

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

TREVA THOMPSON, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL ACTION NO.
)	2:16-cv-783-WKW
)	
JOHN H. MERRILL, in his official)	CLASS ACTION
capacity as Secretary of State, <i>et al.</i> ,)	
)	
Defendants.)	

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR
SUMMARY JUDGMENT ON COUNT 18**

Plaintiffs are entitled to summary judgment on Count 18 because Alabama's voter registration forms do not specify which convictions make a citizen ineligible to vote, contrary to the requirements of the National Voter Registration Act ("NVRA"). Despite the major change in the eligibility requirements with the enactment of HB 282 in 2017, Alabama's forms have remained unchanged. Plaintiffs are entitled to summary judgment on Count 18.¹

¹ Plaintiffs cross-moved for summary judgment on Count 18 with respect to both the federal and state forms. Regarding the federal form, Plaintiffs contended that Secretary Merrill had failed to comply with this statutory obligation to inform the federal Election Assistance Commission of the change in state law following enactment of HB 282. As Defendants note, *see* ECF No. 105 at 2, the Secretary has now done so. Plaintiffs thus agree that their claim with respect to the federal form is now moot.

ARGUMENT

I. Alabama’s Forms Fail to “Specify” Each Eligibility Requirement.

Alabama’s forms² violate the NVRA because they do not specify which felony convictions make a citizen ineligible to vote. The NVRA provides that voter registration forms “shall include a statement that [] specifies each eligibility requirement (including citizenship).” 52 U.S.C. § 20508(b)(2)(A); *see also* 52 U.S.C. § 20505(a)(2) (requiring state-created forms to meet § 20508’s requirements). Alabama’s voter registration forms provide that one must “[n]ot have been convicted of a disqualifying felony,” ECF No. 95-1 at 6, without specifying which felonies are disqualifying. This violates the plain text of the NVRA.

As the Supreme Court has explained, when Congress uses the word “specify,” it means that information should be provided in detail. *See Kucana v. Holder*, 558 U.S. 233, 243 n.10 (2010) (“[S]pecify’ means ‘to name or state explicitly or in detail.’” (quoting Webster’s New Collegiate Dictionary 1116 (1974))). The use of “marginally

² Defendants’ contention that GBM only has standing to challenge the mail-in registration form, *see* ECF No. 105 at 4, stretches the standing doctrine too far. By Defendants’ logic, GBM could only obtain relief with respect to the specific copies of the registration form in its physical custody, rather than the template form itself. But that is not the law. GBM has standing to challenge a state’s unlawful practice that causes it to expend additional organizational resources. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). If Alabama’s other forms, including those issued at agencies providing driver’s licenses, properly specified the eligibility requirements, GBM would not encounter as many eligible, unregistered voters in the first place. Likewise, if the Court concludes that the mail-in registration form violates the NVRA, Defendants can hardly contend that they would be justified to leave unchanged their various other, identical forms. Nor could they simply create a slightly revised form, not previously used by GBM, and use the language just found unlawful by the Court.

ambiguous” language does not suffice to “specify” something. *Id.* (quoting *Soltane v. U.S. Dep’t of Justice*, 381 F.3d 143, 147 (3d Cir. 2004) (Alito, J.)). Defendants’ position that the State forms satisfy the NVRA by generally referring to “disqualifying felon[ies]” is foreclosed by the plain meaning of the word “specify.”

First, Defendants contend that the NVRA does not require the forms to “*explain*” the eligibility requirements, ECF No. 105 at 5 (emphasis in original), which they say is what Plaintiffs seek in alleging that the forms must specify the actual disqualifying felonies. To the extent that there is a distinction between “specify” and “explain,”³ Defendants mistake what it means to “specify.” Although the forms provide people notice that there *is* an eligibility requirement generally related to felony status, they do not specify *what* that eligibility requirement is. *See* ECF No. 95-1 at 6 (Alabama form stating that a registrant must “[n]ot have been convicted of a disqualifying felony” or, if so, “must have had [his or her] civil rights restored”). Nothing on the form tells would-be registrants—who must certify their eligibility under penalty of perjury—what constitutes a disqualifying felony.

