

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: (1) Denying State's Motion For Stay
Of 6/4/2020 Temporary Injunction Order and (2) Granting
State's Motion For Interlocutory Appeal**

The Court's analysis begins with the motion filed by the Defendant State Officials (hereinafter referred to as the "State") to stay a June 4, 2020 Temporary Injunction. That Injunction Order expands access to absentee voting during the pandemic. The State's motion is filed pursuant to Tennessee Civil Procedure Rules 62.03 and 62.06.

Scope of June 4, 2020 Temporary Injunction

To be clear about the issues, the State has **NOT** been ordered by this Court¹ to mail out to every Tennessean or registered voter an absentee ballot due to COVID-19. The State is **NOT** required by the Injunction Order issued on June 4, 2020, to immediately provide a mass mailing of absentee ballots to all voters.

What the State has been ordered to do is what Alabama, Arkansas, Kentucky, West Virginia and other states similar to Tennessee² are doing and that is to implement a common sense measure to temporarily give their registered voters, due to the COVID-19 worldwide pandemic, the option of going to the polls to vote in-person or voting by absentee ballot.

As required by Tennessee Civil Procedure Rule 65 and case law, the June 4, 2020 Injunction Order is conservative, narrowly tailored to the peculiar circumstances of a worldwide pandemic, and flexible to fit the diversity of Tennessee voters who cover the

¹ See 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, June 4, 2020 (referred to therein as the "Injunction Order").

² In the most recent briefing by the Plaintiffs in Case No. 20-453, the Court is informed that now Missouri has joined the vast majority of states who have expanded access to absentee balloting during the pandemic. According to the Plaintiffs, there are now only three states remaining who have not implemented such measures. Those states are Mississippi, Texas and Louisiana.

spectrum of: those who are offended by COVID-19 mask wearing, those who are offended if a mask is not worn, Republicans, Democrats, Independents, seniors, young, autoimmune compromised, and rural, small and big town, and urban voters.

Additionally conservative and narrow is that the Injunction Order does not require the State to take the initiative on initial ballot distribution. It is the voter who must take the first affirmative step to fill out a form and apply for an absentee ballot due to COVID-19. The only adjustment the Injunction Order makes to existing Tennessee law (Tennessee Code Annotated section 2-6-201) for the COVID-19 pandemic is that the Order temporarily expands the absentee ballot process to allow a voter to request an absentee ballot due to the pandemic and for the State to process that. This is a conservative and narrow remedy because it is the very same process presently required under Tennessee law. The Injunction Order does not add a new category to the statute or the State's absentee ballot form. Derived from the COVID-19 absentee ballot measures implemented in Alabama and West Virginia, the Injunction Order construes the statute to include COVID-19 situations as fitting within Tennessee Code Annotated sections 2-6-201(5)(C) and (D) when the guarantee of the right to vote found in the Tennessee Constitution is applied to the circumstances of a worldwide pandemic. Under the terms of the Injunction Order a voter seeking to vote absentee due to COVID-19 uses an existing category on the absentee ballot application form.

Thus because the Injunction Order is narrowly tailored to fit the circumstances, the result is that in parts of Tennessee where COVID-19 is not perceived to be a negative health factor, there will be low or no demand for absentee ballots due to COVID-19

because it is the voter who has to submit an application for an absentee ballot. And in the parts of the State where citizens do perceive COVID-19 to be a negative health factor, there will be more demand for absentee ballots. But as the evidence in the June 3, 2020 injunction hearing established, the State has prepared enough ballots for this eventuality, has already posted notices of the new COVID-19 excuse for an absentee ballot, and has \$1 million of federal funds to help with resources to process absentee ballots submitted due to COVID-19.

Dire Fiscal Impact Not Proven; The Injunction Order Does Not Increase Absentee Voters Disproportionate to State's Preinjunction Allocation of Resources for Absentee Voting

The bases the State asserts for a stay are that the State is not prepared for and cannot handle the fiscal and logistical impact, and potential user error of absentee balloting that the State asserts will occur from the expanded access to absentee voting ordered by the June 4, 2020 Temporary Injunction. With all due respect to the State, the evidence does not support that claim.

