**No. 24-5546**

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TENNESSEE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

*Plaintiff-Appellee,*

v.

TRE HARGETT & MARK GOINS,

*Defendants-Appellants.*

On appeal from the United States District Court
for the Middle District of Tennessee
No. 3:20-cv-1039

## Reply in Support of Appellants' Emergency Motion

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## INTRODUCTION

The injunction upends Tennessee's processes for verifying voter eligibility during an ongoing presidential election cycle. Absent a stay pending appeal, ineligible voters will inevitably cast ballots because the State lacks the resources necessary to verify eligibility due to the administrative burdens created by the injunction. The Response provides no sound basis for disregarding *Purcell* and the traditional stay factors. If anything, it highlights the need for a stay. The State's next voter-registration deadline is eight days away. The Supreme Court just abrogated the precedent the NAACP relies on for standing. And the confusion caused by the injunction has been so rampant that the NAACP asked the district court to *modify* the injunction's terms. This Court should grant the State's motion.



## BACKGROUND

From the moment the district court granted the injunction, Tennessee's election officials have made "heroic efforts" to comply with the law while providing unprecedented transparency into the initial steps taken to abide by the injunction. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh J., concurring). The NAACP's baseless accusations evidence their frenzied efforts to defend a vulnerable injunction.

The day the injunction took effect, Coordinator of Elections Mark Goins took action to comply. He informed all county election commissioners about the injunction and instructed them to forward all applications from individuals with felony convictions to the Division of Elections. Resp. Br. Ex. B. Soon thereafter, he took steps to modify the online version of Tennessee's State registration form.[1] In compliance with the injunction's command that the election officials "shall, as soon as possible … [d]eliver at least one live training" about how the injunction alters the State's voter-registration procedures, R.237 at 3826, Coordinator Goins provided training on June 10. Shortly thereafter, Coordinator Goins distributed written guidance, *see* Resp. Br. Ex. C, as required by the injunction. And given that the Division of Elections could not use the Documentation Policy, Coordinator Goins "notified two staff members that they would have to step



[1] On June 13, the district court clarified its injunction. R.245. Although the injunction forbids the State from "requiring the applicant to provide additional documentary proof of eligibility," R.237 at 3825, and the State Form instructs applicants to provide documentary proof, R.156-10 at 2503, the district court informed the parties that the State need not change its State Form, R.245 at 3884. Within hours of that order, the State notified this Court of the update. Dkt. 10 at 2. Accordingly, the Appellants no longer claim any burden from revisions to that form.

away from preparing for the upcoming elections to facilitate the verification process." Goins Decl. ¶ 8 (attached as Exhibit A).

On June 18, Coordinator Goins sat for another deposition on unrelated claims in the district court. Afterwards, in response to the NAACP's demands that the State produce *post-judgment* documents demonstrating compliance with the injunction, the State did so as a show of good faith. Despite the NAACP having no entitlement to those materials, the State worked overtime on the eve of a federal holiday to produce them.

The NAACP cherry-picked snippets of those documents in its Response; the full record demonstrates that the injunction creates unworkable administrative burdens on the eve of imminent deadlines in an ongoing presidential election cycle, which threatens election integrity.



## REASONS FOR GRANTING A STAY

### I. The State's Emergency Motion is Ripe for Decision

The NAACP errs by insisting that the State's motion is premature because another stay motion remains pending in the district court. Resp. 4-6. Rule 8 authorizes litigants to move for a stay in the court of appeals so long as they "state that, a motion having been made, the district court denied the motion or failed to afford the relief requested." Fed. R. App. P.

8(a)(2)(A)(ii). The Motion so stated, *see* Mot. 9, and Rule 8 contemplates circuit intervention where the stay motion remains undecided in the district court. After all, a court by definition has "failed to afford the relief requested" when it has not acted on a pending motion.

The district court failed to afford relief here. In fact, if this Court had not entered an administrative stay, the State *still* would not have relief. The State gave the district court ample time to decide the motion and followed the well-worn path of seeking relief from this Court when no relief was afforded below. *See, e.g.*, *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, 992 F.3d 518, 521 n.2 (6th Cir. 2021) (order); *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 243, 253 (6th Cir. 2006) (stay motion filed in district court December 19, stay motion filed in the Sixth Circuit on December 22, Sixth Circuit granted a stay on December 29 even though the district court had not yet ruled).



Anyway, if the Court wants to give the district court more time to rule, then it should leave the administrative stay in place and wait. It would be improper to deny the motion because of the immediate harm the State will suffer from the lifting of the administrative stay, and the confusion caused by the possibility of having a stay *reissued* later by this Court.

