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.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Tennessee informs voters of the eligibility requirements for voter registration as required by the National Voter Registration Act of 1993 ("NVRA"). Additionally, Tennessee protects its elections by verifying that individuals with infamous felony convictions are eligible to vote. This protection neither runs afoul of the NVRA nor violates the right to vote. This Court should grant summary judgment for Defendants on Counts Four, Five, and Six.

ARGUMENT

I. The NAACP Lacks Standing for Counts Four, Five, and Six.

The NAACP argues that it has standing "because the organization itself suffers cognizable injuries" due to Tennessee's voter-registration forms and policies. (Pl.'s Resp., R. 182, PageID# 2946.) In doing so, the NAACP confuses the difference between standing and mootness, ignores the fundamental defect with its assertions of standing, and provides a conclusory declaration that lacks foundation to establish it is based on personal knowledge. For these reasons, the NAACP lacks standing for Counts Four, Five, and Six.

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First, the NAACP incorrectly argues that it need not show standing to challenge the updated policies because standing existed when this lawsuit began. (*Id.* at PageID# 2948–49.) To the contrary, "A foundational principle of Article III is that 'an actual controversy must exist not only at the time the complaint is filed, but through *all* stages of the litigation.'" *Trump v. New York*, 141 S. Ct. 530, 534 (2020) (per curiam) (emphasis added). The NAACP thus "bears the burden of establishing standing as of the time [it] brought this lawsuit and maintaining it thereafter." *Carney v. Adams*, 141 S. Ct. 493, 499 (2020). The NAACP seeks forward-looking injunctive relief against the policies currently in place, so they must show they have standing to challenge those policies. That the updated policies were implemented *after* the complaint was filed does not give Plaintiffs a get-out-of-standing-free card. *See*, *e.g.*, *New York*, 141 S. Ct. at 534–36 (dismissing

an action for lack of standing based on post-filing events).[1] And because the NAACP offers no evidence that the new policies cause erroneous denials, "the possibility of future harm" is "conjectural at best," and there is no standing. *Hyman v. City of Louisville*, 53 F. App'x 740, 744 (6th Cir. 2002).

The NAACP's argument that Defendants conflate standing and mootness shows that it misunderstands the disputed issues. At this point, Plaintiffs challenge the now-obsolete policies *and* the current policies implemented in July 2023. (*See* Pl.'s Mem. in Support, R. 154 at PageID# 2306–07.) The parties dispute whether the challenges to the old policies are moot because the NAACP only seeks forward-looking relief. The challenge to the current policies presents a different question. Obviously, disputes about the current policies are not moot because they are being (and will continue to be) enforced. So, the proper question is whether the NAACP has proven that it has standing to challenge the current policies—not whether the legal challenge to those policies is moot.

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Second, the NAACP's response ignores the fundamental jurisdictional flaw. Even assuming the NAACP diverts resources to remedy erroneous denials, the NAACP has not shown that the updated policies will cause those resource-diverting erroneous denials in the future, which they must establish to prove standing. (*See* Def.'s Mem. in Support, R. 151, PageID# 1063–68.) The NAACP's "wealth of evidence" about now-obsolete policies does not create standing to

[1] To be sure, the Sixth Circuit has held that "standing does not have to be maintained throughout all stages of litigation" and is instead "determined as of the time the complaint is filed." *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 524 (6th Cir. 2001); *see also Sumpter v. Wayne County*, 868 F.3d 473, 490 (6th Cir. 2017). But those cases have been abrogated by intervening Supreme Court precedent—namely, *Trump v. New York*, 141 S. Ct. 530, 534 (2020) (per curiam), and *Carney v. Adams*, 141 S. Ct. 493, 499 (2020). *See Baynes v. Cleland*, 799 F.3d 600, 616–17 (6th Cir. 2015) (explaining that the Sixth Circuit is not bound by earlier cases that have been abrogated by intervening Supreme Court precedent).

challenge the *current* policies because "standing is not dispensed in gross," and it must be shown with respect to each of the claims being brought. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

