

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

BENJAMIN WILLIAM LAY,
CAROLE JOY GREENAWALT,
and SOPHIA LUANGRATH,

Plaintiffs/Appellees,

v.

MARK GOINS, in his official
capacity as Coordinator of
Elections for the State of
Tennessee, TRE HARGETT, in
his official capacity as
Secretary of State for the State
of Tennessee, and WILLIAM
LEE, in his official capacity as
Governor of the State of
Tennessee,

Defendants/Appellants.

No. M2020-00832-SC-RDM-CV

Davidson County Chancery Court
Docket No.:
20-0453-IV(III)

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SUMMARY OF THE ARGUMENT

Defendants’ briefs are nothing more than a plea for this Court to “substitute its judgment for that of the [Chancery] [C]ourt.” *Gentry v. McCain*, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010). Of course, this request runs afoul of the well-established principle that a trial court’s decision granting or denying injunctive relief,” is reviewed under the highly deferential “abuse of discretion” standard. *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 306 (Tenn. 2020).

The State¹ resorts to distorting the applicable standard of review because when the correct standard is applied, a singular conclusion emerges—Chancellor Lyle did not abuse her discretion, and the Chancery Court’s Memorandum And Order Granting Temporary Injunction To Allow Any Tennessee Registered Voter To Apply For A Ballot To Vote By Mail Due To COVID-19 (the “Injunction” or “Injunction Order”), T.R. Vol. XV, 2110-41, should be affirmed.²

Indeed, Defendants rehash and repackage the very arguments that the Chancery Court rejected and impermissibly raise new, inapposite arguments. They point to nothing that should lead this Court to disturb the Chancery Court’s careful and conservative thirty-page opinion regarding the merits of Plaintiffs’ claims and the balance of the equities. This is unsurprising because the only relevant facts that have emerged

¹ The “State” includes Defendants Mark Goins, Tre Hargett, and William Lee, in their official capacities.

² The record on appeal consists of 19 volumes of a Technical Record (“T.R.”) and one volume of a Supplemental Technical Record (“S.T.R.”).

since the Chancery Court’s decision tilt *further* in favor of affirming the relief for Plaintiffs.

First, the COVID-19 situation in Tennessee grows more dire every day, underscoring the propriety of the Chancery Court’s decision, which found unacceptable the health risks posed by Defendants’ interpretation and enforcement of the excuse requirement for absentee voting and held there is an urgent public interest in reducing crowds at in-person polling locations by expanding access to absentee voting. As this Court itself recognized in its July 2, 2020 Order Cancelling the July 2020 Bar Examination:

On July 1, the State had its largest single-day increase in COVID-19 cases. The daily increases in Shelby County, Davidson County, and Knox County where the Bar Examination would have been given are troubling.³

Likewise, as of July 2, “more people [wer]e in the hospital . . . in Tennessee with the virus than at any other point in the pandemic.”⁴ And, just yesterday, July 8, Tennessee experienced its “highest single-day new

³ *In re COVID-19 Pandemic*, No. ADM2020-00428 (July 2, 2020) available *at*
https://www.tncourts.gov/sites/default/files/docs/ble_covid-19_order_-_7-2-2020.pdf.

⁴ Phil Williams, *COVID-19 hospitalizations double in Tennessee in last month*, NEWS CHANNEL 5 NASHVILLE (July 2, 2020 4:31 P.M.) <https://www.newschannel5.com/news/newschannel-5-investigates/covid-19-hospitalizations-double-in-tennessee-in-last-month>.

case total” with 2,472 new COVID-19 cases.⁵ In light of this climbing case count, Davidson County Circuit and Chancery Courts have cancelled all jury trials until at least September.⁶ And, on June 6, Defendant Lee once again declared Tennessee under a state of emergency and promoted social distancing, among other safety measures.⁷ The deteriorating conditions related to the pandemic underscore that the Chancery Court did not abuse its discretion in finding that requiring voters to congregate in-person at polling places—even voters who, like Plaintiff Benjamin Lay and his wife with whom he lives, have chronic medical conditions placing them at high-risk of severe complications and death from COVID-19—constitutes an unconstitutional burden on the right to vote guaranteed by the Tennessee Constitution.

⁵ Sebastian Posey, *TDH: 2,472 new COVID-19 cases, new single-day record for Tennessee*, WKRN-TV (July 8, 2020 6:47 P.M.) <https://www.wkrn.com/community/health/coronavirus/tdh-2472-new-covid-19-cases-now-tennessees-highest-number-of-new-cases/>; T.R. Vol. X, 1476-78 (Tenn. Dep’t of Health, *Coronavirus Disease (COVID-19)*, (last visited July 8, 2020)).

⁶ July 2, 2020 Letter from Judge Joe P. Binkley, Presiding Judge of the Twentieth Judicial District, *available at*: http://d31hzhk6di2h5.cloudfront.net/20200626/45/dd/b4/f7/8d4eb55865672601ae354301/informational_notification_concerning_July_and_August_2020_jury_trials.pdf?utm_source=newsletter&utm_medium=email&utm_content=Notification&utm_campaign=%20UA-74284455-1.

⁷ Tenn. Exec. Order No. 54, <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee54.pdf>.

Second, other states around the country continue to make the administrative transition to no-excuse absentee voting in the midst of the pandemic. Since the Injunction was issued, neighboring Missouri passed legislation permitting all eligible voters to cast their ballots by mail throughout the 2020 elections cycle.⁸ In other words, as the Chancery Court concluded, the record “evidence[] does not support the State’s claims and calculations that expanded voting by mail is not feasible in Tennessee.” T.R. Vol. XV, 2125 (Injunction Order). Instead, the only thing standing between Tennessee voters and their fundamental right to vote is the State’s “unapologetic” unwillingness to adopt the “can-do approach of the two-thirds of the U.S. states who have for years allowed any voter to vote by mail and thirteen more states that have relaxed voting by mail restrictions for the 2020 elections due to the pandemic.” *Id.* at 2112-13.

Third, Defendants’ claims of infeasibility are further belied by their own actions in this matter. By Defendants’ own admission, as of June 25, 2020, several County Election Commissions were not in compliance with the Injunction Order. *See* Pls.’ App. at 7-9 (July 6 Compliance Order) at 1.⁹ Yet, just eight business days later, Defendant Coordinator

⁸ T.R. Vol. XVI, 2289 (Pls.’ Opposition Br.) (citing Jaclyn Discroll & Rachel Lippman, “Missouri Governor Signs Bill Making Absentee Voting Easier for Some in Pandemic,” KWMU, June 4, 2020, *available at* <https://bit.ly/2AWcvZs>); S.B. 631, 100th Gen. Assemb., 2nd Reg. Sess. (Mo. 2020), *available at* <https://www.senate.mo.gov/20info/pdf-bill/tat/SB631.pdf>.

⁹ References to “Pls.’ App.” refer to the Appendix filed concurrently herewith, which contains certain documents that were filed in or

of Elections Mark Goins certified to the Chancery Court that *all* 95 County Election Commissions were in compliance with the Injunction Order and did not identify any inability for *any* of the County Election Commissions to come into apparent compliance within that timeframe. Pls.’ App. at 16-19 (July 8, 2020 Goins Declaration).

Finally, the Chancery Court’s Injunction has been in place now for over a month. During this time, voters seeking to avoid the potentially grave health consequences of COVID-19 exposure have been requesting absentee ballots, and in some counties, have been receiving them. Indeed, it is likely that thousands of voters have already received their absentee ballots pursuant to the Injunction, and that many such voters have already cast their ballots by returning them through the mail. Because ballots cast by voters pursuant to the Injunction are indistinguishable from other absentee ballots, reversal of the Injunction would only cause the very “chaos and confusion” that Defendants claim they seek to avoid. Supplemental Brief of the State of Tennessee (“Defs.’ Supp. Br.”) at 30.

The Chancery Court did not abuse its discretion in issuing the Injunction during the deadliest pandemic in a century—and one which is getting worse by the day. This Court must therefore affirm the Chancery Court’s Injunction in its entirety.

issued by the Chancery Court after the Supplemental Technical Record was transmitted to this Court.

STATEMENT OF FACTS

“COVID–19 [is] a novel severe acute respiratory illness that has killed . . . more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.” *S. Bay United Pentecostal Church v. Newsom*, 140 S Ct. 1613 (2020) (Roberts, J., concurring). Indeed, *The New England Journal of Medicine* has described “[a]symptomatic transmission of [COVID-19] [a]s the Achilles’ heel of COVID-19 pandemic control.”¹⁰ Moreover, COVID-19 is far deadlier than the seasonal flu, including in countries with advanced healthcare systems, and it poses heightened risks for individuals with certain preexisting medical conditions and for individuals with compromised immune systems like Plaintiff Benjamin Lay, who is a two-time cancer survivor, and his wife Carole Joy Greenawalt with whom he lives and who has Ulcerative Colitis.¹¹ T.R. Vol., 1191 ¶ 3, 5 (Greenawalt Decl.); T.R. Vol. VIII, 1195 ¶¶ 6, 12 (Lay Decl.).

¹⁰ T.R. Vol. VIII, 1112 (Am. Compl.) (citing Monica Gandhi, M.D., M.P.H., et. al. *Asymptomatic Transmission, the Achilles’ Heel of Current Strategies to Control COVID-19*, NEW ENGLAND JOURNAL OF MEDICINE (Apr. 24, 2020) <https://www.nejm.org/doi/full/10.1056/NEJMe2009758>).

¹¹ T.R. Vol. IX, 1329 (Steiner Decl. Ex. 12, Ctrs. for Disease Control & Prevention, *Groups at Higher Risk of Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html> (last visited May 9, 2020)).

Before Plaintiffs brought this action, Plaintiffs were not eligible to vote by mail under Defendants’ interpretation and implementation of Tennessee’s vote by mail statute, which requires certain enumerated excuses to vote absentee rather than in person (“Excuse Requirement”).¹² Specifically, and as Defendants have admitted, under their interpretation of the law, seeking to avoid exposure to COVID-19 does not qualify as an excuse to vote by mail. T.R. Vol. VIII, 1106 ¶ 6, 1110 ¶ 18 (Am. Compl.); T.R. Vol. XVIII, 2554 (06/03/20 Hr’g Tr. 136:5-9) (C. Lyle & A. Rieger); *id.* at 2586-87 (168:21-169:20) (C. Lyle & A. Rieger). This left Plaintiffs with two untenable options: (1) vote in person and risk their health and the health of those with whom they live; or (2) forgo their fundamental right to vote.

