

Case 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	:	On Appeal from the
COLORED PEOPLE, et al.,	:	United States District Court
	:	for the Southern District of Ohio
	:	Eastern Division
Plaintiffs-Appellees,	:	
	:	
v.	:	District Court Case No.
	:	2:14cv00404
	:	
OHIO SECRETARY OF STATE JON	:	
HUSTED and OHIO ATTORNEY	:	
GENERAL MIKE DEWINE	:	
	:	
Defendants-Appellants.	:	

EMERGENCY MOTION FOR TEMPORARY STAY PENDING
EXPEDITED APPEAL AND MEMORANDUM IN SUPPORT

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MOTION

Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine (“Ohio” or “State”) jointly move the Court under Fed. R. App. P. 8(a) for an order *temporarily* staying the district court’s order. Ohio’s request is limited. It asks only for a stay until this Court resolves the merits through an expedited schedule. And Ohio seeks only a stay of the district court’s order that would take effect immediately—before this Court can resolve the expedited appeal. Ohio, for example, asks for a stay of the injunction to the extent it orders the Secretary to *now* “require all Ohio county Boards of Election to set uniform and suitable EIP voting hours” or *now* restrains the Secretary from “preventing” local boards of elections from setting hours beyond those ordered in the injunction. Doc. 72, Page ID #5917-18. The district court has already denied Ohio’s request for a stay pending appeal. *See* Doc. 82, Order Denying Stay, at Page ID #5989. And Plaintiffs have now filed a motion to enforce the district court’s injunction, Doc. 83, Mot., at Page ID #5994, to which the Secretary must file a response by 9:00 A.M. tomorrow, September 12, 2014, Doc.84, Order, at Page ID #6012.

This stay simply preserves the pre-litigation status quo and avoids what the Plaintiffs have themselves described as the “disorient[ing]” effects of possible “flip-flopping rules” that are counterproductive in the run-up to voting. Doc.81, Opp. to Mot. for Stay, at Page ID #5986; *see also* Doc. 82, Order Denying Stay, at

Page ID #5993. Without a stay, the Secretary might take action, only to have this Court reverse the injunction, leaving voters and election officials to quickly sort out conflicting rules for the ever-closer election. With the stay in place, voters and Boards will avoid this whiplash.

Counsel for Plaintiffs have been notified of this motion. Counsel for Plaintiffs have indicated their opposition.

Respectfully submitted,

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s/Eric E. Murphy

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MEMORANDUM IN SUPPORT

Ohio requests a stay of the district court's injunction until this Court resolves the pending appeal. The State has moved for expediting this appeal to allow for a merits resolution before the court-ordered early voting scheduled for September 30. If the expedition order is granted, it would hopefully allow this Court to issue a decision before that time. Until the decision day, all involved—voters, boards of election, and state officials—benefit from expecting a single official answer about voting days and hours. All are disserved by any immediate *official* communications about specific voting hours and days required by the federal court if those specific voting hours and days *evaporate* when the expedited appeal concludes.

As it stands now, the injunction could require certain immediate acts that threaten voter and election-worker confusion. The injunction orders certain relief that will occur on early voting days (minimum days and hours beyond those set in State law) and arguably orders other relief immediately (that the Secretary will “require” the boards to set those days and hours; the Secretary may not prevent boards from setting non-uniform hours now). Doc.72, Order, at Page ID #5917-18. Ohio seeks a stay only as to any *immediate* commands that could possibly require action *before this Court can resolve the appeal*. Such a stay benefits all involved,

and avoids further wrangling in district court about the timing of the acts the injunction arguably commands. A stay is justified for the following reasons.

Everyone agrees that serial changes to election laws cause confusion. One common belief shared by Plaintiffs, the State, and the district court is that repeated changes to election rules right before an election causes harmful confusion. Plaintiffs think that “flip-flopping rules” have “disorient[ing]” effects on voters. Doc.81, Opp. to Mot. for Stay, at Page ID #5986. The district court likewise believes that constant changes to election rules equals “greater public confusion.” Doc.82, Order Denying Stay, at Page ID #5993. Ohio concurs that all are ill-served by contradictory directions about voting rules. A stay is appropriate to preserve *this Court’s* authority to resolve this appeal without imposing unnecessary confusion in the minds of voters and election workers for the next few weeks while the appeal progresses. Plaintiffs’ attempts to treat the injunction as the baseline would be odd because it is the *injunction*—not the *stay* Ohio requests to retain the rules that have been set since at least February 2014—that upsets the status quo about early voting. Without a stay boards might set hours that voters think are set in stone even though those hours might be *erased* by the appeal. Without a stay, the injunction could take on a life of its own, even if this Court reverses on the merits. A stay avoids the confusing back-and-forth that all agree should be avoided.