Third, the *only* evidence the NAACP offers to show standing for any of its claims—a declaration submitted after the close of discovery from the president of the Tennessee Chapter of the NAACP—is woefully deficient. Although Federal Rule of Civil Procedure 56(c)(4) provides that a declaration "used to . . . oppose a motion must be made on personal knowledge," the declarant here never explains how she has personal knowledge of the information she provides. For example, Ms. Sweet-Love asserts that "the TN NAACP has accompanied persons and taxied them to and from governmental offices to troubleshoot the issue and correct an erroneous rejection." (Sweet-Love Decl., R. 156-2, PageID# 2356.) But she fails to lay out how she has personal knowledge of any such alleged events, whether she personally taxied people to governmental offices, if not, who told her about these rides, and how she formed the foundation that the applications were erroneously rejected. Her declaration lacks foundation showing personal knowledge and appears to rely on the hearsay of one or more unidentified declarants. *See Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009) (requiring the non-moving party to offer evidence that *will be* admissible at trial to avoid summary judgment). Moreover, the generalized and "conclusory" statements that the declarant offers are insufficient "to forestall[] summary judgment." *State Farm Fire & Cas. Co.*, 428 F. App'x 549, 550 (6th Cir. 2011).

II. Defendants Are Entitled to Summary Judgment on Counts Four, Five, and Six.

A. Tennessee's voter-registration forms comply with federal law.

The NAACP's interpretation of sections 20507(a)(5) and 20508(b)(2)(A) of the NVRA loses sight of the purpose of the NVRA and sidesteps other courts' interpretation of the NVRA's

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requirements. The NVRA is a "notice statute enacted for the convenience of voting registrants." *Thompson v. Alabama*, 65 F.4th 1288, 1309 (11th Cir. 2023). Accordingly, Tennessee notifies applicants of the eligibility requirement—the absence of a disqualifying felony—and satisfies the NVRA's requirements. (*See* Def.'s Mem. in Support, R. 151, PageID 1080–82.)

The NAACP argues that Tennessee's forms and policies do not comply with the NVRA's provision requiring that the notice "specif[y] each eligibility requirement." (Pl.'s Response, R. 182, PageID# 2950–52 (citing 52 U.S.C. § 20508(b)(2)(A).) But the position taken by the NAACP is precisely the argument addressed and rejected by the Eleventh Circuit in *Thompson v. Alabama*. Like the NAACP here, the appellants there argued for an expansive definition of the term "specify" within the NVRA yet claimed that something less than a full recitation of all disqualifying felonies from every jurisdiction would comply. *Thompson*, 65 F.4th at 1308–09. To accept the NAACP's interpretation of the NVRA would require Tennessee to list every state, federal, and foreign felony conviction that disqualifies a person from voting under Tennessee law. *See id.* at 1309. The Eleventh Circuit called this "an absurd, unworkable, and internally inconsistent interpretation" of the NVRA. *Id.*

The Supreme Court's decision in *Kucana v. Holder*, 558 U.S. 233 (2010), does not hold otherwise. There, the Court merely stated that "'specified' is not synonymous with 'implied' or 'anticipated'." *Id.* at 243 n.10. That hardly proves the proposition that the NAACP advances—that "[w]hen Congress uses the word 'specify,' it means 'to name or state explicitly or in detail.'" (Pl.'s Resp., R. 182, PageID# 2951.) But even if the NAACP were correct about that, the challenged form *does* "state explicitly" the disqualifying-felony requirement. (*See* Def.'s Mem. in Support, R. 151, PageID# 1080–81.)

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B. Tennessee's voter-registration policies comply with federal law.

1. Tennessee ensures that eligible applicants are registered to vote.

Tennessee's policies "ensure" that "eligible applicant[s] [are] registered to vote." 52 U.S.C. § 20507(a)(1). The NAACP argued for the first time in its own motion for summary judgment that Tennessee's policy of rejecting "every voter registration application where the felony question is answered in the affirmative *absent additional documentation*" impermissibly prevents eligible applicants from registering to vote. (Pl.'s Mem. in Support, R. 154, PageID# 2295 (emphasis added).) They reassert this belated argument in response to Defendants' motion for summary judgment. This argument fails for three reasons.