Plaintiffs therefore sought a temporary injunction to enjoin Tennessee’s limitations on absentee voting eligibility for the duration of the 2020 calendar year and until the State lifts its state of emergency and the U.S. Centers for Disease Control (the “CDC”) no longer recommends individuals engage in social distancing; or, in the alternative to enjoin Tennessee’s limitations on absentee voting eligibility for the duration of the 2020 calendar year and until the State lifts its state of emergency and the CDC no longer recommends individuals engage in social distancing

¹² Plaintiffs filed this action in the Chancery Court for Davidson County on May 15, 2020. Plaintiffs filed an Amended Complaint for Injunctive and Declaratory Relief T.R. Vol. VIII, 1104-36 (“Amended Complaint” or “Am. Compl.”), and a Motion for a Temporary Injunction on May 22, 2020, T.R. Vol. VIII 1140-88 (“TI Motion”).

for (a) any eligible voter who lives with an individual who is at a higher risk of complications should they contract COVID-19 and/or (b) any eligible voter who is at a higher risk for complications should they contract COVID-19. T.R. Vol. VIII, 1187 (Plaintiffs’ Memorandum of Law In Support of Motion for Temporary Injunction Pursuant to Tenn. R. Civ. P. 65.04 (“Pls.’ Br.”)).

On June 3, the Chancery Court conducted a hearing on Plaintiffs’ Motion for A Temporary Injunction and granted the Injunction the very next day, June 4. In its lengthy and detailed opinion, the Chancery Court held “that the State’s restrictive interpretation and application of Tennessee’s voting by mail law (Tennessee Code Annotated section 2-6-201), during the unique circumstances of the pandemic, constitutes an unreasonable burden on the fundamental right to vote guaranteed by the Tennessee Constitution.” T.R. Vol. XV, 2114 (Injunction Order).

In so ruling, the Chancery Court enjoined Defendants from “enforcing their current construction of the ‘excuse requirement’ for absentee voting stated in Tennessee Code Annotated section 2-6-201(5)(C) and (D).” *Id.* at 2115. The court also required Defendants to take certain affirmative actions to facilitate voting by mail. Specifically, the court ruled that Defendants must “provide any eligible Tennessee voter, who applies to vote by mail in order to avoid transmission or contraction of COVID-19, an absentee ballot in upcoming elections during the pendency of pandemic circumstances.” *Id.*

The court further directed that, to facilitate such relief, Defendants must allow “any qualified voter who determines it is impossible or unreasonable to vote in person at a polling place due to the COVID-19

situation [to] be eligible to check the box on the absentee ballot application that, ‘the person is hospitalized, ill or physically disabled and because of such condition, the person is unable to appear at the person’s polling place on election day; or the person is a caretaker of a hospitalized, ill or physically disabled, person,’” and to duly process such absentee voting requests under Tennessee law. *Id.* As the Chancery Court explained:

The Temporary Injunction Order used the Secretary of State’s *Absentee By-Mail Ballot Request* form and boxes, existing at the time. The Court did this deliberately to save the State from having to change its form.

T.R. Vol. XVIII, 2680-81 (June 11 Compliance Order).

Finally, the court ordered Defendants to “prominently post on their websites and disseminate to County Election Officials that voters who do not wish to vote in-person due to the COVID-19 virus situation are eligible to request an absentee ballot by mail or that such voters still have the option to vote in-person during Early voting or on Election Day.” T.R. Vol. XV, 2115 (Injunction Order).

Rather than implementing the Chancery Court’s “effective and binding” Injunction Order, Tenn. R. Civ. P. 65.04(5), Defendants spent the past month taking a series of actions that violated the Injunction Order’s plain terms. The State thereby needlessly wasted taxpayer money by forcing (i) the Chancery Court to hold an additional hearing;¹³

¹³ See T.R. Vol. XVI, 2274-76 (Order Setting Hearing by Zoom on Thursday, June 11, 2020 At Noon on Plaintiffs’ Combined Rule 65.06 Notice and Motion and Motion to Enforce the Court’s Order And/Or for Sanctions).

(ii) the Parties to engage in additional briefing; and (iii) the Chancery Court to issue *seven* additional orders directing the State to comply with the Injunction.¹⁴

Indeed, as soon as the Injunction Order was issued, Defendants doubled-down on their “unapologetic” rejection of the “can-do attitude” that the majority of other states have adopted in the face of this unprecedented pandemic, T.R. Vol. XV, 2112 (Injunction Order), and directed elections officials *not* to process the absentee ballot requests of individuals seeking to vote absentee on the basis of COVID-19. T.R. Vol. XV, 2167 (Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Combined Rule 65.06 Motion to Enforce the Court Order and/or for Sanctions (“Motion to Enforce”). Furthermore, “[i]gnoring and overriding [the terms of] the Temporary Injunction, the State, on its own, without seeking leave to modify the Injunction Order, added a segregated box . . . to the Secretary of State *Request* Form for voters with COVID-19

¹⁴ T.R. Vol. XVIII, 2680-83 (Order Granting Plaintiffs’ Rule 65.06 Motion in Part (“June 11 Compliance Order”)); T.R. Vol. XVIII, 2677-79 (Order on Absentee Wording); T.R. Vol. XIX, 2695-97 (Order for Supplemental Instructions to Be Issued 6/15/2020 to County Election Commissions Followed by Declaration of Compliance (“June 15 Compliance Order”)); T.R. Vol. XIX, 2722-24 (Order of 6/25/2020 3:30 P.M. Filing Deadline for Defendants (“June 25 Compliance Order”)); S.T.R. Vol. I, 1-7 (6/26/2020 Memorandum and Order to Comply (“June 26 Compliance Order”)); Pls.’ App. at 1-3, (6/30/2020 Order Requiring Affidavit of Compliance (“June 30 Compliance Order”)); Pls.’ App. at 7-11, (Memorandum and Order For 7/8/2020 Filing by Defendant Goins) (“July 6 Compliance Order”).

excuses, making a new *Absentee By-Mail Ballot Request* form and boxes.” T.R. Vol. XVIII, 2681 (June 11 Compliance Order). Due to these violations of the Injunction Order, the Chancery Court was forced to hold a hearing on Plaintiffs’ Motion to Enforce and to issue two additional orders—its Order on Absentee Wording, T.R. Vol. XVIII, 2677-79, and its June 11 Compliance Order, T.R. Vol. XVIII, 2680-83.

In its June 11 Compliance Order, the Chancery Court ordered Defendants to remove the newly created box from the absentee ballot form, incorporate COVID-19 into two of the existing boxes on the form as it had required in its Injunction Order, and post the revised form online by noon on June 12. *Id.* at 2681-82. Correctly foreseeing that the State would not comply with those instructions, the Chancery Court further ordered Defendant Goins to file a declaration certifying compliance with the June 11 Compliance Order. *Id.* at 2682.

On June 12, Defendant Goins filed a declaration with the Chancery Court representing that he had taken the steps ordered in the June 11 Compliance Order. T.R. Vol. XIX, 2685 ¶ 2 (June 12 Goins Decl.). But he conspicuously omitted any representation as to whether he had instructed County Election Commissions to treat voters requesting and casting absentee ballots pursuant to the Injunction on the same footing as all other voters. Thus, on June 15, the Chancery Court ordered as follows:

[I]n addition to the instructions sent to all County Election Commissions on June 12, 2020, Coordinator Goins shall send out instructions today, June 15, 2020, to all County Election Commissions that COVID-based requests for absentee ballot applications or for absentee ballots shall be treated the same

as non[-]COVID-based requests for absentee ballot applications or absentee ballots.

T.R. Vol. XIX, 2696 (June 15 Compliance Order).

On June 15, Defendant Goins filed another declaration representing that he had sent the required supplemental instructions to the County Election Commissions. T.R. Vol. XIX, 2692 (June 15 Goins Decl.). But as of June 25, several County Election websites had not been updated as required by the Injunction Order. T.R. Vol. XIX, 2722-23 (June 25 Compliance Order). The Chancery Court was therefore forced to issue four additional compliance orders: (i) one on June 25 identifying the non-compliance, T.R. Vol. XIX, 2722-24 (June 25 Compliance Order); (ii) one on June 26 requiring Defendant Goins to “direct the County Election Commissions” to update their “websites” and “any materials listing the excuses ... for voting by-mail that ... [are] disseminate[d] to voters,” S.T.R. Vol. I, 1-7 (June 26 Compliance Order); (iii) one on June 30, requiring Defendant Goins to file “an affidavit stating the actions he ha[d] taken to comply with” the June 26 Compliance Order, Pls.’ App. at 1 (June 30 Compliance Order); and (iv) one July 6, requiring Defendant Goins to submit another filing because it still remained unclear as to whether County Election Officials “were providing voters accurate instructions and information” as required by the Injunction Order. Pls.’ App. at 7-8 (July 6 Compliance Order).

STANDARD OF REVIEW

Where, as here, an appellate court is reviewing a “trial court’s decision granting or denying injunctive relief,” that decision is reviewed only for an “abuse of discretion.” *Senior Hous. Alternatives, Inc. v.*

Bernard Glob. Loan Inv'rs, Ltd., No. E2010-01964-COA-R3CV, 2011 WL 2553260, at *9 (Tenn. Ct. App. June 28, 2011) (citing *Gentry v. McCain*, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010)); *Medtronic, Inc. v. NuVasive, Inc.*, No. W200201642COAR3CV, 2003 WL 21998480, at *10 (Tenn. Ct. App. Aug. 20, 2003). As this Court has repeatedly emphasized, there are “limitations inherent in” this highly deferential standard of review. *Harmon*, 594 S.W.3d at 306.¹⁵

As an initial matter, the reviewing court must start from the “presumption that the decision is correct and [must] review the evidence in the light most favorable to the decision.” *Gentry*, 329 S.W.3d at 793 (quoting *DeLapp v. Pratt*, 152 S.W.3d 530, 538 (Tenn. Ct. App. 2004)). Furthermore, a trial court’s findings of fact are entitled to a “presumption of correctness” so long as the “preponderance of the evidence” is not “otherwise.” Tenn. R. App. P. 13(d).

The reviewing court may not—as the State seeks to have happen here—“substitute its judgment for that of the trial court.” *Harmon*, 594 S.W.3d at 306 (“[B]ecause, by their very nature, discretionary decisions involve a choice among acceptable alternatives, reviewing courts will not second-guess a trial court’s exercise of its discretion simply because the trial court chose an alternative that the appellate courts would not have chosen”); *Gentry*, 329 S.W.3d at 793. Instead, so long as “reasonable

¹⁵ Defendants’ attempt to distort the applicable standard of review is unavailing. Defs.’ Supp. Br. at 8-9. Of the cases that Defendants cite, only one involved an appeal from an order granting, denying, or dissolving a temporary injunction, and in that case, this Court upheld the Chancery Court’s decision. *Myers v. Wolf*, 162 Tenn. 42, 34 S.W.2d 201, 205 (1931).

minds can disagree with the propriety of” the trial court’s decision, the trial court’s decision must be “affirmed.” *Harmon*, 594 S.W.3d at 306; *Gentry*, 329 S.W.3d at 793.

