

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

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

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**DEFENDANTS’ OBJECTIONS TO PLAINTIFF’S PROPOSED ORDER  
ON COUNT SIX**

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The Court ordered Defendants Tre Hargett and Mark Goins along with Plaintiff Tennessee Conference of the National Association for the Advancement of Colored People (“TN NAACP”), to each file a proposed injunction as to Count Six of the First Amended Complaint (Order, D.E. 225), on which count the Court granted summary judgment on April 18, 2024, to Plaintiff TN NAACP, (Mem. Opinion and Order, D.E. 221, 222). Noting that there is little-to-no common ground between the two proposals, the Court ordered the parties to file any and all objections to the other party’s proposed injunction. (Order on proposed injunctions, D.E. 229, PageID# 3722.) Because TN NAACP’s proposed order seeks to rewrite Tennessee election law and because it goes well beyond the bounds of the Court’s memorandum opinion, the Court should not enter Plaintiff’s proposed injunction order.

## GENERAL OBJECTIONS

Federal courts have limited power to remedy constitutional wrongs committed by States. When remedying such wrongs, federal courts must refrain “from ‘rewrit[ing] state law to conform it to constitutional requirements.’” *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quotation omitted). Institutional competence and principles of federalism caution federal courts against using injunctions to force new procedures on states. *See Horne v. Flores*, 557 U.S. 433, 448 (2009); *Ayotte*, 546 U.S. at 329. So although “federal courts can enter positive injunctions that require parties to comply with existing law,” “they cannot usurp[ ] a State’s legislative authority by re-writing its statutes to create new law.” *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam) (“*Thompson I*”) (cleaned up); *see Thompson v. DeWine*, 976 F.3d 610, 620 (6th Cir. 2020) (“*Thompson II*”) (“If we find a state ballot-access requirement unconstitutional, we can enjoin its enforcement,” “[b]ut otherwise, ‘state and local authorities have primary responsibility for curing constitutional violations’” (quotation omitted)); *cf. Wilson v. NLRB*, 920 F.2d 1282, 1289 (6th Cir. 1990) (“courts cannot . . . redraft statutory language”).

Those principles hold true especially in the context of voting-rights disputes. “[T]he federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections.” *Thompson I*, 959 F.3d at 812. As such, “federal courts have no authority to dictate to the States precisely how they should conduct their elections.” *Esshaki v. Whitmer*, 813 F. App’x 170, 172 (6th Cir. 2020) (order). Injunctions requiring States to implement new procedures to remedy constitutional deficiencies in their electoral framework are thus improper. *See, e.g., Thompson II*, 976 F.3d at 620.

In response to this Court’s finding that Tennessee’s policy of requesting additional documentation violates the NVRA, TN NAACP does not simply ask the Court to prohibit

Tennessee from requiring additional documentation. Instead, TN NAACP also asks the court to compel Defendants to rewrite Tennessee’s mail-in voter registration form, rewrite Tennessee’s voter registration appeal request form, prohibit the state from removing ineligible felons from the voter rolls, and change Tennessee’s online voter registration portal. (TN NAACP’s Proposed Order, D.E. 226-1, PageID# 3710-11.) Additionally, Plaintiffs ask the Court to order Defendants to issue two types of written guidance, hold at least one live training on two different topics, and record the live trainings and post them to a website. (*Id.* at PageID# 3711.)

TN NAACP’s proposed order is nothing short of an improper request for the Court to rewrite Tennessee voter registration procedures wholesale. If accepted those changes would require the Court to engage in “quintessentially legislative work” by re-writing Tennessee election law, *Ayotte*, 546 U.S. at 329, by unnecessarily limiting Defendant Goins’s statutory authority under Tenn. Code Ann. §§ 2-2-139(c) and 40-29-203, which empowers the Coordinator of Elections to formulate a uniform procedure for verifying the registration eligibility of any person convicted of an infamous crime. Because TN NAACP’s proposed injunction is impermissible, the Court should not adopt it.

## SPECIFIC OBJECTIONS

### 1. **Objection to Part 1 of TN NAACP’s Proposed Injunction**

Part 1 of TN NAACP’s proposed injunction purports to apply to both federal and state voter registration forms containing an indication that the applicant has a felony conviction. Defendants object to this proposal because it is factually inaccurate. The federal form does not provide the applicant with an option to indicate whether they have a felony conviction. *See* U.S. Election Assistance Commission, Federal Voter Registration Form, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Federal\\_Voter\\_Registration\\_ENG.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf)

(Last visited May 16, 2024). Defendants further object to the proposed injunction to the extent that it requires any change to the federal form or Tennessee’s instructions thereon, as the federal form does not indicate that additional documentation is required upon submission of the form. Nor can Defendants unilaterally make or guarantee any changes to the federal form because any change to that form requires approval by the United States Election Assistance Commission’s approval. *See id.*

Defendants further object to part 1, subsection (c) of TN NAACP’s proposed injunction because it goes beyond the Court’s rulings regarding the practice of requesting additional documentation. Instead, TN NAACP’s proposed injunction improperly rewrites Tennessee’s procedure for verifying eligibility, a procedure that may only be formulated by the Coordinator of Elections, *see* Tenn. Code Ann. §§ 2-2-139(c) and 40-29-203.

