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

TENNESSEE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	**No. 3:20-cv-01039**
v.	)	**Judge Campbell**
	)	**Magistrate Judge Frensley**
WILLIAM LEE, et al.	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO THE NAACP'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Individuals with infamous felony convictions are prohibited from voting in Tennessee unless they obtain restoration of their voting rights. *See* Tenn. Code. Ann. §§ 2-19-143, 40-29-101, 40-29-202. Tennessee protects the integrity of its elections by verifying that individuals with infamous-felony convictions are eligible to vote. For individuals who were not convicted of an infamous felony, Tennessee processes their voter-registration application like any other applicant. But for individuals who indicate on the state voter-registration form that they have been convicted of an infamous felony, information beyond that provided on the voter-registration application is needed to verify that the applicant is eligible to vote.

Through its motion for summary judgment, the NAACP attacks Tennessee's instructions on voter-registration forms and Tennessee's voter-registration policies. First, NAACP argues that

detailed and extensive instructions should be added to the voter-registration form to comply with the National Voter Registration Act of 1993 ("NVRA"), even if those additions would result in a lengthy and monstrous form. But having identified no instances of unlawful deprivation of voting rights due to the voting-registration form, and presenting no credible evidence of future harm, the NAACP can only hypothesize theoretical injury and consequently lack standing to assert their NVRA claims. Further, Tennessee's voter registration forms comply with the NVRA; the creation of an unwieldy voter-registration application that lists every precondition for eligibility is not required by the NVRA, as recognized by the Eleventh Circuit Court of Appeals.

Next, NAACP argues against a non-existent policy that allegedly allows a blanket rejection of voter registration forms indicating a felony conviction. But there is no such policy of blanket rejection in Tennessee. This argument lacks any merit and thus the NAACP is not entitled to partial summary judgment.

NAACP then challenges the requirement for documentation of eligibility for individuals who indicate that they have an infamous-felony conviction on the state voter-registration form. But this challenge fails because the documentation is necessary for officials to make a proper eligibility determination. Finally, the NAACP asserts a conclusory claim of discrimination. The lack of proof to support this claim cannot support judgment as a matter of law.

For all those reasons, this Court should deny the NAACP's motion for partial summary judgment on Counts Four and Six.

BACKGROUND

A. Tennessee's voter-registration application

Tennessee's voter-registration application provides the following information about applying to vote with a felony conviction:

> If you have had a felony conviction, your eligibility to register and vote depends upon the crime you were convicted of and the date of your conviction. To assist in processing your application, provide the required information in box 4 and any responsive documents you have. For more information about this process, call 1-877-850-4959 or visit sos.tn.gov/restoration.

Tennessee Mail-In Application for Voter Registration, Tennessee Secretary of State, https://sos-tn-gov-files.tnsosfiles.com/forms/ss-3010.pdf (last visited October 9, 2023). Box 4 of the voter-registration application is labeled "Felony Conviction" and asks, "Have you ever been convicted of a felony?" *Id.* It provides a parenthetical explaining, "If expunged, answer 'no.'" *Id.* Then, the form provides check boxes for "Yes" and "No." *Id.* It further states, "If yes, provide the following information (if known)." *Id.* The form provides space for the applicant to list the crimes, dates, and places relating to the felony conviction. *Id.* Additionally, the form asks, "Have you received a pardon or had your voting rights restored?" *Id.* Immediately following, the form provides check boxes for "Yes" and "No." *Id.* Adjacent to the check boxes is an instruction stating, "If yes, provide copy of document." *Id.* The form requires an oath or affirmation and a signature of the applicant. *Id.* On the "Go Vote TN" online registration portal, an applicant cannot continue to fill out the voter-registration application after checking "Yes" in response to the felony question. (Ex. 3, Lim Dep., at 163.) However, the individual will be automatically directed to use the paper voter-registration application. *Id*.

B. NAACP and its post-discovery factual additions that existed before the close of discovery but were not disclosed to Defendants

The NAACP assists individuals with voter restoration or voting registrations, regardless of whether the individual is a member of the NAACP. (Morris Dep., R. 151-4 at PageID# 1317-18, 1368-70.) The NAACP attends events and sets up a table for voter registration. (*Id.* at PageID# 1334.) The table is staffed with an NAACP member volunteer. (*Id.*) The NAACP has a tablet at their table where an individual can use the Tennessee voter-registration online portal to register to

vote. (*Id.* at PageID# 1335.) However, if an individual is unable to use the tablet to register to vote and discloses that they need information about voting rights, the NAACP provides them with a worksheet created by the Free Hearts organization and a certificate-of-restoration form. (*Id.* at PageID# 1336, 1340.) The NAACP noted that the only costs associated with a voter-registration event are the volunteers' time and the gas getting to the location. (*Id.* at PageID# 1369, 1376.) The NAACP also holds public education workshops on the certificate of restoration process, where they disseminate publicly available information. (*Id.* at PageID# 1368-70.) The NAACP has held only two workshops, and the noted expenses were time and gas money. (*Id.* at PageID#1369.)

However, the NAACP does not keep track of whether any of its members have a felony conviction or document the voting status of its members. (*Id.* at PageID# 1331.) More specifically, the NAACP does not track whether members were convicted of a felony during the grace period. (*Id.* at PageID# 1367.)

The parties engaged in extensive fact discovery, which initially closed on May 28, 2023. (Joint Mot. to Amend Sched. Order, R. 125, PageID# 837–38; Order Granting Mot. in Part, R. 128, PageID# 847–48.) In support of its motion for summary judgment, the NAACP submitted new evidence, namely the declaration of the President of the Tennessee Conference of the NAACP, alleging that they are "aware" of individuals convicted of felonies during the "grace period" between January 15, 1973, and May 17, 1981, who are unable to register to vote. (Sweet-Love Decl., R. 156-2, PageID# 2357.) Additionally, in an attempt to establish standing, the NAACP alleges that they have taxied individuals to government offices, assisted with obtaining court records, and even helped with payment to retrieve court records, but cite to no specific proof in the record to support these allegations. (*Id.* at 2357-58.)

C. Events leading up to and during the filing of the motions for summary judgment

From May through July 2023, Defendants engaged in extensive settlement discussions with Plaintiffs and made numerous offers of settlement, all of which Plaintiffs rejected.

At the end of June 2023, the Tennessee Supreme Court issued its decision in *Falls v. Goins*, 673 S.W.3d 173, 2023 WL 4243961 (Tenn. June 29, 2023), which interpreted and clarified Tennessee's voting statutes.

Frustrated with Plaintiffs' multiple rejections during settlement and determining that *Falls* would dictate some changes to the implementation of the voting statutes, Defendants eventually paused the settlement efforts, began making policy changes, and turned their attention to the upcoming dispositive-motion deadlines. (*See* Joint Mot. to Amend Sched. Order, R. 145, PageID# 1004.) On July 18, 2023, Defendants' counsel informed Plaintiffs' counsel of the pause and of Defendants' intent to file a summary-judgment motion on all of Plaintiffs' claims in light of the intervening *Falls* decision.

