

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

HUNTER DEMSTER, EARLE J.)
FISHER, JULIA HILTONSMITH,)
GINGER BULLARD, JEFF BULLARD,)
ALLISON DONALD, and)
#UPTHEVOTE901,)

Plaintiffs,)

vs.)

No. 20-435-I(III)

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

Defendants.)

AND

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

Plaintiffs,)

vs.)

No. 20-453-IV(III)

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

Defendants.)

**MEMORANDUM AND ORDER FOR DEFENDANT STATE OFFICIALS
TO REVISE BY 8/31/2020 ABSENTEE APPLICATION FORM TO INCLUDE
COVID-19 SUSCEPTIBILITY IN THE ELIGIBILITY REQUIREMENTS
AS INSTRUCTED BY THE TENNESSEE SUPREME COURT**

At stake in the above captioned cases is the right to vote, guaranteed in the Tennessee Constitution, Article I, Section 5, which states “the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto” TENN. CONST. ART. I, § 5 (West 2020).

On August 5, 2020, the Tennessee Supreme Court issued its Decision¹ determining that persons, with underlying medical or health conditions which render them more susceptible to contracting COVID-19 or who are at greater risk should they contract it, and their caretakers, are eligible to vote absentee by mail for the November 3, 2020 election. The Court’s decision came after an eleventh-hour concession by the Defendant State Officials in oral argument before the Tennessee Supreme Court.²

Because the Defendant State Officials’ concession was a complete reversal³ of what they had previously told voters, new information has to now be provided.

In that regard, the Tennessee Supreme Court in its Decision takes the Defendants at their word. The Court stated that it has “no reason to doubt that the State will faithfully discharge its duty to implement the absentee voting statutes.” The Tennessee Supreme Court removed the injunction this Court had issued, stating that “injunctive relief is not

¹ *Fisher v. Hargett*, No. M202000831SCRDMCV, 2020 WL 4515279 (Tenn. Aug. 5, 2020).

² This order only pertains to “Group 1 voters,” identified by the Tennessee Supreme Court as “persons with special vulnerability to COVID-19” and their caretakers. A separate order will be entered by this Court concerning the State’s motion for summary judgment as to persons who do not have a special vulnerability to COVID-19, referred to herein as “Group 2” voters. As to Group 2, the Tennessee Supreme Court reversed this Court’s injunction which had allowed those persons to vote absentee.

³ In their filings in this Court, the Defendants called the Group 1 Plaintiffs’ claims to vote absentee due to autoimmune and COVID-19 susceptibility, “not fit for judicial decision” and not a “meaningful hardship.” Defendants State Officials’ *Response in Opposition to Plaintiffs’ Request for a Temporary Injunction*, May 22, 2020 at 10.

necessary.” Believing the last-minute concession of the State, the Tennessee Supreme Court replaced the injunction (a mandate by law) with instructions to the State to provide, “appropriate guidance . . . to Tennessee registered voters with respect to the eligibility requirements of such persons to vote absentee by mail in advance of the November 2020 election” and “the guidance should inform voters that . . . a physician’s statement is not required . . . that the voter makes his or her own determination.” *Id.* at *7 & FN10. The cases were then remanded to this Court for further proceedings consistent with the opinion of the Tennessee Supreme Court.

On remand the Plaintiffs claim that the Defendant State Officials are not following through with their concession to the Tennessee Supreme Court and are not carrying out the instructions the Defendants were given by that Court. Most critically is the form a voter must complete to obtain an absentee ballot, “the Absentee Application Form.” This is a form State law requires to be made available to voters to enable them to vote absentee.⁴ It lists for voters all the excuses which allow them to vote absentee. The Form the State has now prepared makes no reference to COVID-19 as a legitimate excuse. The result is that a prospective voter looking at the Form has absolutely no way of knowing that the Tennessee Supreme Court has held that if the voter determines for himself/herself that he/she has a “special vulnerability to COVID-19” or is a “caretaker” of such a person, he/she is eligible to vote via absentee ballot during the November election.

