

IN THE CHANCERY COURT OF TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

EARLE F. FISHER, JULIA
HILTONSMITH, JEFF BULLARD,
ALLISON DONALD, and
#UPTHEVOTE901,

Plaintiffs,

v.

TRE HARGETT, MARK GOINS,
WILLIAM LEE, and HERBERT
SLATTERY III, each in his official capacity
for the State of Tennessee,

Defendants.

AND

BENJAMIN WILLIAM LAY, CAROLE
JOY GREENAWALT, and SOPHIA
LUANGRATH,

Plaintiffs,

v.

MARK GOINS, in his official capacity as
Coordinator of Elections for the State of
Tennessee, TRE HARGETT, in his official
capacity as Secretary of State for the State of
Tennessee, and WILLIAM LEE, in his
official capacity as Governor of the State of
Tennessee,

Defendants.

Case No.: 20-0435-I(III)

Chancellor Ellen Hobbs Lyle

Case No.: No. 20-453-IV(III)

Chancellor Ellen Hobbs Lyle

PLAINTIFFS' COMBINED NOTICE OF MOTION AND MOTION FOR CONTEMPT

Come Plaintiffs in *Fisher v. Hargett*, 20-0435-I(III) and *Lay v. Goins*, No. 20-453-IV(III) to move the Court for an order holding Defendants in contempt of this Court’s Memorandum and Order Granting Temporary Injunction to Allow Any Tennessee Registered Voter to Apply for a Ballot to Vote by Mail Due To COVID-19 (the “Injunction Order”).

FACTS

On June 4, 2020, this Court issued its Injunction Order, holding that “the State’s¹ restrictive interpretation and application of Tennessee’s voting by mail law (Tennessee Code Annotated section 2-6-201), during the unique circumstances of the pandemic, constitutes an unreasonable burden on the fundamental right to vote guaranteed by the Tennessee Constitution.” Injunction Order at 5. Accordingly, this Court ordered the State to

provide *any* eligible Tennessee voter, who applies to vote by mail in order to avoid transmission or contraction of the COVID-19, an absentee ballot in upcoming elections during the pendency of pandemic circumstances

Id. at 6 (emphasis added).

This Court further directed that, to facilitate such relief, Defendants must allow “any qualified voter who determines it is impossible or unreasonable to vote in person at a polling place due to the COVID-19 situation [to] be eligible to check the box on the absentee ballot application that, ‘the person is hospitalized, ill or physically disabled and because of such condition, the person is unable to appear at the person’s polling place on election day; or the person is a caretaker of a hospitalized, ill or physically disabled, person,’” and to duly process such absentee voting requests under Tennessee law. *Id.* Finally, this Court ordered Defendants to “prominently post on their websites and disseminate to County Election Officials that voters who do not wish to vote in-

¹ The “State” includes Defendants Mark Goins, Tre Hargett, and William Lee, in their official capacities.

person due to the COVID-19 virus situation are eligible to request an absentee ballot by mail or that such voters still have the option to vote in-person during Early [V]oting or on Election Day.”

Id.

Rather than implementing the “effective and binding” Injunction Order, Tenn. R. Civ. P. 65.04(5), Defendants doubled-down on their “unapologetic” rejection of the “can-do attitude” that the majority of other states have adopted in the face of this unprecedented pandemic, Injunction Order at 3-4, and have spent the past month taking a series of actions that violated the Injunction Order’s plain terms, thereby forcing this Court to issue *seven* additional orders directing the State to comply with the Injunction.² Incredibly, the State remains in non-compliance.

The State continues to inform voters that they must vote in person if they are first-time voters who registered by mail. Indeed, and notwithstanding the fact Defendant Goins has represented to this Court that the State is in compliance with the Injunction Order, June 12, 2020 Declaration of Mark Goins (“June 12 Goins Decl.”) ¶ 2, the Defendant Secretary of State Tre Hargett’s website informs voters:

Unless you are on the permanent absentee voting register or enrolled in the Safe at Home program, you must appear in-person to vote in the first election after you have registered by mail.³

² (i) Order Granting Plaintiffs’ Rule 65.06 Motion in Part (“June 11 Compliance Order”); (ii) June 11, 2020 Order on Absentee Wording; (iii) Order for Supplemental Instructions to Be Issued 6/15/2020 to County Election Commissions Followed by Declaration of Compliance (“June 15 Compliance Order”); (iv) Order of 6/25/2020 3:30 P.M. Filing Deadline for Defendants (“June 25 Compliance Order”); (v) 6/26/2020 Memorandum and Order to Comply (“June 26 Compliance Order”); (vi) 6/30/2020 Order Requiring Affidavit of Compliance (“June 30 Compliance Order”); and (vii) Memorandum and Order For 7/8/2020 Filing by Defendant Goins (“July 6 Compliance Order”).

³ Tenn. Sec. of State, *Absentee Voting*, <https://sos.tn.gov/products/elections/absentee-voting> (last visited July 13, 2020).