On July 21, 2023, as part of the post-*Falls* policy changes, the Tennessee Secretary of State and the Division of Elections announced policy revisions for the processing of voter-registration applications for individuals with felony convictions before January 15, 1973, and for individuals with felony convictions between January 15, 1973, and May 17, 1981. (Goins Decl., R. 151-1, at PageID# 1091-94). The Division of Elections issued a memorandum to the county election commission in Tennessee to provide clarity and prevent rejection of voter-registration applications for individuals who did not lose their voting rights. (Memo on Older Felonies, R. 151-2, at PageID# 1095-96.) This memorandum instructs county election commissions to process voter-registration applications for individuals in two categories: (1) individuals with pre-January 15, 1973, convictions that did not commit an infamous crime; and (2) individuals with convictions

between January 15, 1973, and May 17, 1981. (*Id.* at 1-2.) The memorandum also provides a list of infamous crimes for the county election commissions to reference when reviewing a voter-registration application listing a pre-January 15, 1973, felony conviction. (*Id.* at 2.) The memorandum further describes an updated Voter Registration Rejection Appeal Form that allows an appealing individual to indicate that he did not lose his right to vote because he falls in one of the aforementioned categories. (*Id.* at 2.)

The NAACP sought additional time to file its motion for partial summary judgment, and Defendants agreed to join the extension motion so that the extension applied to all parties. (Joint Mot. to Amend Sched. Order, R. 144, PageID# 999—1002.) The Court granted the motion. (Order, R. 145, PageID# 1003.) Plaintiffs later requested additional time to respond to Defendants' motion for summary judgment, and Defendants were amenable, but only so long as the same dispositive-motion deadlines applied to all parties. (Pl.'s Mot. for Extension, R. 158, PageID# 2734—37.) The Court granted the motion, as well as Defendants' corresponding motion. (Order, R. 164, PageID# 2773—74; Order, R. 168, PageID# 2788.) Next, Plaintiffs filed a Motion for Relief Under Rule 56(d) requesting that discovery be reopened and that Defendants' motion for summary judgment on Counts One, Two, and Three be denied without prejudice. (Pl.'s R. 56(d) Mot., R. 171, PageID# 2796-98.) Defendants opposed this motion. (Def.'s R. 56(d) Resp., R. 175, PageID# 2829-40.) The Court granted Plaintiffs' motion, denied Defendants' motion for summary judgment without prejudice to refiling after the close of discovery, and reopened discovery until December 18, 2023. (Order, R. 179, PageID# 2856.) In the same order, the Court set a briefing schedule for the remainder of the briefing on the dispositive motions on Counts Four, Five, and Six. (*Id.*)

STANDARD OF REVIEW

Summary judgment is appropriate only if the answers to interrogatories, depositions, admissions, and pleadings combined with the affidavits in support, show that no genuine issue as to any material fact remains and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a)-(c); *Chao v. Hall Holding Co.*, 285 F.3d 415, 424 (6th Cir. 2002). When reviewing a summary-judgment motion, the court must view all materials supplied, including all pleadings, in the light most favorable to the nonmoving party. *Chao*, 285 F.3d at 424. The moving party has the burden of informing the court of the basis for its motion and identifying the portions of the record that establish the absence of a genuine issue of material fact. *Id.* A fact is "material" if it might affect the outcome. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If a reasonable juror might not return a verdict for the movant, the court should deny summary judgment. *See id.* at 257.

ARGUMENT

I. The NAACP Lacks Standing for the Claims in Counts Four and Six of the Amended Complaint.

In Counts Four and Six, the NAACP seeks to enjoin allegedly unlawful voter-registration practices. At the pleadings stage, this Court found that the NAACP had standing to bring these claims based on a diversion-of-resources theory of injury. This Court accepted as true the NAACP's allegation that it was "injured when a person it helps register to vote is rejected despite being eligible because such denials cause it to divert significant time and resources to correct the error." (Mem. Op., R. 83, PageID# 460.) But mere allegations do not establish injury at summary judgment.

Standing is a "threshold question in every federal case." *Barry v. Lyon*, 834 F.3d 706, 714 (6th Cir. 2016). The elements of standing "must be supported in the same way as any other matter

on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at successive stages of litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the motion for summary judgment stage, Plaintiffs can no longer rely solely on the allegations in their complaint to establish standing. *Id.* Instead, they must come forward with admissible evidence to support each element required to establish an actual case or controversy under Article III of the United States Constitution. *See id.*

For standing, an organizational plaintiff must follow "th[e] same black-letter rules" that apply to individual plaintiffs. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 255 (6th Cir. 2018). The Supreme Court has established three elements that plaintiffs must satisfy to meet the constitutional requirements for standing. First, plaintiffs must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quotation and internal quotation marks omitted). Second, they must establish "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court.'" *Lujan*, 504 U.S. at 560–61 (quotation omitted). Third, they must show a "'substantial likelihood' that the requested relief will remedy the alleged injury in fact." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quotation omitted).

Plaintiffs seeking "the forward-looking remedy of an injunction," *Reform Am. v. City of Detroit*, 37 F.4th 1138, 1148 (6th Cir. 2022), "must show a present ongoing harm or imminent future harm" to satisfy the injury-in-fact requirement, *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) (per curiam). "The 'threat' of a prospective injury

must be real and immediate and not premised upon the existence of past injuries alone." *Gaylor v. Hamilton Crossing CMBS*, 582 F. App'x 576, 579 (6th Cir. 2014) (quotation omitted).

A. The NAACP fails to show sufficient injury to establish standing.

The NAACP's speculative assertion of injury is not enough to establish standing on either Count Four or Count Six. (*See* Def.'s Mem. in Support, R. 151, PageID# 1064-68.) The NAACP claims that Tennessee's "unlawful forms and erroneous rejections" require the NAACP to divert its resources to "help applicants correct the error by for example, locating and printing records found online, taxiing individuals to government offices, and even paying out of pocket to get documents from court clerks." (Pl.'s Mem. in Support, R. 154, PageID# 2286.) Yet the NAACP has not established evidence of a single instance when an erroneous rejection occurred for an applicant they assisted. (*See* Morris Dep., R. 151-4, PageID# 1331-67; NAACP First Interrog. Resp., R. 151-14, PageID# 1857-78; Attachs. to NAACP Third Interrog. Resp., R. 151-15, PageID# 1879-86; NAACP Third Interrog. Resp., R. 151-16, PageID# 1887- 1901.) Without identifying a person who has been erroneously rejected, the NAACP has not identified a specific instance when they searched for records, provided a taxi service, or paid for documents. (*Id.*) Rather, the NAACP merely claims that it is "aware" of individuals that were unable to register to vote who were otherwise eligible and that the NAACP has assisted individuals in attempting to correct an erroneous rejection. (Sweet-Love Decl., R. 156-2, PageID# 2357.)