This stands in contrast to the forms’ specification of citizenship, residency, and age eligibility requirements. The forms specify these requirements by providing that one must “[b]e a citizen of the United States,” “[r]eside in Alabama,” and “[b]e at least

³ Notably, when Defendants were unaware that the NVRA actually used the word “specify,” they were of the view that “specify” and “explain” meant the same thing. In their initial brief seeking summary judgment on this Count, Defendants noted that “[h]ad Congress intended the forms to ‘specify’ eligibility requirements, Congress would have used a word like ‘describe,’ ‘explain,’ ‘detail,’ or ‘specify.’ It did not.” ECF No. 95 at 21 (emphasis added).

18 years of age on or before election day.” ECF No. 95-1 at 6. The forms would violate the NVRA if they instead provided that one must “not be disqualified by reason of country of citizenship,” “not be disqualified by reason of state of residency,” or “not be of a disqualifying age.” Like the current statement regarding disqualifying felonies, these statements would provide notice that citizenship, residency, and age eligibility requirements *existed*, but they would not specify *what* those requirements were. The NVRA requires that the actual eligibility requirements be specified, not merely that the *subject matter* of those requirements be listed, obligating people to read the Alabama Code, or be informed by organizations like GBM, to learn of the specific eligibility requirements.⁴

Second, Defendants cite no authority to support their contention that the NVRA requirements may be disregarded because compliance would require the State to make modifications it believes are difficult to administer. *See* ECF No. 105 at 5, 8-9. The NVRA requirement that eligibility requirements be “specif[ied]” does not become optional merely because a state enacts a long list of eligibility requirements.

⁴ Defendants’ examples—Air Force officers temporarily stationed in Alabama, 17-year-olds turning 18 prior to the next election, and green card holders, ECF No. 105 at 6—are inapposite because Plaintiffs are not contending that every nuanced question be resolved by specifications on the forms. Rather, they contend that the specific list of disqualifying felonies—a relatively small subset of felonies—be communicated.

Likewise, Defendants’ citation to the 1994 Federal Election Commission guide citing Washington State’s form, which referred to ineligibility because of conviction for “infamous crime,” is misplaced. ECF No. 105 at 7. At the time, Washington defined *all* felonies as “infamous crimes.” *See Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

In any event, Defendants' characterization of the difficulty the State would face in specifying the eligibility requirements is overstated. Defendants contend that "no State form anywhere provides the level of detailed explanation of eligibility requirements that Plaintiffs would require." ECF No. 105 at 8. This is not so, as Plaintiffs explained in moving for summary judgment on this Count. *See* ECF No. 97 at 37-38. For example, Mississippi lists the disqualifying felonies on its state form:

- You can use this form to: register to vote in Mississippi or change your name and/or address.
- If you are registering for the first time in Mississippi and DO NOT have a Mississippi driver's license or social security number, you must send with this application a copy of a current and valid photo ID or a copy of a current utility bill, bank statement, government check, paycheck or other government document that shows your name and address in this county.
- An application for voter registration must be postmarked or hand delivered to the Circuit Clerk's Office located in the county of your voting residence no later than 30 days before an election.
- You may not register to vote if you have been convicted in a Mississippi state court of any of the following crimes: voter fraud, murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, bigamy, armed robbery, extortion, felony bad check, felony shoplifting, larceny, receiving stolen property, robbery, timber larceny, unlawful taking of a motor vehicle, statutory rape, carjacking or larceny under lease or rental agreement.
- If you live in an area without house numbers or street names, please include a drawing of your location to enable us to identify your appropriate voting precinct.
- Photo ID Required to Vote: You will be required to present an acceptable form of photo identification when you vote at your polling place on Election Day or by absentee ballot in your Circuit Clerk's Office, unless exempted by law. For more information, go to www.MSVoterID.ms.gov or call (844) 678-6837.