First, Tennessee's recent policy changes moot the NAACP's claims for individuals with non-disqualifying felony convictions. Individuals with those convictions need not submit documentation of eligibility after the Division of Elections July 2023 policy changes. Plaintiffs did not rebut the presumption that Defendants will not reinstate the previous policy, *see Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019),[2] as explained in Defendants' Response to the NAACP's motion for summary judgment. (Def.'s Response, R. 180, PageID# 2870–71.) Now, the only live controversy from Count Six is the policy of requiring additional documentation from state-form applicants in two hypothetical scenarios—(1) when an applicant indicates that his rights have been restored and (2) when an applicant was convicted of an infamous crime before January 15, 1973, but was not adjudged infamous by the convicting court.

Second, the NAACP quotes § 20508(b)(1)'s requirement that States "ensure that any eligible applicant is registered to vote[.]" (Pl.'s Resp., R. 182, PageID# 2954.) But they gloss over the word "eligible." Tennessee *does* ensure that eligible applicants are registered to vote by

[2] Defendants do not concede that the policies in place prior to July 21, 2023, were illegal.

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verifying the applicant's eligibility with additional documentation in the two scenarios explained above. The plain text of the NVRA clearly allows election officials to determine if applicants are eligible to vote before registering the applicant. (Def.'s Resp., R. 180, PageID# 2881.) An individual who asserts on the voter-registration form that he has been convicted of an infamous felony indicates *ineligibility*, absent restoration. If an applicant indicates ineligibility, Tennessee does not run afoul of the NVRA by requesting additional documentation to verify eligibility.

Third, the NAACP improperly attempts to present claims about the Federal Form for the first time at the summary-judgment stage. Raising a new claim at the summary-judgment stage is prohibited. *See Howard v. Tennessee*, 740 F. App'x. 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."). In the Amended Complaint, the NAACP presented its claim in Count Six 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.) But the NAACP admits in its 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." (Pl.'s Mem. in Support, R. 154 at PageID# 2300.) Thus, it is impossible for a Federal Form to meet the NAACP's description of the forms at issue. In any event, the NAACP lacks standing to challenge Tennessee's policies about the federal form because it almost exclusively uses the State form—an issue that the NAACP ignored in its opposition. (Def.'s Resp., R. 180, PageID# 2867–68.)

2. Tennessee's requirement of additional documents complies with the NVRA.

Tennessee's requirement for additional documentation is consistent with the NVRA's limitation on the information that States may require for voter registration. *See* 52 U.S.C. § 20508(b)(1). Nothing in the NVRA forbids Tennessee from requiring additional documents to

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verify a state-form applicants' eligibility, as discussed in Defendants' Response to the NAACP's motion for summary judgment, (Def.'s Response, R. 180, PageID# 2882–85). The Supreme Court has recognized that the NVRA leaves room for States to make policy decisions about state registration forms. *See Young v. Fordice*, 520 U.S. 273, 286 (1997). A state's policy decisions may create more procedural hurdles not included on the Federal Form, and the Supreme Court has expressly stated that state registration forms "may require information that the Federal Form does not." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 12 (2013).

The NAACP's reliance on the Tenth Circuit's ruling in *Fish v. Kobach*, 840 F.3d 710, 737 (10th Cir. 2016) is misplaced. The NAACP cites *Fish* to argue that the NVRA limits States to requesting "the minimum amount of information necessary" to determine eligibility. (Pl.'s Resp., R. 182, PageID# 2957.) But *Fish* relied on an entirely different provision in the NVRA than the one at issue here. The provision in *Fish* applies to voter registration applications submitted along with an application for a motor vehicle driver's license, and that provision *explicitly* limits States to requesting "the minimum amount of information necessary" to determine eligibility. 52 U.S.C. § 20504(c)(2)(B). The relevant statutory provision here notably *omits* the requirement that States include the "minimum" amount of information necessary. 52 U.S.C. § 20508(b). That suggests States may require *more* than the bare minimum required to assess eligibility, which is exactly what the *Fish* court concluded. *See* 840 F.3d at 733–34.