These broad and vague statements do not establish standing because they do not establish a real and imminent threat of future injury. *See*, *e.g.*, *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 362 (5th Cir. 1999) ("To infer that ACORN has spent resources combating Louisiana's alleged failure to provide voter registration forms with mail-in driver's license

applications and to properly maintain its voter rolls simply from evidence that ACORN conducts at least one voter registration drive a year in Louisiana is, in our view, speculative.").

Moreover, the NAACP fails to explain—much less put on proof of—how the allegedly improper instructions on the voter-registration form leads to the NAACP searching for records, providing a taxi service, or paying for documents. Those allegations of injury could be caused only by the elusive and unidentified erroneous rejections. Indeed, the NAACP cannot prove that it expended resources because of alleged informational deficiencies due to conduct that is "fairly traceable" to any Defendant. *Fowler*, 178 F.3d at 359. Instead, the undisputed facts show that the NAACP furthers its mission by "[p]romoting voter registration and turnout," (Sweet-Love Decl. R. 156-2, PageID# 2356), and it routinely spends time and resources explaining voter registration requirements to would-be applicants, regardless of whether they are convicted felons or not. Accordingly, the NAACP has "fail[ed] to show that it would not have undertaken the same efforts in the absence of the alleged illegal act by the defendants"—that is, it did not establish that the costs "were in any way caused by any action" from Tennessee, "as opposed to part of the normal, day-to-day operations of the group." *Fowler*, 178 F.3d at 359. Thus, the NAACP lacks standing for their claim about the voter registration form instructions in Count Four.

B. The NAACP lacks standing to challenge how the State processes applications submitted on the Federal Form.

The NAACP admitted in the Amended Complaint that it "almost exclusively" uses Tennessee's state voter registration forms—*not* the Federal Form. (Am. Compl., R. 102, PageID# 620-21). In the context of Federal Form applicants, the NAACP's alleged injury occurs when "a person they identify and help register to vote is rejected despite being eligible." (*Id.* at PageID# 620–21; *see* Sweet-Love Decl., R. 156-2 ¶ 13.) But the NAACP presents no evidence that it diverted resources in the past towards someone whose federal voter-registration application was

wrongly denied. (*See* Sweet-Love Decl., R. 156-2, PageID# 2357.) Nor does the NAACP offer any evidence that it will do so imminently in the future, an outcome made even more unlikely given the NAACP's "almost exclusiv[e]" use of the State Form. As Defendants discussed previously, (Def.'s Mem. in Support, R. 151, PageID# 1064-68), the NAACP has not established any imminent injury in fact because whether any wrongful denials of Federal Form applications will occur is purely conjectural. *See Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 387-88 (6th Cir. 2020) (holding that the plaintiffs lacked standing because they did not cite data showing that ballots will be incorrectly rejected or that ballots were erroneously rejected in the past). And even assuming that there are *some* erroneous denials of Federal Form applications, there is no evidence that the NAACP helped those applicants or diverted their resources to correct those allegedly wrongful denials.

Even if the NAACP has standing, the alleged deficiencies in how Tennessee processes federal forms were not properly presented. The NAACP asserts in its partial motion for summary judgment that Tennessee fails to "accept and use" the federal voter-registration form. (Pl.'s Mem. in Support, R. 154 at PageID# 2300.) But this is inconsistent with the claim presented in the Amended Complaint that Tennessee had a policy of rejecting all registration forms "on which the applicant affirmed that they have a felony conviction[.]" (Am. Compl., R. 102, PageID# 656.) The NAACP admits in their motion for summary judgment that "the Federal Form does not allow an individual to attest to whether or not they have been convicted of a felony, only to their eligibility generally" and asserts that election officials require documentation "when they *learn* about" a felony conviction (not that there is a blanket rejection). (Pl.'s Mem. in Support, R. 154 at PageID# 2300.) Thus, to the extent that the NAACP moves for summary judgment on Tennessee's acceptance of the federal form, the NAACP moves on a claim not presented in their

Amended Complaint, which is prohibited. *See Howard v. Tennessee*, 740 F. Appx. 837, 842-43 (6th Cir. 2018) ("[P]laintiffs cannot raise new claims in their summary judgment briefing and should instead request to amend their complaint.").

II. Portions of the NAACP'S NVRA Claims Are Based on Obsolete Facts and Are Moot.

"[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *Resurrection Sch. V. Hertel*, 35 F.4th 524, 528 (6th Cir. 2022) (quoting *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974)). "Thus, when a case at first presents a question concretely affecting the rights of the parties, but—as a result of events during the pendency of the litigation—the court's decision would lack any practical effect, the case is moot." *Id.* Because of a change in policy, a portion of Count Six is now moot.

In Count Six, the NAACP seeks an injunction preventing Defendants from rejecting voter applications from: (1) individuals with pre-1973 convictions who did not commit infamous crimes; and (2) individuals with convictions between January 15, 1973, and May 17, 1981. Specifically, the NAACP seeks an injunction that prevents Defendants from rejecting voter-registration applications from individuals in these groups. (Am. Compl., R. 102, PageID# 658.) Additionally, the NAACP requests an injunction requiring Defendants to modify the voter-registration form so that it can be used by these groups and requiring issuance of guidance that prohibits the requirement of documentary proof of eligibility. (*Id.* at PageID# 658-59.)

The facts upon which these claims are based no longer exist. the Division of Elections announced that the applications of individuals whose only felony convictions occurred between January 15, 1973, and May 17, 1981, would be processed, not rejected. (Goins Decl., R. 151-1, PageID# 1093; Goins Memo., R. 151-2, PageID# 1096.) Similarly, the applications of individuals whose only felony convictions occurred before January 15, 1973, and which could not have

rendered the felon infamous would be processed. (Goins Decl., R. 151-1, PageID# 1093; Goins Memo., R. 151-2, PageID# 1095-96). The Division of Elections seeks further documentation only from applicants when the pre-January 15, 1973, conviction could have rendered him infamous, but the convicting court may or may not have declared him so. (*Id*.) That is, the Division of Elections cannot tell from the face of the application that the applicant is eligible to vote. There is no "blanket rejection" policy upon which their claim in Count Six relies. (Am. Compl., R. 102, PageID# 655—57; Pl.'s Mem. in Support, R. 154, PageID# 2294-98.) Thus, for a portion of Count Six, there is no controversy between the parties and such claims are moot.

In an attempt to avoid this mootness problem, the NAACP contends that the pre-July 21, 2023, policies might theoretically be resurrected at some unknown point in the future. (Pl.'s Mem. in Support, R. 154, PageID# 2307–10.) But when a *government* entity voluntarily ceases allegedly illegal conduct,[1] the Sixth Circuit presumes that the "allegedly wrongful conduct by the government is unlikely to recur." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019). Voluntary cessation of allegedly illegal activities is treated differently when the parties are government officials rather than private parties. *Id.* Courts have treated cessation by governmental officials with more solicitude than similar actions by private parties, and so long as it appears genuine, self-correction provides a secure foundation for a dismissal based on mootness. *Id.* (citing *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012)). Government action receives this solicitude because courts assume that the government acts in good faith. *Id.* (citing *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018)).