Check One: <input type="checkbox"/> New Registration <input type="checkbox"/> Change of Information	Are you a citizen of the United States of America? Yes <input type="checkbox"/> No <input type="checkbox"/>			
	Will you be 18 years of age on or before Election Day? Yes <input type="checkbox"/> No <input type="checkbox"/>			
NOTE: If you checked 'No' in response to either of these questions, DO NOT complete this form.				
	Would you like to serve as an Election Day poll worker? Yes <input type="checkbox"/> No <input type="checkbox"/>			
Name	Last Name	First Name	MI	Suffix
Number and Street/Road/Dorm/Apt #				

ECF No. 97-7 (red box added). Defendants offer no reason why they cannot do the same, other than to suggest that it "is more likely to confuse the vast majority of voters who have not committed a felony." ECF No. 105 at 8. But they do not explain why the presence of a list of disqualifying felonies might confuse those who have *not* been convicted of a felony into thinking that perhaps they *have been*, or why non-felons would even look at the list at all. The supposition of Defendants' employees that specifying the disqualifying convictions will confuse people who have not committed a felony does not create a genuine issue of material fact, nor does it make

much sense. In any event, a state agency employee's opinion does not trump federal law.

The current form's treatment of felon eligibility *is* confusing to the most important audience of the information: felons. As the attached declaration of Tari Williams, Organizing Director for GBM, makes clear, she has encountered eligible voters who believe that the statement on the form means that *all* felonies are disqualifying. *See* Ex. 1 (Williams Decl.) ¶ 4. She has had to expend time and resources explaining the eligibility requirements to these people. *Id.* ¶ 4. This is compounded by the statement threatening perjury prosecution and imprisonment, and she has experienced eligible voters declining to register because of such fear. *Id.* ¶ 5. This is precisely why Congress required that the forms “specify” the eligibility requirements.

Third, Defendants reason that Plaintiffs' position would mean that “Alabama's State and federal forms have always violated the NVRA because they have never provided a list of specific felonies that are disqualifying.” ECF No. 105 at 5, *id.* at 8 (contending that the fact that the Secretary of State has never listed the disqualifying felonies on the form somehow “strongly suggests it is not required”). Considering that *no one* knew which felonies were disqualifying prior to 2017—including the Secretary of State—it should hardly be surprising that such a list was not included on the registration form. *See* ECF No. 72 at 1 (this Court asking “[b]ut what does ‘moral turpitude’ mean?”); ECF No. 80 at 5-6 (noting the “unenviable task” of determining whether a felony involves “moral turpitude”). The fact that the Secretary of State did

not previously list the disqualifying felonies says more about the unconstitutional vagueness of the prior law than about what the NVRA requires to be specified on the registration form.⁵

The NVRA requires that Alabama “specify” its eligibility requirements. States are not excused from this requirement merely because they have a long list of eligibility requirements. Alabama’s registration forms violate Section 20508, and thus Plaintiffs are entitled to summary judgment on Count 18.

CONCLUSION

For the foregoing reasons, Plaintiffs should be granted summary judgment on Count 18 of their supplemental complaint.

⁵ Plaintiffs seek for the registration form to specify what Alabama law specifies—the state law convictions that are disqualifying, and the fact that analogous convictions under other states’ laws and federal law are likewise disqualifying. Defendants’ suggestion that Plaintiffs’ position would require them to list all such non-Alabama laws is misplaced. ECF No. 105 at 6.

