IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERRENCE JOHNSON, JIM HARRIS, and ALEXANDER FRIEDMANN,	)	
Plaintiffs,	)	
v.	)	**Case No. 3:08cv0187**
PHIL BREDESEN, Governor of the State of Tennessee, BROOK THOMPSON, Coordinator of Elections, RILEY DARNELL, Secretary of State of Tennessee, JAMES JOHNSON, Administrator of Elections for Shelby County, KIM BUCKLEY, Administrator of Elections for Madison County, and RAY BARRETT, Administrator of Elections for Davidson County, in their official capacities,	)	**Judge Thomas A. Wiseman, Jr.**
Defendants.	)	

MEMORANDUM OPINION

Plaintiffs Terrence Johnson, Jim Harris and Alexander Friedmann bring this action seeking to invalidate those portions of Tenn. Code Ann. § 40-29-202 that condition the restoration of voting rights for people previously convicted of infamous crimes upon their payment of certain legal financial obligations, namely restitution and child support. Plaintiffs assert that this statute, by denying the vote to those who have not satisfied certain legal financial obligations, violates their fundamental right to vote and discriminates among citizens on the basis of wealth. More specifically, Plaintiffs claim that the statute at issue violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Twenty-Fourth Amendment to the United States Constitution, the Ex Post-Facto Clauses of the United States and Tennessee Constitutions, the Privileges and Immunities Clauses of the United States and Tennessee Constitutions, and the Due Process Clauses of the United States and Tennessee Constitutions. Plaintiffs name as defendants those state and county officials, in their official capacity, they allege are responsible for the implementation and enforcement of the state statutory scheme as it pertains to voter eligibility and registration. They seek declaratory and injunctive relief, nominal damages, attorney's fees and costs.

Defendants Ray Barrett, Kim Buckley and James Johnson, the Administrators of Elections for

Davidson, Madison and Shelby Counties respectively (collectively, the "County Officials") have now filed separate motions for summary judgment (Doc. Nos. 18, 29, 31). In his motion, Defendant Barrett asserts only that the Plaintiffs' claims against him are subject to dismissal under Rule 12(b)(6) for failure to state a claim that complies with the pleading requirements of Rule 8(a)(2), citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007). Defendant Kim Buckley relies upon the same argument but also asserts that (1) Plaintiff Jim Harris does not have standing to bring this action, such that the Court lacks subject-matter jurisdiction over his claims; and (2) all Plaintiffs have failed to state a claim for which relief may be granted against Defendant Buckley. Defendant James Johnson raises essentially the same points as Buckley, but adds that that Plaintiff Terrence Johnson fails to state a claim for which relief may be granted. Plaintiffs have filed their responses in opposition, and the motions are ripe for review.

For the reasons set forth below, the County Officials' motions will be denied.

I. FACTUAL BACKGROUND

Current Tennessee statute pertaining to the restoration of voting rights to convicted felons provides that such persons are ineligible to apply for a voter registration card or to have the right to suffrage restored unless they have paid all restitution ordered by the court as part of their sentence and are current on all child-support obligations. Tenn. Code Ann. § 40-29-202(b) & (c). Plaintiffs Terrence Johnson and Jim Harris are convicted felons who have served their sentences and wish to vote in upcoming elections but are ineligible under § 40-29-202(c) to apply for restoration of their voting rights because they owe past-due child support payments. Plaintiff Alexander Friedmann is likewise a convicted felon who has served his sentence and seeks restoration of his voting rights. Friedmann actually applied for such restoration in 2006, but his application was denied on the grounds that he supposedly owed over $1,000 in restitution. Friedmann maintains that his criminal file does not reflect that the sentencing court ordered him to pay restitution in any amount, but the State has nonetheless refused to restore his voting rights.