ARGUMENT

Defendants’ position in this case boils down to a single assertion: Because in-person voting is not burdensome and passes constitutional muster under normal circumstances, it is *always* constitutionally permissible for the State to require voters to congregate in person at polling places, even during the worst pandemic in a century—and even those voters who suffer from underlying medical conditions that place them at higher risk of both contracting a highly transmissible and deadly virus and at a higher risk of severe health complications or even death should they contract the virus. That position is incompatible with the fundamental right to vote guaranteed by Article I, Section 5 and Article IV, Section 1 of the Tennessee Constitution.

In determining whether to issue a temporary injunction, courts evaluate whether the applicant has demonstrated the following four factors: (1) a substantial likelihood of success on the merits; (2) immediate and irreparable harm before final judgment can be entered; (3) that the equities balance in favor of the applicant; and (4) the issuance of the injunction is in the public interest. *See, e.g., South Cent. Tenn. R.R. Auth. v. Harakas*, 44 S.W.3d 912, 919 n.6 (Tenn. Ct. App. 2000). The Chancery Court carefully considered the factors going to the merits of Plaintiffs’ claims and to the balance of the equities. Because all of the factors weigh in favor of a temporary injunction, the Chancery Court did not abuse its discretion in granting Plaintiffs injunctive relief.

A. The Chancery Court Correctly Found That Plaintiffs Are Likely to Succeed on the Merits of Their Constitutional Claim

1. The Chancery Court Correctly Found that Defendants’ Interpretation and Implementation of the Tennessee Voting by Mail Law Is Unconstitutional

The Chancery Court’s decision finding Defendants’ interpretation and implementation of the Tennessee voting by mail law unconstitutional is based in sound reasoning, correctly interprets the Tennessee Constitution, and includes appropriately tailored injunctive relief. The Chancery Court did not abuse its discretion in finding that Plaintiffs are likely to succeed on the merits.

The Chancery Court took a conservative approach in reaching its decision and fashioning the injunctive relief sought by Plaintiffs. As an initial matter, the Chancery Court acknowledged that this Court has not yet addressed the issue of whether courts must apply strict scrutiny to restrictions placed on voting. *See* T.R. Vol. XV, 2133 (Injunction Order). The Chancery Court therefore applied “the more flexible *Anderson-Burdick* test” and concluded that, even under this less stringent standard of scrutiny, Plaintiffs were likely to succeed on the merits of their claim that enforcement of the State’s Excuse Requirement for absentee voting during the COVID-19 pandemic would unreasonably force Plaintiffs to risk their health in order to cast a ballot and thus violate their constitutional right to vote. *Id.*

Ignoring the narrowly tailored Injunction that only applies while the State remains in crisis, the State advances three unavailing arguments: (i) the Chancery Court erred as a matter of law in applying

the *Anderson-Burdick* balancing test; (ii) Plaintiffs seek to vindicate the right to vote absentee, but such right does not exist under the Tennessee Constitution, and COVID-19 did not create such a right; and (iii) the injunction exceeds the scope of relief available to Plaintiffs.¹⁶ None of these arguments warrants reversal of the Chancery Court’s Injunction.

(a) *The Chancery Court correctly applied the Anderson-Burdick framework*

The Chancery Court correctly applied the *Anderson-Burdick* framework to the facts at issue in this case. As the Tenth Circuit has explained, courts applying the *Anderson-Burdick* framework are to:

engage in a case-specific inquiry based on (1) “the character and magnitude of the asserted injury to the rights ... that the plaintiff seeks to vindicate,” (2) “the precise interests put forward by the State as justifications for the burden imposed by its rule,” and (3) “the extent to which those [state] interests make it necessary to burden the plaintiff’s rights” [T]he scrutiny [to be] appl[ied] will wax and wane with the severity of the burden imposed on the right to vote in any given case;

¹⁶ Defendants also assert in a footnote that “Plaintiffs have been dilatory in seeking relief.” Defs.’ Supp. Br. at 16 n.5. But, the State did not finalize its COVID Contingency Plan—which revealed that the State was not planning to expand eligibility in light of the COVID-19 pandemic—until April 23, 2020. *See* T.R.Vol. III, 277-358 (Tenn. Sec. of State, *Tennessee Election COVID-19 Contingency Plan*, (“COVID-19 Contingency Plan”) (Apr. 23, 2020), <https://bit.ly/3g7WrUN>). And, the first press reports about the COVID-19 Contingency Plan emerged only on May 12, 2020—three days before Plaintiffs filed their Complaint. T.R.Vol. II, 225-26 (Jonathan Mattise, Tennessee official: Fear of virus not reason to vote by mail, ASSOCIATED PRESS (May 12, 2020), <https://bit.ly/2X638xP>).

heavier burdens will require closer scrutiny, lighter burdens will be approved more easily.

Fish v. Schwab, 957 F.3d 1105, 1124 (10th Cir. 2020) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

Here, the Chancery Court systematically engaged in the *Anderson-Burdick* inquiry and correctly found that requiring voters to appear in person during the COVID-19 pandemic amounts to an unconstitutional burden on the right to vote—a conclusion that is supported by the extensive record. For example, Plaintiff Lay was diagnosed with Ewing Sarcoma in 2006 at the age of sixteen and was given a ninety percent mortality rate. T.R. Vol. VIII, 1195 ¶ 6 (Lay Decl.). He lives with his wife who is also immunocompromised. *Id.* ¶ 12. As such, he and his wife are both at a higher risk of contracting COVID-19 and at a higher risk of severe complications should they contract COVID-19. *Id.*; T.R. Vol. IX, 1200 ¶ 7 (Reingold Decl.) (“[T]hose with immunologic deficiencies and with other pre-existing conditions . . . are at a high risk of life-threatening COVID-19 illness); T.R. Vol. XIV, 1984-85 ¶¶ 5-6 (Reingold Supp. Decl.). To prevent exposure to COVID-19, Plaintiff Lay and his wife have been self-quarantining at home and have been practicing the social distancing measures prescribed by the CDC. T.R. Vol. VIII, 1196 ¶ 13 (Lay Decl.). They do not even leave their apartment to buy groceries. *Id.* Instead, they have their groceries delivered and thoroughly disinfect them upon receipt. *Id.* Plaintiff Lay feels that voting in person—as Mr. Lay has done in the past, *id.* ¶ 14—is not safe for either himself or for his spouse, *id.* at 1196-97 ¶¶ 16-17.

Plaintiffs’ concerns about voting in-person during this deadly pandemic were corroborated by the testimony of Mary Frances Clark, who has served as a poll official in Tennessee for more than ten years, T.R. Vol. VIII, 1189 ¶ 2 (Clark Decl.), but who has decided that because of the risks posed by COVID-19, she will not be working as a poll official during the upcoming August and November elections, *id.* ¶¶ 3-4 (“I will not be working as a poll official because I do not wish to risk any unnecessary exposure to COVID-19, and I would have no way of knowing whether a voter or a fellow poll official has COVID-19). Ms. Clark testified that in her over ten years of experience, she has “both experienced and witnessed the many forms of *close contact* that poll officials and voters are forced to make at polling sites.” *Id.* at 1190 ¶ 6 (emphasis added). Based on this experience, she testified that she does “not believe that it will be possible for poll officials and voters to adhere to social distancing guidelines at polling sites during in-person voting unless the number of voters voting in-person *is significantly lower than normal.*” *Id.* ¶ 5 (emphasis added). She further explained that she does “not have confidence that even diligent efforts to provide social distancing, protective wear and sanitation will be effective.” *Id.* ¶ 7. The fallout from the April 7 Wisconsin primary reinforces Ms. Clark’s testimony. T.R. Vol. IX, 1205 (Reingold Decl.) (“[C]ounties in Wisconsin that had more in-person voting per voting location had a higher rate of positive COVID-19 tests than counties with relatively fewer in-person voters.”); *see* T.R. Vol. XV, 2131 (Injunction Order).

In addition to this extensive record evidence, and as this Court is well aware and has recognized, the situation has grown worse since the

Injunction was issued, *see In re COVID-19 Pandemic*, No. ADM2020-00428 (July 2, 2020), suggesting an even greater health risk to voters. Indeed, just yesterday, Tennessee experienced its “highest single-day new case total” with 2,472 new COVID-19 cases.¹⁷ And, as of July 2, “more people [wer]e in the hospital . . . in Tennessee with the virus than at any other point in the pandemic.”¹⁸ Indeed, Defendant Lee continues to declare that Tennessee is in a state of emergency.¹⁹ Given the worsening COVID-19 situation, the risk to Plaintiffs’ and similarly situated Tennesseans’ health, and in particular to the health of voters like Plaintiff Lay and his wife—and the burden on their right to vote—has grown *more* severe.

Based on the extensive record evidence of the health risks posed by in-person voting, the Chancery Court properly concluded that: (i) “[f]or persons with autoimmune disease or other conditions or [those] who reside with someone with these conditions . . . the burden placed on them by the State not providing them with the mail-in option is *severe*” and (ii) “[f]or all persons [because] there are the risks of the higher level of contagion of the virus compared to other viruses or [the] flu[, the] contagion is exacerbated indoors where there are gatherings of individuals[, and] there are various consequences of contracting the virus including fatality or long-term health issues , . . the burden placed on

¹⁷ Posey, *supra* note 5; Tenn. Dep’t of Health, *supra* note 5.

¹⁸ Williams, *supra* note 4.

¹⁹ Tenn. Exec. Order No. 54, *supra* note 7.

them by the State is in the category of somewhat severe to moderate.” T.R. Vol. XV, 2131-32 (Injunction Order).

After finding a constitutional violation, the Chancery Court correctly issued a narrowly tailored Injunction to address that violation (and nothing more). As the court explained:

To be clear about the issues, the State has **NOT** been ordered by this Court to mail out to every Tennessean or registered voter an absentee ballot due to COVID-19. The State is **NOT** required by the Injunction Order issued on June 4, 2020, to immediately provide a mass mailing of absentee ballots to all voters.

What the State has been ordered to do is what Alabama, Arkansas, Kentucky, West Virginia and other states similar to Tennessee are doing and that is to implement a common sense measure to temporarily give their registered voters, due to the COVID-19 worldwide pandemic, the option of going to the polls to vote in-person or voting by absentee ballot.

T.R. Vol. XVIII, 2623 (Memorandum and Order: (1) Denying the State’s Motion for Stay of 6/4/2020 Temporary Injunction Order and (2) Granting State’s Motion for Interlocutory Appeal (“Order Denying Stay”))(footnotes omitted).

