

No Constitutional Right to Distribute Absentee-Ballot Applications

*Lichtenstein v. Hargett (Eli Richardson
and Aleta A. Trauger, M.D. Tenn. 3:20-cv-736)*

A time-sensitive federal complaint challenged Tennessee’s proscriptioin on the distribution of absentee-ballot applications by persons other than election officials, noting the importance of absentee voting during a global infectious pandemic. The district court denied immediate relief.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; case assignment; signature matching.

Middle District of Tennessee Judge Eli Richardson determined that plaintiffs did not have a clear constitutional right to distribute absentee-ballot applications in Tennessee.

The Emergency Case

At a time of widespread interest in absentee voting because of social distancing made necessary by the global Covid-19 infectious pandemic, five organizations and one person filed a federal complaint in the Middle District of Tennessee on Friday, August 28, 2020, against Tennessee and Shelby County election officials challenging legal proscriptions on persons other than election officials providing voters with absentee-ballot applications.¹ The plaintiffs filed a motion for a preliminary injunction on Monday.² With that motion, the plaintiffs filed a motion to expedite briefing by ten days so that a reply brief would be due on September 11, noting that “the window for applying for an absentee ballot for the November election opened on August 5, 2020. Only 57 days remain before the October 27, 2020 deadline to submit applications to vote absentee.”³

On the following day, Judge Aleta A. Trauger agreed to the proposed briefing schedule.⁴ On the day after that, Judge Trauger reassigned the case to Judge Richardson as related to a May 1 complaint pending before him.⁵ Judge Richardson set the case for a telephonic status conference on Septem-

1. Complaint, *Lichtenstein v. Hargett*, No. 3:20-cv-736 (M.D. Tenn. Aug. 28, 2020), D.E. 1; *Lichtenstein v. Hargett*, ___ F. Supp. 3d ___, ___, 2021 WL 5826246 (M.D. Tenn. 2021) (pp.1–3 of opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56); see Mariah Timms, *Law-suit Challenges Felony Charge for Sharing Absentee Voter Application*, Columbia Daily Herald, Sept. 6, 2020, at A3.

2. Preliminary-Injunction Motion, *Lichtenstein*, No. 3:20-cv-736 (M.D. Tenn. Aug. 31, 2020), D.E. 11; *Lichtenstein*, ___ F. Supp. 3d at ___, 2021 WL 5826246 (p.3 of opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56).

3. Motion to Expedite Briefing, *Lichtenstein*, No. 3:20-cv-736 (M.D. Tenn. Aug. 31, 2020), D.E. 13.

4. Order, *id.* (Sept. 1, 2020), D.E. 15.

5. Order, *id.* (Sept. 2, 2020), D.E. 18.

ber 11, inviting members of the public to use the public-record contact information for the conference.⁶

The Earlier Case

In addition to relaxation of the proscription on providing voters with absentee-ballot applications, the May 1 complaint—brought by two voters and the five organizations who became plaintiffs in the August 28 case—sought expansion of eligibility to vote absentee and opportunities to cure apparent mismatches between signatures accompanying absentee ballots and signatures on record.⁷ The case was assigned to Judge Richardson after recusal by Judge Waverly D. Crenshaw, Jr.⁸

Judge Richardson decided on July 21 that it was too late to provide relief for an August 6 primary election but not too late for the November 3 general election.⁹ On August 11, he focused the litigation further by observing, “Plaintiffs plainly are confused to an extent about the difference between an application and a request for an application.”¹⁰

The court of appeals described signature verification for absentee voters:

[The] training consists of a video prepared by the Election Division of the Oregon Secretary of State, which is supplemented by directives from the Division of Elections for the Tennessee Office of the Secretary of State. Among other things, the Division of Elections directs officials to apply a presumption in favor of the validity of the signature. The training video instructs officials that “all but the most obvious of inconsistent signatures are to be regarded as acceptable.” Election officials must compare the questionable signature “with as many exemplars on file as possible.” A signature should not be rejected unless three officials, including the county election administrator, determine that it is inconsistent with the signature on file.¹¹

On August 28, Judge Richardson concluded that inaccurate judgments about whether absentee voters’ signatures matched signatures on file did not implicate due-process concerns because the right to vote is not a liberty in-

6. Order, *id.* (Sept. 10, 2020), D.E. 26.

7. Complaint, *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-374 (M.D. Tenn. May 1, 2020), D.E. 1; *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 553 (6th Cir. 2021); *Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 567 (6th Cir. 2020); *Memphis A. Phillip Randolph Inst. v. Hargett*, 485 F. Supp. 3d 959, 967 (M.D. Tenn. 2020); *Memphis A. Phillip Randolph Inst. v. Hargett*, 482 F. Supp. 3d 673, 678 (M.D. Tenn. 2020); *Memphis A. Phillip Randolph Inst. v. Hargett*, 478 F. Supp. 3d 699, 701–02 (M.D. Tenn. 2020); *Memphis A. Phillip Randolph Inst. v. Hargett*, 473 F. Supp. 3d 789, 790–91 (M.D. Tenn. 2020); *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742, 748 (M.D. Tenn. 2020); *see* Preliminary-Injunction Motion, *Memphis A. Phillip Randolph Inst.*, No. 3:20-cv-374 (M.D. Tenn. June 12, 2020), D.E. 40; Amended Complaint, *id.* (June 12, 2020), D.E. 39; *see also* Adam Tamburini, *Groups Sue to Expand Absentee Voting Amid Covid-19 Pandemic*, Nashville Tennessean, May 5, 2020, at A2.