⁴ Tennessee Code Annotated section 2-6-202(a) provides that to vote absentee by mail a voter must do one of two things: (1) make a request for an absentee ballot that comports with all of the statutory requirements for voting by mail or (2) “request from the county election commission office an application to vote absentee.” TENN. CODE ANN. § 2-6-202(a)(3) (West 2020).

In addition to this material omission of COVID-19 from the Absentee Application Form, the Plaintiffs provide examples of other misleading and confusing content on Defendant Secretary of State Hargett's Website ("State Website"); an August 7, 2020 Memorandum from Defendant Coordinator of Elections Mark Goins to All Election Commissions ("Election Commissions Memorandum"); and other content on the Absentee Application Form. The Plaintiffs assert that the Defendant State Officials have not made good on their concession and have defied the instructions of the Tennessee Supreme Court. The Plaintiffs seek for this Court to enforce those instructions based upon the Tennessee Supreme Court remanding the case to this Court for further proceedings.

The Defendant State Officials deny the Plaintiffs' allegations about confusing and misleading content, and take the position that the Tennessee Supreme Court's remand to this Court to conduct further proceedings does not authorize this Court to enforce the instructions of the Tennessee Supreme Court to provide guidance to voters.

On August 20, 2020, this Court conducted a hearing on these issues and did not immediately issue an order. This Court took more time to study the Tennessee Supreme Court's August 5, 2020 Decision. The Tennessee Supreme Court was not explicit about what this Court was to do on the remand of the cases. Therefore, this Court has used textual clues from the Decision, in particular the explicit reference by the Tennessee Supreme Court to the "eligibility requirements" in its instructions⁵ to the State, and the

⁵ When Tennessee courts "instruct" another to do something, it is not a mere suggestion. *See, e.g., Nelson v. State*, No. W2010-02088-CCA-R3-PC, 2011 WL 6349720 at *4 (Tenn. Ct. App. Dec. 14, 2011) (instructing post-conviction court to "revisit its findings" as to one factor of a test and "to make additional findings" on that factor); *State v. Schiefelbein*, 230 S.W.3d 88, 136 (Tenn. Ct. Crim. App. 2007) ("We instructed that upon retrial . . . the trial court should instruct the jury" regarding *mens rea*).

authority of Article I, section 5 and Article IV, section 1 of the Tennessee Constitution.

From these, this Court concludes as follows.

- The Tennessee Supreme Court’s remand to this Court for further proceedings consistent with their decision requires this Court to take action to revise the Absentee Application Form to redress the violation by the Defendant State Officials of the right to vote under the Tennessee Constitution and to enforce the instruction of the Tennessee Supreme Court to inform voters that COVID-19 susceptibility of voters and their caretakers is an eligibility excuse to vote absentee in the November 3, 2020 election.
- As to all other wording on the Absentee Application Form, outside of the eligibility requirements themselves, and the State Website and the Election Commissions Memorandum, this Court concludes that these are more in the nature of statements of policy which the Tennessee Supreme Court signaled in its decision that this Court does not have the authority to revise.

1. It is therefore ORDERED that by noon on Monday, August 31, 2020, the Coordinator of Elections shall change its Absentee Application Form and shall use the following specific wording with respect to the two eligibility criteria identified in the Tennessee Supreme Court decision. The wording is taken from the August 5, 2020 Decision of the Tennessee Supreme Court.⁶

⁶ In its decision, the Tennessee Supreme Court stated, quoting as follows.

At oral argument before this Court, the State conceded that, under its interpretation of Tennessee Code Annotated section 2-6-201(5)(C) and (D), persons who have underlying medical or health conditions which render them more susceptible to contracting COVID-19 or at greater risk should they contract it (“persons with special vulnerability to COVID-19”), as well as those who are caretakers for persons with special vulnerability to COVID-19, already are eligible to vote absentee by mail.”

* * *

FN 10. . . . As the State acknowledged during oral argument, these statutory provisions operate essentially as an “honor system” in that the voter makes *his or her own*

I am hospitalized, ill or physically disabled and unable to appear at my polling place to vote (this includes persons who have underlying medical or health conditions which in their determination render them more susceptible to contracting COVID-19 or at greater risk should they contract it).

