No. 14-3877

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ohio State Conference of the National Association for the Advancement of Colored People, *et al*.,

Plaintiffs-Appellees

v.

Mike DeWine, *et al*.,

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of Ohio, Case No. 2:14-cv-00404

Plaintiffs-Appellees' Response in Opposition to Defendants-Appellants' Emergency Motion for Temporary Stay Pending Expedited Appeal

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On September 4, 2014, the district court entered a preliminary injunction preserving – for one more election – specific early voting opportunities that the state had targeted for elimination. Order Granting Pl.s' Mot. Prelim. Inj., *NAACP v. Husted*, No. 2:14-cv-00404 (S.D. Ohio Sep. 4, 2014), ECF No. 72 (hereinafter "Opinion and Order"). These opportunities included a same-day registration period – a period in which voters could register or update their registration and vote in-person at the same time – and voting on weekday evenings and Sundays, opportunities that have been implemented for eight years including the last four federal elections and are relied upon by tens of thousands of Ohio voters, especially low-income voters. *Id.* at 50. The next day, on September 5, the Secretary of State sent an e-mail to Ohio's 88 county boards of elections informing them of the injunction. But the e-mail did not instruct the boards to follow the injunction. Instead it attached a Press Release with quotes from the Secretary of State expressing personal disagreement with the court's ruling. Damschroder Aff., Doc 18-2 Ex. 1.

On September 9, five days after the injunction was issued, Defendants-Appellants ("Defendants") moved for a stay pending appeal Def.'s Mot. to Stay. Inj. Pending Appeal, *NAACP* v. *Husted*, No. 2:14-cv-00404 (S.D. Ohio Sep. 9, 2014), ECF 80, which the district court denied the following day. Order Denying

Def.'s Mot. to Stay Inj. Pending Appeal, *NAACP* v. *Husted*, No. 2:14-cv-00404 (S.D. Ohio Sep. 10, 2014), ECF 82.

More than a week after entry of the injunction, the Secretary of State's website continues to post a voting schedule that fails to abide by the district court's order. Sec'y of State, Early Voting Sched. for the 2014 Gen. Elec., (Ex. A). Additionally, the websites of County Boards of Elections throughout the State similarly misinform voters as to the existence of all of these early voting opportunities. Early Voting Sched. For Cuyahoga Cnty, Franklin Cnty, Hamilton Cnty, and Summit Cnty (Ex. B).

Defendants argue that a stay pending appeal is necessary in order to preserve the "status quo" that they unlawfully created when they deliberately disobeyed the district court's order for eight straight days. All of Defendants' arguments in favor of a stay are simply different ways of asserting that they are entitled to ignore district court orders essentially until the United States Supreme Court has denied certiorari. But it is well-established that "until [a court's] decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 294 (1947).

Most importantly, Defendants' Motion for a Stay Pending Appeal does not even address the legal standard that controls the issuance of a stay pending appeal.

The grant of a stay pending appeal is "an exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citations omitted). The "party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34. And that party's burden is a "heavy" one. *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 389 (6th Cir. 2008).

In exercising that discretion, courts must consider four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken. 556 U.S. at 434 (citations omitted); *see also U.S. Student Ass'n Found.*, 546 F.3d at 380.

Factor One: Defendants do not even address their likelihood of success on the merits, much less make a "strong" showing of one.

"The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. Yet, as the party bearing the burden of demonstrating the need for a stay, Defendants do not even mention these factors, which is reason alone to deny this motion.

Even if Defendants attempted to demonstrate a "strong" likelihood of success on the merits, they would fail. First, the district court correctly found that Plaintiffs were likely to succeed in showing that the targeted elimination of same-day registration, voting on evenings, and voting on Sundays violated the

