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 EMERGENCY MOTION FOR A STAY OF PERMANENT INJUNCTION PENDING APPEAL

None of the arguments the NAACP offers in response to the emergency motion provide a sound basis for disregarding *Purcell* and the traditional stay factors. In fact, the case for granting a stay is now stronger than ever because the Supreme Court just abrogated the exact precedent that the TN Chapter of the NAACP relies on to establish standing to bring its claim.

I. *Purcell* displaces the "traditional test for a stay" when "a lower court" alters "a state's election law in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring); *see, e.g.*, *League of Women Voters v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022) (per curiam) (applying *Purcell* rather than traditional stay factors). And here, based on *Purcell* and *Merrill*, the Court should abide by the Sixth Circuit's "general rule" against last-minute injunctions, Mot. 2 (collecting cases), and grant a stay.

In response to that "general rule," the NAACP never disputes that the injunction changes the State's voter-registration procedures on the eve of an election. Nor does it meaningfully dispute the administrative burdens the injunction creates for election officials who must now "verify that new applicants are not disqualified from voting because of past felonies." Mot. 3. Because the State can no longer use the documentation policy, it must independently verify voter eligibility by having state election officials research "the felony status and restoration status of all voter registration applicants who disclose that they have a felony conviction." Goins 3d Supp. Decl., R. 243-1 at 3879. That creates "an arduous, and sometimes impossible, burden" for state election officials who are already "working around the clock to prepare for the upcoming August primary election and November general election." *Id.* at 3878, 79.[1] Given those new

[1] The NAACP downplays the seriousness of the burden by pointing to the mootness argument that the state officials raised and arguing that the State has made "prior representations that their current practices already align with the Court's relief." Resp. 5. That argument rests on a misrepresentation of the record. Defendants argued that "a portion" of Count Six was moot because individuals who never lost their right to vote under current policy are not required to

responsibilities thrust on the State in the middle of an election cycle, the Coordinator of Elections believes that some ineligible voters will slip through the cracks and improperly cast ballots, "thereby compromising the integrity of the election process in Tennessee." *Id.* at 3879.

Rather than engage with those arguments, which provide an independent basis for a stay, the NAACP focuses entirely on an issue that the Court has already clarified—namely, the lack of an obligation to change the voter-registration forms. Resp. 6-8. Given the Court's order on June 13, 2024, the State now understands that the injunction does not require updated state forms. But that only *strengthens* the case for a stay because the injunction will cause voter confusion in the absence of new forms. The Court enjoined Tennessee from "requir[ing] [voter-registration applicants] to present documentary proof of eligibility," R. 237 at 3825, yet the State Form itself instructs applicants to submit documentary proof of eligibility, *see* R. 156-10 at 2503. That will confuse applicants about whether and in what circumstances they must submit proof of eligibility.

Next, the NAACP argues that *Purcell* supports their position because a "conflicting order" granting a stay now would create voter confusion. Resp. 15-16. But the NAACP's position would effectively overrule the *Purcell* doctrine; it would mean that, whenever a district court issues an election-related injunction in the middle of an election cycle, that order 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 ongoing election cycles. *See Petteway v. Galveston County*, 87 F.4th 721, 723 (5th Cir. 2023) (Oldham, J., concurring) (collecting cases).

provide proof of eligibility. Resp. to NAACP's MSJ, R. 180 at 2869-70. Of course, as both parties agree, the documentation policy *does* apply to anyone with post-May 18, 1981, convictions, as well as anyone else convicted of disqualifying felonies before that date. The State must now verify whether applicants with disqualifying convictions are eligible to vote, and there is absolutely no record evidence to support the NAACP's statement that the State is "*already doing* the bulk of what this Court's order on Count 6 now requires of them." Resp. 7.

Anyway, the injunction is now administratively stayed, it was only in place for nine days, and thus the risk of voter confusion from issuing a stay pending appeal is minimal.

II. The traditional factors also favor granting a stay. *See* Mot. 3-6.

A. There is nothing "belated" about the defendants' standing arguments. Resp. 10. The defendants have consistently argued that the NAACP has not shown it suffers an ongoing or imminent injury from the challenged policies. The NAACP's response (at 9-10) focuses on precedent that the Supreme Court just abrogated in *FDA v. Alliance for Hippocratic Medicine*, 2024 WL 2964140 (June 13, 2024). Although *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021) suggests that the "diversion of organizational resources are sufficient injury-in-fact for direct organizational standing," Resp. 10, the Supreme Court just held that standing does not exist merely "when an organization diverts its resources in response to a defendant's actions," *Alliance for Hippocratic Medicine*, 2024 WL 2964140 at *13. Adopting that position "would mean that all the organizations in America would have standing to challenge almost every [government] policy that they dislike, provided they spend a single dollar opposing those policies." *Id.* That reflects a misunderstanding of Article III, so the Court limited *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)—the principal case relied on by this Court to establish the NAACP's standing—to its facts. Given *Alliance for Hippocratic Medicine*, the Court should reconsider its grant of summary judgment on Counts Four and Six. At minimum, the State raises "serious questions" about the NAACP's standing that warrant granting a stay pending appeal.