Defendants additionally object to part 1, subsection (c) of TN NAACP’s proposed injunction because it conflicts with state law requiring applicants with a prior felony conviction to demonstrate (1) restoration of their full rights of citizenship and (2) compliance with the requirements of Tenn. Code Ann. §§ 40-29-201 through -205, as established in the Tennessee Supreme Court’s decision in *Falls v. Goins*, 673 S.W.3d 173, 183 (Tenn. 2023). Before Tennessee election officials can declare that an applicant with a felony conviction is eligible to vote, the officials must possess all of the documentation necessary to demonstrate compliance with the two-step process outlined above—and that documentation is necessarily in the hands of the applicant and not Tennessee election officials. While state and county election officials receive some information about felony convictions in Tennessee, there is no comprehensive database containing *all* information needed to assess eligibility. Election officials receive no information regarding individuals with out-of-state or most federal court convictions, much less information about out-

of-state and federal pardons and/or restoration of citizenship right unless an applicant submits such information with their voter registration form.

Defendants further object to part 1, subsection (c) of TN NAACP's proposed injunction because it attempts to create a presumption of restoration due to a prior successful voter registration—a presumption that goes well beyond the Court's Memorandum and Order and does not relate to any requirement in federal or state law. The Court's memorandum opinion is completely silent on the effect of prior voter registrations or any presumption that should result therefrom. The inclusion of this provision in TN NAACP's proposed attempts to create a loophole around Tennessee's voting-rights-restoration requirements outlined in *Falls*. TN NAACP's proposed injunction order should only relate to Count 6 of the First Amended Complaint claiming that Tennessee's registration documents violated the NVRA, not documents regarding voting-rights restoration. At any rate, even if an applicant successfully registers to vote while indicating a felony conviction, Defendants may learn of a prior disqualifying felony conviction or subsequent disqualifying felony conviction that would demonstrate that an applicant's voting rights were not restored. Moreover, this proposal allows no room for human error on the part of an election official. Defendants cannot be prevented from denying a subsequent voter registration application simply because a previous application may have been approved—yet that is exactly what part 1, section (c) of TN NAACP's proposed injunction would decree. TN NAACP proposes this section even though it is in direct contradiction with Tenn. Code Ann. § 2-2-106, which allows for purging voter registrations. It would further mandate that Defendants act contrary to state law and recognize the restoration of an applicant's voting rights. *See Falls v. Goins*, 673 S.W.3d 173, 183 (Tenn. 2023) *discussed supra*.

Defendants also object to part 1, subsection (c) of TN NAACP’s proposed injunction creating a presumption of restoration because it is inconsistent with the NVRA. Noting that an estimated “24 million voter registrations in the United States—about one in eight—are either invalid or significantly invalid the Supreme Court has recognized that one of the two main objectives of the NVRA is to remove ineligible persons from the States’ voter registration rolls. *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 760 (2018) (citing 52 U.S.C. § 20501(b)). And the NVRA specifically allows registered voters to be removed from the voter rolls if the individual has a disqualifying criminal conviction. 52 U.S.C. § 20507(a)(3)(B). Yet TN NAACP’s proposed injunction in part 1, section (c) contradicts the Act’s objective and creates a scenario that hamstring election officials’ ability to maintain accurate voter registration rolls in compliance with the NVRA. TN NAACP’s proposal creates the untenable scenario whereby Tennessee election officials would be prohibited from purging an individual with a disqualifying felony conviction<sup>1</sup> who had been erroneously registered—because that erroneous registration is deemed to be the restoration of that individual’s voting rights.

## **2. Objection to Part 2 of TN NAACP’s Proposed Injunction**

Defendants object to part 2 of TN NAACP’s proposed injunction because it goes beyond the Court’s memorandum opinion, (Memorandum Opinion, D.E. 221, PageID# 3634-40), and beyond any requirement of the NVRA. Indeed, the Court’s analysis of Count 6 in its memorandum opinion never mentions the online voter registration portal. (*See id.*) Nor has this Court determined elsewhere that Tennessee’s online voter registration portal violates the NVRA. The plain text of the NVRA only sets forth content requirements specific to “mail” voter registration

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<sup>1</sup> A disqualifying felony conviction is any felony conviction where the individual was rendered infamous and the individual’s voting rights had not been restored according to the requirements of Tennessee law.

forms. 52 U.S.C. §§ 20505(a)(1); 20508(b)(1). Therefore, any provision of TN NAACP's proposed injunction order related to the online voter registration portal should not be entered.

