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, on behalf of itself and its members, et al., Plaintiffs, v. WILLIAM LEE, in his official capacity as Governor of the State of Tennessee, et al., Defendants.	Civil No. 3:20-cv-01039 JUDGE CAMPBELL MAGISTRATE JUDGE FRENSLEY [Class Action]

PLAINTIFF'S OBJECTIONS TO DEFENDANTS' PROPOSED ORDER ON COUNT SIX AND NOTICE OF FILING

On April 18, 2024, the Court granted summary judgment in favor of Plaintiff Tennessee Conference of the National Association for the Advancement of Colored People ("TN NAACP") on Count Six of its First Amended Complaint against Defendants Tre Hargett and Mark Goins in their respective official capacities as Secretary of State and Coordinator of Elections for the State of Tennessee (collectively "Tennessee Election Officials"). Doc. Nos. 221, 222. The Court further ordered the parties to "meet in person and confer about the language for the injunction that will be entered as to Count Six" and "[o]n or before May 3, 2024, . . . file an agreed proposed injunction as to Count Six or notify the Court that the parties could not agree on the injunction language." Doc. No. 222. On May 1, 2024, Plaintiff's counsel met with counsel for Tennessee Election Officials in person in Nashville and on May 3, 2024, the parties filed a joint status report stating that they could not agree on the language for the injunction and would file separate proposed orders. Doc. No. 224. The Court ordered the parties to each file a proposed injunction, Doc. No.

225. Accordingly, the parties filed their proposed orders on May 8, 2024, Docs. No. 226, 227. On May 10, 2024, finding that the "respective proposals have little-to-no common ground," the Court ordered the parties to file objections to each other's proposed injunctions. Doc. No. 229. Plaintiffs' objections are below.

In its May 10, 2024 Order, the Court also noted that Defendants' conduct at the parties' in-person meeting on May 1, 2024, as described by Plaintiffs, "could be viewed as a lack of good faith effort by the Tennessee Election Officials to comply the with Court's prior Order." Doc. No. 229. Plaintiffs have attached a declaration to provide the Court with their account of that meeting.

OBJECTIONS

I. Defendants' proposed order fails to clearly define the challenged policy, declare the policy in violation of the NVRA, and fully enjoin the policy's implementation.

Federal Rule of Civil Procedure 65(d)(1) provides that "every order granting an injunction . . . must: (A) state the reasons why it issued; (B) state its term specifically; and (C) describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required." Defendants' proposed order fails to meet this standard.

As the Court stated in its Memorandum Opinion, "[a]t issue in Count Six is Tennessee's policy of rejecting valid Federal Forms and State Forms submitted by eligible applicants with felony convictions and requiring these eligible applicants to provide additional documents as further proof of their eligibility." Doc. No. 221 at 45. It is undisputed that this challenged policy has two components: (i) rejection of valid registration forms because the applicant has a felony conviction (whether indicated on the State Form or otherwise in the case of the Federal Form), and (ii) a requirement that such applicants provide documentary proof of their eligibility before being added to the voter rolls. *Id.* at 13. The Court ruled that this policy, in its entirety, violates multiple sections of the NVRA because the fact of a felony conviction does not mean an applicant is

disqualified from voting in Tennessee. *Id.* at 51. However, Defendants' proposed order nowhere articulates the actual policy at issue in Count 6 which this Court found to violate the law, certainly not with "reasonable detail" as required by Rule 65.

Defendants' proposed order therefore also fails, by its terms, to enjoin the unlawful policy's enforcement, application, or implementation. Instead, it incompletely enjoins Tennessee Election Officials from "[d]irecting county election officials to require an otherwise qualified person" from "fil[ing]" certain types of documentation, leaving them apparently free to continue requiring other forms of documentation in violation of the NVRA. Doc. No. 227-1 at 1. Furthermore, their proposed order does not even mention the State's practice of rejecting valid registration forms upon indication that the applicant has a felony conviction, a core aspect of the challenged policy—instead, it states only when Tennessee Election Officials are "*not* enjoined from rejecting voter registration applications." *Id.* at 2.

Defendants' proposed order also fails to include a declaration that Tennessee Election Official's challenged policy violates the NVRA. As Defendants made clear in their notice of filing, they do not intend to concede "that [their] policies and procedures, past or present, conflict with the National Voters (*sic*) Registration Act." Doc. No. 227. Nonetheless, the Court has found that Tennessee Election Officials' challenged policy does violate multiple provisions of the NVRA, and per Rule 65(d)(A), the order of judgment should clearly reflect that as the reason why an injunction is being issued.

In contrast, Plaintiff's proposed order fully articulates the challenged policy this Court considered in its Memorandum Opinion, declares the policy in violation of the NVRA provisions, and clearly enjoins its enforcement.