On the merits of the NVRA claim, the Court enjoined Tennessee from requesting information the Supreme Court has already said States may require—that is, documentary proof of eligibility. In *Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1 (2013), the Court explained

that States "may require information the Federal Form does not," and pointed to Arizona's proof-of-citizenship policy which required applicants to submit documentary proof. *Id.* at 7, 12.

Moreover, the NAACP is wrong that "Section 20507(b)(1) specifically requires that state voter registration programs and activities 'shall be uniform [and] nondiscriminatory.'" Resp. 13 (citation omitted). That portion of the NVRA 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) (emphasis added); *see, e.g.*, *Mi Familia Vota v. Fontes*, 2023 WL 8181307, at *11 (D. Ariz. Sept. 14, 2023) (agreeing that § 20507(b) "speaks to ensuring the *maintenance*, not the enlargement, of current voter registration rolls"). Defendants have consistently disputed that a voter-registration policy can violate this statutory provision, *see*, *e.g.*, R. 180 at 28 (arguing that the NAACP did 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" (emphasis added)), and even now, it is unclear to the Defendants how the documentation policy violates an NVRA provision that does not apply to voter-registration procedures.[2]

B. The State will also suffer irreparable harm absent a stay. The NAACP asserts that "Defendants' sole claim to irreparable harm" derives from its earlier understanding that the injunction required changes to the voter-registration forms. Resp. 6. Nonsense. The principal harm to the State derives from the administrative burdens caused by the injunction and the

[2] Perhaps recognizing the lack of factual or legal basis for their claim, the NAACP now—months after judgment has been entered—appears to be trying to enter new evidence into the record. *See* Resp. 14 n.5. But "parties cannot introduce new evidence post-judgment unless they show that the evidence was previously unavailable." *Mays v. USPS*, 122 F.3d 43, 46 (11th Cir. 1997) (per curiam). The NAACP made no such showing here, so the Court should disregard that evidence which, in any event, fails to show that the State had an unlawful maintenance program.

accompanying risk to the integrity of the 2024 election cycle. Mot. 3; *see* Goins 3d Supp. Decl., R. 243-1 at 3879. It is true that the injunction does not expressly require "Defendants [to] hire new staff" or undertake independent efforts to verify voter eligibility. *See* Resp. 17. But the State must either hire those staffers and do that administrative legwork or let its voter-eligibility criteria go unenforced. For obvious reasons, Tennessee's election officials, who have been charged with enforcing state election law, will not let its lawful voter qualification requirements be ignored. So as a practical matter, the injunction creates serious administrative burdens and an accompanying increased likelihood that ineligible voters will slip through the cracks. *Supra* I.

On top of that, by enjoining voter-registration policies implemented by Tennessee's election officials, "serious and irreparable harm" will result 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 dismissal of those interests on the basis that those policies are unlawful (Resp. 14) overlooks the State's likelihood of proving that those policies are lawful on appeal, *see supra* II.A.

C. The other factors likewise support granting a stay. The NAACP's argument to the contrary rests primarily on the premise that the challenged policies have denied individuals their fundamental right to vote. Resp. 13-14. That premise is flawed because the Court has not yet decided whether the challenged policies burden the fundamental right to vote; those allegations have been asserted in Count Five, which has not yet been decided by the Court, 1st Am. Compl., R. 102 at 655-56, and which is disputed by the Defendants. The NAACP cannot shoehorn consideration of those unadjudicated interests into this stay application. *See* Order, R. 237 at 3824 (noting that Count Six "does not concern 'constitutional wrongs'").

The Court should grant the motion to stay its injunction pending appeal.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General and Reporter

ANDREW COULAM
Deputy Attorney General

ZACHARY L. BARKER
Assistant Attorney General

DAWN JORDAN
Senior Counsel

DAVID RUDOLPH
Senior Assistant Attorney General

ROBERT WILSON
Senior Assistant Attorney General

/s/ *Philip Hammersley*
Philip Hammersley (BPR No. 041111)
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207
Philip.Hammersley@ag.tn.gov

Counsel for Defendants

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.

Blair Bowie
Danielle Lang
Alice C. Huling
Valencia Richardson
Aseem Mulji
Ellen Boettcher
Kate Uyeda
Campaign Legal Center
1101 14th Street NW, Suite 400
Washington, DC 20005

Charles K. Grant
Denmark J. Grant
Baker, Donelson, Bearman
Caldwell & Berkowitz, P.C.
1600 West End Avenue, Suite 2000
Nashville, TN 37203

Phil Telfeyan
Natasha Baker
Equal Justice Under Law
400 7th St. NW, Suite 602
Washington, DC 20004

Keeda Haynes
Free Hearts
2013 25th Ave. N.
Nashville, TN 37208

Date: June 18, 2024

/s/ Philip Hammersley
Assistant Solicitor General