I am a caretaker of a hospitalized, ill or physically disabled person (this includes caretakers for persons who have underlying medical or health conditions which in their determination render them more susceptible to contracting COVID-19 or at greater risk should they contract it).

2. It is additionally ORDERED that Defendant Goins shall direct the County Election Commissions to use the specific wording in paragraph 1 above on any materials listing the excuses found in Tennessee Code Annotated section 2-6-201 for absentee voting by mail that the County Election Commissions disseminate to voters.

3. It is further ORDERED that Defendant Coordinator of Election Goins shall file a Declaration with this Court by noon, September 1, 2020, that the orders in paragraphs 1 and 2 above have been complied with.

The bases for this Court's ruling are as follows.

The State's position before this Court, when these cases were filed in May 2020, was that as to Group 1, persons with special vulnerability to COVID-19 and their caretakers, they were not allowed across the board to vote absentee. Only if Group 1 persons fit within a very narrow set—those quarantined or who had tested positive for

determination as to being “ill” or the caretaker for someone who is “ill,” based on the voter's own knowledge. [emphasis added]

Fisher v. Hargett, No. M202000831SCRDMCV, 2020 WL 4515279, at *7 (Tenn. Aug. 5, 2020).

COVID-19—were they allowed by the Defendant State Officials to vote absentee. Defendant State Officials circulated the *Tennessee Election COVID-19 Contingency Plan* which stated that only individuals “who have — quarantined because of a potential exposure [to COVID-19] or who ha[ve] tested positive [for] COVID-19 are considered — ill for the purposes of — vot[ing] by mail absentee.” Steiner Decl. Ex. 63, Tenn. Sec. of State, *Tennessee Election COVID-19 Contingency Plan*, (April 23, 2020), <https://bit.ly/3g7WrUN>. In their filings in this Court, the Defendants called the Group 1 Plaintiffs’ claims to vote absentee due to autoimmune and COVID-19 susceptibility, “not fit for judicial decision” and not a “meaningful hardship.”⁷ The State took this position well after the spread of COVID-19 in Tennessee⁸ and well into the election cycle.

On June 4, 2020, this Court determined that under the Tennessee Constitution voting is a fundamental right and that the State not giving persons an option to apply to vote absentee during a worldwide pandemic violated the Tennessee Constitution. The Court issued a temporary injunction requiring the Defendant State Officials to change their Absentee Application Form and explanatory materials to allow any Tennessee registered voter, who determined it was impossible or unreasonable to vote in-person due to COVID-19 and/or their caretakers, to apply for a ballot to vote by mail.⁹ In arriving at that

⁷ Defendants State Officials’ *Response in Opposition to Plaintiffs’ Request for a Temporary Injunction*, May 22, 2020 at 10.

⁸ March 5, 2020 was when Tennessee confirmed its first official case of COVID-19. *Verified Complaint for Declaratory and Injunctive Relief*, Cause No. 20-435-III, May 8, 2020 at ¶ 19.

⁹ This is not the universal mail-in voting used by some states. To be able to vote absentee in Tennessee, a voter has to take the initiative and obtain an Absentee Application Form, complete that and deliver it to their Election Commission who then mails the voter a ballot. The COVID-19 eligibility this Court ordered kept that process in place and required the voter to have to take the initiative to obtain a ballot, consistent with Tennessee’s excuse required absentee voting law enacted by the Legislature.

decision, this Court identified two groups of voters: (1) persons with underlying medical or health conditions which render them more susceptible to contracting COVID-19 or at greater risk should they contract it (“persons with special vulnerability to COVID-19” or “Group 1”) and their caretakers and (2) persons who do not have special vulnerability to COVID-19 (“Group 2”).

When they lost before this Court, the Defendant State Officials appealed to the Tennessee Supreme Court. That Court adopted this Court’s analytical approach of the two groups of voters and noted the right to vote guaranteed by the Tennessee Constitution, but vacated the injunction issued by this Court.