Friedmann asserts that the Defendants have violated his constitutional rights by refusing to issue him a voter registration card without offering documentation to prove he still has an obligation to pay restitution. In the alternative, Friedmann, like the other two plaintiffs, alleges that the state statutory scheme requiring convicted felons who have served their sentences to pay restitution and past-due child-

support obligations prior to being eligible to apply to have their voting rights restored violates their rights under the United States and Tennessee constitutions.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows district courts to dismiss a complaint which fails "to state a claim upon which relief may be granted." In the recent case of *Bell Atlantic Corp. v. Twombly*, — U.S. —, 127 S. Ct. 1955 (2007), the Supreme Court attempted to clarify the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. The Court expressly disavowed the oft-quoted standard established half a century ago by Justice Black in *Conley v. Gibson*, 355 U.S. 41 (1957), which purported to recognize "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 127 S. Ct. at 1968 (quoting *Conley*, 355 U.S. at 45–46). Characterizing that rule as one "best forgotten as an incomplete, negative gloss on an accepted pleading standard," *Twombly*, 127 S. Ct. at 1969, the Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964–65 (citations and quotation marks omitted). Further, the Court emphasized that even though a complaint need not contain detailed factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true. . . ." *Id.* at 1965 (internal citations omitted).

Rather than clarifying matters, *Twombly* created "significant uncertainty" as to the appropriate pleading requirements. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007). *See also Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 337 (6th Cir. 2007) ("We have noted some uncertainty concerning the scope of *Bell Atlantic Corp. v. Twombly*, . . . in which the Supreme Court 'retired' the 'no set of facts' formulation of the Rule 12(b)(6) standard . . . ."). Notwithstanding this confusion, the modified standard embraced by the Sixth Circuit for reviewing 12(b)(6) motions in light of *Twombly* appears to be as follows: On a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 502 (6th Cir. 2007) (quoting *Twombly*, 127 S. Ct. at

1974 (2007)). Thus, although the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Twombly*, 127 S. Ct. at 1964–65).

III. ANALYSIS AND DISCUSSION

A. Plaintiffs' Complaint Satisfies Rule 8 and *Twombly.*

The County Officials first argue, basically, that Plaintiffs have not alleged any wrongdoing, or any specific action at all, on the part of the County Officials, and that the claims against them should therefore be dismissed under Federal Rules 8(a) and 12(b)(6) in light of the Supreme Court's holding in *Twombly*. The Court finds that *Twombly* has not changed the federal rules' requirement that a plaintiff's complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (quoting *Twombly*, 127 S. Ct. at 1964; ellipsis in original).

Plaintiffs clearly have met that standard. First, they assert that the Plaintiffs are all ineligible (or are deemed ineligible by the state) to vote under the current statutory scheme in place in Tennessee, that they wish to vote in the upcoming election, and that the state statutory scheme, by rendering them ineligible to vote, violates their civil rights. Second, they claim that the Defendants are all jointly or severally liable, in their official capacity, for acting under color of state law to implement and enforce the statutory scheme that Plaintiffs contend is unconstitutional. The relief sought is primarily declaratory and injunctive. Plaintiffs have stated a claim for relief that is "plausible on its face." *Bledsoe*, 501 F.3d at 502.

B. Plaintiffs Jim Harris and Terrence Johnson Have Standing to Bring their Claims.

The County Officials assert that Plaintiffs Harris and Johnson lack standing to bring their claims because neither of them alleges that he actually attempted to have his voting rights restored. Notwithstanding, both Harris and Johnson allege that they wish to vote in the upcoming election but are ineligible to do so.

Their failure to seek restoration of their voting rights does not bar standing given that they are clearly ineligible under the terms of the statute to have their voting rights restored, and the law of standing does not require a futile gesture. *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005) (finding that failure to apply for a handgun license was not a barrier to standing where the plaintiff would not have been eligible to file