In doing so, the Chancery Court considered at length the State’s two justifications for denying expanded access to voting by mail—“(1) that it is not fiscally nor logistically feasible for the State to do so and (2) voter fraud.” T.R. Vol. XV, 2118 (Injunction Order). Importantly, the Chancery Court did not ignore the State’s interests; to the contrary, the Court expressly recognized that the State has “interests in ensuring the efficacy and integrity of its election process,” and repeatedly acknowledged that whatever she ordered would have to be “a practical,

workable solution or it [would] throw the election into chaos.” T.R. Vol. XVII, 2435 (06/03/20 Hr’g. Tr. 17:4-6) (C. Lyle). Ultimately, the Chancery Court concluded that record evidence established that “increased voter fraud is not a material concern” and that “it is feasible for the State to provide registered voters a vote by mail option.” *Infra* Section B (discussing feasibility analysis).

With respect to voter fraud, as the Chancery Court explained, “many safeguards are already in place.” T.R. Vol. XV, 2126 (Injunction Order) (citing Tenn. Code Ann. § 2-6-202(d); Tenn. Code Ann. § 2-6-202(b); Tenn. Code Ann. § 2-6-202(g); Tenn. Code Ann. § 2-6-202(c); Tenn. Code Ann. § 2-6-601(c); Tenn. Code Ann. § 2-19-104 through 2-19-117). Indeed, the Tennessee “vot[ing] by mail absentee” process has a number of measures in place at each stage of the process to ensure the integrity of absentee balloting procedures. T.R. Vol. VIII, 1163-64 (Pls.’ Br.). Likewise, Tennessee also has several criminal provisions aimed at preventing misuse of absentee ballots. *Id.* at 1164. Moreover, *the State’s own expert* conceded that voter fraud is “not a material threat” from expanded voting by mail. T.R. Vol. XV, 2134 (Injunction Order). Importantly, the State has not identified any instances of voter fraud in Tennessee relating to absentee ballots. Nor have (or could) Defendants provide any evidence that the thirty-three states that allowed no-excuse mail-in voting prior to the COVID-19 pandemic experienced more problems with fraud or election integrity than did the seventeen states that did not. T.R. Vol. XIV, 1978 Plaintiffs’ Reply Brief in Support of Motion for Temporary Injunction (“Pls.’ Reply Brief”). Nor did Defendants present any evidence that the thirteen states—shown in the

table below—that have relaxed their respective excuse requirements for absentee voting in light of the pandemic by the time of the Temporary Injunction hearing experienced more problems with fraud since doing so. *Id.*

States Relaxing Excuse Requirement During The COVID-19 Pandemic

<p style="text-align: center;">Alabama</p>	<p>Alabama has allowed “[a]ny qualified voter who determines it is impossible or unreasonable to vote at their voting place” as a result of COVID-19 to vote by mail in primary runoff elections being held in July by reason that “a physical illness or infirmity [] prevents [the voter’s] attendance at the polls.”²⁰</p>
<p style="text-align: center;">Arkansas</p>	<p>Arkansas has determined that Ark. Code Ann. § 7-5-402, which only allows absentee voting for people who are “absent or unable to attend an election due to illness or physical disability,” should be read “so that all eligible qualified electors currently entitled to vote in the March 31, 2020 election may request the appropriate absentee</p>

²⁰ T.R.Vol. XIV, 1972 (Reply Br.) (citing Ala. Leg. Servs. Agency, Absentee Voting During State of Emergency, 17-11-3(e) (Mar. 18, 2020), <https://bit.ly/3cUhOqN>; Press Release, Alabama Secretary of State, 100 Days Left to Apply for Absentee Ballot for the Primary Runoff Election (Mar. 31, 2020), <https://bit.ly/2ygoArG>; Ala. Code § 17-11-3(a)(2)).

	ballots from their county of residence. ²¹
Connecticut	The Governor of Connecticut has issued an executive order modifying Conn. Gen. Stat. Ann. § 9-135 to allow any eligible voter to vote by absentee ballot in the August 11, 2020 primary if “he or she is unable to appear at his or her polling place . . . because of the sickness of COVID-19.” ²²
Delaware	A Delaware executive order provides that for upcoming primary and special elections, “the qualification of ‘sick or physically disabled’ [in Delaware vote-by-mail provisions] shall apply to and include any such voter who is asymptomatic of COVID-19 . . . and who herself or himself freely

²¹ T.R. Vol. XIV, 1972 (Reply Br.) (citing Governor of Arkansas, Exec. Order No. 20-08, (Mar. 20, 2020), <https://bit.ly/2TheWwc>). According to recent comments from the Governor of Arkansas, he has determined that Ark. Code Ann. § 7-5-402 should be interpreted to allow a person with a concern or a fear of COVID-19 to vote by absentee ballot. Jon Moritz, *Virus OK as excuse for voting absentee in Arkansas, Hutchinson says*, ARKANSAS DEMOCRAT GAZETTE (July 3, 2020) <https://www.arkansasonline.com/news/2020/jul/03/virus-ok-as-excuse-for-voting-absentee/?news-politics>.

²² T.R. Vol. XIV, 1973 (Reply Br) (citing Conn. Exec. Order No. 7QQ (May 20, 2020) <https://bit.ly/2LWF0Zq>).

	chooses to use such qualification to vote by absentee ballot.” ²³
Indiana	The Indiana Election Commission issued an order stating that “[a]ll registered and qualified voters are afforded the opportunity to vote no-excuse absentee by mail” ²⁴
Kentucky	The Governor of Kentucky issued an executive order stating that “[a]ll Kentuckians should utilize absentee voting by mail for the June 23, 2020 primary if they are able to do so.” ²⁵
Massachusetts	Massachusetts law clarifying that “any person taking precaution related to COVID-19 in response to a declared state of emergency or from guidance from a medical professional, local or state health official, or any civil authority shall be deemed to be unable by reason of physical disability to cast their

²³ T.R. Vol. XIV, 1973 (Reply Br.) (citing Governor of Delaware, Exec. Dep’t, *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), <https://bit.ly/3bKVfTM>).

²⁴ T.R. Vol. XIV, 1973 (Reply Br.) (citing Ind. Elec. Comm’n. Order No. 2020-37, *Concerning Emergency Provisions Affecting the 2020 Indiana Primary Election*, March 25, 2020, <https://bit.ly/2yznaJ1>; Chris Sikich, *Indiana Election Officials have message for Hoosiers: Please, Please, Please Vote by Mail*, INDYSTAR, (May 15, 2020 7:44 P.M.) <https://bit.ly/2Abpbv8>).

²⁵ T.R. Vol. XIV, 1973 (Reply Br.) (citing Ky. Exec. Order 296, (April 24, 2020), <https://bit.ly/3d3jfDj>).

	vote in person,” which is one of the reasons set forth in the state constitution that permits a Massachusetts voter to vote by mail. ²⁶
Missouri	Missouri has allowed any registered voter to cast a mail-in ballot. ²⁷
New Hampshire	New Hampshire has interpreted its “physical disability” provision to “appl[y] equally to voters who are experiencing symptoms of COVID-19 . . . and those who are self-quarantining as a preventative measure.” ²⁸
New York	The Governor of New York has issued an executive order stating

²⁶ T.R. Vol. XIV, 1974 (Reply Br.) (citing An Act Granting Authority to Postpone 2020 Municipal Elections in the Commonwealth and Increase Voting Option in Response to the Declaration of Emergency to Respond to COVID-19, ch. 45 (2020), <https://bit.ly/2LFSZTc>). On July 6, Massachusetts passed a law allowing “any qualified voter to cast an early ballot by mail for the primary election and general election.” Mass. Legislature, An Act Relative to Voting Options in Response to COVID-19, Bill H.4820, 191st Session (July 6, 2020).

²⁷ T.R. Vol. XIV, 2294 (Pls.’ Opposition Br.) (citing Jaclyn Discroll & Rachel Lippman, Missouri Governor Signs Bill Making Absentee Voting Easier for Some in Pandemic (June 4, 2020), *available at* <https://bit.ly/2AWcvZs>).

²⁸ T.R. Vol. XIV, 1974 (Reply Br.) (citing Memorandum from the Sec’y of State and Att’y General to New Hampshire Election Officials re: Elections Operations During the State of Emergency 2 (Apr. 10, 2020), <https://bit.ly/2ZdZ8xV>).

	that every eligible voter will receive an application for an absentee ballot with postage paid to return the application. ²⁹
South Carolina	The South Carolina General Assembly passed a bill, which was signed by the Governor and which allows any voter to cite the state of emergency resulting from the COVID-19 pandemic as a recognized reason to request an absentee ballot. ³⁰
Virginia	The Virginia Department of Elections issued a statement clarifying that “[v]oters may choose reason ‘2A My disability or illness’” to vote absentee in upcoming elections due to COVID-19. ³¹

²⁹ T.R. Vol. XIV, 1974 (Reply Br.) (citing N.Y. Exec. Order No. 202-23 (April 24, 2020) <https://on.ny.gov/3ekb0mj>).

³⁰ T.R. Vol. XIV, 1974 (Reply Br.) (citing Morgan Newell, *S.C.’s Absentee Ballot Expansion Bill Means Changes to Voting this Primary Season*, WBTV (May 13, 2020 5:58 P.M.), *available at* <https://bit.ly/2yxuYe8>).

³¹ T.R. Vol. XIV, 1974 (Reply Br.) (citing *Absentee Voting*, Va. Dep’t of Elections, <https://bit.ly/3dU4YbW> (last visited May 18, 2020)). In addition to this administrative clarification that was triggered by the ongoing pandemic, the Virginia General Assembly amended Virginia’s election laws to permanently allow for no-excuse absentee voting starting with the November 2020 general election. *Id.* (citing VA LEGIS 1149 (2020), 2020 Virginia Laws Ch. 1149 (H.B. 1)).

<p>West Virginia</p>	<p>West Virginia now permits all registered voters to vote absentee in forthcoming elections due to “[i]llness, injury or other medical reason which keeps [the voter] confined,” defining “other medical reason” as “any threat to a person’s health posed by an epidemic, pandemic, outbreak, disease, virus, or other emergency, which creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters.”³²</p> <p>West Virginia construes “confined” as being “restricted to a specific location for reasons beyond that person’s control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or close contact with other persons.”³³</p>
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Accordingly, the litany of cases that Defendants cite in purported support of the proposition that “absentee voting is especially susceptible to fraud” are irrelevant. Defs.’ Supp. Br. at 14-15.³⁴

³² T.R. Vol. XIV, 1975 (Reply Br.) (citing W. Va. Code R. §§ 153-53-2–153-53-3).

³³ T.R. Vol. XIV, 1975 (Reply Br.) (citing W. Va. Code R. § 153-53-2).