## II. The *Purcell* Principle Warrants a Stay.

The NAACP (at 19) resists the notion that *Purcell* displaces the "traditional test for a stay." *Merrill*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring). The NAACP's position conflicts with the emerging consensus among circuit courts that treats *Purcell* as an independent basis for a stay, *e.g.*, *Petteway v. Galveston County*, 87 F.4th 721 (5th Cir. 2023) (en banc) (per curiam); *League of Women Voters v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022) (per curiam), along with *Purcell v. Gonzalez*'s guidance that stays may be granted without opining on the merits, *see* 549 U.S. 1, 5 (2006) (per curiam). The post-*Merrill* Sixth Circuit cases the NAACP cites (at 20 n.10) do not support their position because those cases did not address whether *Merrill* changes the applicable legal framework.

That said, the Court need not decide whether *Purcell* operates independently from the traditional stay factors. Either way, the doctrine supports granting a stay pending appeal here. The NAACP never disputes that the injunction changes the State's voter-registration procedures on the eve of an election. Mot. 11-12. Nor does it dispute that *Purcell* applies to cases like this one that involve voter-registration procedures. *Id.* Instead, the NAACP tries in vain to downplay the intrusiveness of the

injunction. Resp. 6-10. But the evidence shows that the permanent injunction creates serious administrative burdens, undermines election integrity, and causes confusion for voters and election administrators.

*Administrative Burdens*. The NAACP argues (at 6) that the injunction itself creates no burdens because it does not order the State to conduct individual research to verify voter eligibility. That misses the point. As a result of the injunction, either the State must abandon enforcing its voter qualifications or it must conduct burdensome verification processes in the absence of the Documentation Policy. It is no answer to say that the injunction is not burdensome if officials simply ignore state law because Tennessee's election officials have a duty to *uphold* that law.

Next, the NAACP argues that verifying voter eligibility is "'not a burdensome task'" because election officials can easily check a database to confirm whether an applicant had their voting rights restored—quoting a snippet from a recent deposition. Resp. 7-8. Yet the NAACP fails to mention that the database only includes records dating back to the late 1990s or that election officials must also conduct a felony search to confirm voter eligibility. Henry-Robertson Dep. 54, 58 (Exhibit B).

And that felony search "is what takes a lot of time." *Id.* 57. Officials must run that search because applicants do not always "disclose the crime for which they were convicted, the year of the conviction and/or the number of felony convictions that they have," Ex. A ¶ 10, information that is material to voter eligibility, *see id.* ¶¶ 10-12. Even for applicants in the restoration database, officials must determine whether the individual has committed another felony since being restored. Henry-Robertson Dep. 59. When applications start pouring in, as they do during presidential election cycles, it will be "extremely burdensome" for the State to verify eligibility without the Documentation Policy. Ex. A ¶ 12.



Perhaps recognizing how serious those burdens are, the NAACP next claims that the injunction creates minimal work because it only applies to certain classes of applicants. Resp. 7. But the injunction plainly covers *all* voter-registration applicants and categorically prohibits the State from requiring those applicants with felony convictions who claim they are eligible from submitting proof of eligibility. R.237 at 3825.

*Election Integrity*. The NAACP also asserts that the injunction poses no threat to the integrity of Tennessee's elections. Resp. 9. But Coordinator Goins concluded, based on his fifteen years of experience,

that the State's inability to conduct a thorough eligibility review for every voter who notes a prior felony would result in ineligible voters casting votes in the upcoming election, R.243-1 at 3879; Ex. A ¶¶ 13, 16. The NAACP offers no sound reason to second guess that determination.

*Confusion*. The injunction causes "confusion and chaos" among election officials and voters alike. *Democratic Nat'l Comm. v. Wisc. State Legis.*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring). That may be why the NAACP, despite prevailing below and securing an injunction in its favor, has twice in the past week alone asked the district court to "clarify" or "modify" the injunction so that it is clear about "the scope of registrations impacted" by the order. R.256-1 at 4440; *see* R.251 at 3924. If the Court denies the stay pending appeal, election officials will be left in a state of limbo, wondering whether the changes they are implementing to comply with the injunction and whether their efforts will all be for naught if the district court modifies its injunction. Chaos indeed.

Left with nothing else, the NAACP reimagines *Purcell* as a principle that generally *forbids* appellate courts from staying election-related injunctions because of the risk of confusion caused by "conflicting" court orders. Resp. 20, 21 n.12. But that would effectively overrule *Purcell*; it

would mean that, whenever a court issues an election-related injunction in the middle of an election cycle, it should not be stayed because it would be a "conflicting" order. That position defies a mountain of Supreme Court precedent applying *Purcell* to stay injunctions during elections. *See Petteway*, 87 F.4th at 723 (Oldham, J., concurring) (collecting cases).