II. Defendants' proposed order does not order relief necessary to ensure the State's compliance with the NVRA.

Defendants order is designed to effectively maintain the status quo by not requiring Tennessee Election Officials to do anything besides what they already claim to be doing "in accordance with their July 21, 2023 [memorandum]." Doc. No. 227-1 at 2. However, the Court found that the "policy revision" did not moot the case or cure the violation. Doc. No. 221 at 29-32. There is more work to do beyond the Election Division's current policies and practices, and the purpose of this order is to state in reasonable detail what else must be done to ensure compliance.

A. Defendants' proposed order authorizes Tennessee Election Officials to continue to violate the NVRA by rejecting voter registrations from facially eligible voters and requiring documentary proof of eligibility where it is unnecessary.

i. Pre-1973 Convictions

Defendants' proposed order, like their July 21, 2023 memorandum, does not follow the contours of Tennessee law regarding convictions prior to January 15, 1973 ("pre-1973 convictions"). As Defendants have acknowledged and the Court determined, a pre-1973 felony conviction only takes away the right if the conviction was for one of a particular set of crimes *and* the judgment order rendered the person infamous. Doc. No. 221 at 3-4. Defendants' current policy, reflected in the July 21 memorandum, is to consider conviction of one of the specified crimes as a proxy for disenfranchisement without regard for whether the judgment order also rendered the person infamous. *Id.* at 13.[1] It continues to require rejection of any application indicating one of the identified crimes and unlawfully shifts the burden to the voter registrant to "show that at the

[1] As the Court has noted, "Coordinator Goins' new policy does not address how an individual convicted of one of the potentially infamous crimes would indicate on their registration whether they were declared infamous." *Id.* at 24, n.12.

time of your conviction the judge did not render you 'infamous'." Tennessee Secretary of State, "Restoration of Voting Rights" (last accessed May 17, 3:30 PM) https://sos.tn.gov/elections/guides/restoration-of-voting-rights. Defendants' proposed order merely mentions processing applications with pre-1973 non-infamous felony convictions in accordance with the July 21 memorandum, without clarifying what in their current policy must be changed to fully comport with both parts of the law concerning pre-1973 convictions.[2] Plaintiff's order correctly applies Tennessee's voter eligibility rules for applicants with pre-1973 convictions to the standard under the NVRA.

ii. People who have been pardoned or who have had their voting rights restored

Additionally, Defendants' proposed order and current policies do not provide adequate relief to voter registrants who have been pardoned or who have already had their voting rights restored. The Court has found that among the classes of facially eligible voter registrants are those otherwise qualified who indicate that they have received a pardon or had their voting rights restored. Doc. No. 221 at 45. Defendants' order attempts to circumvent the NVRA's protections for these eligible voters by shoehorning their recent procedural changes to the rights restoration process into the phrase "otherwise qualified." The validity of these procedural changes remains contested under Counts 1-3 and have no place in this Court's order as to Count 6.

In July 2023, Tennessee Election Officials issued a "flood of changes to the [rights restoration] policies at issue in this lawsuit." Doc. No. 214 at 1. The drastically up-ended procedures combine previously recognized independent pathways to voting rights restoration—pardons, citizenship restoration, and certificates of restoration—into a mandatory "two-step

[2] Defendants also use different descriptors of the class of eligible pre-1973 voters in their order: "a pre-January 15, 1973 non-infamous felony conviction" (at 1) and "individuals with pre-January 15, 1973, convictions that did not commit an infamous crime" (at 2).

process." Doc. No. 157-3 at 1. In the last five months, Defendants also appear to have added an additional step to that process: restoration of gun rights. *See* Evan Mealins, "TN elections official: Before regaining right to vote, felons must be able to own a gun," THE TENNESSEAN (Jan. 23, 2024, 8:09PM), https://www.tennessean.com/story/news/2024/01/23/tennessee-voting-rights-officials-consider-linking-gun-voting-rights/72313073007. Defendants' proposed order attempts to underhandedly formalize these new procedures by injecting them into the definition of "otherwise qualified." Doc. 227-1 at 2. Plaintiffs dispute the validity and legality of these changes to the voting rights restoration process, viewing them as further proof of the due process and equal protection violations alleged in Counts 1-3. Indeed, these recent developments have provided many examples of arbitrary and erroneous denials of the right to vote and certificates of restoration to qualified individuals.

The dispute over the current voting rights restoration procedures, however, is not the subject of Count 6. The subject of Count 6 is not what restores the right to vote, but how Defendants and their agents must process registration forms from individuals who have *already* restored their right to vote. Plaintiffs' proposed order hues closely to the Court's finding that "an otherwise qualified person with a disenfranchising felony who has received a pardon or has their voting rights restored, is eligible to vote in Tennessee," Doc. 221 No. at 45, and appropriately leaves the question of how to restore voting rights for another day. Plaintiffs' order also addresses a relevant effect of Defendants' shifting sands approach to voting rights restoration on the voter registration process by requiring the state to afford some measure of *res judicata* to people who met whatever the Election Division's criteria were at the time they restored their rights and who the state previously permitted to register to vote. *See* Doc. No. 226-1 at 3, ¶ 1.c. Unlike Defendants' proposed order, which risks retroactively disenfranchising applicants whose rights were duly

restored under prior restoration procedures, Plaintiff's proposed order aligns with the Election Division's stated policy that their new procedures will not apply to people who have already had their voting rights restored. *See* Doc. No. 151-6 (Defendants "Felon Restoration FAQs") ("How does this change impact voters who had their rights restored without a pardon or court order? All voters who have their rights restored remain eligible to vote.").