[1] To be clear, Defendants in no way are conceding that the policies in place before July 21, 2023, were illegal.

The NAACP has failed to rebut the presumption that the Defendants will not resume their allegedly illegal activities. Defendants' implementation of the current policy for applicants with non-infamous felonies from before January 15, 1973, and for applicants with felony convictions between January 15, 1973, and May 17, 1981, is not "spur-of-the-moment," but genuine, and the result of a long-term process by the Coordinator of Elections. (*See* Goins Supp. Decl., Exhibit 1.) The genuine nature of this policy change was formalized in a memorandum sent out by the Coordinator of Elections to all county elections officials, (*id.*), and by Coordinator Goins's declaration, (Goins Decl., R. 151-1, at PageID# 1091-94). This policy is in place, and the NAACP presents no competent evidence demonstrating that the Coordinator will reverse it.

Moreover, what evidence the NAACP does submit in support of its contention is either inaccurate or mischaracterized. For example, the NAACP alleges that Coordinator Goins sent a letter in November 2019 "establishing a position" and then reversed that position less than four months later. (Pl.'s Mem. in Support, R. 154, at PageID# 2308.) But Coordinator Goin's letter simply responded to counsel's inquiries as to the restoration of voting rights for three individuals. (Goins Letter, DEF000421, Exhibit 2.) More importantly, the NAACP fails to acknowledge that any alleged change in the Coordinator's position was due to an opinion issued by the Tennessee Attorney General in March 2020—an opinion that was subsequently affirmed by the Tennessee Supreme Court in *Falls*, 2023 WL 4243961, at *7-8. (*See* Goins Supp. Decl., Exhibit 1); Tenn. Att'y Gen. Op. 20-06 (Mar. 26, 2020).

Next, the NAACP alleges that, in an unrelated case, Defendants made a "last-minute" reversal of their position before the Tennessee Supreme Court and then failed to comply with that Court's order. (Pl.'s Mem. in Support, R. 154, at PageID# 2308-09.) Contrary to the NAACP's allegations, the Tennessee Supreme Court made no finding of a reversal of position by the State.

See Fisher v. Hargett, 604 S.W.3d 381, 405 (Tenn. 2020). Instead, the Tennessee Supreme Court noted a concession by the State and found that the plaintiffs were unlikely to succeed on the merits of their claims and vacated the injunction. *Id.* No further action was required by the Defendants to comply with the Tennessee Supreme Court's ruling. *Id.* Thereafter, the State changed its policy to align with its concession, albeit after a lower court order. At any rate, the NAACP's argument is inapposite here. Defendants have already implemented the change in policy relevant to this issue. (Goins Decl., R. 151-1, at PageID# 1091-94).

Finally, the NAACP asserts that the Coordinator and Secretary have engaged in, and subsequently backed out of, negotiations with it for several years, but only now, on the precipice of dispositive motions, adopted new policies. (Pl.'s Mem. in Support, R. 154, at PageID# 2309.) But again, the NAACP fails to acknowledge that during those negotiations, Coordinator Goins made changes to the state and federal voter registration forms—changes that were requested and approved by counsel for the NAACP. That revised form has been in use since 2020. (*See* Goins Supp. Decl., Exhibit 1.) The NAACP also fails to acknowledge that Coordinator Goins only ceased further negotiations after the NAACP filed this lawsuit. (Goins Supp. Decl., ¶ 9.)

And Defendants paused the most recent round of negotiations only after Plaintiffs rejected multiple settlement offers made by Defendants, after the issuance of *Falls*, and a short time before dispositive motions were to be filed. There is no bad faith here, much less any indication that Defendants will suddenly reverse course and return to the pre-July 21, 2023, policies.

In short, the policy change memorialized in the July 21, 2023 memorandum was not simply at the whim of the Coordinator of Elections. Rather, the Coordinator and Secretary of State engaged in a lengthy process of internal discussions and deliberations with staff and legal counsel that culminated in the policy change. (*See* Goins Supp. Decl., Exhibit 1.) Consistent with his

statutory duty to "authoritatively interpret the election laws for all persons administering them" and to advise election officials "as to the proper methods of performing their duties," Tenn. Code Ann. § 2-11-202(a)(3)-(4), the Coordinator, with the approval of the Secretary of State, formalized this policy change in a memorandum that was distributed to all the county election officials. (Memo on Older Felonies, R. 151-2, at PageID# 1095-96.) Absent a change in the law or a court order, Coordinator Goins has no intention of changing course, as evidenced by the sworn declaration provided in support of this opposition. (*See* Goins Supp. Decl., Exhibit 1.)

III. The NAACP's Motion for Partial Summary Judgment on Count Four Fails Because Tennessee's Voter Registration Form Adequately Informs Applicants of Voter Eligibility Requirements in Accordance with the NVRA.

Tennessee's instructions on the state and federal voter registration forms comply with the NVRA by adequately specifying the eligibility requirements for voting. The NVRA requires States to "inform applicants" of "voter eligibility requirements." 52 U.S.C. § 20507(a)(5). In furtherance of that mandate, the NVRA also requires that state mail-in forms "include a statement" that "specifies each eligibility requirement." *Id.* § 20508(b)(2)(A). Tennessee prohibits individuals convicted of infamous felonies from registering to vote. Tenn. Code. Ann. § 2-19-143. In turn, the absence of a conviction for an infamous felony is a voter eligibility requirement. *See* 52 U.S.C. § 20507(a)(5). While the conviction crime and date may affect whether an individual was convicted of an infamous felony, those are underlying preconditions for eligibility that are not subject to the requirements of the NVRA.

A. Tennessee's voter-registration form provides adequate information to enable applicants to determine eligibility.

Tennessee's mail-in form specifies the eligibility requirement about felony convictions and directs applicants to additional resources:

> If you have had a felony conviction, your eligibility to register and vote depends upon the crime you were convicted of and the date of your conviction. To assist in

> processing your application, provide the required information in box 4 and any responsive documents you have. For more information about this process, call 1-877-850-4959 or visit sos.tn.gov/restoration.

Tennessee Mail-In Application for Voter Registration, Tennessee Secretary of State, https://sos-tn-gov-files.tnsosfiles.com/forms/ss-3010.pdf (last visited August 1, 2023). Functionally similar language is provided as a state-specific instruction on the Federal Form. *Federal Mail-In Application for Voter Registration*, United States Election Assistance Commission, https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf (last visited August 16, 2023). The website link provided on the forms provides thorough guidance about the disqualifying-felonies requirement—including details about which felonies are permanently disqualifying, the dates between which felons were never disenfranchised (and are thus eligible to vote), and the process for disqualified felons to restore their eligibility to vote. And in case those instructions were not sufficiently clear, the forms include a toll-free number for applicants to call and request help.

These instructions specify the eligibility requirement related to felony convictions and inform applicants that certain felons are ineligible to vote. This is in compliance with the NVRA. *See* 52 U.S.C. §§ 20507(a)(5), 20508(b)(2)(A). Individuals filling out a state or federal voter registration form in Tennessee are sufficiently notified that the absence of an infamous felony conviction is an eligibility requirement for voting. The additional resources also provide prospective voters with information and guidance for navigating Tennessee's straightforward voter registration process.