an application anyway, stating "We will not require such a futile gesture as a prerequisite for adjudication in federal court" (quoting *Williams v. Lambert*, 46 F.3d 1275, 1280 (2d Cir. 1995)). *See also Sporhase v. Nebraska ex rel. Douglas* 458 U.S. 941, 944 n.2 (1982) (noting that because the plaintiffs would not have been granted a permit for the interstate transportation of water if they had applied for one, their failure to submit an application for a permit did not deprive them of standing to challenge the legality of the reciprocity requirement for obtaining a permit); *Nyquist v. Mauclet*, 432 U.S. 1, 6 n.7 (1977) (noting that a plaintiff had standing despite his never having sought a student loan, where he was ineligible to receive one based on his status as a resident alien and the language of the applicable statute—which the plaintiff challenged—barring non-citizens from receiving student loans, and stating: "It is clear, therefore, that Art. III adverseness existed between the parties and that the dispute is a concrete one. . . . [L]ittle is to be served by requiring [plaintiff] now to go through the formality of submitting an application for a loan, in light of the certainty of its denial."); *Odle v. Decatur County*, 421 F.3d 386, 389 & n.2 (6th Cir. 2005) (plaintiffs who presented a facial challenge to a statutory scheme requiring adult entertainment establishments to obtain a license prior to doing business had standing to bring such a claim, despite not having applied for a license).

Moreover, the Court notes that the statute provides that "a person *shall not be eligible to apply* for a voter registration card" unless he has paid all restitution ordered by the court as part of the sentence and is current on all child-support obligations. Tenn. Code Ann. § 40-29-202(b) & (c). The statute therefore makes it clear that Plaintiffs Johnson and Harris are ineligible not only to have their voter rights restored under the terms of the statute but even to apply such for such restoration. Failure to apply therefore cannot preclude them from bringing suit to challenge the provisions of the statute.

C. Plaintiffs Have Stated a Claim for Relief Against the County Officials.

Finally, the County Officials argue that Plaintiffs have not stated a claim as to the County Officials themselves because Plaintiffs cannot trace their injuries to any action taken by the County Officials, nor show that any judgment against the County Officials would redress their alleged injuries. Along the same lines, the County Officials appear to be arguing that they cannot be held liable under the doctrine of *respondeat superior* for § 1983 violations unless they actually violated Plaintiffs' rights or caused such violations.

As an initial matter, it should be recognized that claims against the County Officials, in their official capacity, are tantamount to claims brought against the counties themselves in which the officials operate. *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. . . ."); *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). As the County Officials suggest, there is no *respondeat superior* liability under § 1983. *Monell*, 436 U.S. at 690. It is nonetheless clear, however, that local government units are "persons" for purposes of § 1983, and they "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.*

In the present case, Plaintiffs allege that the State of Tennessee "has not implemented a set of procedures that all counties have to follow when determining whether a person convicted of an infamous crime owes [legal financial obligations] and, if so, whether that person has satisfied his or her [legal financial obligations." (Compl. ¶ 24.) It may be reasonably inferred from this statement that, in the absence of a standard established by the state, the individual counties have been required to develop their own policies and procedures for determining whether a convicted felon meets all the requirements of Tenn. Code Ann. § 40-29-202 and is therefore eligible to have his voting rights restored. If relief is granted, the county officials will have the responsibility of dismantling the currently established procedure for dealing with voter rights restoration. Under *Monell*, it appears the County Officials can be sued under § 1983 for implementing or executing policies in accordance with the state law that Plaintiffs allege to be unconstitutional. The doctrine of *respondeat superior* is not a bar to Plaintiff's claims here.

The County Officials next argue, however, that Plaintiffs do not allege that the County Officials took any action at all on behalf of the counties they represent, much less any action that might have violated the Plaintiffs' constitutional rights, such that there can be no "fairly traceable causal connection" between the claimed injury and conduct by the County Officials. *Larson v. Valente*, 456 U.S. 228, 239 (1982) (internal quotation marks and citations omitted)), and that, in any event, they are not in a position

to redress the Plaintiffs' alleged injuries.

