

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

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' COMBINED RULE 65.06 MOTION TO ENFORCE
THE COURT'S ORDER AND/OR FOR SANCTIONS**

INTRODUCTION

Plaintiffs submit this Memorandum in Support of their Motion for an Order to Enforce this Court’s June 4, 2020 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 “Order”) and/or impose sanctions as outlined below.

Pursuant to Tenn. R. Civ. Pr. 65.04(5), “[a] temporary injunction becomes effective and binding on the party enjoined *when the order is entered* [and] [i]t . . . remain[s] in force until modified or dissolved on motion or until a permanent injunction is granted or denied.” (emphasis added). Here, there is no dispute that the Order is valid and that Defendants (or the “State”) are aware of the Order. Yet, and as explained below, Defendants have violated and continue to violate the Order by treating requests for absentee ballot applications from individuals who cite COVID-19 or illness as their reason for making their request differently from other requests in at least two ways.

First, while the Order directs the State to permit any eligible voter to obtain an absentee ballot during the COVID-19 pandemic by checking “the already existing box on the absentee ballot application that states that the person is hospitalized, ill or physically disabled,” Order at 6, the State has instead unilaterally created a new “COVID-19”-related line on the absentee ballot request form and is directing voters who seek to vote absentee pursuant to the Order to use that line. *Second*, the State has instructed its election officials to put on hold the processing of requests for absentee ballot applications for individuals who cite COVID-19 or other illness as their reason for making their request. These actions—which will have the effect of intimidating, confusing and disenfranchising those choosing to vote by absentee ballot due to concern about contracting or unknowingly transmitting COVID-19 in accordance with this Court’s Order—are

in direct violation of the plain and express terms of this Order, which became effective upon entry. Tenn. R. Civ. P. 65.04(5). The Court should not tolerate such disrespect of its Orders; Defendants should be directed immediately to show cause, if any there be, why sanctions should not be imposed under Rule 65.06 of the Tennessee Rules of Civil Procedure, which sanctions should continue until the State is in strict compliance with the Order.

ARGUMENT

I. The State Has Violated And Continues To Violate The Order

The express terms of the Order “mandate[]” the State, *inter alia*, to “provide any eligible Tennessee voter, who applies to vote by mail in order to avoid transmission or contraction of COVID-19, an absentee ballot in upcoming elections during the pendency of the pandemic circumstances.” Order at 6. The Order then goes on to set forth the specific steps that the State must follow to ensure that voters who request an absentee ballot for COVID-related reasons are treated the same as other voters.

First, the State must permit such voters “to check” the already existing “box on the absentee ballot application that” states 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.” *Id.* (internal quotation marks omitted). *Second*, the State must “duly process[]” such applications “in accordance with Tennessee law.” *Id.* *Third*, the State must “print and mail absentee ballots to [them] *as the applications come in.*” *Id.* at 7 (emphasis added). *Finally*, the State must prominently post information about the new absentee ballot eligibility on its websites, and disseminate this to county election officials as well. *Id.* at 6.

The State is not following any of these mandates. On Friday June 5, 2020—the day after the Court issued its order—Defendant Mark Goins, State Coordinator of Elections, emailed county election administrators the following instructions:

All,

To follow up on the prior email, *you only need to hold off on sending absentee applications to voters who are requesting them for illness or COVID-19. You may continue to send out absentee applications to those who are making requests for the other reasons in the law (over 60, out of the country, etc.).*

If a voter asks for an application because of COVID-19, *go ahead and take their information so you can send them a form later with the revised language if we update the form or a stay is not granted.*

Sincerely,

Mark¹

In accordance with Defendant Goins’ direction, election officials are refusing to process absentee ballot applications and mail absentee ballots to eligible voters requesting them on the basis of COVID-19 or other illness. For example, on Friday June 5, 2020, State Representative London Lamar called Defendant Secretary of State Tre Hargett’s absentee ballot office to request an absentee ballot.² When she called, she referenced the Order, noted that she was under 60 years old, and inquired as to how she could “apply for an absentee ballot.”³ Rather than telling Representative Lamar that she could check the “hospitalized, ill or physically disabled” box on the absentee ballot application, *see* Order at 6, the election official with whom Representative Lamar spoke told Representative Lamar that the State is “getting together new guidelines” and is

¹ *See* Exhibit A to the Declaration of Jacob Webster Brown (“Brown Decl.”) (emphasis added); *see also* Exhibit A to the Declaration of Angela M. Liu (“Liu Decl.”).

² Declaration of London Lamar (“Lamar Decl.”) ¶ 3.

³ Lamar Decl., Exhibit B at 2:6-25.

therefore just “taking people’s names, phone numbers, and email addresses.”⁴ The election official further advised Representative Lamar that when State has the “new guidance ready,” the State will “contact the individuals that have reached out and shown interest in this.”⁵ She did not, however, provide any indication of when that might be. Representative Lamar specifically asked whether she would be sent an absentee ballot “immediately” if she submitted an application that day.⁶ The election official could not answer the question.⁷

Not only does this process directly contravene the Order, Order at 6-7, but it also runs afoul of the State’s own instructions for processing other absentee ballot requests, absentee ballot applications, and absentee ballots. Specifically, the COVID-19 Contingency Plan directs elections officials as follows:

Do not get behind on mailing out requests, applications or ballots.