The NAACP also complains of Tennessee elections officials accepting older versions of the voter registration form and notes that some counties have not updated their websites with the current voter-registration form. (Pl.'s Mem. in Support, R. 154, PageID# 2292.) The Knox County

website has been updated with the current version of the form, and the Hamilton and Dekalb County website provide a link to the current form on the Secretary of State's website. *See* Voter Registration Form, Knox County, https://www.knoxcounty.org/election/pdfs/VRF.pdf (last visited Sept. 8, 2023); Voter Registration Link Page, https://elect.hamiltontn.gov/VoterInfo/AllForms.aspx (last visited Sept. 8, 2023); Voter Registration Link Page, Dekalb County, https://www.dekalbelections.com/voter-registration-information/ (last visited Sept. 8, 2023). Indeed, the NAACP admits that the current version of the form has been in use since 2020. (Pl.'s Mem. in Support, R. 154, PageID# 2292.)

That three out of ninety-five counties in Tennessee at one point had not updated their website with the current version of the form is not proof of an NVRA violation, (*see id.*), and it is not attributable to Defendants. Moreover, accepting older versions of the form, rather than demanding that an applicant fill out the current version of the form before acceptance, is done for the convenience of the applicant. (*See* Lim Dep., R. 151-3, PageID#1189.) The NAACP has put forth zero proof that the acceptance of an older version of the voter registration form has led to an erroneous rejection of voter registration.

B. The NVRA does not require notice of every precondition to eligibility.

In support of their motion for summary judgment, the NAACP argues that Tennessee's registration form violates the NVRA because it does not describe the various scenarios in which an individual with a felony conviction can vote. (Pl.'s Mem. in Support, R. 154, at PageID# 2291.) While the instructions on the forms specify that the absence of a conviction for an infamous felony is an eligibility requirement, the NAACP believes the NVRA requires that forms "must on their face provide registrants with a statement that is sufficiently specific as to all qualifications for voting such that an individual may assess their eligibility," (*see id.* at PageID# 2293). Notably

absent from the NAACP's argument is any case law supporting that position. (*See id.* at PageID# 2290-93.) Yet at least two federal courts have held that the NVRA does *not* require an exhaustive list of preconditions for voting eligibility.

Earlier this year, the Eleventh Circuit heard a challenge to Alabama's voting-registration form as a violation of the NVRA involving materially similar instructions to those found in Tennessee's voter-registration form. *Thompson v. Alabama*, 65 F.4th 1288, 1309 (11th Cir. 2023). As here, the plaintiffs asserted that Alabama violated 52 U.S.C. § 20508(b)(2)(A) by failing to provide sufficiently specific instructions. *Id.* at 1308-09; (Am. Compl., R. 102, at PageID# 654.) Alabama's voter registration form included language notifying applicants that "[t]o register in Alabama you must: . . . not have been convicted for a felony involving moral turpitude (or have had [y]our civil and political rights restored). The list of moral turpitude felonies is available on the Secretary of State web site at: sos.alabama.gov/mtfelonies." *Thompson*, 65 F.4th at 1296.

The appellants in *Thompson* essentially argued that "a state that disqualifies voters for some felonies but not others can only sufficiently specify its eligibility requirements on its mail voting form by listing each disqualifying felony." *Id.* at 1308. But the Eleventh Circuit rejected this argument and held that such a position is an "absurd" and "unworkable" interpretation of § 20508(b)(2)(A). *Id.* Listing every state, federal, and foreign felony involving moral turpitude to sufficiently specify disqualifying felonies under Alabama law would result in a form of "monstrous" size. *Id.* The court noted that "[a]ppellants may as well ask Alabama to attach a copy of each state, federal, and foreign criminal code to its voting form. And any time any state, federal, or foreign government amended their criminal code, Alabama would have to update its list[.]" *Id.* The court held that Alabama's mail-in voting form complied with the NVRA by providing sufficient notice through informing registrants that persons convicted of disqualifying felonies are

not eligible to vote and providing an easily accessible link whereby voters convicted of felonies can determine their voter eligibility. *Id*. at 1308-09.

In a similar case also decided this year, the United States District Court for the Northern District of Florida heard a challenge alleging that the instructions on Florida's mail-in voting form failed to provide sufficient notice to applicants. *See* Order Granting Motion to Dismiss, *League of Women Voters of Florida, Inc. v. Cord Byrd*, No. 4:23-cv-165 (N.D. Fla. July 10, 2023), ECF No. 36. Florida's mail-in voting form stated, "If you have been convicted of a felony, or if a court has found you to be mentally incapacitated as to your right to vote, you cannot register until your right to vote is restored." *Id.* at 4. However, the plaintiffs claimed that the NVRA required more detail, namely that the form specify each method of voting-rights restoration. *Id.*

The court explained that the different methods for restoring one's right to vote were not an eligibility requirement, but rather only restoration of the right to vote was an eligibility requirement. *Id.* at 5–6. And while there are certain "preconditions" to eligibility, like some applicants needing to pay off all legal financial obligations, these preconditions are not independent eligibility requirements for NVRA purposes. *Id.* at 6. The court noted, "[o]bviously, if the NVRA required applications to catalog every potential 'precondition for eligibility,' Florida's one-page, front-and-back application form would explode into something hopelessly cumbersome, counter to the NVRA's goal of promoting convenient registration. The federal application, too, would become unrecognizable." *Id.* at 7.

Tennessee's instructions contain information like the instructions on the forms in Alabama and Florida. The instructions provide notice of the disqualifying-felony eligibility requirement. Tennessee's language notifying applicants that their eligibility depends on the crime and date of conviction is analytically similar to Alabama's language that an applicant must not be convicted

of a crime of moral turpitude. *See Thompson*, 65 F.4th at 1296. Both applications provide the reader with direction to the resources needed to make an eligibility determination without specifying each and every detail of which felony convictions render someone ineligible. *See id.* Alabama's form refers the applicant to the Alabama Secretary of State's website. *Id.* Tennessee's form and the Tennessee specific instructions on the Federal Form provide both a phone number to call for assistance and the Tennessee Secretary of State's website where the reader can find information necessary to evaluate one's eligibility. *See* Tennessee Secretary of State, https://sos.tn.gov/restoration, (last visited August 23, 2023).

