

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

ARKANSAS UNITED, et al.

PLAINTIFFS,

v.

No. 5:20-CV-05193-TLB

**JOHN THURSTON, in his official capacity as
the Secretary of State of Arkansas, et al.**

DEFENDANTS.

MOTION TO CLARIFY AND REQUEST FOR EXPEDITED CONSIDERATION

Enjoining election laws close to an election creates turmoil. This Court's injunction of Arkansas's law prohibiting persons from assisting more than six voters at the polls for the 2022 General Election in Benton, Sebastian, and Washington Counties is no exception. Although the Court has not enjoined the 72 other counties from enforcing the six-voter limit, there is language in the Court's order that could be broadly construed to render the State Defendants¹ accountable for failures by the non-party counties to act consistently with its order. So the State Defendants respectfully request that the Court clarify its order concerning their obligations for the 2022 General Election.

Due to the proximity of the approaching election, the State Defendants respectfully request that the Court require any response to this motion to be filed no later than Friday, September 2, 2022, at 9:00 am Central time and that the Court expeditiously enter an order clarifying the State Defendants' obligations.

BACKGROUND

Long before the 2022 election cycle began, the Parties filed cross-motions for summary judgment in this action challenging Arkansas's prohibition on persons assisting more than six

¹ The State Defendants are John Thurston, in his official capacity as Arkansas Secretary of State, and the members of the State Board of Election Commissioners.

voters at the polls. (Docs. 131, 134, 137 (filed on September 21 and 22, 2021)). Those motions remained pending as the deadlines for the 2022 Preferential Primary Election, Nonpartisan General Election, and General Primary Election approached, came, and went.² In fact, the Court did not rule for almost a year.

But with the 2022 General Election approaching, the Court acted, declaring that Section 208 of the Voting Rights Act preempts Arkansas’s six-voter limit. (*Id.* at 38). The Court ordered the State Board of Election Commissioners, the Secretary of State, and Benton, Sebastian, and Washington Counties to inform their staff to cease enforcement of the six-voter limit “in advance of the 2022 General Election.” (*Id.*).

Recognizing the proximity of its injunction to the 2022 General Election, the Court stated that it “does *not* expect Defendants to conduct updated trainings or produce an updated training manual before the 2022 General Election.” (Doc. 168 at 38 n.15 (emphasis added)). Rather, “[f]or the 2022 General Election, Defendants must simply inform their employees and volunteers to not enforce the six-voter limit and update the text on the Assisted Voter Card.” (*Id.*).

ARGUMENT

I. The Court should clarify that its order requires only that the State Defendants instruct their employees and volunteers to not enforce the six-voter limit for the 2022 General Election and does not impose responsibility on the State Defendants for the actions of the 72 non-party counties.

The vast majority of persons tasked with election administration in Arkansas have not been enjoined by this Court from enforcing the six-voter limit. *See Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (“[F]ederal courts enjoy the power to enjoin *individuals* tasked with enforcing laws, not the laws themselves.” (emphasis added)); *California v. Texas*,

² See 2022 Election dates, *Secretary of State John Thurston*, https://www.sos.arkansas.gov/uploads/elections/Important_Election_Dates.pdf.

141 S. Ct. 2104, 2115-2116 (2021). True, the State Board and the Secretary of State are able to inform *their* employees and volunteers not to enforce the six-voter limit for the 2022 General Election, as the Court has ordered. (Doc. 168 at 38). They have done so. And three of Arkansas's 75 counties are enjoined from enforcing the six-voter limit. But the other 72 county election boards and their poll workers at each local precinct are *not* employees or volunteers of the State or County Defendants. (Ex. A, Shults Decl.).

Election administration in Arkansas is decentralized. (*Id.*). Elections are conducted by county election boards that are elected by each county's political parties—not by the State Board or the Secretary of State. (*Id.*). By law, and in practice, these autonomous county election boards have the relevant authority to “[e]nsure compliance with all legal requirements relating to the conduct of elections.” Ark. Code Ann. 7-4-107(a)(1). The State Board does not supervise the county election boards, whose members serve at the pleasure of their respective county parties. (Ex. A, Shults Decl.). Rather, the State Board's role is to assist them by training their representatives on election laws and procedures and investigating any post-election complaints that are received. (*Id.*).

County election boards are *required by law* to “exercise [their] duties consistent with the training and materials provided by the State Board.” Ark. Code Ann. 7-4-107(a)(2). For the 2022 General Election, that horse has already left the barn. Months ago, the State Board prepared materials and conducted training for the county election boards and certified election workers for representatives of all 75 counties. (Ex. A, Shults Decl.). This training instructs on the importance of enforcing the six-voter limit. (*Id.*). Each county's certified poll-worker trainers have, in turn, trained thousands of local election workers in the local precincts to enforce the six-voter limit. (*Id.*). Indeed, the six-voter limit was enforced during the May 2022 Preferential

Primary Election and June General Primary Elections. (*Id.*). Once trained, election workers do not receive additional training from the State Board before the General Election. (*Id.*).