Fourteenth Amendment. These claims are governed by the flexible "*Anderson-Burdick*" balancing test, *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992), which is routinely applied in election law challenges, *see, e.g.*, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591-93 (6th Cir. 2012). Under the guidance of Sixth Circuit precedent, and relying on dozens of evidentiary submissions, the district court made extensive factual findings concerning the significant burdens imposed on low-income voters who rely upon the specific early voting opportunities that the Defendants attempted to eliminate. *See, e.g.*, *Obama for Am. v. Husted ("OFA")*, 697 F.3d 423, 431-32 (6th Cir. 2012) (targeted elimination of weekend early voting opportunities constituted burden on low-income voters). The district court found, *inter alia*, that low-income Ohioans in particular rely on voting outside regular business hours (the hours to which nearly all the early voting days are limited) because of difficulties taking unpaid time off work or arranging for childcare. Opinion and Order at 35. The district court also found that such voters, and those living on "the margins of society" *Id.* at 51, rely on same-day registration due to a confluence of factors: greater transience (requiring more frequent updates to their registration); need for in-person help with registration; and need for resolution of registration and voting issues in one trip due to lack of transportation. *Id.* at 24, 51. The district court found that by targeting these specific early voting opportunities, the

challenged cutbacks impose burdens that, while not "severe," were still "significant." *Id.* at 53. Defendants do not suggest that any of these factual findings are clearly erroneous.

It then found that these significant burdens outweighed the interests proffered by Defendants, such as fraud, cost and administrability, interests that are often intoned and rejected in election law challenges in this Circuit. *See, e.g.*, *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006) *superseded as moot*, 473 F.3d 692 (6th Cir. 2007) (fraud); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006) (cost/administrability).[1] Without applying a "litmus test," *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (Stevens, J., joined by Roberts, C.J., and Kennedy, J., plurality opinion), and instead carefully applying this balancing test, the district court properly concluded that these targeted cutbacks could not, for now, be sustained under the Equal Protection Clause.

[1] With respect to the elimination of evenings and Sundays, the only justification raised by Defendants was not cost or administrability, but "uniformity" – an interest in having all counties keep the same hours to avoid voter confusion. (This was a different tack than in *OFA*, where Defendants raised, and this Court rejected, cost and administrability concerns as a justification for the elimination of a weekend of early voting. *See OFA*, 697 F.3d at 432-34.) Here, Plaintiffs accepted Defendants' interest in uniformity. But Defendants were unable to show why uniformity necessarily justified the *elimination* of hours across the board, rather than having uniform and adequate hours across the board, such as the same evening hours in all counties. *See Burdick*, 504 U.S. at 434 (court must consider "extent to which [proffered] interests make it *necessary* to burden the plaintiff's rights" (quoting *Anderson*, 460 U.S. at 789)).

Second, the district court correctly found that Plaintiffs were likely to succeed in demonstrating a violation under Section 2 of the Voting Rights Act, which prohibits the use of any electoral practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). As this Court explained in *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007), a showing of intent is not required, and "the essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 879 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). After sifting through eleven expert reports from seven different expert witnesses, among other studies and exhibits, the district court credited the Plaintiffs' experts, who found that African Americans in Ohio disproportionately use and rely upon the specific early voting opportunities that were eliminated[2] because of the accessibility of these methods to lower-income populations. *See, e.g.*, *Stewart*, 444 F.3d at 879 (remanding for consideration of socioeconomic and other factors). The district court's application of Sixth Circuit precedent was again proper and likely to be upheld on appeal.

[2] Because Ohio's voter rolls do not keep track of race (unlike in North Carolina and Florida), indirect quantitative analyses must be performed to measure the racial disparity in early voting usage in Ohio.

Plaintiffs' likelihood of success on the merits therefore weighs in favor of denying Defendants' motion for a stay.

Factor Two: Defendants fail to show that they will be irreparably injured absent a stay.

Similarly, on the other "most critical" factor, *Nken*, 556 U.S. at 434, Defendants have not demonstrated – or even discussed – how merely continuing the same specific election practices upon which tens of thousands of Ohio voters rely would "*irreparably*" harm Defendants. Over the past eight years, Defendants have conducted elections involving these practices which have merely been continued by the district court for one more election. Over that same time period, and including in past litigation and this litigation, Defendants have had repeated opportunities to demonstrate how providing these specific voting opportunities has been unduly burdensome. They failed to do so before the district court, and they fail to do so here.

Factors Three and Four: The issuance of a stay would substantially harm the plaintiffs and the public at large.

