voting would decidedly lead to fraud is particularly deserving of scrutiny here. The State’s own actions belie any serious concern about fraud in absentee voting. In a typical election applying Tennessee’s existing absentee eligibility criteria (and not held during a pandemic), fewer than 3 percent of the population votes by mail. *See* Tennessee Election COVID-19 Contingency Plan, Tennessee Division of Elections, April 23, 2020 at 1, <https://www.courthousenews.com/wp-content/uploads/2020/05/COVID-19-Plan.pdf> (noting that approximately 97.5 percent of Tennesseans typically vote in person). This year, as a result of COVID-19, the State is preparing for and encouraging all 1.4 million Tennessee voters who are over the age of 60—more than 30 percent of the voting population—to vote by mail. *See* Hargett Interview, at 32:30 – 33:40 (stating that with respect to voting by mail, “[i]t’s not just important we advertise to [voters] over 60, . . . [but] that we talk to their children and their grandchildren to make sure that they know and they might be encouragers to get people to vote absentee”); *see also* Tennessee Election COVID-19 Contingency Plan at 10 (showing that about 35 percent of registered voters are eligible to vote by mail because they are over 60 years old, the largest category of absentee eligible voters). The State is thus already inviting a wide

expansion of vote by mail while at the same time arguing that an expansion of absentee voting will cause inevitable fraud.<sup>4</sup> It should therefore not be able to claim—without any support—that further expanding the right to vote by mail during a pandemic to all Tennessee voters, should they choose to exercise it, will create a problem any more widespread than the one the State is already willing to accommodate.<sup>5</sup>

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<sup>4</sup> To be clear, *Amici* do not believe that there is a colorable risk of fraud in absentee voting. As the State’s own expert, Washington State’s Secretary of State Kim Wyman has confirmed, absentee voting is safe and secure. See Kim Wyman, *Republican leader: My State Shows Why Voting By Mail Is Secure and Trustworthy*, USA TODAY, May 15, 2020, <https://www.usatoday.com/story/opinion/2020/05/15/amid-coronavirus-washington-state-shows-why-vote-mail-secure-column/5189588002/>. The Republican National Committee (“RNC”), which submitted an *amicus curiae* brief in support of Appellants/Defendants, has similarly promised voters that “Voting by mail is an easy, convenient, and secure way to cast your ballot.” See Amy Gardner & Elise Viebeck, *GOP Pushes Voting By Mail —With Restrictions—While Trump Attacks It As ‘Corrupt’*, Wash. Post, April 13, 2020, [https://www.washingtonpost.com/politics/gop-pushes-voting-by-mail-with-restrictions-as-trump-attacks-it-as-corrupt/2020/04/12/526057a4-7bf8-11ea-a130-df573469f094\\_story.html](https://www.washingtonpost.com/politics/gop-pushes-voting-by-mail-with-restrictions-as-trump-attacks-it-as-corrupt/2020/04/12/526057a4-7bf8-11ea-a130-df573469f094_story.html) (noting that the RNC also urged voters to “[r]eturn the attached official Republican Party mail-in ballot application to avoid lines and *protect yourself from large crowds* on Election Day” (emphasis added)).

<sup>5</sup> As the Chancellor found, “even if turnout increased 17% from August 2018, and 100% of voters chose to cast absentee ballots,” the State would already be prepared to accommodate such turnout based on its plan to prepare for 1.4 million absentee voters. Op. at 12. Thus, because it is unlikely that the more than 1.4 million Tennesseans will vote in the August 2020 election, the State has already agreed to accept the purported risk that would accompany every voter who votes this Fall doing so by absentee ballot (which is itself unlikely, *see id.*).

Because the State’s continued enforcement of laws restricting absentee ballot access during a pandemic that is spread through personal contact imposes an extremely heavy burden on voters who are fearful of voting in person during the pandemic, but are not qualified to vote by absentee ballot under Tennessee’s strict eligibility requirements, and because the State has failed to justify the need for that burden, the continued application of this law during the COVID-19 public health crisis cannot survive scrutiny under the *Anderson-Burdick* test.

**IV. It Is Well within the Province of the Chancery Court to Grant the Injunctive Relief at Issue in this Case.**

As courts of equity, chancery courts have discretion to grant injunctive relief as it deems necessary to address the injury that a party has demonstrated. *Morrison v. Jones*, 58 Tenn. App. 333 (Tenn. Ct. App. 1968); *Hall v. Ballance*, 497 S.W.2d 409, 410 (Tenn. 1973) (noting that injunctive relief is issued at “the sound discretion of the Chancellor”).

