UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

PROJECT VOTE/VOTING FOR AMERICA,

Plaintiff,

v. Case No. 2:10-CV-75

ELISA LONG, General Registrar for the City of Norfolk, Virginia, and DONALD PALMER, Secretary of the Virginia State Board of Elections,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO STAY JUDGMENT

The Defendants, Donald Palmer, Secretary of the Virginia State Board of Elections ("SBE"), and Elisa Long, the General Registrar for the City of Norfolk, Virginia, through counsel, respectfully ask the Court to stay its July 20, 2011, judgment under Fed. R. Civ. P. 62(c), for the following reasons discussed further below:

First, the facts here support staying this judgment pending appeal to the Fourth Circuit Court of Appeals under the four-part test set forth in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This includes the prejudice the Defendants will suffer complying with the Court's ruling which, if not stayed, would require the disposal of over a million voter registrations currently in stock for the 2011-2012 election cycle, and the prompt expenditure of substantial time and money to redo and reprint an estimated 1.2 million Voter Registration Applications ("Applications"). This would include obtaining pre-clearance from the U.S. Department of Justice ("DOJ") under Section 5 of the Voting Rights Act, 42 U.S.C. §§ 1973c. In total, it will take an estimated six months to make

changes to the Applications and cost an estimated $78,500 to print and restock the new Applications. If the Court's ruling is overturned on appeal, all that time and money will be lost. This would prejudice the Defendants and not serve the public interest.

In addition, Virginia is holding primary elections for state and local offices on August 23, 2011, and elections for those offices (including the State Senate and House of Delegates) on November 8, 2011. It is impossible for Virginia to comply with the Court's order in time for those elections given the required approvals described above.

A stay will also not impose any appreciable harm on the Plaintiff or voters whose applications are denied. Current law already provides: (1) notice to denied voter registration applicants about why their applications are denied and how they can appeal those denials to a state court; and (2) a public list of all persons whose applications are denied, making it possible for the Plaintiff to monitor denials and contact denied applicants. This lessens the "harm" (if any) a stay would pose to the Plaintiff.

Second, and very importantly, the Consent Decree entered into under the Fourth Circuit's ruling in *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993), mandates the inclusion of a Privacy Act Notice on these Applications. That Notice states, among other things, that voter registration cards (applications) "will not be open to inspection by the public," which conflicts directly with the Court's July 20 ruling. The Defendants ask the Court to stay its ruling pending appeal so that the issue in this case can be considered and harmonized by the Fourth Circuit in light of the decree in *Greidinger* and privacy concerns not addressed by the Court's July 20 ruling.[1] Otherwise the Defendants will be faced with conflicting orders from this Court, one of which orders the confidentiality of

[1] The Court's ruling addresses social security numbers but not other privacy concerns.

these Applications and the other which orders their public disclosure. The Defendants also present substantive arguments for appeal, including that the disclosure of these Applications would violate the provisions of at least two federal statutes.

The Court has previously noted that this is a case of first impression with potential national ramifications. All this supports staying this judgment pending appeal to the Fourth Circuit.

I. FACTS

On July 20, 2011, the Court issued a Memorandum Opinion and a Judgment Order granting summary judgment to the Plaintiff for the reasons previously stated by the Court. The Court ruled that Virginia Code § 24.2-444 violates the Public Disclosure section of the National Voting Rights Act ("NVRA"), 42 U.S.C. § 1973-gg(6)(i)(1), insofar as the state statute requires that completed Applications be kept confidential in Virginia. The Court found that the Applications are subject to public disclosure under the NVRA, which trumps the state statute under the Supremacy Clause of the Constitution.

In its July 20 ruling, the Court granted the Plaintiff prospective relief, ordering the disclosure of all Applications completed from the date of that ruling, but denied any retrospective relief. The denial of retrospective relief was driven significantly by the provision on current Applications indicating that they will be kept "confidential." But now that the Court has declared that these Applications are subject to public disclosure, none of Virginia's current Applications are valid insofar as they contain that disclaimer.

By way of background, the Privacy Act Notice on current Applications is mandated by the Consent Order entered into by the plaintiff in *Greidinger* and the SBE, which under that Order must obtain the consent of the plaintiff in *Greidinger*, and the

Court which entered the Order, before such changes can be made. A copy of the Consent Order is attached as Exhibit A. Paragraph 6 of the Consent Order requires that the SBE put a Privacy Act Notice on all Applications. That Notice states, among other things, that those Applications (called registration "cards") "will not be open to inspection by the public." *See* Exhibit attached to Exhibit A hereto.

In order to change these Applications to comply with the Court's July 20 Order, the SBE would have to take the following steps:

1. The SBE would have to amend the Applications authorized by the U. S. Constitution, Article I, Sections 2 and 4, and 42 U.S.C. § 1973gg-4. The SBE would also be required by Virginia Constitution Article II, Section 2, and Virginia Code § 24.2-418, to edit the Privacy Act Notice on the applications, which also requires securing approval from the SBE and the DOJ under Section 5 of the Voting Rights Act (42 U.S.C. § 1973c), and the plaintiff in *Greidinger v. Davis*, Case No. 3:91-CV-00476 (E.D.Va.), who previously objected to making any change to that Notice. A copy of the Consent Decree and attached Notice in that litigation are attached as Exhibit A.

2. Consistent with Public Participation Guidelines adopted by the SBE in July 2010, SBE staff would request that the Board approve exposing an edited version of the draft application, inviting comments from the public, including the plaintiff in *Greidinger*, for a period of 30 days.