The record is clear that even before this lawsuit was filed and even before the Court issued its Temporary Injunction Order the level of fiscal and logistical impact of absentee voting anticipated under the Injunction Order were already being planned for by the State. The evidence of record establishes that the number of absentee voters anticipated by the expanded access to absentee voting of the Injunction Order is consistent with the 1.4 million absentee voters the State had already projected and planned for before these lawsuits were filed. Paragraphs 11-13, 16 of the Declaration of Coordinator of Elections Goins details the "overpreparedness" of Tennessee for absentee voting in terms of

personnel, logistics and equipment. Because the State had “overprepared”³ in its projections and planned for an increase from historically 2.5% absentee voters to a projected 36% of all registered voters even before these lawsuits were filed, the Declaration of Commissioner Goins shows that expanded access to absentee voting ordered by the June 4, 2020 Temporary Injunction is absorbed in what the State had already planned for fiscally and logistically. Thus, dire fiscal impact and potential user error are not new effects resulting from the Temporary Injunction Order and do not justify issuance of a stay.

This Court is not irresponsible. It is careful, and in connection with the June 3, 2020 injunction hearing the Court methodically examined and closely questioned all Counsel about the fiscal impact of expanded absentee voting. It was the State who asserted lack of funds. Yet, with all due respect, the State’s proof was not competent and not weighty. In a nutshell what the State did to support its claim that it could not give Tennessee voters expanded access to absentee voting during the pandemic because the State does not have the resources was to assume

- 100% of all registered voters in Tennessee will vote (*Goins Supplemental Declaration* June 1, 2020 at ¶¶ 3-4), and that
- 100% of all those 100% registered voters will vote absentee (*Id.*).

The condition of 100% turnout of all registered voters has never occurred, ever, in the State of Tennessee based upon the historical voter turnout stated in the record. As to the assumption that 100% of all registered voters will vote absentee, this assumption is not

³ *Declaration of Mark Goins*, Coordinator of Elections for the State of Tennessee, p. 5, ¶ 11 (May 22, 2020).

industry standard. The opinion of the State's expert, Washington Secretary of State Wyman, is that the absentee ballot voting assumption is in the range of 23% to 60%. Accordingly, the State's argument in its motion to stay that "[i]t would require the State and its counties to expend millions of dollars, in a short timeframe, to implement absentee voting that is not contemplated by the statute" has absolutely no support or weight in the record.

Moreover, despite the void of proof left by the State, and being careful and responsible, the Court, on its own initiative, took the opinion of the Defendant's expert, Ms. Wyman, that the industry standard for absentee turnout is 23% to 60%. Using the absolute maximum of 60%, the Court multiplied that by the greatest number of voter turnout in the record which was 61% of 4.16 million registered voters or 2.5 million for the November 2016 election. *Declaration of Mark Goins*, p. 2, ¶ 5 (May 22, 2020). Calculating 60% of the 2.5 million voters yields 1.5 million. Accordingly, the absolute maximum that the State should be prepared to handle if absentee voting is expanded for COVID reasons in November 2020 is approximately 1.5 million voters, using the industry standard opined by the State's expert. The record showed that the State is already prepared to handle 1.4 million Tennesseans to vote by mail. *Declaration of Mark Goins*, p. 5, ¶¶ 11-13, 16 (May 22, 2020). In addition the State has \$1 million of federal funds to assist with expanded absentee voting for 2020.

This evidence of record and these calculations are not rebutted by the State in its motion to stay leaving no evidence to support the State's claims of dire fiscal consequences and irreparable harm if the Injunction Order is not stayed. The evidence of record is that

the State can support and cover the expanded access to voting ordered in the Temporary Injunction.