The reason for vacating the injunction as to Group 1—persons with special vulnerability to COVID-19 and their caretakers—was that the Defendant State Officials took the extraordinary step of a last-minute concession during oral argument before the Tennessee Supreme Court, conceding that the relief the Group 1 Plaintiffs had been seeking all along in the litigation, to absentee vote in the upcoming November 2020 election that the State had resisted, should be granted. The State’s concession before the Tennessee Supreme Court came after time-consuming litigation that delayed certainty on a matter critical to voters. If the State had taken this position in the proceedings in this Court, the absentee voting rights of Group 1 voters would have been settled and known to them much earlier.¹⁰

¹⁰ Before this Court in oral argument the State was explicit that persons with special vulnerability to COVID-19 or their caretakers did not qualify within the eligibility excuse requirements of “hospitalized, ill or physically disabled.” This Court questioned them directly on this point to determine if under their interpretation, these Group 1 voters fit within the excuse/criteria of “hospitalized, ill or physically disabled” and the State’s answer was unequivocally no. Now, in an ambiguous manner, reported in the Tennessee

This changing, amorphous concession by the State before the Tennessee Supreme Court is problematic and harmful to the Group 1 voters (that is, persons with special vulnerability to COVID-19 and their caretakers) because the result of the State's concession was that the Tennessee Supreme Court took the Defendants at their word. The Tennessee Supreme Court stated that it had "no reason to doubt that the State will faithfully discharge its duty to implement the absentee voting statutes." The Tennessee Supreme Court removed the injunction this Court had issued, stating that "injunctive relief is not necessary." In place of an injunction (a mandate by law), the Tennessee Supreme Court gave "instructions" to the Defendants to abide by their concession and provide guidance to voters.

We instruct the State to ensure that appropriate guidance is provided to Tennessee registered voters with respect to the eligibility requirements of such persons to vote absentee by mail in advance of the November 2020 election.¹⁰ Accordingly, we hold that as to plaintiffs and persons with special vulnerability to COVID-19 or who are caretakers of persons with special vulnerability to COVID 19, injunctive relief is not necessary.

¹⁰ Such guidance may include that provided by the CDC with respect to underlying medical and health conditions which place individuals at heightened risk for COVID-19. In addition, the guidance should inform voters that, as set forth in the State's COVID-19 Contingency Plan, for those who request a mail-in ballot on the basis that the voter is either ill or the caretaker of someone who is ill, "[a] physician's statement is not required to allow these voters to vote absentee by-mail." As the State acknowledged during oral argument, these statutory provisions operate essentially as an "honor system" in that the voter makes his or her own determination as to being "ill" or the caretaker for someone who is "ill," based on the voter's own knowledge.

Use of the term "instructions" to the State as to Group 1 voters was in the context of

Supreme Court Decision, "the State conceded that, under its interpretation of Tennessee Code Annotated section 2-6-201(5)(C) and (D), persons who have underlying medical or health conditions which render them more susceptible to contracting COVID-19 or at greater risk should they contract it ("persons with special vulnerability to COVID-19"), as well as those who are caretakers for persons with special vulnerability to COVID-19, *already are eligible* to vote absentee by mail." *Id.* at *1 (emphasis added).

other statements by the Tennessee Supreme Court. Signaling a deferential approach to policy choices the Defendants make, the Tennessee Supreme Court’s majority decision, in its opinion about Group 2: persons without special vulnerability to COVID-19, stated that it was up to the Coordinator of Elections to make “policy choices . . . with respect to the conduct of elections during the COVID-19 pandemic,” and that these policy choices would be judged “by history and by the citizens of Tennessee” but that the Tennessee Supreme Court “may not and will not judge the relative merits” of those policy decisions. *Id.* at *18.