³⁴ In any event, these cases are also distinguishable from the matter at hand, as they do not concern eligibility requirements for voters

The Chancery Court likewise undertook a painstaking analysis of all of the record evidence regarding the feasibility of the State “temporar[ily] easing off on the restrictions of voting by mail limited to the time of the pandemic,” T.R. Vol. XV, 2112 (Injunction Order), and concluded that the only thing standing in the way was the State’s “unapologetic position” and refusal to adopt the “can-do attitude” of almost every state in the country:

[T]he evidence does not support the State’s claims that it is impossible for it to provide expanded access to voting by mail. Respectfully, the evidence is that the assumptions the State has employed in its fiscal and resource calculations are oddly skewed and not in accordance with the methodology of its own expert and industry standards. When, however, normal industry-recognized assumptions are used, the evidence establishes that the resources are there to provide temporary expanded access to voting by mail in Tennessee during the pandemic if the State provides the leadership and motivation as other states have done.³⁵

The Chancery Court then “weighed” the “severe” and “moderate to severe” burdens on voters that it had identified against the lack of evidence of the “State’s justifications” and concluded that “Plaintiffs [were] entitled to the issuance of a Temporary Injunction.” T.R. Vol. XV, 2134-35 (Injunction Order). Given the extensive record below, the Chancery Court did not abuse its discretion when concluding that

to obtain absentee ballots or the voters involved faced much lower burdens than Plaintiffs here face.

³⁵ The Chancery Court’s feasibility analysis is discussed at greater length below. *Infra* Section C.

requiring voters to appear in-person during the COVID-19 pandemic amounted to an unconstitutional burden on the right to vote.

Finally, given the complete paucity of evidence to support the two interests “put forward by the State as justifications for the burden imposed by” the Excuse Requirement, *Fish*, 957 F.3d at 1124 (quoting *Burdick*, 504 U.S. at 434), the State’s refusal to expand absentee voting during this pandemic would not even pass the rational basis review that Defendants incorrectly claim is applicable. Defs.’ Supp. Br. at 12.

(b) Plaintiffs are seeking to vindicate their fundamental right to vote

As the Chancery Court explained, the State acknowledges that COVID-19 has upended almost all aspects of life. T.R. Vol. XV, 2139 (Injunction Order). While most Tennesseans have traditionally voted in person on Election Day, Defs.’ Supp. Br. at 11, so long as the COVID-19 pandemic persists, voting cannot proceed as usual. Although in-person voting remains an *option* for voters, forcing voters during this pandemic to physically line up at their traditional polling places, touch the same equipment, have face-to-face interactions with poll workers, and more, is not possible without contravening the advice of public health experts and threatening public safety. T.R. Vol. IX, 1204-05 ¶¶ 17-18 (Reingold Decl.); T.R. Vol. VIII, 1190 ¶¶ 6-9 (Clark Decl.).

The State claims that Chancellor Lyle abused her discretion because there is no right to vote absentee. Defs.’ Supp. Br. at 12. Plaintiffs, however, are not seeking to vindicate the right to vote absentee, but instead the fundamental right to vote *at all* during this unprecedented global pandemic, which is unequivocally protected by the

Tennessee Constitution.³⁶ T.R. Vol. XV, 2112 (Injunction Order) (“[T]he Tennessee Constitution [] is more explicit in guaranteeing Tennesseans the right to vote than the counterpart federal Constitution”); T.R. Vol. XVII, 2524 (06/03/20 Hr’g. Tr. 106:12-14) (“[T]he Tennessee Constitution is even stronger [than] the Federal Constitution about the fundamental right to vote.”) (C. Lyle). In the context of the pandemic, requiring voters to appear in person and congregate at polling places in order to vote—particularly voters, like Plaintiff Lay and his wife with whom he lives, who are at a high risk of severe complications and death from COVID-19 exposure—constitutes an unacceptable burden on the right to vote itself. There are countless examples where courts have enjoined voting provisions under much less stringent constitutions due to crisis. *See infra* pp. 41-43.

In an effort to evade this well-established legal practice, Defendants draw heavily on a recent Fifth Circuit case, *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) (“*Abbott*”). Defendants’ reliance on *Abbott* is misplaced. As an initial matter, *Abbott* was an age discrimination case brought on behalf of voters age 18-plus claiming that Texas’ restriction of absentee voting to those

³⁶ Defendants’ attempt to analogize to *Mooney v. Phillips*, 118 S.W.2d 224, 226 (Tenn. 1938); *Mills v. Shelby County Board of Election Commission*, 218 S.W.3d 33, 41 (Tenn. Ct. App. 2006); and *Cook v. State*, 16 S.W. 471, 473 (Tenn. 1891) is unavailing because these disputes did not concern the provision or receipt of absentee ballots, and the actions of the state did not leave the plaintiffs entirely disenfranchised as they do here.

age 65 years and over violated younger voters’ rights under the 26th Amendment to the United State Constitution. *Id.* at 395. The Supreme Court has held that such age discrimination claims are only subject to rational basis review because age is not a suspect class. *See Mass. Board of Ret. v. Murgia*, 427 U.S. 307 (1976). As such, the *Abbott* court did not apply heightened scrutiny and instead only applied rational basis review. 961 F.3d at 409. Here, by contrast, Plaintiffs did not bring an age discrimination claim and instead brought a fundamental right to vote claim under the Tennessee Constitution. As the Chancery Court held, the proper standard of review for such claims is some form of heightened scrutiny. *See* T.R. Vol. XV, 2114-15 (Injunction Order) (citations omitted), *supra* Section A.1.a; *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 15 (Tenn. 2000) (burden on fundamental rights triggers strict scrutiny); *Johnston v. Davidson County Elec. Comm’n*, 2014 WL 1266343, *2 (Tenn. Ct. App. Mar. 26, 2014) (strict scrutiny applies to fundamental right to vote); *City of Memphis v. Hargett*, 414 S.W.3d 88, 102 (Tenn. 2013) (assuming strict scrutiny applied). In any event, and as explained above, *supra* Section A.1.a, Tennessee cannot articulate a rational basis for requiring the vast majority of its citizens to crowd into polling places on election day to be able to participate in the election—as is readily evidenced by the fact that virtually every other state that does not otherwise allow no-excuse absentee voting has relaxed its rules and expanded absentee voting during this pandemic.

Abbott also relied on a previous decision by the Texas Supreme Court, 961 F.3d at 411 (citing *In re State*, No. 20-0394, 2020 WL 2759629 at *1 (Tex. May 27, 2020)), which held that in Texas, “elected officials

have placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition.” *In re State*, 2020 WL 2759629, at *11. In Tennessee, however, voters do not have that choice. Instead, even citizens like Plaintiff Lay and his wife with whom he lives who have preexisting conditions that render them at high risk of severe health issues or even death from COVID-19, must vote in person under Defendants’ interpretation of the vote by mail statute.

Defendants also rely on a concurrence in *Abbott* to make an entirely new argument that they failed to raise below: “hardships” caused by the COVID-19 pandemic “that make getting to the polls difficult are not state action and do not warrant judicial intervention.” Defs.’ Supp. Br. at 13 (internal quotation marks and citation omitted). As an initial matter, it is well-established that “[i]ssues not raised in the trial court cannot be raised for the first time on appeal.” *Barnes v. Barnes*, 193 S.W.3d 495, 501 (Tenn. 2006) (affirming trial court decision); *Main St. Mkt., LLC v. Weinberg*, 432 S.W.3d 329, 337 n.4 (Tenn. Ct. App. 2013).

In any event, it is the *State* that is requiring Plaintiffs to vote in person during a deadly pandemic. On Defendants’ logic, if a polling place were on fire, the State could continue to enforce its rule that voters must cast their ballots at their assigned polling locations, and require voters to brave a burning building to exercise the right to vote, because it would be the fire and not the State that is burdening the right to vote. That is absurd, and is not (and cannot) be the law.

Indeed, courts routinely require accommodations when a voter’s normal mode of participation becomes impossible due to exigent

circumstances, such as when tornadoes destroyed polling locations in Davidson County on the night before elections this past March. *See Order, Tenn. Democratic Party v. Davidson County Elec. Comm’n*, No. 20-0248-III (Davidson County Chancery Court) (Mar. 3, 2020). This case is no more about the “right to vote absentee” than the tornado case was about the “right to vote out-of-precinct.”

Likewise, a federal district court found that, in light of Hurricane Matthew, Florida’s voter registration deadline amounted to a “severe” and unconstitutional burden on the right to vote because it “foreclosed the only methods of registering to vote” during the final week of Florida’s voter registration window, meaning that if the deadline remained in place, it would “completely disenfranchise[] thousands of voters.” *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016); *see also Ga. Coalition for the Peoples’ Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345–46 (S.D. Ga. 2016) (granting preliminary injunction to extend statutory voter registration deadline for a Georgia county after a hurricane).

Similarly, the federal court in the Eastern District of Virginia granted a preliminary injunction in 2016 extending Virginia’s statutory voter registration deadline after the state voter registration website crashed on the final day of registration. *Order, New Va. Majority Educ. Fund v. Va. Dep’t of Elections*, No. 1:16-cv-01319-CMH-MSN, Dkt. No. 10 (E.D. Va. Oct. 20, 2016). And an appellate court in Pennsylvania upheld a decision postponing an election entirely in light of significant flooding because “[w]ithout the court’s action, some voters, by reason of the elements, would have incurred the discrimination of

disenfranchisement.” *In re Gen. Election-1985*, 531 A.2d 836, 839 (Pa. Commw. Ct. 1987).

Defendants’ citation to *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802 (1969), Defs.’ Supp. Br. at 17-18, is also inapposite. As the Sixth Circuit has explained, the United States Supreme Court found that “[t]he *McDonald* 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.” *Obama for Am. v. Husted*, 697 F.3d 423, 430-31 (6th Cir. 2012) *stay denied*, 568 U.S. 970 (2012); *see O’Brien v. Skinner*, 414 U.S. 524, 529 (1974) (“Essentially the Court’s disposition of the claims in *McDonald* rested on failure of proof.”). Here, on the other hand, there is “no failure of proof.” Instead, Plaintiffs have presented extensive record evidence that they will be prevented from voting if the Injunction is dissolved. *See supra* Section B. And, in arguing that “Tennessee cannot risk running out of ballots for its citizens,” Defs.’ Supp. Br. at 28, Defendants effectively concede that their refusal to make absentee voting an option for all voters during the pandemic constitutes a denial of the right to vote.

McDonald is also irrelevant because the case pre-dates both *Anderson* and *Burdick*, which set forth the framework that the United States Supreme Court has said courts must use to determine whether heightened scrutiny should be applied when assessing whether a “statute impose[s] a burden on the right to vote under the United States Constitution.” *Hargett*, 414 S.W.3d at 102; *supra* Section A.1.a.