Likewise, and notwithstanding the fact that Defendant Goins has represented to this Court that *all* 95 County Election Commissions are in compliance with the Injunction Order, July 8, 2020 Declaration of Mark Goins (“July 8 Goins Decl.”) ¶ 2, County Election Commission websites follow this state directive in their instructions to voters, and some even ban absentee voting for first-time online registrants. For example, the Shelby County Election Commission website states:

Please note - if you registered to vote by mail or on the on-line system and you have not voted in Shelby County before, you must vote in person.⁴

Essentially, pursuant to such directions, unless a first-time voter registers in person, he or she will likely not be able to vote absentee, despite the clear language of this Court’s Injunction Order.

The number of voters affected by the State’s willful non-compliance is substantial. More than 144,000 first-time registrants were recorded in Tennessee in the last half of 2019.⁵ Since many quadrennial nonpartisan municipal elections occurred in 2015 and not 2019, and turnout for presidential preference primaries is normally about 30%,⁶ many if not most of these new registrants will be first-time voters. Additionally, although statistics for the first half of 2020 are not available, a significant number of voters certainly have registered to vote for the first time in

⁴ Shelby Cnty. Election Comm’n., *Voting Absentee*, <https://www.shelbyvote.com/voting-absentee> (last visited July 13, 2020).

⁵ Tenn. Sec. of State, *Election Statistics, Registration (December 2019)*, available at <https://sos-tn-gov-files.tnsosfiles.com/RptSixMonthSumDec2019.pdf?bwg.F1B6O64zPY8baFShlOjro1wu1OvP> (last visited July 13, 2020).

⁶ Tenn. Sec. of State, *Election Statistic, Turnout (Mar. 1, 2016)*, available at <https://sos-tn-gov-files.s3.amazonaws.com/2016%20March%20PPP%20Turnout.pdf> (last visited July 13, 2020).

the first half of this year in anticipation of voting in the presidential election. Indeed, more than 150,000 new voters registered in the first half of the last presidential election year.⁷

In an effort to resolve this dispute without the Court’s involvement, counsel for the *Lay* Plaintiffs and counsel for *Fisher* Plaintiffs each separately asked Defendants’ counsel to confirm that both the State and the County Election Commissions were in compliance with respect to all voters, “including first time registrants.”⁸ The State did not respond. Thus, Plaintiffs were not only forced to file this motion, but also to speculate as to the State’s likely reasons for blatant non-compliance.

ARGUMENT

“Civil contempt based on the violation of a court order has four elements:

First, the order alleged to have been violated must be “lawful.” Second, the order alleged to have been violated must be clear, specific, and unambiguous. Third, the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order. Fourth, the person’s violation of the order must be “willful.”

Cowan v. Cowan, No. W201900179COAR3CV, 2020 WL 1966322, at *5 (Tenn. Ct. App. Apr. 24, 2020) (quoting *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 354–55 (Tenn. 2008)).

Each of the elements is met here. *First*, there is no doubt that the Injunction Order was “lawful.” *Id.* (“An order is ‘lawful’ if it is issued by a court with jurisdiction over the parties and the subject matter of the case.”).

⁷ *Id.*; *Election Statistics, Registration (June 1, 2016)*, available at <https://sos-tn-gov-files.s3.amazonaws.com/2016%20March%20PPP%20Turnout.pdf> (last visited July 13, 2020).

⁸ Ex. 1 to Declaration of Angela M. Liu (“Liu Decl.”); Liu Decl. Ex. 2.

Second, an order is “clear, specific, and unambiguous” so long as it “spell[s] out the details of compliance in a way that will enable reasonable persons to know exactly what actions are required or forbidden.” *Id.* (citations omitted) (internal quotation marks omitted). The Injunction Order could not have been any clearer. It specifically states that the State must “provide *any* eligible Tennessee voter, who applies to vote by mail in order to avoid . . . COVID-19, an absentee ballot.” Injunction Order at 6 (emphasis added). In other words, nothing in the Injunction Order carved out an exception for first-time voters who registered by mail or who registered online. All that is required for a Tennessean to be able to vote absentee during the COVID-19 pandemic is that the person be an “eligible Tennessee voter who applies to vote by mail.” *Id.*

Third, Defendants and County Election Commissions are unilaterally refusing to provide first-time voters who registered by mail or online who then apply to “vote by mail in order to avoid . . . COVID-19, an absentee ballot.”⁹ Some counties are even refusing to allow voters who are *not* first-time registrants in the state or even in the county to vote via absentee ballot. For example, Taylor Alexander Zukowski, a resident of Hamilton County who had twice previously voted in-person in Hamilton County, requested an absentee ballot from the Hamilton County Election Commission on June 15, 2020 because he “determined that it [wa]s impossible or unreasonable to vote in-person due to the COVID-19 situation,” but on July 9, 2020, he received a letter from the Hamilton County Election Commission informing him that because he “registered by mail and