Election Integrity—The State Already Made this Decision Before These Lawsuits Were Filed and Before the Injunction Order Was Issued

There may be voter confusion as the State appears to be dismissive of the Injunction Order. According to evidence filed by the Plaintiffs cited below in the footnote,⁴ the State has modified implementation of the Injunction Order contrary to the terms of the Order.

There may also be some absentee ballots not counted because of user error that would not have occurred if the individual voted in-person. But, again, prior to these

⁴ As per instructions from the State, election officials in Tennessee are not processing absentee ballot applications and mailing absentee ballots to voters who request the absentee ballots on the basis of COVID-19. Declarations of London Lamar, Angela Marie Lui and Jacob Webster Brown, filed June 8, 2020 in support of *Plaintiffs’ Combined Rule 65.06 Motion To Enforce The Court’s Order And/Or For Sanctions*. The State has instructed 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. *Id.* The State has also unilaterally created a new line on its absentee ballot application form, to segregate voters who attempt to apply pursuant to the Injunction Order. These actions by the State are in derogation of the June 4 Injunction Order, page 6, which required the following.

[T]he Defendants are enjoined from:

- enforcing their current construction of the “excuse requirement” for absentee voting stated in Tennessee Code Annotated section 2-6-201(5)(C) and (D), and are mandated 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 pandemic circumstances; and
- implement the construction and application of Tennessee Code Annotated section 2-6-201(5)(C) and (D) that any qualified voter who determines it is impossible or unreasonable to vote in-person at a polling place due to the COVID-19 situation shall 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 have that absentee voting request duly processed by the State in accordance with Tennessee law.

In addition it is ORDERED that the Defendants are mandated to:

- prominently post on their websites and disseminate to County Election Officials that voters who do not wish to vote in-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 voting or on Election Day.

lawsuits being filed and prior to issuance of the Injunction Order, the State was prepared for 1.4 million Tennesseans to vote absentee. That is, the State was already planning for an increase in absentee voting from 2.5% of voters to 36% of all registered voters. The State, therefore, had accepted and come to terms with the issue of potential user error and that some absentee ballots may be rejected.

Even more basic, though, with respect to the pandemic is that the issue of user error goes back to the individual and giving them a choice since it is their fundamental right under the Tennessee Constitution to vote which is at stake. It is for the individual, not the State, to weigh the risk of not filling out the absentee ballot correctly and their vote not being counted, versus exposing themselves to the polling place during the pandemic. As the findings of fact of the Injunction Order make clear, one size does not fit all. There are so many different situations for each voter related to the Virus (autoimmune, caretaker for someone who has COVID-19 heightened susceptibility, having been exposed to the Virus, etc.), as well as health effects which can be permanent or fatal if the Virus is contracted, that an individualized remedy is appropriate and fits the circumstances. By notifying voters of the alternatives of in-person voting at a polling place versus the availability of absentee ballots due to the pandemic and providing those ballots when requested by a voter and processing them, the State fulfills its duty under the Tennessee Constitution, leaving the rest up to the individual.

Additionally, in all the details and nuances of this case, it is important not to lose sight that what is at issue is a fundamental right which requires the State, under Tennessee law, to have good reasons for limitations imposed on that right. *City of Memphis v.*

Hargett, 414 S.W.3d 88, 102 (Tenn. 2013). As Article I, section 5 of the Tennessee Constitution provides, “the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto” By not making the conservative, narrow changes to absentee balloting temporarily ordered by this Court to address the ongoing pandemic in Tennessee, the State is violating the Tennessee Constitution. The authority for the Injunction Order is not, to use a cliché, “judicial activism” or “legislating from the bench.” It is the oath administered to all courts in this State to uphold the Tennessee Constitution. That is the authority for the Injunction Order.