The Tennessee Supreme Court ended its decision with the mandate to this Court to conduct “further proceedings consistent with this opinion.” *Id.*

From the foregoing, in particular,

- the Supreme Court majority’s statement is that it is up to Election Coordinator Goins to make policy choices during the pandemic;
- yet instructing the State “to ensure that appropriate guidance is provided to Tennessee registered voters with respect to **eligibility requirements** of such persons to vote absentee by mail in advance of the November 2020 election [emphasis added]” and that “the guidance should inform voters that . . . a physician’s statement is not required . . . **that the voter makes his or her own determination**”; and
- that this Court is to conduct further proceedings consistent with the opinion,

this Court determines it is constrained from revising any of the State’s materials except for the eligibility requirements on the Absentee Application Form. That is because the Tennessee Supreme Court gave explicit instructions on these matters and ordered this Court on remand to conduct proceedings consistent with their decision. Moreover, as cited above, State law requires that the voter be provided an Absentee Application Form if

requested pursuant to Tennessee Code Annotated section 2-6-202(a)(3). So, while the State Website and the Election Commissions Memorandum and other content on the Absentee Application Form could be said to be policy statements, the eligibility excuse requirements are not policy. They are the law, and the Tennessee Supreme Court has decided and the State has conceded that COVID-19 susceptibility constitutes one of those excuses. As to the State Website, the Election Commissions Memorandum and other matters on the Absentee Application Form, this Court concludes, those fall into policy choices of the Defendant State Officials and cannot be revised by this Court. It is for these reasons that the Court has issued the above order.

In addition there are three final matters the Court must address.

The Court had considered and mentioned to Counsel at the August 20, 2020 hearing that the Court might conduct additional briefing and oral argument on this issue. But after more study of the Tennessee Supreme Court decision, the Court concludes additional proceedings on this issue would not be productive, and this is a time-critical matter in the event an appeal is taken to the Tennessee Supreme Court to clear up what it meant in its Decision about how its instructions to the State are to be enforced. As stated by Plaintiffs' Counsel in their *Plaintiffs' Joint Statement Of Issues*, "given that the absentee application period for the November 2020 election has started, and the *deadline* for absentee applications is just about ten weeks away, expedited proceedings are necessary." *Plaintiffs' Joint Statement Of Issues*, p. 1 (Aug. 13, 2020). For these reasons, the Court has considered and converted the *Plaintiffs' Joint Statement Of Issues* to a motion for the relief stated therein with respect to making the Defendants comply with the Tennessee Supreme

Court Decision, and the Court has considered the Defendants' *Response To Plaintiffs' Joint Statement Of Issues* as opposition to that motion.¹¹ As detailed above, the Court's ruling on that motion is that it is granted in part and denied in part. If, however, a party is concerned about confusion on appeal, it can file a notice that states it is converting its *Joint Statement or Response* to a motion, or other procedural measure they determine to ensure no confusion on appeal. As well, the foregoing reasons dictate that it is ORDERED that the Plaintiffs' request for expedited discovery on the compliance issues is denied as moot.

Additionally, while this Court has determined it does not have the authority to revise other matters on the Absentee Application Form or Director Goins' Memorandum to Election Commissioners or Secretary of State Hargett's Website, this Court, as a co-equal branch of government to the Defendants, speaking clinically and not disrespectfully, notes that these materials are confusing and misleading, especially given the State's acknowledgement in the August 20, 2020 hearing before this Court that if a person determines for him/herself they are COVID-19 eligible to vote absentee they cannot be prosecuted for perjury.

The following examples of the misleading and confusion content being circulated by the Defendant State Officials are quoted from pages 3-5 of the *Plaintiffs' Joint Statement of Issues*, August 13, 2020.

[T]he following "**NOTICE**" has been added to the Form in yellow highlighting:

¹¹ See, e.g., *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 300 (Tenn. Ct. App. 2001) ("The courts should avoid construing pleadings in any artificially technical sense. Thus, they should give the language of a pleading its fair and natural construction, and they should give effect to the substance of a pleading rather than its form.").

NOTICE: You may be eligible for a reward of up to \$1,000 if you make a report of voter fraud that leads to a conviction. Call the state election coordinator’s Voter Fraud Hotline at 877-850-4959 to report voter fraud.