- o Process and send requests received that day.
- o Process and send applications received that day.
- o Process and send ballot supplies received that day.⁸

The harm caused by treating voters who request absentee ballots on the basis of COVID-19 differently than other absentee voters is far more than the delay in receipt and ability to vote by absentee ballot. By refusing to process or delaying processing of those ballot applications, when other voters are receiving their absentee ballots timely, Defendants will create uncertainty and confusion on the part of voters seeking to vote absentee due to COVID-19 or other illness as

⁴ *Id.* at 2:22-3:4.

⁵ *Id.* at 2:24-3:4.

⁶ *Id.* at 3:5-10.

⁷ *Id.*

⁸ Brown/Liu Decl., Ex. B, Tenn. Sec. of State, *Tennessee Election COVID-19 Contingency Plan*, (April 23, 2020), <https://bit.ly/3g7WrUN>, 16 (emphasis in original).

to whether they have validly requested a ballot, whether they are eligible to vote, and whether their vote will be processed and counted. Such intentional disparate treatment of these eligible voters is directly contrary to the guarantees of the Tennessee Constitution.

Furthermore, without seeking clarification or asking to modify the Order, the State has unilaterally created an entirely new category on its absentee ballot application forms just for voters seeking to vote by mail due to COVID-19 concerns.⁹ Two lines below the “hospitalized, ill, or disabled” box that the Order permitted voters who wish to vote by mail due to COVID concerns to use, Order at 6, the State has devised an entirely new box and category that reads: “I have determined it is impossible or unreasonable to vote in-person due to the COVID-19 situation, and therefore qualify as hospitalized, ill, or disabled and unable to appear at my polling place.”¹⁰ Not only is the creation of this newly created category not contemplated by the Order and in tension with the Order’s directive that a different category be used, Order at 6, but there is no explanation of what constitutes being “impossible or unreasonable” to vote in-person, and there is no place for a person to indicate it is “impossible or unreasonable to vote in-person” due to COVID-19 because of the voter’s responsibilities as a “caretaker” for someone else. *See* Order at 6.

This unilateral disregard of the Court’s Order is designed to place increased scrutiny on voters who wish to do nothing more than to rely on this Court’s Order, lead to voter confusion and intimidation, and enable the state to segregate these voters’ absentee ballot requests and refrain from processing them.

⁹ Brown/Liu Decl., Ex. C Secretary of State website, *Absentee Vote By-Mail Request, August 6, 2020*, available at <https://bit.ly/3bYzUX3>.

¹⁰ *Id.*

II. Sanctions Are Appropriate

The Court has the discretion to impose sanctions for violation of a court order whenever the violation is “willful.” *State ex Rel Flowers v. Tenn. Trucking Ass’n Self Insur. Group Trust*, 209 S.W.3d 602, 613-615 (Tenn. Ct. App. 2006) (J. Lyle) (imposing sanctions where party failed to comply by date for compliance set by this Court); *see Reed v. Hamilton*, 39 S.W.3d 115, 118-120 (Tenn. Ct. App. 2000) (affirming the imposition of sanctions); *Bryan v. Leach*, 85 S.W.3d 136, 158-160 (Tenn. Ct. App. 2001); T.C.A. 21-1-804 (a chancery court may enforce its orders against the person in default or by process against that person as appropriate); T.C.A. 29-9-102 (authorizing contempt sanctions for “willful” disobedience of a court order); T.C.A. 29-9-104 (if the defendant is a corporation rather than an individual, the court can impose a fine, as authorized by law, for each day the violation continues).

In this context, the term “willful” simply means that the violation was “intentional and not accidental.” *Flowers*, 209 S.W.3d at 613-615. Here, there can be no dispute that the State’s violation of the Order was willful and not accidental. As described above, the State has made calculated decisions to act contrary to the plain text of the Order and has instructed county election officials to do the same.

In an effort to resolve these issues without Court intervention, Plaintiffs’ counsel contacted Defendants’ counsel (via phone and via email) on June 5, 2020 to schedule a meet and confer. Plaintiffs’ counsel again contacted Defendants’ counsel via phone earlier today. Plaintiffs’ counsel have yet to receive any response.

Accordingly, this Court should direct the State to immediately comply with the Court’s June 4 Order, and/or face sanctions. To comply with the Order, the State must:

(1) Treat *any* COVID-based request for an absentee ballot application or absentee ballot the same as a non-COVID based request, including by *not* creating any special COVID-related category on absentee ballot request forms;

(2) Upon receipt of a request from *any* eligible voter, regardless of whether the voter is seeking an absentee ballot application due to a determination that it is unreasonable to appear at a polling location because of the COVID-19 pandemic, promptly send out absentee ballot applications and instruct all county election officials to do the same; and

(3) Upon receipt of an absentee ballot application from an eligible voter, regardless of whether the voter is seeking an absentee ballot application due to a determination that it is unreasonable to appear at a polling location because of the COVID-19 pandemic, promptly send out an absentee ballot and instruct all county election officials to do the same.

Dated: June 8, 2020

Respectfully submitted,

/s/ Jacob Webster Brown

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing memorandum has been served on June 8, 2020, via email, prepaid U.S. Mail, or both upon opposing counsel of record in the above-styled matter.

/s/ Jacob Webster Brown _____