Finally, the underlying facts at issue in *McDonald* bear no resemblance to the facts at-hand. The *McDonald* plaintiffs argued that the state’s absentee ballot procedures had to be permanently changed because the classifications of voters who were allowed to vote by mail were arbitrary in violation of the Equal Protection Clause of the United States Constitution. In the present case, Plaintiffs did not bring a discrimination claim, and instead asked that the Excuse Requirement be temporarily enjoined for the duration of the pandemic.

(c) The Chancery Court did not exceed the scope of available relief

Defendants’ argument that the Chancery Court exceeded the scope of available relief turns on an overly formalistic view of “facial” versus “as-applied” challenges that is not supported in the case law. Specifically, Defendants contend that the Chancery Court exceeded the scope of available relief because (i) although Plaintiffs brought an “as-applied challenge,” (ii) the Chancery Court ordered relief for “every registered voter in Tennessee,” (iii) thereby “convert[ing] Plaintiffs’ as-applied challenge into a “quasi-facial challenge.”” Defs.’ Supp. Br. at 19-21.

But, as the United States Supreme Court explained in *Doe v. Reed*, 561 U.S. 186, 194 (2010)—a case on which Defendants heavily rely, Defs.’ Supp. Br. at 20—“[t]he label is not what matters. The important point is [the substance of] plaintiffs’ claim and the relief that would follow.”³⁷

³⁷ The single citation that Defendants proffer to support the proposition that “[t]his Court has repeatedly recognized the distinction between facial challenges and “as-applied challenges,” *Richard v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 454-55 (Tenn.

And here, “the nature of the [voting] rights asserted . . . require that the injunction run to the benefit of all persons similarly situated.” *Cromwell v. Kobach*, 199 F. Supp. 3d 1292, 1313-14 (D. Kan. 2016) (holding that class certification is unnecessary in voting rights cases).

At issue in *Doe* was the state of Washington’s Public Records Act (“PRA”) pursuant to which private parties could “obtain copies of government documents,” which the state of Washington had “construe[d]” to cover petitions submitted by individuals seeking to have referenda placed on the state’s ballot. 561 U.S. at 190. The plaintiffs alleged that the “disclosure of referendum petitions in general” violated the First Amendment. *Id.* On these facts, the United States Supreme Court explained that the plaintiffs’ claims “obviously ha[d] characteristics of both” a facial challenge and an as-applied challenge:

The claim is “as applied” in the sense that it does not seek to strike the PRA in all its applications, but only to the extent it covers referendum petitions. The claim is “facial” in that it is not limited to plaintiffs’ particular case, but challenges application of the law more broadly to all referendum petitions.

Id.

Accordingly, the Supreme Court held that plaintiffs only had to “satisfy our standards for a facial challenge” vis-a-vis the PRA’s application to referendum petitions, not with respect to all government documents. *Id.*

1995), is inapposite because it concerned the extent to which an administrative agency “can resolve constitutional issues raised in a contested case proceeding.”

The same holds true here: Plaintiffs' claims are *facial* in that they are not limited to Plaintiffs' "particular case, but challenge the application of the Excuse Requirement "more broadly to all" voters during the ongoing COVID-19 pandemic.³⁸ These claims are only "as-applied" in the sense that they do not seek to strike the Excuse Requirement "in all applications, but only to extent that" the ongoing COVID-19 pandemic persists. *Doe*, 561 U.S. at 190.

As such, the Chancery Court did not abuse its discretion in ordering relief for every Tennessee voter "during the pendency of pandemic circumstances," T.R. Vol. XV, 2115, particularly because unlike the plaintiffs in *Doe* who offered "scant evidence or argument beyond" the "specific harm" they said would result from the disclosure of their specific referendum petition and "other similarly controversial ones," *Doe*, 561 U.S. at 200-01, Plaintiffs have offered extensive factual evidence of the harm posed to *all* Tennessee voters. *Supra* Section A.1.a; *infra* Section B.

To conclude otherwise would mean that the only way to challenge the constitutionality of the Excuse Requirement during these "pandemic circumstances" would be through individual lawsuits brought by every

³⁸ In the alternative, Plaintiffs did bring a claim to enjoin Tennessee's limitations on absentee voting eligibility for the duration of the 2020 calendar year and until the State lifts its state of emergency and the CDC no longer recommends individuals engage in social distancing for (a) any eligible voter who lives with an individual who is at a higher risk of complications should they contract COVID-19 and/or (b) any eligible voter who is at a higher risk for complications should they contract COVID-19. T.R. Vol. VIII, 1187 (Pls.' Br.).

individual Tennessee voter seeking to vote absentee. *See Cromwell*, 199 F. Supp. 3d at 1313-14 (class certification is unnecessary in voting rights cases). Defendants’ formalistic approach “if countenanced, would require the judiciary to re-write Tennessee’s election laws . . . on a voter-by-voter basis.” *Cf.* Defs.’ Supp. Br. at 18. As Defendants say, “[t]his cannot be.” *Id.*

2. The Chancery Court Correctly Found that Plaintiffs’ Claims Are Justiciable

Defendants’ contention that Plaintiffs have failed to present a justiciable controversy because all Plaintiffs lack standing strains credulity. *See* Combined Application of the State Defendants for Appeal by Permission and Merits Brief (“Defs.’ Br.”) at 19-23. As an initial matter, during the Temporary Injunction hearing, counsel for Defendants admitted that Plaintiffs would not be eligible to vote by mail based on the State’s construction of Tennessee law.³⁹ Based on this admission and the extensive evidentiary record established by Plaintiffs, Chancellor Lyle concluded, “with the exception of . . . Joy Greenawalt (Case No. 20-453-III), all the Plaintiffs are registered voters who do not

³⁹ T.R. Vol. XVIII, 2554 (06-03-20 Hr’g Tr. 136:5-9) (C. Lyle & A. Rieger) (“So, our Plaintiffs in this case, the ones with autoimmune disorder or taking care of someone with one would not qualify as ill under (c) or (d)? That is correct”); *id.* at 2586-87 (168:21-169:20) (C. Lyle & A. Rieger) (“[I]f you’re not quarantining, but you have been potentially exposed, you can’t check “ill”, right? You have to be quarantined for one reason or another to be able to check that “ill” box if it’s an exposure situation, right? According to this guidance, yes, Your Honor”).

fit within one of the categories of Tennessee Annotated section 2-6-201 to qualify to vote by absentee ballot.” T.R. Vol. XV, 2132-33 (Injunction Order) (“[U]nder the State’s COVID-19 Plan, these Plaintiffs would currently not be eligible to vote by mail.”).

This conclusion was not reached “summarily,” as the State claims. Defs.’ Br. at 20. Instead, Chancellor Lyle examined and analyzed Plaintiffs’ extensive evidence of the harm and the State’s COVID-19 Contingency Plan. *See, e.g.*, T.R. Vol. XV, 2132 (Injunction Order) (“The fact that, as testified to by Commissioner Goins, elaborate and lengthy plans have been prepared by the State of Tennessee to mitigate the spread and contraction of the COVID-19 virus at polling places establishes that this is not a hypothetical circumstance.”) Based on this analysis, Chancellor Lyle properly concluded that Plaintiffs will suffer the “distinct and palpable injury,” Defs.’ Br. at 20 (citation omitted), of being disenfranchised in upcoming elections if they are not given the option of voting by mail. *See, e.g.*, T.R. Vol. XV, 2132 (Injunction Order).

Indeed, COVID-19 infections and death have only been increasing on a daily basis in Tennessee—a fact that Defendants utterly ignore in their opening brief. *Supra* Section A.1a. In support of their position, Defendants cite *ACLU of Tenn. v. Darnell*, 195 S.W.3d 612, 621 (Tenn. 2006). Defs.’ Br. at 20. *Darnell*, however, only serves to demonstrate why Plaintiffs have, in fact, suffered a “distinct and palpable injury.” The plaintiffs in *Darnell* had argued that the secretary of state’s actions had injured “their ability to lobby an informed electorate.” 195 S.W.3d at 621. But the court found that the plaintiffs had failed to offer evidence (“telephone trees, ad campaigns, mailings to the public, billboards”)

showing that those plaintiffs had even engaged in the lobbying activities that they claimed were being hindered by the state's actions. *Id.* at 621-22. By contrast, here, Plaintiffs' concerns about voting in-person during this deadly pandemic, which the Chancery Court adopted in its findings of fact which are entitled to a "presumption of correctness," Tenn. R. App. P. 13(d); T.R. Vol. XV, 2127-31 (Injunction Order), are corroborated by the extensive medical record and health consequences of in-person voting that are plainly evident after recent primaries. *Supra* Section A.1.a.

Similarly, the State's reliance on *West v. Schofield*, 468 S.W.3d 482 (Tenn. 2015), Defs.' Br. at 19, is unavailing. In *West*, the court was asked to declare whether a death sentence by means of electrocution was constitutional. In analyzing justiciability, the court concluded that inmates who are sentenced to death are not "currently subject to execution by electrocution and will not ever become subject to execution by electrocution unless one of two statutory contingencies occurs in the future." 468 S.W.3d at 484-85. The case here, however, is a far cry from the "hypothetical and contingent future events that may never occur." *Id.* at 491. Unlike in *West*, Defendants here do not deny that COVID-19 is "*still* a public health issue" and have "already started by devoting a significant amount of time" to develop a plan for the August and November election cycle. TR Vol. III, 278 (COVID-19 Contingency Plan) at 1 (emphasis added).

Apparently recognizing the weakness of its lack of injury argument, the State attempts to argue that Plaintiffs have failed to establish "a causal connection between the claimed injury and the challenged conduct." Defs.' Br. at 22. But as Chancellor Lyle explained, crediting

the testimony of Plaintiffs' expert, Dr. Arthur L. Reingold, regarding the experiences in Florida and Wisconsin, T.R. Vol. XV, 2131 (Injunction Order), Plaintiffs' position is not a "hypothetical" scenario; rather, the health consequences of in-person voting are "plainly evident." *Id.*

In sum, the Chancery Court found that Plaintiffs are likely to succeed on the merits of their constitutional claim. The State has failed to demonstrate why that determination was incorrect. This Court must therefore affirm the Chancery Court's injunction. *See Harmon*, 594 S.W.3d at 306.