Lastly, the State in its motion for interlocutory appeal and stay has pivoted from the argument made at the injunction hearing that voter fraud was the compelling, or at least a necessary and reasonable justification, for denying the expansion of absentee balloting required by the Court. Now in its motion to stay and for interlocutory appeal the State has pivoted away from voter fraud, perhaps because its own expert debunked that justification. Now the State argues chaos. This too is not a legitimate justification for a stay because the evidence cited by the State comes from states which have not implemented the careful, conservative terms of the Injunction Order in this case. Quoting from the Plaintiffs’ opposition as follows:

[T]he State cites to ballot delivery problems in Maryland, Memo at 4-6, but Maryland adopted a complete-vote-by-mail system—a remedy that Plaintiffs did not request and that this Court studiously avoided. Order at 6-7. The State further points to problems including long lines at in-person voting locations in Washington, D.C., Memo at 4-5, but fails to mention that the District reduced polling places by 86%, which contributed to longer lines at the remaining polling locations despite a 15-fold increase in the number of absentee ballots requested. Thus, the District’s problems with long lines would only have been worse—burdening voters even more and exacerbating

public health concerns due to crowding—if the District had required an excuse for voting absentee, and had forced even more voters to vote in-person. Likewise, the State mentions an issue with the instructions accompanying absentee ballots sent to voters in a single Pennsylvania county, Memo at 6, but again conveniently omits that the absentee ballots themselves had the correct instructions.

Plaintiffs’ Brief in Opposition to Defendants’ Motion for Stay Pending Appeal, Case No. 20-453 at 9-10 (footnotes omitted).

For all these reasons, it is ORDERED that the Court denies a stay of its *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*, issued June 4, 2020, and that *Order* shall remain in effect.

State’s Motion for Interlocutory Appeal

As to the Defendants’ motion for interlocutory appeal, it is ORDERED that the motion is granted based upon factor 3 of Tennessee Appellate Rule 9(a) that “the challenged order will not otherwise be reviewable upon entry of final judgment.” As stated above, the Injunction Order expanding access to absentee balloting takes effect immediately. By the time this case is final the absentee balloting for the August 2020 election will have occurred. Accordingly interlocutory review is appropriate.

As to factors 1 and 2 of Tennessee Appellate Rule 9(a) the Court’s analysis is that the Injunction Order will be upheld on appeal for the reasons stated above and based upon the clear law and evidence stated in the 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. This is not a close call in this case. This is a common sense, conservative remedy given the unprecedented worldwide pandemic. As stated in the findings of fact of the Injunction Order numerous other states have implemented this same remedy in the same or less time as Tennessee has in this case and under statutory schemes similar to Tennessee. The State’s evidence opposing such relief falls well below the mark required to burden the fundamental right to vote. The evidence and law are clearly that the Plaintiffs should prevail based upon a temporary injunction order that is appropriately narrowly tailored to address the State’s constitutional violation. And any increased efforts of expanded absentee voting that result from the Injunction Order can be absorbed and handled by the State because the increase is consistent with the range of absentee voters the State had projected and prepared for before the lawsuit was filed and the Injunction Order was entered. The Injunction Order is not fiscally nor logistically irresponsible. The remedy provided in the Injunction Order is consistent with the State’s “overprepared”⁵ projections for absentee balloting preexisting these lawsuits.

For these reasons, factors one and two of Tennessee Appellate Rule 9(a)⁶ do not apply in determining whether the Court should grant the State’s motion for an interlocutory appeal.

⁵ *Declaration of Mark Goins*, p. 5, ¶ 11 (May 22, 2020).

⁶ Tennessee Rule of Appellate Procedure 9(a) provides,

(a) Application for Permission to Appeal; Grounds. Except as provided in rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: (1) the need to prevent irreparable injury, giving consideration to the severity

Thus, pursuant to Tennessee Appellate Procedure Rule 9(a) factor 3, this Court grants an interlocutory appeal so a superior court can promptly issue a ruling on whether the June 4, 2020 Temporary Injunction is valid and shall remain in effect.

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, through June 30, 2020, 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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of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment.

TENN. R. APP. P. 9(a) (West 2020).

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