Indeed, Tennessee's website contains a list of crimes that permanently disqualify an individual from voting. *Id.* It contains an explanation of the procedure for restoring an individual's voting rights when lost due to a felony conviction after May 18, 1981. *Id.* It explains that individuals with felony convictions between January 15, 1973, and May 17, 1981, are eligible to vote but that the Division of Elections must verify that the individual's conviction occurred during that period. *Id.* It also provides a list of crimes that prior to January 15, 1973, resulted in the loss of the right to vote but includes a disclaimer stating, "Even if you were convicted of a crime listed above, you still have the right to vote if you can show that at the time of your conviction the judge did not render you 'infamous,' if your conviction was reversed on appeal or expunged, if you received a full pardon, or if you have your voting rights restored." *Id.*

The NAACP believes, however, that Tennessee's state mail-in voter registration form should contain all of this information, i.e., an extensive explanation that felony convictions between January 15, 1973, and May 17, 1981, and felony convictions for non-infamous crimes prior to January 15, 1973, do not remove the right to vote; an explanation for the highly improbable scenario where an individual with a conviction for an infamous crime was not deemed infamous

by the convicting court; and an explanation that an individual with a felony conviction may get their voting rights restored. (Pl.'s Mem. in Support, R. 154, at PageID# 2291.) But including all the information listed on the Secretary of State's website would result in an application of unwieldy length and unusable format.

This is precisely the "absurd" and "unworkable" interpretation of § 20508(b)(2)(A) that the Eleventh Circuit rejected. *Thompson*, 65 F.4th at 1308. As the court in *Thompson* explained, § 20508(b)(2)(A) is a notice statute. *Id.* at 1309. The NVRA does not prescribe a voter-registration application composed of a comprehensive list of every felony conviction that results in the loss of the right to vote, nor does it require that the application contain a primer on voting rights restoration. Tennessee's voter registration application complies with the NVRA because it sufficiently notifies applicants that the absence of a conviction for an infamous felony is a voter eligibility requirement. Therefore, the NAACP's motion for partial summary judgment on Count Four should be denied.

IV. The NAACP's Motion for Partial Summary Judgment on Count Six Fails Because Tennessee's Process for Applicants with Felony Convictions Complies with the NVRA.

Defendants' policies for processing voter registration applications for individuals with felony convictions complies with the NVRA. Applicants who indicate on their voter-registration application that they were not convicted of an infamous felony go through the same process as every other applicant. (Memo on Older Felonies, R. 151-2, at PageID# 1095-96.) Defendants' policy of requiring documentation for a small subset of applications is compliant with the NVRA. These policies are not discriminatory.

A. Tennessee's process and policies ensure that eligible voters are registered to vote.

The State does not have a blanket policy rejecting all voter-registration applications that show a felony conviction. As noted, under the recent policy changes, applications from individuals with non-infamous felonies predating January 15, 1973, are processed just like someone without a felony conviction. (Goins Decl., R. 151-1, PageID# 1093; Older Felonies Memo, R. 151-2, PageID# 1095-96.) Those applicants need not submit any documentary proof of eligibility—all they must do is submit the application and attest under penalty of perjury that they are eligible to vote. (*Id.*) Likewise, applications from individuals with felony convictions from between January 15, 1973, and May 17, 1981, are also processed just like applicants without felonies "because those individuals never lost the right to vote." (*Id.*) And for all other applicants with felonies, election officials will not reject their application to vote if they submit proof that their voting rights have been restored. (Goins Decl., R. 151-1, PageID# 1093.)

In its motion for summary judgment, the NAACP changed the position it took in the Amended Complaint regarding Count Six. The Amended Complaint alleged that Tennessee has a "policy and practice of rejecting *all* registration forms"—every single one—"on which the applicant affirmed that they have a felony conviction." (Am. Compl., R. 102, PageID# 655 (emphasis in original).) Because discovery has proven that allegation patently false, (*see* Burch Dep., R. 151-19, PageID# 2182-84 (pointing out that thousands of Tennesseans have had their voting rights restored), the NAACP now says that Tennessee rejects "every voter registration application where the felony question is answered in the affirmative *absent additional documentation*," (Pl.'s Mem. in Support, R. 154, at PageID# 2295 (emphasis added).) But there is no documentation requirement for applicants with grace period or pre-1973 non-infamous convictions. (Goins Decl., R. 151-1, PageID# 1093; Older Felonies Memo, R. 151-2, PageID#

1095-96.) And by now taking the position that the State rejects those applicants who fail to provide mandatory documentation, the NAACP implicitly concedes that the State *does* grant voter applications from felons who properly submit proof of eligibility. Even if the NAACP does not concede that point, there is no genuine dispute that individuals with felony convictions who secure voting-rights restoration are allowed to register and to vote. (*See* Lim Dep., R. 151-3, PageID# 1291 ("[I]f the person turned in a voter registration application marking 'Yes' to the felony conviction, and then also turned in a Certificate of Restoration at the same time, . . . they would not have been rejected.").)

Plus, the NAACP has not established that Tennessee has a policy of denying applications from eligible voters with grace period and pre-1973 convictions. And the evidence cited by the NAACP about the documentation requirement for those applicants is irrelevant because no such requirement exists. (*See* Goins Decl., R. 151-1, PageID# 1093; Older Felonies Memo, R. 151-2, PageID# 1095-96.) The NAACP seeks forward-looking equitable relief, but "the Court cannot enjoin what no longer exists." *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 393 (2d Cir. 2022). There is no evidence that eligible individuals are being denied their right to vote under the current system.

As for the remaining applicants with felonies, Tennessee's practice complies with federal law. The NVRA requires states to "ensure that any eligible applicant is registered to vote" in federal elections so long as they timely submit a "valid voter registration form." 52 U.S.C. § 20507(a)(1). "Eligible" means "fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status." Eligible, BLACK'S LAW DICTIONARY (11th ed. 2019). By describing the applicant as "eligible," the text of the NVRA clearly allows election officials to determine if applicants are qualified to vote before registering the applicant. The State seeks

documentation only when an individual was convicted of an infamous felony or when an individual has asserted that their voting rights were restored. This ensures that only eligible applicants are registered to vote. An individual asserting that he has been convicted of an infamous felony indicates *ineligibility*, absent restoration.

One needs to look no further than *Falls*, 2023 WL 4243961, at *1, 8, to see that not all applicants are correct when they assert that their voting rights have been restored. Because the NVRA's "ensure" language applies only to *eligible* applicants, Tennessee does not run afoul of the NVRA by requesting additional documentation from applicants that have indicated ineligibility to determine whether the applicant is ineligible. This protects the integrity of Tennessee elections while complying with the NVRA's mandate to ensure that *eligible* applicants are registered to vote.

B. Tennessee does not violate the NVRA by requiring applicants using the state registration form to submit proof of eligibility.

The documentation requirement is consistent with the NVRA's plain text and authoritative interpretations of the NVRA's provisions from the Supreme Court and the Sixth Circuit. The NAACP's argument to the contrary relies on out-of-circuit precedent analyzing statutory provisions that are irrelevant to this case.

To begin, the NVRA "authorizes States, '[i]n addition to accept[ing] and us[ing] the' Federal Form, to create their own, state-specific voter registration forms." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 12 (2013) (quoting 52 U.S.C. § 20505(a)(2)). "States retain the flexibility to design and use their own registration forms" that create "procedural hurdles" not included on the Federal Form—indeed, the Supreme Court has expressly stated that state registration forms "may require information the Federal Form does not." *Id.* Put differently, the NVRA "still leaves room for policy choice" by States about how to design and administer state

voter-registration forms, including the choice about what information that form may require applicants to submit. *See Young v. Fordice*, 520 U.S. 273, 286 (1997) (explaining that the NVRA does not list "all the other information the State may—or may not—provide or request").