⁹ Tenn. Sec. of State, *Absentee Voting*, <https://sos.tn.gov/products/elections/absentee-voting> (last visited July 13, 2020); Shelby County Election Commission website, *Voting Absentee*, <https://www.shelbyvote.com/voting-absentee> (last visited July 13, 2020).

ha[d] not voted by personal appearance in an election in Hamilton County,” he could not vote by mail unless he “stop[ped] by our office to show [his] Tennessee o[r] federal photo ID.”¹⁰

Finally, there can be no doubt that Defendants have acted willfully in their disobedience of the Injunction Order. Indeed, “[a] person acts ‘willfully’ if he or she knows what he or she is doing, and intends to do what he or she is doing.” *Cowan*, 2020 WL 1966322, at *5. (citations omitted) (internal quotation marks omitted). Here, not only has Defendant Goins submitted multiple declarations representing compliance to this Court, but Defendants have also refused to respond to emails requesting confirmation that first-time voters are not being excluded from the State’s implementation of Injunction Order.¹¹

Defendants are thus plainly in contempt of the Injunction Order.

Since the State has refused to engage with Plaintiffs on this issue,¹² Plaintiffs are left to speculate as to the State’s justifications for failing to comply with the plain terms of the Injunction Order. The State will likely point to Tenn. Code Ann. § 2-2-115(b)(7), which requires first-time voters who register by mail to vote in person (“First-Time Voter Restriction”), and will likely argue that adherence to the First-Time Voter Restriction is necessitated by federal law. That argument would be unavailing because neither the Help America Vote Act (“HAVA”), nor the National Voter Registration Act (“NVRA”)—the only two federal statutes that could arguably be applicable here—requires the First-Time Voter Restriction.

¹⁰ Declaration of Taylor Alexander Zukowski (“Zukowski Decl.”) ¶¶ 2-3, 8-9; Zukowski Decl. Ex. A. During the October 22, 2018 and March 3, 2020 elections, Mr. Zukowski voted in-person in Knox County where he resided in a dorm to attend university. Zukowski Decl. ¶ 4. He currently resides in Hamilton County and updated his voter registration information to reflect the same on May 26, 2020. *Id.* ¶ 6.

¹¹ June 12 Goins Decl.; July 8 Goins Decl.; Liu Decl. Ex. 1; Liu Decl. Ex. 2.

¹² Liu Decl. Ex. 1; Liu Decl. Ex. 2.

Under HAVA, certain first-time voters are required to vote in-person, *see* 52 U.S.C. § 21083(b)(1)-(2), but only a small subset of them: first-time registrants who applied to register to vote by mail who *also* either (1) failed to submit the required proof of identity with their registration or mail ballot; or (2) failed to submit their driver’s license number or last four digits of their social security number, so that the election officials can use that information to match the voter with existing identification records. 52 U.S.C. § 21083(b)(3). That federal requirement is wholly irrelevant in Tennessee, which already requires a voter’s social security number on all mail-in registration forms.¹³ Under HAVA, Tennessee *must* use this information to verify voter’s information where possible. 52 U.S.C. § 21083(a)(5)(A). Thus, because every first-time mail registrant in Tennessee is already required to provide a social security number, HAVA’s first-time voter restriction on absentee voting is inapplicable here.

The same holds true regarding the NVRA. The NVRA does not require Defendants to require first-time voters who register by mail to vote in person. Instead, it merely *permits* states to do this. *See* 52 U.S.C. § 20505(c)(1) (“[A] State *may* by law require a person to vote in person if . . . (A) the person was registered to vote in a jurisdiction by mail; and (B) the person has not previously voted in that jurisdiction.”) (emphasis added).

In sum, the issue of whether first-time voters who register by mail must vote in-person is purely an issue of *state* law. And, in its Injunction Order, this Court answered this issue of state law head-on and determined that the Tennessee Constitution does not permit the State to require persons to vote in-person during the ongoing COVID-19 pandemic. Injunction Order at 6.

¹³ *See* Tenn. Code Ann. § 2-2-116 (requiring use of registration form); *see also* Tenn. Sec. of State, *Voter Registration Form SS-310*, <https://sos.tn.gov/products/elections/voter-registration-application-form-ss-3010> (last visited July 13, 2020).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order:

- (1) holding Defendants in civil contempt of its Injunction Order;
- (2) specifying that all first-time voters in Tennessee are eligible to vote absentee during the pandemic, regardless of how they registered;
- (3) directing the Coordinator of Elections to promptly inform voters of this in all public notices and communications with voters, including but not limited to its website information and forms; and
- (4) directing the Coordinator of Elections to promptly ensure that all County Election Commissions do the same.

Dated: July 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing notice of motion and motion has been served on July 13, 2020, via the Court's electronic filing system and email upon the following opposing counsel of record in the above-styled matter:

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