As just one example of the harm that the injunction may cause if not stayed, consider the part of the injunction that enjoins the Secretary from keeping local boards of elections from setting non-uniform hours contrary to state law. Without a stay, some boards might set and publish hours now. Without a stay, the Secretary is powerless to prevent that. If this Court were to ultimately reverse the injunction, those publicly communicated hours will be invalid. That would mean immediate reworking by elections officials and likely voter confusion for those who saw and internalized the ultimately erroneous hours.

The unanimous concern with ever-changing election rules makes a stay appropriate. Plaintiffs resist that logic and say they are concerned that any reactions to this Court's holding might require voters to "turn on a dime" just a few days before the election. Doc.81, Opp. to Mot. for Stay, at Page ID #5984. But that is a natural consequence of their choice to file a preliminary injunction in June seeking voting that might start in September. The question now is how to deal with the aftermath. Without a stay, everyone might turn on a dime twice, once in an effort to comply with the injunction, and then again if this Court reverses that injunction. With a stay, there is at most only one change to the status quo (and possibly none). With a stay, everyone can prepare while possibly knowing that this Court might affirm or reverse the injunction. With a stay, no one will be lulled

into thinking that the injunction will *necessarily* provide the rules for this election, only to learn just days before voting that the status quo has been restored.

This Court has frequently vacated late injunctions of election procedures. A stay is appropriate because a change to the injunction is probable and any interim official action would confuse voters and burden officials. “As a general rule, last-minute injunctions changing election procedures are strongly disfavored.” *Serv. Emps. Int’l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012). Orders that change election procedures “can themselves result in voter confusion,” and the risk for confusion only increases as the election draws near. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Late changes to election procedures also harm the “strong public interest in smooth and effective administration of the voting laws.” *Ne. Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006).

These twin concerns of voter confusion and smooth election administration have led this Court to stay late-breaking injunctions against Ohio election laws with some regularity in federal-election years. *See, e.g., Serv. Employees Int’l Union Local 1*, 698 F.3d 341 (2012); *Ne. Coal. for the Homeless*, 467 F.3d 999 (2006); *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004); *Nader v. Blackwell*, 230 F.3d 833 (6th Cir. 2000). Those orders have included vacating an injunction that would have required—like the injunction here—“expedited issuance of new instructions” to elections officials.

Serv. Emps. Int'l. Union, 698 F.3d 341, 346. A stay to preserve the pre-litigation status quo recognizes that this Court has quite regularly found that district courts made mistakes when they enjoined Ohio's election laws so close to the wire.

A stay is justified to avoid repeating post-injunction confusion as in the 2012 election. Some groups challenged early-voting hours in 2012. *See Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012). After a district court's preliminary injunction ordered uniform in-person early voting, *id.* at 426, the Secretary issued a Directive in response a few days later. That spawned *collateral* litigation about whether the Directive was faithful to the injunction even while the appeal of that injunction proceeded on a fast track. *See, e.g., Obama for America v. Husted*, No. 12-cv-636 (S.D. Ohio Sept. 10, 2012). There is no reason to repeat those events, and a partial stay will avoid any temptation to litigate the exact contours of an injunction that might be reversed on appeal.

A related point: the Secretary must communicate with the local boards of elections about the changing judicial landscape. A stay keeps those channels of communication open. The events of 2012 show that, without a stay, the Secretary is discouraged from communicating with the boards of election for fear of his communications leading to collateral litigation. That disserves the boards of elections and the voters they serve. The day after the district court's injunction, the Secretary sent an email about the decision to notify the election workers in all 88

Ohio counties. *See* Damschroder Aff., Ex. 1. Now, the Secretary plans to send a more detailed communication to the same group telling them about the expedited appeal and asking them to prepare for the contingency of offering voting hours and days as detailed in the injunction should the injunction ultimately be affirmed on appeal. *Id.* at Ex. 3. A stay protects these kinds of communications because, without it, Plaintiffs may challenge whether those communications are compatible with their vision of the injunction. Indeed, they have already filed a motion to enforce the injunction, claiming that the Secretary has “entirely failed to comply” with it and is now “misleading” the public. Doc. 83, Mot., at Page ID #5994-95.

Whatever the merits of late-breaking election litigation, it takes a toll on voters, officials, and courts. The only thing worse is avoidable collateral litigation over an injunction that will succeed or fail on appeal in a matter of weeks. A temporary stay avoids the kind of confusion and waste that attends litigation within litigation. And it allows the Secretary to reasonably prepare for *both* contingencies at the same time—one in which the early-voting days and hours that were set months ago still apply (with a reversal) and one in which the early-voting days and hours that were set at the last minute apply (with an affirmance).

CONCLUSION

Ohio respectfully asks the Court to temporarily stay the injunction below pending appeal to the extent it requires or prohibits any act before the appeal can be resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September 2014, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

s/Eric E. Murphy
ERIC E. MURPHY