Acting within the confines of that discretion, Tennessee determined that it needs documentation from applicants whose voting rights have been restored so that the State may "assess the eligibility of the applicant" and "administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). That documentation provides proof of voter eligibility and empowers the State to approve the registration application. Tennessee's documentation requirement is consistent with the Supreme Court's instruction that States "may require information the Federal Form does not." *Inter Tribal*, 570 U.S. at 12. And it is supported by Sixth Circuit precedent upholding a requirement that voter registration applicants provide their social security number. *See McKay v. Thompson*, 226 F.3d 752, 755–56 (6th Cir. 2000) (holding that requiring applicants to provide their social security number did not violate the NVRA's provision that states "only 'require the minimum amount of information necessary'" to determine voter eligibility). That requirement was challenged on the basis that social security information was not "necessary" to assess eligibility, but the court dismissed the challenge because "[t]he NVRA does not specifically forbid use of social security numbers." *Id.* Here, too, nothing in the NVRA forbids States from requiring evidence to prove that applicants satisfy the eligibility requirements.

The NAACP's reliance on *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016), is misplaced and misleading. The NVRA "requires each State to permit prospective voters to 'register to vote in elections for Federal office' by any of three methods: [1] simultaneously with a driver's license application, [2] in person, [3] or by mail." *Inter Tribal*, 570 U.S. at 5. The NAACP cites *Fish* for the proposition that the NVRA limits Tennessee to requesting "the minimum amount of

information necessary" to determine voter eligibility for its mail-in form. (Pl.'s Mem. in Support, R. 154, PageID# 2300.) But *Fish* interpreted § 20504(c)(2), which provides that "[t]he voter registration application portion of an application for a *State motor vehicle driver's license* . . . may require only the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." (emphasis added). That provision is not at issue here because the NAACP has not challenged the registration form that applicants use when they are simultaneously applying for a driver's license. And when *Fish* discussed the provision that *does* apply to this litigation, § 20508(b)(1), the court explicitly stated that it imposes *less* strict limitations upon the discretion of states to administer voter registration forms. 840 F.3d at 733–34; *see* 52 U.S.C. § 20505(a)(2) (state forms must comply with "the criteria stated in section 20508(b)"). The reasoning in *Fish*, consistent with *Inter Tribal*, thus supports the State's position by establishing that Tennessee has more leeway when determining what applicants must provide when seeking voter registration via the state form.

The NAACP argues that demanding anything more than "an attested . . . state registration form exceeds the amount of information Tennessee may require for registration in federal elections." (Pl.'s Mem. in Support, R. 154, PageID# 2300.) That is wrong for at least three reasons.

First, the Court has explained time and again that States may require state-form applicants to submit information beyond that required by the Federal Form. *See Inter Tribal*, 570 U.S. at 12; *Young*, 520 U.S. at 286. The NAACP cannot reconcile its position with that guidance.

Second, the state registration form would "ceas[e] to perform any meaningful function" if States are forbidden from requiring anything beyond an attestation. *Inter Tribal*, 570 U.S. at 13.

In *Inter Tribal*, Arizona argued that the accept-and-use requirement for the Federal Form gave the State authority to request proof of citizenship. The Court rejected that argument, reasoning that "Arizona's reading would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form," an outcome which would render the Federal Form entirely duplicative and thus meaningless. *Id.* The NAACP's argument creates the inverse problem—it would render *state forms* meaningless because they could not seek any information beyond that required by the Federal Form.

Third, even if *Fish* applies here, the additional information sought is necessary to determine the eligibility of the applicant. The NAACP argues that an attestation from a felon whose rights have been restored is the only information necessary to determine eligibility. (Pl.'s Mem. in Support, R. 154, at PageID# 2300, 2302.) This defies commonly accepted principles about the testimony of felons. *See Martin v. Page*, 417 F.2d 309, 310 (10th Cir. 1969) (stating "the self-serving testimony of a felon is certainly suspect and should be viewed by the fact-finder with caution[.]"). Even the Federal Rules of Evidence allow for impeachment by evidence of a felony conviction. Fed. R. Evid. 609. Moreover, a well-intentioned felon may be incorrect about their restoration or eligibility. *See Falls*, 2023 WL 4243961, at *1. These considerations justify a request for the necessary documentation to confirm eligibility.

C. Tennessee's voter-registration policies are uniform and nondiscriminatory.

The NAACP failed to put forth evidence showing that Tennessee's voter-registration policies violate the NVRA's uniformity and non-discrimination requirements. They also do not support their argument with citation to any case where another court has found any voter-registration policy to be non-uniform or discriminatory under the NVRA. (*See* Pl.'s Mem. in Support, R. 154, at PageID# 2305-06.) Nor is it clear what legal theory of discrimination that they

pursue. (*Id.*) The court should deny the NAACP's motion for partial summary judgment on this basis.

Tennessee's voter-registration policies for individuals with felony convictions comply with the NVRA because the policies do not single out any class of applicants based on an irrelevant characteristic. Nor does Tennessee impose a blanket rejection policy. The NAACP argues that the voter-registration form "targets eligible voters with past convictions by requiring them to check a box that is not targeted to identify specific eligibility criteria." (*See* Pl.'s Mem. in Support, R. 154, at PageID# 2305-06.) Yet, they cannot identify a single affected eligible voter. (*See* Morris Dep., R. 151-4, at PageID# 1331-67; NAACP First Interrog. Resp., R. 151-14, PageID# at 1857-78; Attachs. to NAACP Third Interrog. Resp., R. 151-15, PageID# 1879-86; NAACP Third Interrog. Resp., R. 151-16, at PageID# 1887- 1901.)

A felony conviction is a strong indicator that an individual is ineligible to vote. Indeed, the NVRA expressly provides for removing individuals with criminal convictions from the list of eligible voters. 52 U.S.C. § 20507(a)(3)(B). The felony question on the voter registration form precisely targets relevant information for determining eligibility.

Documentation of eligibility in the form of a judgment that shows a felon was not rendered infamous or documentation of voting-rights restoration is necessary to ensure that only eligible voters are added to the voter rolls. Any minimal burden of providing documentation of eligibility is justified by the State's legitimate and important interest in preventing voter fraud, which the Supreme Court has recognized. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford v. Marion County Election*

Bd., 553 U.S. 181, 196 (2008). When an individual indicates that he has a felony conviction on the voter-registration application, it is important that the State ensure that he is an eligible voter. A minimal burden on individuals who have felony convictions is more than justified.

For its brief argument about racial and age discrimination, the NAACP does not argue that these policies were created with discriminatory intent, nor have they come forward with evidence of a discriminatory motive. (*See* Pl.'s Mem. in Support, R. 154, at PageID# 2305-06.) Rather, it argues in conclusory fashion that the class of eligible voters subject to these policies are disproportionately black and elderly. (*Id.*) This allegation alone does not demonstrate that the NAACP is entitled to judgment as a matter of law.