Defendants further object to part 2, subsection (d) of TN NAACP's proposed injunction because it conflicts with state law requiring applicants with a prior felony conviction to demonstrate (1) restoration of their full rights of citizenship and (2) compliance with the requirements of Tenn. Code Ann. §§ 40-29-201 through -205, as established in *Falls*. Even individuals having their full rights of citizenship restored via pardon must comply with Tenn. Code Ann. §§ 40-29-201 through -205. *See Falls*, 673 S.W.3d at 183. TN NAACP's proposed injunction would essentially do away with this statutory requirement.

### **3. Objection to Part 3 of TN NAACP's Proposed Injunction**

Defendants object to part 3 of TN NAACP's proposed injunction because it goes beyond the Court's memorandum opinion, (Memorandum Opinion, D.E. 221, PageID# 3634-40). Indeed, the Court's analysis of Count 6 in its memorandum opinion never mentions the Voter Registration Appeal Request Form. (*See id.*) Nor has this Court determined elsewhere that Tennessee's Voter Registration Appeal Request Form violates the NVRA. Moreover, none of the provisions of the NVRA cited in the Court's analysis set forth requirements for a Voter Registration Appeal Request form. *See* 52 U.S.C. §§ 20505(a)(1), (a)(2); 20507(a)(1), (b)(1); 20508(b)(1).

Defendants further object to part 3 of TN NAACP's proposed injunction because the exception to sovereign immunity under *Ex parte Young*, 209 U.S. 123 (1908), does not apply. A suit against a state official in his official capacity, like the Defendants here, is considered to be a suit against the State. *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989); *Wells v. Brown*, 891 F.2d 591, 592-94 (6th Cir. 1989). "However, there is an exception to the State's sovereign immunity under *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908),

whereby ‘a suit challenging the constitutionality of a state official’s action is not one against the State.’ *Russell*, 784 F.3d at 1046-47. “In order to fall under the *Ex Parte Young* exception, a claim must seek prospective relief to end a continuing violation of federal law.” *Id.* at 1047. Even if the Court’s analysis were construed to apply to the Voter Registration Appeal Request Form, there is no continuing violation of federal law. Tennessee’s voter registration form already allows for an appeal on the bases listed in TN NAACP’s proposed order. (*See* Voter Registration Appeal Request Form, D.E. 157-8, PageID# 2733.) There are check boxes to appeal based on rights restoration, expungement, grace period convictions, and pre-1973 convictions. Also, individuals with a judicial diversion can check the box, “I have not been convicted of a felony,” as the basis for an appeal. Under Tennessee law, a judicial diversion is not a conviction. *See State v. Dycus*, 456 S.W.3d 918, 925-26 (Tenn. 2015). Therefore, Defendants are immune from the terms of TN NAACP’s injunction regarding the Voter Registration Appeal Request Form.

#### **4. Objection to Part 4 of TN NAACP’s Proposed Injunction**

Defendants object to part 4 of TN NAACP’s proposed injunction because it goes beyond the Court’s memorandum opinion, (Memorandum Opinion, D.E. 221, PageID# 3634-40). Again, as with the previous overreaches in TN NAACP’s proposed injunction, the Court’s analysis of Count 6 in its memorandum opinion never mentions guidance or training by Defendants. (*See id.*) Nor has this Court determined elsewhere that Defendant’s guidance or training violates the NVRA. Moreover, none of the provisions of the NVRA cited in the Court’s analysis set forth requirements for guidance and training to be offered by election officials. *See* 52 U.S.C. §§ 20505(a)(1), (a)(2); 20507(a)(1), (b)(1); 20508(b)(1).

Defendants object to part 4, subsection (a) that requires “credible information establishing that the applicant is ineligible to vote.” (TN NAACP’s Proposed Injunction, D.E. 226-1, PageID#



3711.) Plaintiff's proposal in part 4, subsection (a) appears to require documentation affirmatively showing ineligibility. This proposal is inconsistent with TN NAACP's proposal in part 1, subsection (c) that only requires confirmation in writing from Tennessee Election Officials that the state does not possess a restoration letter or other proof of restoration before denying a voter registration application, which is a lack of documentation showing eligibility.

Defendants further object to part 4, subsection (a) because it is factually inaccurate by asserting that a federal voter registration application could contain an indication that an applicant has a felony conviction. Again, there is no provision for indicating a felony conviction on the federal form. *See* U.S. Election Assistance Commission, Federal Voter Registration Form, [https://www.eac.gov/sites/default/files/eac\\_assets/1/6/Federal\\_Voter\\_Registration\\_ENG.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/6/Federal_Voter_Registration_ENG.pdf) (Last visited May 16, 2024).

Defendants object to part 4, subsection (c) because it would require Defendants to advise Tennessee election officials to continue processing versions of the voter registration form that Plaintiffs claim *are in violation of the NVRA*. If an injunction is entered ordering Defendants to cease the use of a voter registration form, it would be contradictory to continue advising Tennessee election officials to use that form.

Defendants object to part 4, subsections (b) and (d) because Defendants already offer trainings on changes to election law effecting Division of Elections staff and Tennessee election officials. Thus, an injunction to that effect would be improper, *see* Defendants' objection to part 3 *supra*.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the above document has been forwarded electronically. Notice of this filing will be sent by 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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