8. Order, *Memphis A. Phillip Randolph Inst.*, No. 3:20-cv-374 (M.D. Tenn. May 5, 2020), D.E. 19.

9. *Memphis A. Phillip Randolph Inst.*, 473 F. Supp. 3d 789.

10. *Memphis A. Phillip Randolph Inst.*, 478 F. Supp. 3d 699.

11. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 384(6th Cir. 2020).

terest.¹² But Judge Richardson did grant plaintiffs relief on September 9 from a requirement that voters who register by mail or online vote in person the first time they vote after registering.¹³ The court of appeals declined to stay this injunction because the defendants did not seek a stay until a month later.¹⁴

By a vote of two to one, the court of appeals agreed on October 15 that the plaintiffs should be denied relief from Tennessee’s signature-matching procedures.¹⁵ “The parties are . . . in general agreement as to the number of ballots that have been reported rejected for inconsistent signatures in the 2016 and 2018 national elections—around 0.03% and 0.09% respectively”¹⁶ As such, “the plaintiffs have clearly not demonstrated that they face an actual, concrete, particularized, and imminent threat of harm.”¹⁷ So the injunction denial was affirmed for lack of standing.¹⁸

In 2021, by the same vote of two to one, the court of appeals vacated the preliminary injunction that Judge Richardson did grant, the one that allowed first-time voters to vote by mail.¹⁹ Writing for the court, Judge Julia Smith Gibbons concluded that the need for the injunction had passed because the Covid-19 pandemic was a once-in-a-century crisis.²⁰ Judge Chad A. Readler concluded as well that the enjoined requirement easily passed constitutional muster.²¹ Judge Karen Nelson Moore would have affirmed the injunction.²²

Because the preliminary injunction remained in effect until the 2021 decision by the court of appeals, the plaintiffs were entitled to \$99,222.13 in attorney fees.²³

12. *Memphis A. Phillip Randolph Inst.*, 482 F. Supp. 3d at 678.

13. *Memphis A. Phillip Randolph Inst. v. Hargett*, 485 F. Supp. 3d 959 (M.D. Tenn. 2020); *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 554 (6th Cir. 2021); *Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 567–68 (6th Cir. 2020); see Opinion, *Memphis A. Phillip Randolph Inst.*, No. 3:20-cv-374 (M.D. Tenn. Sept. 28, 2020), D.E. 103 (denying reconsideration).

14. *Memphis A. Philip Randolph Inst.*, 977 F.3d 566; *Memphis A. Philip Randolph Inst.*, 2 F.4th at 554.

15. *Memphis A. Philip Randolph Inst.*, 978 F.3d 378.

16. *Id.* at 384.

17. *Id.* at 387.

18. *Id.* at 385–89.

19. *Memphis A. Philip Randolph Inst.*, 2 F.4th 548.

20. *Id.* at 560.

21. *Id.* at 561 (Judge Readler, concurring).

22. *Id.* at 564 (Judge Moore, dissenting: “Haphazardly wielding the law and the facts, today’s majority misapplies our mootness jurisprudence and vacates a lawful preliminary injunction.”).

23. Opinion, *Memphis A. Phillip Randolph Inst. v. Hargett*, No. 3:20-cv-374 (M.D. Tenn. Feb. 25, 2022), D.E. 169, 2022 WL 576554, *adopting* Report and Recommendation, *id.* (Jan. 10, 2022), D.E. 166, 2022 WL 95236, *aff’d*, Opinion, No. 22-5207 (6th Cir. Jan. 26, 2023) (“Because the defendants failed to raise their only argument on appeal in their objections to the magistrate judge’s report, they have forfeited that argument for our consideration now.”).

Relief Denied in the Emergency Case

In the August 28, 2020, case, Judge Richardson denied the plaintiffs immediate relief on September 23, 2020.²⁴ They did not have a constitutional right to distribute absentee-ballot applications.²⁵ Judge Richardson dismissed the complaint on December 7, 2021.²⁶

By a vote of two to one, the court of appeals affirmed the dismissal, deciding that distributing a government form is conduct and not speech.²⁷

24. *Lichtenstein v. Hargett*, 489 F. Supp. 3d 742; *Lichtenstein v. Hargett*, ___ F. Supp. 3d ___, ___, 2021 WL 5826246 (M.D. Tenn. 2021) (p.4 of opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56); see Mariah Timms, *Federal Judge Denies Push to Block Tennessee Ballot Law*, Memphis Com. Appeal, Sept. 27, 2020, at A7.

25. *Lichtenstein*, 489 F. Supp. 3d 742.

26. *Lichtenstein*, ___ F. Supp. 3d ___, 2021 WL 5826246 (opinion filed at M.D. Tenn. No. 3:20-cv-736, D.E. 56).

27. *Lichtenstein v. Hargett*, 83 F.4th 575 (6th Cir. 2023); see *id.* at 612 (Circuit Judge Helene White, dissenting: “I conclude that Tennessee’s law restricts core political speech”).