iii. Forms besides the federal form

Defendants' proposed order only enjoins Tennessee Election Officials themselves from "requiring an applicant using the Federal Form to submit documentation proof of voting rights restoration." Doc. No. 227-1 at 2 (emphasis added). But state-level election officials process both federal and state forms, and this apparent limitation to Federal Form applicants only does not accord with the Court's ruling. Doc. No. 221 at 7, n.5, 47, n.25; 51. Furthermore, Defendants' proposed injunction as to the Federal Form only prohibits requiring "proof of voting rights *restoration,*" but the Court's ruling prohibits Defendants from requiring any documentary proof of eligibility from facially eligible applicants. Plaintiff's proposed order, on the other hand, is not so limited and includes specifics that would allow facially eligible applicants that submit any valid voter registration to become registered. Doc. No. 226-1 at 1-2, ¶ 1.

iv. Where election officials have information "indicating" ineligibility

Defendants' proposed order states that "Defendants Hargett and Goins are not enjoined from rejecting voter registration applications when Tennessee elections officials receive or otherwise possess information beyond the face of a voter registration application that *indicates* that the applicant is ineligible to register to vote." Doc. No. 227-1 at 2 (emphasis added). This wording is an improper sleight of hand. In *Arizona v. Inter Tribal Council of Arizona*, Justice Scalia stated that "while the NVRA forbids States to demand that an applicant submit additional

information beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession *establishing* the applicant's ineligibility.'" 570 U.S. 1, 15 (2013) (internal citations omitted) (emphasis added). Information *indicating* that an applicant is ineligible is not information *establishing* the applicant's ineligibility. Indeed, this proposition effectively summarizes the entire thrust of Plaintiff's contention and the Court's ruling in Count 6. While the fact that someone has a felony conviction may indicate, or point to, possible ineligibility under Tennessee law, it does not establish it.

B. Defendants' proposed order avoids Tennessee Election Officials' statutory responsibility for enforcement of the NVRA in Tennessee.

Defendant Goins is the "chief administrative election officer of the state" and is therefore responsible for coordinating implementation of the requirements on the NVRA. *See* 52 U.S.C. § 20509. It is his responsibility to ensure the state's compliance with the NVRA, including actively monitoring, training, and issuing compliant policies to county-level Administrators of Elections ("AOEs"). *See Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014) ("The NVRA centralized responsibility in the state and in the chief elections officer, who is the state's stand-in."); *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1361 (S.D. Fla. 2016) ("Under the NVRA, '[t]he chief elections officer is 'responsible for coordination of the state's responsibilities.'") (internal citation omitted).

Defendants' proposed order skirts this responsibility. It would enjoin Defendants from directing county election officials to require certain forms of documentation from otherwise qualified voters with felony convictions, but it does not require Defendants to direct county election officials to allow those individuals to register to vote. Doc. 227-1 at 1. In other words, it enjoins Defendants from instructing the AOEs to *violate* the NVRA but does not require them to ensure that all election officials in the state *comply* with it.

The proposed order would also only "encourag[e]" Defendants Hargett and Goins to "continue instruction" county election commissions based on the flawed July 21, 2023, memorandum regarding older convictions. Doc. 227-1 at 2. Even if the memorandum stated a procedure that fully complies with the NVRA (it does not), more than mere encouragement is needed to ensure the state's compliance with the NVRA and full and complete cessation of any enforcement, application, or implementation of the unlawful policy. *See Schedler*, 771 F.3d at 839; *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 438 n.2 (6th Cir. 2020) ("the district court has broad discretion to fashion appropriate injunctive relief"). In light of the challenged policy's longstanding use in Tennessee, Defendants must be required to provide training and education to all state and county election officials making clear that its continued application is prohibited and explaining how to comply with the Court's ruling. Relying on the July 21, 2023 memorandum alone, as Defendants propose, is wholly insufficient and will not prevent future violations of the NVRA. *See United States v. T.W. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations[.]").

Pursuant to Rule 65(d)(B) and (d)(C), Plaintiff's proposed order outlines specific, reasonable steps that Tennessee Election Officials must take to ensure that AOEs and all state election officials understand and process registration applications in compliance with the NVRA and this Court's ruling. Doc. 226-1 at 3-4, ¶¶ 2-4.

CONCLUSION

Plaintiff respectfully requests that the Court enter its proposed injunction, Doc. No. 226-1, to afford complete relief as to Count 6.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, a copy of the foregoing document was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to counsel for parties below. Counsel for the parties may access these filings through the Court's electronic filing system:

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