This “**NOTICE**” will have the effect of confusing and intimidating voters, thereby suppressing voter participation and contravening one of the “stated purposes” of Tennessee election law, namely “to ‘[m]aximize participation by all citizens in the electoral process[.]’” Slip op. at 27 (quoting Tenn. Code. Ann. § 2-1-102(4)).

* * *

Defendant Goins’ Memo to County Election Officials (i) contravenes the Tennessee Supreme Court Order and (ii) contradicts the representations that the State made during oral argument before the Tennessee Supreme Court. Specifically, it contains the following language, which strongly suggests that County Election Officials are to instruct voters that if a voter goes to any public place—even just to the grocery store—that voter cannot vote via absentee ballot and must instead vote in person:

- Is the voter otherwise going to public places such as Walmart, Home Depot, shopping centers or other public places? As you all are aware, you have implemented extensive measures to provide safe voting environments pursuant to the Tennessee Election COVID-19 Contingency Plan. Most of those safety measures are far in excess of what other places of businesses throughout the state are required to do. Ex. C to Liu Decl. at 2.
- If the voter is able to willingly go to public places on a regular basis, the voter has already likely made the determination that their underlying illness, physical disability or other health condition, or that of someone in their care, does not make them or their charge especially vulnerable to COVID-19. *Id.* at 2-3.

* * *

Defendant Hargett’s website currently contains the following language regarding eligibility to vote absentee:

- You are hospitalized, ill or physically disabled and unable to appear at your polling place to vote. Voters who have an illness, physical disability or other underlying health condition that makes them especially vulnerable to COVID-19, and who, because of that condition, are unable to appear in the polling place on Election Day and instead wish to vote by-mail should check this box. For a list of underlying health conditions that makes a person especially vulnerable see <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>. A physician's statement is not required to check this box.
- You are the caretaker of a person who is hospitalized, ill, or disabled. Voters who are the caretaker of someone with an illness, physical disability or other underlying health condition that makes a person you care for especially vulnerable to COVID-19, and who wish to vote by-mail should check this box. For a list of underlying health conditions that makes a person especially vulnerable see <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html>. A physician's statement is not required to check this box [footnote omitted].

This language plainly departs from the language set forth in the Tennessee Supreme Court Order. Indeed, rather than using the Supreme Court's language of "special vulnerability to COVID-19," Slip Op. at 14, or "underlying medical and health conditions which place individuals at a heightened risk of COVID-19," *id.* at n.10, Defendant Hargett has chosen to employ the phrase "especially vulnerable to COVID-19."³ This is not merely a semantic difference. When Plaintiffs requested that the State change the language to match the Tennessee Supreme Court Order, the State refused.

Finally, pursuant to Tennessee Civil Procedure Rule 54.02 it is ORDERED that the Court directs entry of this Order as a final order as there is no just reason for delay with respect to the Group 1 persons with special vulnerability to COVID-19 and their

caretakers. Because of the State's concession before the Tennessee Supreme Court that Group 1 is eligible to vote absentee in the November 3, 2020 election, the only remaining matter was the Supreme Court's instruction to the State to supply guidance to voters. On that matter, on remand, this Court has made herein a final ruling appropriate for entry as a final order under Tennessee Civil Procedure Rule 54.02. Any remaining matters in the cases pertain to the separate Group 2 of voters on which the State has not conceded they may vote absentee and on which the Tennessee Supreme Court reversed this Court's injunction. The Group 2 matters are therefore separate and independent from the rulings herein. Additionally, in the August 20, 2020 hearing, Counsel for all parties stated they had no objection to the Court's entry of a Rule 54.02 final judgment with respect to this matter.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the *Twentieth Judicial District of the State of Tennessee In Re: COVID-19 Pandemic Revised Comprehensive Plan* as approved on May 22, 2020 by the Tennessee Supreme Court, this Court shall send copies solely by means of email to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-5719 to request a copy by mail.

For those who do not have an email address on file with the Court, your envelope will be hand-addressed and mailed with the court document enclosed, but if you have an email address it would be very helpful if you would provide that to the Docket Clerk by calling 615-862-5719.

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Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson

August 25, 2020

Deputy Clerk
Chancery Court