In *United States v. Mississippi*, 380 U.S. 128 (1965), the federal government brought suit against the State of Mississippi, the three members of the Mississippi State Board of Election Commissioners and six county Registrars of Voters, alleging that state law provisions pertaining to voter registration violated federal law and that the defendants and their agents had engaged in and would, unless restrained, continue to engage in acts that violated the right of black citizens of Mississippi to vote. The district court dismissed the complaint on various grounds. On appeal, the Supreme Court reversed the dismissal as to the three Election Commissioners on the basis that the duties and obligations imposed upon those defendants by statute meant that, should the federal government prove its case and obtain an injunction, "it would be natural to assume that such an order should run against the Board of Election Commissioners." *Id.* at 141.

Similarly, in concluding that the district court had erred in granting the motion to dismiss brought by the six county registrars, the Court noted: "[T]he complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20(a) of the Federal Rules of Civil Procedure. . . ." *Id.* at 142. The Court then quoted Rule 20's provision that "all persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action." *Id.* (quoting Fed. R. Civ. P. 20(a)). *See also League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977) ("Rule 20(a) imposes two specific requisites for the joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff or defendant relating to or arising out of the same transaction or occurrence; and (2) some question of law or fact common to all the parties will arise in the action." (citation omitted)); *Hill v. Tennessee*, 868 F. Supp. 221, 226 (M.D. Tenn. 1994) (rejecting the county's argument that it was not a proper party to the lawsuit as it was only acting as an agent of the state, and holding that the county was an indispensible party under Fed. R. Civ. P. 19(a) because dismissal of the county "would render it impossible for this Court to grant complete relief

as requested by the Plaintiff, in the event that he is successful in his claims").

On the basis of the referenced precedent, it appears that Plaintiffs have stated a viable claim for injunctive and declaratory relief against the County Officials in the present case. The statutory scheme at issue provides, with respect to the County Officials' role in the process:

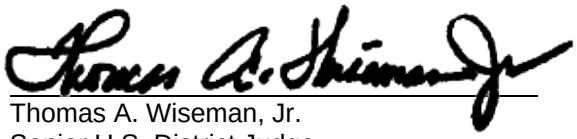
> Any person issued a certificate of voting rights restoration pursuant to this section shall submit the certificate to the administrator of elections in the county in which the person is eligible to vote. The administrator of elections shall send the certificate to the coordinator of elections who shall verify that the certificate was issued in compliance with this section. Upon determining that the certificate complies with the provisions of this section, the coordinator shall notify the appropriate administrator of elections and, after determining that the person is qualified to vote in that county . . . , the administrator shall grant the application for a voter registration card.

Tenn. Code Ann. § 40-29-203(d). In other words, the County Officials, as the administrators of elections within their respective counties, hold the final hoop through which an applicant must jump to obtain restoration of his voting rights. If notified that a person previously convicted of a felony is not eligible for restoration of his voting rights despite having completely satisfied the terms of his sentence, by reason of outstanding child-support payments or an unsatisfied restitution order, the administrator of elections is the person charged with rejecting (or granting) the applicant's request for restoration of his voting rights. The County Officials, in Plaintiffs' words, "play[ ] the ultimate and decisive role in restoration of felon voting rights." (Doc. No. 33, at 6.) Plaintiffs seek relief against them in the form of requiring them to process the Plaintiffs' applications for restoration of voting rights and to issue them a voter registration card. Accordingly, if injunctive or declaratory relief issues in this case, it would not be complete unless it included the County Officials within its purview.

Moreover, as previously discussed, filing a formal request to perform some act is not necessary where the request would be denied and the gesture futile. A logical corollary to that premise is that it is not necessary for the party who is in the position to deny the request, and would in all likelihood have denied the request if Plaintiffs had made it, actually to have denied the plaintiffs' specific request in order to be subject to a lawsuit challenging the statutory basis for denying the request. Accordingly, the Court finds that the Plaintiffs have asserted viable claims against the County Officials in this case.

IV. CONCLUSION

For the reasons stated above, the County Officials' motions to dismiss will be denied. An appropriate Order will enter.



Thomas A. Wiseman, Jr.
Senior U.S. District Judge