B. The Chancery Court Did Not Abuse Its Discretion in Finding That Plaintiffs Will Be Irreparably Harmed in the Absence of the Injunction

The Chancery Court correctly held that in the absence of the Injunction, Plaintiffs and other similarly situated voters will suffer irreparable harm. "The loss of a constitutional right, even for a minimal period[] of time, unquestionably constitutes irreparable injury." *Tanco v. Haslam*, 7 F. Supp. 3d 759, 769-70 (M.D. Tenn. 2014) (*rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)) (internal quotations omitted). Here, the Chancery Court ruled that "the State's restrictive interpretation and application of Tennessee's voting by mail law (Tennessee Code Annotated section 2-6-201), during the unique circumstances of the pandemic, constitutes an unreasonable burden on the fundamental right to vote guaranteed by the Tennessee Constitution." T.R. Vol. XV, 2140 (Injunction Order). If the Injunction is reversed, Plaintiffs and similarly situated voters will suffer irreparable harm from the potential loss or

abridgement of their constitutional right to vote. And if they are denied the ability to vote in the August primary while the appeal is pending, that harm is truly irreparable, because that election will have come and gone; Plaintiffs will never be able to vote in that election again.

In a feeble attempt to escape this conclusion, Defendants repackage their failed standing arguments and disingenuously argue that all Plaintiffs offer is “fears [and] apprehension.” Defs.’ Supp. Br. at 21. In reality, the Chancery Court properly credited Plaintiffs’ extensive evidence of the health risks faced by voters if they are forced to vote in person during the pandemic even if the measures in the State’s COVID-19 Contingency Plan are implemented. T.R. Vol. VIII, 1107 ¶ 7, 1108 ¶ 13, 1109 ¶ 15-16, 1126 ¶ 60, 1128 ¶ 69 (Am. Compl.); *see also* T.R. Vol. VIII, 1190 ¶ 5 (Clark Decl.) (“Based on my over ten years of experience working at and observing in-person polling sites in Tennessee, I do not believe that it will be possible for poll officials and voters to adhere to social distancing guidelines at polling sites during in-person voting unless the number of voters voting in-person is significantly reduced.”); *id.* ¶ 7 (“I do not have confidence that even diligent efforts to provide social distancing, protective wear and sanitation will be effective throughout the approximately 14 hours a polling official typically spends at the polling place on election day.”); T.R. Vol. XIV, 1985 ¶ 6 (Reingold Supp. Decl.) (“[T]here are public health interventions other than those included in the state plan that are available to minimize the risk of transmission, namely to allow people to vote by absentee ballot and not place themselves in the congregate setting of a polling location.”).

In light of that testimony and prevailing public health guidance, the Chancery Court did not err in discounting the testimony of Defendants’ medical expert, Dr. Jones, regarding the State’s COVID-19 Contingency Plan.⁴⁰ As an initial matter, and as the Chancery Court noted but Dr. Jones omitted, “one of the most prominent features” of the State’s COVID-19 Contingency Plan is that it is *entirely voluntary*:

The State’s response to the pandemic is to provide social distancing and sanitation measures at polling places. Significantly, however, one of the most prominent features of social distancing—wearing masks—cannot be compelled of voters, but only encouraged, at polling places. Thus persons who choose not to wear masks cannot be denied access to the polling place and present exposure to others.

T.R. Vol. XV, 2112 (Injunction Order); *see also* T.R. Vol. XVIII, 2534 (06/03/20 Hr’g Tr. 116:9-24) (C. Lyle & A. Rieger) (conceding that the Plan does not require safety precautions but only encourages them). Moreover, Defendant Lee’s Executive “Order Providing Local Governments With Authority Concerning Face Coverings” *prohibits* county mayors from “requir[ing] that a face covering be worn . . . [w]hile in a voting site for the purpose of voting or administering an election.”⁴¹

⁴⁰ The Chancery Court did not “brush aside” Dr. Jones’ testimony “simply because he is a State employee.” Defs.’ Supp. Br. at 22. To the contrary, the Chancery Court analyzed the substance of his “medical opinion” just as it did the substance of all the “medical opinions” before it. T.R. Vol. XV, 2128-31 (Injunction Order).

⁴¹ Tenn. Exec. Order No. 54, *supra* note 7.

There is thus no guarantee that the Contingency Plan will actually be adhered to by poll workers or by voters.⁴²

Moreover, even if the Plan were implemented perfectly, Dr. Jones never asserted that it would eliminate the health risk from voting in person during the pandemic—just that the State could reduce that risk by some indeterminate amount.⁴³ T.R. Vol. XII, 1654 ¶ 5 (Jones Decl.). But even a reduced risk of serious illness or death is still a severe burden on the right to vote, particularly for those, like Plaintiff Lay and his wife, who are immunocompromised. As Defendant Lee himself emphasized in a May 22 Executive Order:

Special care should be taken to protect vulnerable populations. Persons and businesses should take particular care to protect the well-being of those populations especially vulnerable to COVID-19, including older adults and persons with compromised immune systems or severe underlying medical conditions, by, among other things, taking care to

⁴² A recent survey has shown that mask use among Tennesseans has decreased since April, with only about twenty to thirty percent of Tennesseans surveyed in June wearing a mask whenever they go out. Elizabeth Fite, *Most Tennesseans say 'no, thanks' to masks amid COVID-19 pandemic*, CHATTANOOGA FREE TIMES PRESS (Jun. 23, 2020), <https://www.timesfreepress.com/news/local/story/2020/jun/23/most-tennesseans-no-masks/525988/>.

⁴³ The CDC recommends cloth masks because they “*may* help prevent people who have COVID-19 from spreading the virus,” but also warns that masks “may not protect the wearer.” Ctrs. for Disease Control & Prevention, *About Face Cloth Coverings*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html> (last visited July 8, 2020) (emphasis added).

adhere to all precautions advised by the President and the CDC and refraining to the extent practicable from physical contact and association. Businesses should further consider implementing measures to protect our most vulnerable populations by, for example, offering delivery service or special opportunities for members of vulnerable populations to shop in retail establishments exclusive of the general population.⁴⁴

Finally, Defendants contend that “even if Plaintiffs’ fears were well-founded, any resulting harm would not be attributable to the State” because “the risk of contracting COVID-19 exists entirely apart from any action of the State.” Defs.’ Supp. Br. at 23. As noted above, *supra* Section A.1.b, the fact that the COVID-19 pandemic is not itself state action is irrelevant.

Restrictions on fundamental voting rights are irreparable—once the election occurs, there will be no do-over. *See, e.g., Obama for Am.*, 697 F.3d at 436 (“A restriction on the fundamental right to vote therefore constitutes irreparable injury”). This Court should therefore affirm the Injunction.

C. The Chancery Court Did Not Abuse Its Discretion in Finding That the Balance of the Equities Clearly Favors Plaintiffs

As addressed in the preceding section, Plaintiffs and other similarly situated Tennessee voters will suffer irreparable harm if the Temporary Injunction is overturned. Conversely, and notwithstanding Defendants’ protestations to the contrary, Defs.’ Supp. Br. at 24-29, Defendants have

⁴⁴ T.R.Vol. XIV, 2001-02 (Steiner Suppl. Decl. Ex. 2, Tenn. Exec. Order No. 38 (May 22, 2020) 6-7 <https://bit.ly/3ek89tB>).

failed to establish any irreparable harm from the Injunction remaining in place. Accordingly, the balance of the equities favors Plaintiffs.

The State’s primary argument as to why the Injunction will cause it to suffer irreparable harm boils down to a single statement: “The [C]hancery [C]ourt rejected out of hand the assessment of all of the state and county election officials” regarding absentee voting.⁴⁵ Defs.’ Supp. Br. at 26.

This is simply not true.

During the Temporary Injunction Hearing, Chancellor Lyle repeatedly acknowledged both the State’s “budget crisis” and that whatever she ordered would have to be “a practical, workable solution or it [would] throw the election into chaos.” T.R. Vol. XVII, 2435 (06/03/20 Hr’g. Tr. 17:4-18) (C. Lyle); *id.* at 2445 (27:11-13) (“[A]gain, the Court has to be very practical here, because we do not want a chaotic, ineffective election.”). Chancellor Lyle even reminded Plaintiffs’ counsel:

[W]hen you look at the budget shortfall that we’re being faced in Tennessee and you see the *declaration of the election person from Houston County* It’s a real thing to say: Can we really do this? What is the cost go[ing] to be? And that’s why [I have] drilled down.

Id. at 2484-85 (66:23-67-6) (emphasis added).

⁴⁵ Implicitly conceding the futility of this contention, Defendants also claim “a form of irreparable injury” from the State being enjoined from effectuating a statute enacted by “representatives of its people.” Defs.’ Br. at 32 (quoting *Abbott*, 961 F.3d at 411). But this attempted Hail Mary proves too much. On this logic, the State would be entitled to a stay pending appeal in every case for injunctive relief—a right not granted the State under Tennessee law.

Likewise, in her Injunction Order, Chancellor Lyle systematically considered and marched through each piece of evidence proffered by the State as to why “it is not fiscally [or] logistically feasible” to “allow more access to voting by mail during the pandemic.” T.R. Vol. XV, 2119-25 (Injunction Order). After conducting this painstaking analysis, Chancellor Lyle concluded that “the State’s proof was not competent and not weighty.” *Id.* at 2114. But Chancellor Lyle did not stop there. The Chancery Court “on its own initiative” and “despite the void of proof left by the State,” undertook its own calculations, using the “absolute maximum” for absentee voter turnout proffered by *Defendants’ own expert*, and concluded that there is “no evidence to support the State’s claims of dire fiscal consequences.” *Id.* at 2115.

Specifically, the Chancery Court identified the following as among the “faulty facts and assumptions” in Defendants’ analysis:

- Each of the five Tennessee County Election Officials was told to assume in stating feasibility in their counties that 100% of all registered voters in their county will vote. *This has never happened in the entire history of Tennessee voting.*⁴⁶ The turnout in the Nov. 2018 elections was high and it was 54% of all registered voters. The percentage of turnout for the 2016

⁴⁶ Notably, Missouri is transitioning to permit all eligible voters to vote by mail, despite having a relatively low percentage of votes cast by mail in past elections (about 2%). In the 2016 presidential election, there were 55,503 ballots cast by mail in Missouri out of a total 2,811,549 ballots cast. T.R. Vol. XVI, 2294 (Opposition to Motion for Stay) (citing United States Elections Project, “2016 November General Election Turnout Rates,” *available at* <https://bit.ly/3dR5TKJ>; United States Elections Project, “2016 November General Election Early Voting,” *available at* <https://bit.ly/3hiPEIC>)).

presidential election (Trump/Clinton) was 61%. This same unprecedented number of 100% turnout of all Tennessee registered voters was also used by Defendant Goins. Such an extreme assumption carries no weight as evidence. Moreover this skewed assumption so permeates and underlies the State's calculations that the assumption substantially detracts from the weight of State's entire evidence on lack of feasibility.

- The kind of voting by mail Secretary of State Wyman was told to address is a model where the State initiates the process and automatically sends all registered voters absentee ballots. This is not the model ordered herein The Plaintiffs are not seeking a permanent change to automatic, universal voting by mail as is the case in Washington State and is addressed in the Wyman Declaration. This distinction is material.