## III. The Traditional Factors Warrant a Stay.

### A. Tennessee raises serious questions on the merits.

#### 1. The NAACP lacks organizational standing.

The NAACP defends its standing (at 10-12) with precedent that the Supreme Court just abrogated in *FDA v. Alliance for Hippocratic Medicine*, 2024 WL 2964140 (June 13, 2024). The Response (at 11) quotes *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021) to argue that "within-mission organizational expenditures are enough to establish direct organizational standing." But the Supreme Court repudiated that approach in *FDA*, holding that standing does not exist merely "when an organization diverts its resources in response to a defendant's actions." 2024 WL 2964140, at *13. Nor does the NAACP fall within *Havens Realty* because the Documentation Policy does not "directly affec[t] and interfer[e] with [the NAACP's] core business activities." *Id.*

And even setting aside the Supreme Court's recent decision, the NAACP's declaration also lacks the requisite "specific facts" showing that the harms are ongoing. Mot. 16-18. Although the NAACP says that costs keep accruing, Resp. 13-14, they cite no evidence proving as much.

**2. The Documentation Policy complies with the NVRA.**

The NVRA and Supreme Court precedent confirm that applying the Documentation Policy to state-form applicants is lawful. Mot. 19-26. The NAACP's efforts to distinguish *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) (at 15) make no sense.

*First*, the NAACP cites *Arizona* to argue that "the NVRA authorizes states to develop and use a voter registration form that does *not* require information beyond what is required by the Federal Form." Resp. 15 (emphasis added). No. "[S]tate-developed forms *may* require information the Federal Form does not." *Arizona*, 570 U.S. at 12 (emphasis added).

*Second*, the NAACP says that *Arizona* interprets the NVRA as setting a "ceiling and a floor with respect to the contents of the Federal Form." Resp. 15. But that was just what one of the parties *argued*—the Supreme Court declined to adopt that view. *Arizona*, 570 U.S. at 18.

Anyway, that discussion of the *Federal Form* is irrelevant to what documents the *State Form* may require. Mot. 22-23.

*Third*, the NAACP attacks a straw man. The NAACP may be right that *Arizona* does not provide "carte blanche' for the state to require any information." Resp. 15. Tennessee does not argue otherwise; the election officials agree that requiring, for example, an applicant's third-grade report card goes too far. Here, the State requires information that the Supreme Court has expressly blessed—documentary proof that the applicant satisfies the State's voter registration qualifications.

Unable to escape *Arizona*, the NAACP parrots the district court's conclusion that Tennessee failed to show that it made a determination that it needs the Documentation Policy or that documentary evidence is "necessary" to verify voter eligibility. Resp. 15-16. But it never responds to the State's arguments that the policy itself evidences a determination about the need for documentary proof. Mot. 23. Nor does it point to any evidence to prove that Tennessee already has all the information it needs to establish voter eligibility for *all* applicants, *id.* at 24, or address *Arizona*, Sixth Circuit precedent, and the NVRA itself which refute the notion that States cannot request information they already have, *id.* 25.

At last, the NAACP falls back on the district court's holding that the Documentation Policy violates the NVRA's uniformity requirement. Resp. 16-17. But that provision applies only to programs that "ensur[e] the maintenance of an accurate and current voter registration roll," which regulates "state removal programs" rather than voter *registration* policies. *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 764 (2018). The State disputes that *voter-registration* policies can violate this statutory provision and that its policy applying to all applicants with disqualifying convictions violates the NVRA's uniformity requirement.

### B. Absent an immediate stay, the State of Tennessee and its citizens will suffer irreparable harm.

Despite what the NAACP claims (at 6-10), the State will suffer irreparable harm absent a stay. On top of the administrative burdens, the threat to election integrity, and confusion, *supra* Part I, allowing Tennessee's voter-registration policies to remain enjoined will cause "serious and irreparable harm" because the State "cannot conduct its election in accordance with its lawfully enacted ballot-access regulations." *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam) (order).

The NAACP's arguments about the public interest (at 17-19) rest on the mistaken premise that the Documentation Policy denies

individuals their right to vote. The district court has not yet decided that issue; those allegations have been asserted in Count Five, which remains pending. 1st Am. Compl., R. 102 at 655-56. The NAACP cannot shoehorn those unadjudicated interests into the stay application.

### C. The NAACP will suffer minimal if any harm from a stay.

The Response (at 18) merely confirms that the harms the NAACP as an organization will suffer, if any, are minimal. The costs they assert do not overcome the profound consequences that the State and its citizens will suffer absent a stay pending an appeal that the State is likely to win.

## CONCLUSION

The Court should grant the Motion.

Dated: June 24, 2024

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## CERTIFICATE OF COMPLIANCE

This reply complies with the Court's type-volume limitations because it contains 2,597 words, excluding portions omitted from the Court's required word count. This reply complies with the Court's typeface requirements because it has been prepared in Microsoft Word using fourteen-point Century Schoolbook font.

*s/ Philip Hammersley*
Philip Hammersley

**CERTIFICATE OF SERVICE**

On June 24, 2024, I filed an electronic copy of this reply with the Clerk of the Sixth Circuit using the CM/ECF system. That system sends a Notice of Docket Activity to all registered attorneys in this case. Under Sixth Circuit Rule 25(f)(1)(A), "[t]his constitutes service on them and no other service is necessary."

*s/ Philip Hammersley*
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