The Chancellor’s injunction here was appropriately narrow in scope. After determining that Tennessee’s absentee ballot restriction did, in fact, burden the right to vote for *all* non-absentee eligible voters who would be required to risk their health and vote in person during a pandemic, Op. at 18–23, the court issued relief to address the harm it found—namely by enjoining the State from enforcing the offending absentee ballot requirement against these voters during the “pendency of pandemic circumstances,” *id.* at 6. This as-applied relief—which is narrow in both scope and duration—appropriately addressed the injury in front of the court.

The State nevertheless casts the injunction as judicial overreach, arguing that as-applied relief must extend only to the individual plaintiffs. Tenn. Br. at 22. This argument, however, is inconsistent with both Tennessee and federal law. *See Morrison*, 58 Tenn. App. at 344 (discussing the “well settled rule that . . . a Court of equity may grant any relief . . . which is justified by the averments of the bill and the proof”); *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (“Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners’ as-applied claims” if the challenged law is unconstitutional as applied to everyone).

The State’s position on this point is likewise inconsistent. Tennessee urges that this Court should not countenance Plaintiffs’ claims about the constitutionality of its absentee ballot law given the “current’ circumstances” of COVID-19, because to do so would encourage “voter-by-voter examination of the burdens of voter regulations” and “constant litigation.” Tenn. Br. at 21 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 208 (2008)). But, if this Court adopts the State’s arguments limiting as applied relief, Plaintiffs and voters like them—who do not claim the statute is invalid “in all of its applications”—will be able to vindicate their rights only through the kind of individualized assessments Justice Scalia warned against in *Crawford*. *See id.* (noting that an “individual-focused approach . . . would prove especially disruptive” and “naturally encourage[] constant litigation”).

In any event, Plaintiffs have met the standard that the State asserts is required to support the Chancellor’s injunction. The State insists that a proper claim here would be neither facial nor as applied,

but “quasi-facial” as discussed in *Doe v. Reed*. Tenn. Br. at 22. But in *Doe*, the Court held that, where relief would “reach beyond the particular circumstances of” the particular plaintiffs in an as-applied challenge, those plaintiffs must “satisfy our standards for a facial challenge to the extent of that reach.” *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). As discussed *supra*, Plaintiffs here presented evidence showing that *all* non-absentee eligible voters will be burdened by Tennessee’s absentee ballot restrictions through the duration of this public health crisis. The Chancellor agreed and issued relief accordingly. *See Op.* at 6, 23.

In making arguments like this and others—for example, arguing that the State need not provide even bare justifications for the burdens it imposes on voters; that the Court defer without inquiry to the “manifest” power of the State to regulate elections; and that the State bears no responsibility to adapt its elections to the realities of the world in which voters live—Tennessee and *amicus* HEP would remove necessary means of judicial oversight, and more broadly, vitiate the right to vote altogether.

But there can be no question that this Court can and must hold the State accountable for unconstitutionally burdening voters’ fundamental right to access the ballot. While the legislature has broad authority to administer elections, that authority is not boundless. “It is perfectly obvious that an unfair official might [] defeat the will of the people.” *Shoaf v. Bringle*, 192 Tenn. 695, 703 (Tenn. 1951). Thus, for over a century, the Court has recognized the limits of that power that, although “our ‘constitution surrounded the right of suffrage with some inconveniences, and authorized the legislature to attach more. In the exercise of its power,

the legislature must be reasonable and just; not imposing impossible or oppressive conditions, else its legislation will be void.” *City of Memphis*, 414 S.W.3d at 105 (affirming that the State “may properly exercise its authority to secure the integrity of the election process,” “as long as the General Assembly does not overstep by infringing on qualified citizens’ right of suffrage”).

The challenged law here, which requires voters to brave a once in a century pandemic in order to cast their ballots, is no doubt such an “impossible or oppressive” condition placed on Tennesseans’ fundamental right to vote. The chancery court’s injunction, then, was warranted.

### CONCLUSION

For the reasons articulated in the chancery court’s order, and as affirmed by the experience of *Amici’s* members and served communities, this Court should affirm the temporary injunction.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the requirements in Section 3.02(a)1 of Tennessee Supreme Court Rule 46. This brief contains 6,506 words.

Dated: July 9, 2020

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## CERTIFICATE OF SERVICE

I filed this brief via the Court's electronic filing system, which will electronically serve the parties' counsel.

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