CONCLUSION

For the reasons stated above, the NAACP's motion for partial summary judgment should be denied on both Counts Four and Six of the Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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

TENNESSEE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	**No. 3:20-cv-01039**
v.	)	**Judge Campbell**
	)	**Magistrate Judge Frensley**
WILLIAM LEE, et al.	)	
Defendants.	)	

SUPPLEMENTAL DECLARATION MARK GOINS

I, Mark Goins, hereby declare as follows:

1. I am the duly appointed Coordinator of Elections for the State of Tennessee. I was first appointed to this position by the Tennessee Secretary of State Tre Hargett in 2009. I am over the age of eighteen years, and I am competent to testify on the matters set forth herein.

2. As the Coordinator of Elections, I serve as the chief administrative election officer of the State and my statutory duties are set forth in Tenn. Code Ann. § 2-11-202. Among other things, I am statutorily charged with the following duties:

   - Prepare instructions for the conduct of registration;
   - Advise election commissions, primary boards, and administrators of elections as to the proper methods of performing their duties; and
   - Authoritatively interpret the election laws for all persons administrating them.

3. On July 21, 2023, I issued two memoranda to county election officials. These memoranda established new policies and procedures for these officials with respect to the registration of individuals with felony convictions. The first memorandum outlined the process for the restoration of voting rights for individuals convicted of a felony—whether in an in-state court, out-of-state court, or federal court—including the use of a revised Certificate of

Restoration form. (Policy Change Mem., R. 151-5, PageID# 1393-94.) This memorandum was issued in response to the Tennessee Supreme Court's decision in *Falls v. Goins*, --S.W.3d----, 2023 WL 4243961 (Tenn. June 29, 2023).

4. The second memorandum outlined the process for the restoration of voting rights for individuals convicted of a felony 40 or more years ago. Specifically, the memorandum outlined the process for persons convicted of a felony prior to January 15, 1973, and a separate process for individuals convicted of a felony between January 15, 1973, and May 17, 1981. (Older Felonies Mem., R. 151-2, PageID# 1095-96.) This memorandum was issued in response to ongoing discussions and deliberation with my staff and with legal counsel. Both memoranda were issued pursuant to my statutory duties outlined above and were approved by Secretary Hargett.

5. Plaintiffs have alleged in their motion for summary judgment that I issued a letter in November 2019 establishing a "position" and that I changed that position four months later. (Pl.'s Mem. of Law, R. 154, PageID# 2308.) Plaintiffs fail to mention that the change was the result of a Tennessee Attorney General's opinion. I sought legal guidance from the Attorney General as to whether individuals with out-of-state felony convictions were required to comply with the requirements of Tenn. Code Ann. § 40-29-202 to get their voting rights restored. On March 26, 2020, the Attorney General issued an opinion advising that such individuals were required to comply with the provisions of Tenn. Code Ann. § 40-29-202. Tenn. Att'y Gen. Op. 20-06 (Mar. 26, 2020). Pursuant to this legal opinion, we resumed requiring individuals with out-of-state convictions to comply with the requirements of Tenn. Code Ann. § 40-29-202 in obtaining restoration of their voting rights.

6. It should be noted that approximately four months later (July 21, 2020), the Campaign Legal Center filed suit in state court on behalf of an individual with an out-of-state felony conviction alleging that this interpretation of the law was erroneous and unconstitutional. However, on June 29, 2023, the Tennessee Supreme Court issued its opinion declaring that individuals with out-of-state felony convictions were also required to comply with the requirements of Tenn. Code Ann. § 40-29-202, thus affirming the Attorney General opinion. *See Falls v. Goins*, 2023 WL 4243961, at *7-*8.

7. Plaintiffs have also alleged that Secretary Hargett and I have engaged in, and then backed out of, negotiations with it for several years, but only now, on the precipice of dispositive motions, adopted the new policies and procedures set forth in my July 21, 2023 memoranda. This is incorrect for several reasons. Plaintiffs are correct that their counsel, the Campaign Legal Center ("CLC"), contacted Secretary Hargett and me in late 2018 with their concerns regarding the voter-registration form and individuals with pre-January 15, 1973, felony convictions and individuals with felony convictions between January 15, 1973, and May 17, 1981. My staff and I, along with legal counsel, began discussions with the CLC, but those discussions were placed on hold during the legislative session because

of legislation that had been introduced that would have substantially changed the felon-voting-rights-restoration process. When that legislation was unsuccessful, we then resumed discussions with the CLC, but again, the discussions had to be put on hold while I was out on paternity leave during the summer and early fall. Once I returned from paternity leave, discussions were resumed, and we agreed to make changes to the voter-registration application form—changes that were reviewed and approved by the CLC. *See* December 20, 2019, email from Blair Bowie, attached and incorporated herein by this reference. We also agreed to request that the Election Assistance Commission make changes to the Tennessee instructions on eligibility to register to vote with respect to the federal voter-registration form. These changes were also reviewed and approved by the CLC. *Id.* The Election Assistance Commission agreed to make the changes to the Tennessee instructions and those changes were made and have been in effect since early 2020. Additionally, the revised voter-registration application was made available in 2020.

8. Thereafter, much of our discussions with the CLC focused on changes that the CLC wanted us to make to our online voter registration system, the increased costs with changing the online system as well as other concerns associated with changing the online system, and the procedures for processing voter registration applications from individuals with out-of-state convictions. On Election Day, March 1, 2020, a massive tornado hit multiple counties in middle Tennessee. This tornado not only impacted voters, but several election officials were impacted as well, including myself. Later in the month of March, these discussions and negotiations stopped when both the President and Governor Lee declared states of emergency due to the Covid-19 pandemic in March 2020. Initially, we did not resume discussions with the CLC because my small number of staff members had to focus our time and energies on conducting state and federal elections, including the Presidential election, during a world-wide pandemic. During this time, we developed and implemented an 82-page *Tennessee Election Covid-19 Contingency Plan.*

9. Beginning in May 2020, we also had to deal with several lawsuits filed against us in a state and federal court, including a lawsuit in federal court brought by the CLC on behalf of Plaintiff NAACP and several other organizations, challenging the constitutionality of several Tennessee's voter-integrity laws. As a result, we had to focus our energies on responding to these lawsuits and conducting the elections and we simply did not have the time or the resources to resume discussions with the CLC. Then, while we were still dealing with these lawsuits and certifying the results of the November 2020 election, Plaintiffs filed this lawsuit in federal court. At that point, we did not pursue any further discussions with the CLC.

10. However, while our discussions with the CLC may have ceased, internal discussions with Secretary Hargett, staff and legal counsel continued and as noted above, these discussions in conjunction with the Tennessee Supreme Court's decision in *Falls* ultimately resulted in the new policies and procedures that were formalized in my July 21, 2023 memoranda.

Furthermore, absent a change in the applicable law or a court order, I have no intention of changing course.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury the foregoing to be true and correct.

Mark Goins

Executed on: 19 Sept 23