The Court's order is clear that the State Board is not required to "conduct updated trainings or produce an updated training manual before the 2022 General Election." (Doc. 168 at 38 n.15). Nor would it be feasible to do so close to the election. Because the 72 non-party county election boards are required by state law to follow the training materials the State Board has already provided them for the 2022 General Election, that means they presumably will enforce the six-voter requirement at the polls.

Outside of providing training and training materials to county boards, the State Board has no ability to legally direct how county election boards or their poll workers at each local precinct enforce state or federal election laws. (Ex. A, Shults Decl.). The same is true of the Secretary of State. (*Id.*). Thus, neither the State Board nor the Secretary of State can control whether the county election boards or their poll workers at each local precinct enforce the six-voter limit during the 2022 General Election. Consequently, the State Defendants understand the Court's order merely to require them to instruct their employees and volunteers not to enforce the six-voter limit for the 2022 General Election. (Doc. 168 at 38). The State Defendants do not read the Court's order to affect the 72 Arkansas counties that are not parties to this suit as to the 2022 General Election.

Nevertheless, the terms of the Court's injunction extend to "all persons acting in concert with" the State Defendants. (Doc. 168 at 38). Read broadly, this language potentially creates substantial uncertainty concerning the State Defendants' obligations as to the 2022 General Election. Had the Court intended to bind the 72 non-party counties through its "acting in concert

with” language, that would contradict the other terms of the order because the Court has disavowed any expectation that the State Board is to conduct updated training or produce updated material before the 2022 General Election. (Doc. 168 38 n.15). Thus, it is anticipated that county election boards and their poll workers in local precincts will follow the training and material the State Board has already produced for this election cycle, as the counties are required to do under State law. A broad reading of the “acting in concert with” clause of the Court’s order is incompatible with the whole because the State Board’s training and materials are the *only* means at its disposal to influence the actions of the 72 non-party counties for administration of the 2022 General Election. (*Id.*).

The State Defendants, out of an abundance of caution, therefore, request that the Court clarify its order to confirm the State Defendants’ understanding that the order is not intended to bind the election administration of the 72 non-party counties for the 2022 General Election. That reading is consistent with the reality that the only avenue by which the State Defendants have influence over the county election boards, and by extension their poll workers in local precincts, is through the very training and material, long since completed, that the Court has said the State Board is *not* expected to update before the 2022 General Election.

II. The Court should clarify whether it intended to order statewide use of an Assisted Voter Card—a document created by and solely used in Washington County—during the 2022 General Election and beyond.

Despite language in the Court’s order stating that the Defendants are not being required to update training or materials for the 2022 General Election, the order nonetheless appears to require the State Defendants to do this before the 2022 General Election. (*See* Doc. 168 at 38 (ordering “[t]he State and County Defendants . . . to use an updated Assisted Voter Card” that “removes any reference to the six-voter limit”)).

Problematically, the “Assisted Voter Card” is not a document created, used, or approved by the State Board or Secretary of State. (Ex. A, Shults Decl.). The Assisted Voter Card in the record (Doc. 148-7) appears to be a document created for use during a prior election by poll workers in Washington County, and it is unknown whether any other county uses it. (Ex. A, Shults Decl.). In any event, the Court’s order appears to require the State Defendants to use an Assisted Voter Card during the 2022 General Election. (*See id.* (requiring the “State and County Defendants . . . to use an updated Assisted Voter Card in *all* future elections,” not omitting the 2022 General Election (emphasis added)); *contrast id.* (ordering other action “[i]n all future elections *after the 2022 General Election*” (emphasis added))).

The State Defendants have not created an Assisted Voter Card for counties to use. It is not a State document. The State Board has never created any training materials concerning the use of an Assisted Voter Card, nor has it trained county officials as to what an Assisted Voter Card is or how to use one in an election.

The Court’s order is unclear to what extent it imposes an obligation upon the State Defendants to take any action to avoid accountability to this Court for the third-party county election boards or their poll workers’ non-use of an appropriate Assisted Voter Card during the 2022 General Election. Indeed, without clarification, the State Defendants would potentially be faced with the prospect of having to scramble before the 2022 General Election in an effort to produce an Assisted Voter Card and to provide appropriate training or materials concerning its use to the county election boards in time for them, in turn, to instruct their poll workers and develop whatever procedures may be necessary at each local precinct for the (likely novel) use of the card. This is not feasible, and in any case, it is not possible for the State Board to ensure uniform use

of an Assisted Voter Card by county election boards and their poll workers across the state during the 2022 General Election. (Ex. A, Shults Decl.).

CONCLUSION

Although the Court has not enjoined the 72 non-party counties from enforcing the six-voter limit, the State Defendants respectfully request that the Court grant their motion for clarification of their obligations concerning the 2022 General Election; and for expedited consideration.

Respectfully submitted,

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