Respectfully submitted,

/s/ Mark P. Gaber

Danielle Lang (CA Bar: 304450)
J. Gerald Hebert (VA Bar: 38432)
Mark P. Gaber (DC Bar: 988077)
Campaign Legal Center
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
dlang@campaignlegalcenter.org
ghebert@campaignlegalcenter.org
mgaber@campaignlegalcenter.org

J. Mitch McGuire (AL Bar: ASB-8317-S69M)
McGuire & Associates LLC
31 Clayton Street
Montgomery, AL 36104
(334) 517-1000
jmcguire@mandabusinesslaw.com

James U. Blacksher (AL Bar: ASB-2381-S82J)
P.O. Box 636
Birmingham, AL 35201
(205) 591-7238
jblacksher@ns.sympatico.ca

Jessica Ring Amunson (DC Bar: 497223)
Jenner & Block LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 736-6000
jamunson@jenner.com

Pamela Karlan (NY Bar: 2116994)
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

Aderson B. Francois (DC Bar: 498544)
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, DC 20001
(202) 662-6721
abf48@georgetown.edu

Armand Derfner (SC Bar: 1650)
Derfner & Altman
575 King Street, Suite B
Charleston, SC 29403
(843) 723-9804
aderfner@derfneraltman.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on May 18, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record as listed below.

/s/ Mark P. Gaber

Mark P. Gaber

Counsel for Plaintiffs

Andrew Lynn Brasher
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130
334-353-2690
Fax: 334-242-4891
Email: abrasher@ago.state.al.us

Brad A. Chynoweth
State of Alabama
Office of the Attorney General
501 Washington Avenue
Post Office Box 300152
Montgomery, AL 36130
334.242.7997
Fax: 334.353.8440
Email: bchynoweth@ago.state.al.us

James William Davis
State of Alabama
Office of the Attorney General
P O Box 300152
Montgomery, AL 36130-0152
334-353-1356
Fax: 334-353-8440
Email: jimdavis@ago.state.al.us

Laura Elizabeth Howell
Office of the Alabama Attorney General
P O Box 300152
Montgomery, AL 36130
334-353-1018
Fax: 334-353-8440
Email: lhowell@ago.state.al.us

Misty Shawn Fairbanks Messick
Office of the Attorney General
P O Box 300152
Montgomery, AL 36130-0152
334-353-8674
Fax: 334-353-8440
Email: mmessick@ago.state.al.us

Winfield James Sinclair
Office of the Attorney General
P o Box 300152
Montgomery, AL 36130
334-242-7300
Fax: 334-353-8440
Email: wsinclair@ago.state.al.us
Counsel for Defendants

EXHIBIT 1

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TREVA THOMPSON, et. al.,

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v.

STATE OF ALABAMA, et. al.,

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CIVIL ACTION NO.
2:16-cv-783-WKW

DECLARATION OF TARI WILLIAMS

I, Tari Williams, hereby declare as follows:

1. The testimony set forth in this Declaration is based on first-hand knowledge, about which I could and would testify competently in open Court if called upon to do so.

2. I am the Organizing Director at Greater Birmingham Ministries ("GBM"). I have worked with GBM for a total of 11 years (2002-2006 and 2011-present).

3. As part of my role at GBM, I assist our constituents in the Birmingham community with voter registration, including helping people with felony convictions determine if they have lost their right to vote and, if eligible, register to vote.

4. I have worked with community members who do not have disqualifying convictions but believe all felony convictions to be disqualifying under state law. Indeed, many people with both felony and misdemeanor convictions categorically

believe that they cannot vote. Some have attempted to register to vote in the past and have been denied. On several occasions when I have provided people the state's voter registration form to fill out, they have interpreted the form's statement that they must "[n]ot have been convicted of a disqualifying felony" as meaning that a felony conviction is disqualifying—regardless of the specific felony. As a result, I have had to spend additional time and resources convincing and reassuring these constituents that they are actually eligible to register to vote.

5. That problem is compounded by the fact that the form says, "if you falsely sign this statement, you can be convicted and imprisoned for up to five years." I have had to spend additional time and resources assisting and reassuring people, confused by the "disqualifying felony" language on the form, that they will not be prosecuted for registering to vote because, despite the confusing language, their specific felony conviction does not affect their right to vote. In the end, some have chosen not to go forward with registering to vote.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and ability and that this declaration was prepared in the state of Alabama.

May 18, 2018


Tari Williams