Lastly, a stay would both substantially injure Plaintiffs and harm the interests of the public. *Nken*, 556 U.S. at 434. *First*, a stay would call to a halt the expectations of voters, and preparations of voting advocates, for the specific early voting opportunities that tens of thousands of Ohio voters have come to rely upon over the last eight years. As noted above, the district court's factual findings

demonstrate how these longstanding voting opportunities that were preserved by the court's injunction – same-day registration, evening, and Sunday voting – are relied upon by disadvantaged and minority voters, who suffer persistent inequalities in job autonomy, access to transportation, educational attainment, and flexibility to have access to voting outside of normal business hours. A disruption in these opportunities at this point could cause irreparable harm to these voters by burdening their actual ability to vote.

Second, a stay would threaten the implementation of same-day registration on September 30 should Plaintiffs prevail on appeal. If a stay were granted, and Plaintiffs prevail on appeal the week that merits briefing concludes on September 23, it would leave a mere *handful* of business days for Boards of Elections to receive a directive from the Secretary of State restoring the voting hours; create a plan to implement the restored hours; and find, hire and train qualified individuals to staff the restored hours. It is far better to be poised and ready than blindsided and scrambling, especially when what is at stake are longstanding voting opportunities that tens of thousands of Ohio voters rely upon. *See OFA*, 697 F.3d at 437 ("The public interest [] favors permitting as many qualified voters to vote as possible."). Ensuring that the district court's order is followed will promote, should Plaintiffs prevail on appeal, the "smooth and effective administration of the

voting laws" in which "there is a strong public interest." *Ne. Coal. For the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006).

Third, a stay is likely to add to voter confusion. The injunction simply restored opportunities upon which many voters, especially low-income and African-American voters, had relied. After the injunction was issued, the media widely reported it and advocates reasonably expected the injunction to be followed and began publicizing the restoration of these longstanding voting opportunities, just around the time at which voters are now tuning in to the upcoming election. If this Court denies a stay and Plaintiffs prevail on appeal, the transition will be seamless because voters will have the same opportunities that they have long had. Defendants argue that a stay is justified "to avoid repeating post-injunction confusion as in the 2012 election." (Def.'s Mot. at 5.) But Defendants do not explain what is so confusing about the district court's injunction (or, for that matter, what was so confusing about the 2012 injunction). Defendants argue that a stay "keeps those channels of communication open" between the Secretary and the local boards of elections "about the changing judicial landscape" and that without a stay, "Plaintiffs may challenge whether those communications are compatible with their vision of the injunction." (Def.'s Mot. at 5-6.) But a party is always entitled to challenge whether a court order is being followed. Being afraid of disobeying a

court order does not justify disobeying a court order. And again, Defendants do not explain what is so confusing about the district court's injunction.

While Defendants have found four cases to cite for the proposition that this Court has stayed "late" injunctions of election procedures, it is equally true that this Court has declined to stay such injunctions. *See, e.g.*, *U.S. Student Ass'n Found.*, 546 F.3d at 389, *Miller v. Blackwell*, 388 F.3d 546, 547 (6th Cir. 2004). In any event, the four cases cited by defendants are all fundamentally distinguishable from the situation here, because the district court injunction was granted *after* voting had already started. *See Nader v. Blackwell*, 230 F.3d 833, 834-35 (6th Cir. 2000) (injunction concerning party-identification on ballot issued after absentee ballots already printed and mailed); *Ne. Coal. For the Homeless* ("*NEOCH*") *v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) (TRO concerning absentee voting requirements issued after absentee voting already underway); *Serv. Emps. Int'l Union Local 1 v. Husted* ("*SEIU*"), 698 F.3d 341, 345 (6th Cir. 2012) (injunction requiring new instructions to poll workers entered after early voting already started); *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004) (TRO issued *two days* before Election Day). Such is not the case here.

Disrupting the status quo by disobedience to a district court order and asking for preservation of that unlawful status, is hardly an adequate justification for a

stay. Defendants fail to carry their burden of establishing each of the stay factors, much less even mention the "most critical" ones. Defendants' motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants' motion should be denied.

Respectfully submitted,

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Certificate of Service

The foregoing was filed this 12th day of September, 2014 on the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

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