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Reading the *Fish* analysis in conjunction with the Supreme Court's holding that state registration forms can require information outside of the Federal Form, *Inter Tribal Council of Ariz.*, 570 U.S. at 12, States are clearly afforded the latitude to request additional documentation to verify a state form applicant's eligibility. (Def.'s Resp., R. 180, PageID# 2882–85.) Defendants have shown, as a matter of law, that the NAACP cannot demonstrate a violation of the NVRA.

C. Tennessee does not deprive eligible voters of their right to vote.

Tennessee's practice for individuals who never lost their right to vote—facially eligible voters—is to process their voter-registration applications. ((Memo on Older Felonies, R. 151-2, PageID# 1095–96.) Tennessee's practice for individuals who have previously lost their right to vote but had their rights restored is to require a copy of the individual's restoration documentation, while also searching the local election office's files for records of restoration. (Griffy & Hall Dep., R. 156-5, PageID# 2453–54.) These practices do not violate the right to vote, and Defendants are entitled to judgment as a matter of law on Count 5 of the Amended Complaint.

The United States Supreme Court has established and maintained a deferential analysis of electoral logistics. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 45 U.S. 724, 730 (1974). Subjecting every voting regulation to strict scrutiny and requiring that the regulation be narrowly tailored to advance a compelling state interest "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

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The Supreme Court has adhered to a sliding-scale approach where the degree of scrutiny stems from the "character and magnitude" of the burden on voting rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick*, 504 U.S. at 433; *see also McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004). On the sliding scale, actions that impose minimal burdens on the right to vote are subject to rational-basis scrutiny, and actions that impose a severe burden on the right to vote will be subject to strict scrutiny. *Disability Law Ctr. of Alaska v. Meyer*, 484 F. Supp. 3d 693, 703 (D. Alaska Sept. 3, 2020) (citing *Anderson*, 460 U.S. at 789; *Burdick*, 504 U.S. at 434).

Tennessee's current practice places no burden on individuals with a felony conviction who retained their right to vote. Individuals with grace period convictions will have their voter-registration application processed like every other Tennessean. (Ex. 2., Memo on Older Felonies, at 1.) Individuals with non-infamous felony convictions before January 17, 1973, will have their voter-registration application processed like everyone else. (*Id.*) This practice simply requires individuals to know the date of their conviction and their crime of conviction. Even if requiring an individual to know their date and crime of conviction is considered a burden, it is minimal.

The bulk of the NAACP's argument is premised on a hypothetical. The NAACP imagines a scenario where an individual convicted of an infamous crime before January 15, 1973, was not adjudged infamous by the convicting court, and thereby, the individual never lost the right to vote. This is the only scenario where an individual would be tracking down decades-old court records, as the NAACP claims. (Pl.'s Response, R. 182, PageID# 2959.) But the NAACP has not identified any such individual and thus complains of a non-existent burden.

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Additionally, Tennessee's current practice places only a minimal burden on individuals who have had their rights restored. Such individuals need only check the box indicating that their rights were restored and to provide a copy of the restoration documents. (Griffy & Hall Dep., R. 156-5, PageID# 2453–54.) Once the individual does those two things, the voter-registration application will be processed without further input from the individual. This is a minimal burden.

These minimal burdens are 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." *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, indeed, an eligible voter.

The State also has an interest in safeguarding voter confidence. "While [protecting public confidence] is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197. Verification that an individual convicted of a felony is eligible before allowing them to register to vote is indispensable for safeguarding voter confidence. While this may place a minimal burden on individuals with felony convictions, it encourages Tennesseans to participate in the democratic process and justifies that burden.

On the sliding scale, the minimal burden to individuals with felony convictions is fully justified by the legitimate and important State interests in preventing voter fraud and safeguarding voter confidence. Therefore, the right to vote has not been violated, and Defendants are entitled to judgment as a matter of law.

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CONCLUSION

For the reasons stated, summary judgment should be granted in favor of Defendants on Counts Four, Five, and Six.

Respectfully submitted,

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Sincerely,

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CERTIFICATE OF SERVICE

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