T.R. Vol. XV, 2122-23 (Injunction Order).

Finally, financial expenditures do not, as a matter of law, amount to irreparable harm. *See Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) (“[P]otential monetary damage does not constitute irreparable harm. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”).⁴⁷

⁴⁷ As Defendants acknowledge, Amber McReynolds' declaration is not part of the record in this case. Defs.' Supp. Br. at 28 n.9. In any event, Defendants' attempt to cast aspersions on Ms. McReynolds' testimony by pointing to timeframes for transitioning from machine to paper ballots and to universal vote-by-mail is unavailing because as the Chancery Court noted, “the Plaintiffs d[id] not seek for the State to permanently switch to universal and automatic vote by mail in Tennessee. The Plaintiffs instead s[ought] a temporary

D. The Public Interest Supports the Temporary Injunction

The Chancery Court correctly found that the public interest supports leaving the Injunction in place. As an initial matter, but as Defendants conveniently omit, the very same provision that gives the General Assembly the authority to protect the “purity of the ballot box” also expressly states that among the purposes of the State’s Election Code is to ensure that “[m]aximum participation by all citizens in the electoral process is encouraged.” Tenn. Code Ann. §2-1-102(4).

The Injunction also promotes “the public interest in . . . safeguarding public health.” *Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013). There “can be no injury more irreparable” than “serious, lasting illness or death.” *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020); *Diretto v. Country Inn & Suites by Carlson*, No. 16-cv-1037 (JCC/IDD), 2016 WL 4400498, at *4 (E.D. Va. Aug. 18, 2016) (“The public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of disease.”). Accordingly, courts are to give considerable deference to the views of public health entities like the CDC. *See Tolman v. Doe*, 988 F. Supp. 582, 586 (E.D. Va. 1997) (explaining that the CDC’s “views are relied upon by the medical profession as authoritative” and that it is “the type of public medical health officials to which courts should defer”).

That is precisely what the Chancery Court did in issuing its Injunction. Indeed, the very first finding of fact that the Chancery Court

easing off on the restrictions of voting by mail limited to the time of the pandemic.” T.R. Vol. XV, 2112 (Injunction Order).

made with respect to “the effect of the pandemic on in-person voting at polling places” was that “[m]ail-in voting methods are encouraged by the Centers for Disease Control and Prevention . . . to ‘minimize direct contact with other people and reduce crowd size at polling locations.’” T.R. Vol. XV, 2124 (Injunction Order).⁴⁸ Based on that finding and others including that “COVID-19 poses greater risks for people with preexisting heart and respiratory conditions, diabetes, individuals with compromised immune systems, and those with many other conditions, *id.* at 2130-31 (citing Steiner Decl. Ex. 12, *Ctrs. for Disease Control & Prevention, Groups at Higher Risk of Severe Illness*, <https://bit.ly/2zKcqrw> (last visited May 18, 2020)), the Chancery Court concluded:

From the foregoing, the Court finds that for persons with an autoimmune disease or other conditions or who reside with someone with these conditions, such as the Plaintiffs in Case No. 20-453, they are more susceptible to contracting the virus. For all persons, such as the Plaintiffs in Case No. 20-435, there are the risks of the higher level of contagion of the virus as compared to other viruses or flu, and that contagion is exacerbated indoors where there are gatherings of individuals. Lastly, for all persons there are various

⁴⁸ The CDC’s updated guidance for election officials continues to encourage election officials to “offer alternative voting methods that minimize direct contact and reduce crowd size at polling locations” and also notes that “[l]ower risk election polling settings include those with a wide variety of voting options.” Ctrs. for Disease Control & Prevention, *Considerations for Election Polling Locations and Voters*, <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (last visited July 8, 2020).

consequences of contracting the virus including fatality or long-term health issues.

T.R. Vol. XV, 2131-32 (Injunction Order).

And, as this Court is well aware and has recognized, *see In re COVID-19 Pandemic*, No. ADM2020-00428 (July 2, 2020), the situation has grown only worse since the Temporary Injunction was issued, suggesting an even greater health risk voters. *Supra* Section A.1.a. This unfortunate trend makes it all the more important to public health and thus to the public interest that the Chancery Court’s injunctive relief remain in place. *See* T.R. Vol. IX, 1205 ¶ 18 (Reingold Decl.).

Finally, there is a strong public interest in preventing the implementation of an unconstitutional statute and the expenditure of taxpayer funds thereon. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982)); *see also Obama for Am.*, 697 F.3d at 437 (“The public interest ... favors permitting as many qualified voters to vote as possible”); *Garrett v. Bd. of Educ. of School Dist. of City of Detroit*, 775 F. Supp. 1004, 1014 (E.D. Mich. 1991) (adopting plaintiffs’ argument “that the public interest is better served by preventing the opening of an unconstitutional educational facility.”).

Defendants contend that the Injunction is not in the public interest for three reasons, each of which is unavailing. *First*, the State contends that the Injunction will “impose enormous financial cost on the public.” Defs.’ Supp. Br. at 30. But as discussed above, *supra* Section C, based on its painstaking analysis of the record evidence, the Chancery Court rejected this argument and concluded that “it is feasible for the State to provide registered voters a vote by mail option and that increased voter

fraud is not a material concern.” T.R. Vol. XV, 2119 (Injunction Order). The only thing standing between Tennessee voters and their fundamental right to vote is the State’s unwillingness to act. Moreover, it is Defendants by failing to comply with the express terms of the “effective and binding” Injunction who have wasted taxpayer money. *Supra* Statement of Facts.

Second, the State raises the “importance of maintaining the status quo on the eve of an election,” Defs.’ Supp. Br. at 31 (citing *Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014)) because changes in voting “without sufficient time is fraught with opportunities for error, including voter error, that will undermine public confidence in elections,” *id.* at 31. But this concern only further supports why the Injunction is in the public interest—the Injunction *is* the status quo.

The Injunction was issued on June 4. For more than a month, voters who seek to avoid COVID-19 exposure have been requesting absentee ballots, and the State has been processing those requests as they are received. T.R. Vol. XIX, 2694 (June 15 Goins Decl. Ex. 1). And, in some counties, voters are already receiving absentee ballots, and many have already likely returned them. And because the Injunction requires voters who apply to vote absentee in order to avoid COVID-19 exposure to use the same checkbox as those who have other illnesses or disabilities, *supra* Statement of Facts, there is no way now to separate out these voters from those who have requested absentee ballots for other reasons. And even if there were a way to do so, the public interest weighs heavily against eliminating a mode of participation on which voters have already relied in an ongoing election. *Ne. Coal. for the Homeless v. Blackwell*,

467 F.3d 999, 1012 (6th Cir. 2006) (“[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of the submission of absentee ballots.”).

Under these circumstances, where voters throughout Tennessee have already sought to vote absentee in reliance on the Temporary Injunction, any further changes to the form and the availability of absentee ballots that would result from dissolution of the Injunction would only create the very voter confusion that Defendants claim that they seek to avoid. Defs.’ Supp. Br. at 30.

As the United States Supreme Court has warned, “[c]ourt orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (emphasis added). *Cf. Frank v. Walker*, 574 U.S. 929 (2014) (vacating stay that had been granted by appellate court where absentee ballots had already been sent to voters pursuant to district court’s injunction); *see also id.* (Alito, J. dissenting) (explaining that the Supreme Court vacated a stay of district court’s injunction because “absentee ballots have been sent out” with instructions conforming to the injunction).

Relying on the purported experiences of other states, Defendants also raise concerns about the error rates for absentee ballots. Defs.’ Supp. Br. at 30. As an initial matter, the fact that absentee voting has not been conducted perfectly everywhere is hardly a reason to deny relief. Absentee error rates do not justify disenfranchising Plaintiffs and many

other Tennessee voters altogether. Moreover, as the Chancery Court recognized, by “already planning for an increase in absentee voting from 2.5% of voters to 36% of all registered voters,”

[t]he State . . . ha[s] accepted and come to terms with the issue of potential user error and that some absentee ballots may be rejected. Even more basic . . . with respect to is that the issue of user error goes back to the individual and giving them a choice since it is their fundamental right under the Tennessee Constitution to vote which is at stake. It is for the individual, not the State, to weigh the risk of not filling out the absentee ballot correctly and their vote not being counted, versus exposing themselves to the polling place during the pandemic.

T.R. Vol. XVIII, 2629 (Order Denying Stay).

Finally, and notwithstanding Defendants’ bald assertion to the contrary, *nothing* in the Temporary Injunction Order even suggests that “the meaning of [a] law” or “the very text of [a] law” is “mutable depending on ‘circumstances.’” Defs.’ Supp. Br. at 31-33. To the contrary, the Chancery Court took great pains “as required by Tennessee Rule of Civil Procedure 65 and case law,” to ensure that its Temporary Injunction Order was “conservative, narrowly tailored to the peculiar circumstances of a worldwide pandemic.” T.R. Vol. XVIII, 2623 (Order Denying Stay). Accordingly, “[t]he only adjustment the Injunction Order m[ade] to existing Tennessee law [] for the COVID-19 pandemic [wa]s that the Order temporarily expands the absentee ballot process to allow a voter to request an absentee ballot due to the pandemic and for the State to process that.” *Id.* at 2624.

Likewise, nothing the Chancery Court has done suggests that County Election Commissions have the authority to “adopt” their own

“construction[s]” of statutes. *Cf.* Defs.’ Supp. Br. at 33. Instead, the Chancery Court not only repeatedly ordered *Defendants* to provide specific “instructions” and “directions” to County Election Commissions on how to implement the Temporary Injunction, but it also prescribed the “specific language” that must be included “on any materials listing the excuses found in Tenn. Code Ann. § 2-6-201 for voting by mail that the County Election Commissions disseminate to voters and on their website[s].” T.R. Vol. XIX, 2696 (June 15 Compliance Order); S.T.R. Vol. I, 2-3 (June 26 Compliance Order). The issuance of the Injunction was and continues to be in the public interest.

CONCLUSION

Tennessee is an outlier. The only risk of “chaos and confusion” would be from reversal of the Injunction, which would guarantee disenfranchisement of Tennesseans all while the prevailing practices around the country will allow millions of other Americans to exercise their right to vote safely during this deadly pandemic. For the foregoing reasons, the judgment of the Chancery Court should be affirmed, and the Injunction should remain in place.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Section 1.01(b) of Tenn. Sup. Ct. R. 46, the undersigned certifies that this brief complies with the requirements set forth in Section 3.02 of Tenn. Sup. Ct. R. 46.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2020, I electronically filed the foregoing brief using the Court's electronic filing system, which will electronically serve the parties.

/s/ Elizabeth Sitgreaves
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