3. Based on comments received, the SBE would approve a revised draft and request the Office of the Attorney General to submit the revised text to the U.S. District Court in the *Greidinger* case for approval consistent with the terms of the consent decree.

4. After a text was approved by the district court under *Greidinger*, the SBE would request that the Office of the Attorney General submit that final text for approval to the DOJ under Section 5 of the Voting Rights Act.

5. Once the SBE obtains approval from the DOJ, contracts to edit and print the new applications would be obtained following Virginia Public Procurement Act procedures. Based on recent experience with firms

under contract to design and print such applications, revision and printing would take at least one month to complete.

6. Based on the foregoing, it would take an estimated six months to rewrite and print these applications, depending on the time required for district court and DOJ approvals.[2]

Palmer Decl. ¶¶ 2-7. The estimated cost for printing and distributing an estimated 1.2 million new Applications is $78,500. *Id.* ¶ 8. Given the necessary approvals for new Applications, it will be impossible for the SBE to comply with the Court's July 20, 2011 Order in time for the August 23, 2011 state and local primary elections, or the November 8, 2011 elections for state and local offices. *Id.* ¶ 9.

The Defendants attempted to obtain a consent order for staying the July 20 ruling, but the Plaintiff was unwilling, making this Motion and one for an expedited ruling necessary under the competing deadlines set forth in Rule 62 and Local Rule 7.

II. LEGAL STANDARD

District courts must consider four factors when considering whether to issue a stay of a judgment pending appeal: (1) whether the stay applicant has made a strong showing that the appeal 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 to the appeal; and (4) where the public interest lies. *Hilton,* 481

[2] It is impossible to calculate the voter, fiscal and operational impact of authorizing private party examination of official voter registration processes during the critical election preparation phase that begins as the federally mandated 45-day deadline for sending absentee ballots approaches, before any election. General registrars have time sensitive obligations under federal and state laws to process voter registration applications on an expedited basis as soon as the information is received (*see* 42 U.S.C. § 15483 (a)(vi)). Absentee ballots must be sent 45 days before the election or within three business days after receipt if later. 42 U.S.C. § 1973ff-1(a)(8); Va. Code § 24.2-706.

U.S. at 776; *see also Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970) . A district court may balance these four factors. *See Goldstein v. Miller*, 488 F. Supp. 156, 176 (D. Md. 1980), *aff'd mem.,* 649 F.2d 863 (4th Cir. 1981). The firs t two factors are the most important. *Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009).

III. ARGUMENT

A. The Balance of Factors for Considering a Stay under Rule 62 Support Staying This Judgment During Appeal.

1. The Defendants Will Be Irreparably Harmed Without a Stay.

The SBE, in particular, will suffer substantial irreparable harm from the time and expense it will take to dispose of and redo an estimated 1.2 million Applications if this judgment is not stayed. *See* Palmer Decl. ¶¶ 2-8. As noted, the SBE estimates that it will take half a year to replace these Applications at an estimated cost of $78,500. *Id.* ¶ 8. Given the approvals needed for changing the Applications, including from the DOJ under the Voting Rights Act and the plaintiff and the Court under the *Greidinger* Consent Decree, it will be impossible for the SBE to comply with the Court's July 20 Order in time for Virginia's August 23, 2011 primaries or the November 8, 2011 General Election for state and local offices. *Id.* ¶ 9.

By information and belief, it took eight staff persons working for Defendant Long a total of six weeks to gather, redact and prepare 6,000 documents under a court order in 2008. The impact the Court's ruling will have on local Registrars is very significant and will be even more so should Applications be demanded for inspection in the weeks leading up to an election.

And if the Court's ruling on this case of first impression is overturned on appeal, all this time and expense described above will have been wasted. This prejudices the Defendants and fails to serve the public interest, as discussed further below.

2. The Public Interest Is Better Served by Staying the Judgment.

The public interest is better served by staying this judgment. This is particularly true given the time and expense of redoing all of Virginia's Applications, all of which would be wasted if the Court's July 20 decision is overturned on appeal. Only a stay will serve the public interest in this regard, since otherwise the Defendants will be forced to incur this time and expense of taxpayer dollars to comply with the July 20 ruling, given the time before the 2012 elections. A stay will also ensure that there will be no confusion regarding voter registration for the 2011 Virginia primaries and elections.

In addition, the Defendants believe there are voter privacy concerns which are not addressed by the Court's July 20 ruling. In that ruling, the Court did address the concern posed by allowing public disclosure of Social Security Numbers ("SSNs") on disclosed Applications, by ordering that SSNs be redacted before disclosure. *See* Mem. Op. at 14. But in their Opposition to Summary Judgment, the Defendants noted other privacy concerns, including the danger posed by disclosing signatures (which can be used to engage in identify theft), along with sensitive information about mental incapacity and criminal history (also on the Applications), all found on single documents subject to public disclosure under this ruling. *See* Palmer Opp. to Mot. for Sum. Judg., Docket No. 51 at 9-10. (In addition, Virginia provides that the addresses of persons such as law enforcement agents or abused spouses may also be kept confidential for safety reasons. *See* Va. Code § 24.2-418.) It is in the public interest to have this judgment stayed so that

the issues of public disclosure and privacy can be fully considered and weighed by the Fourth Circuit before any judgment takes effect.

3. The Plaintiff Will Not Suffer Any Appreciable Harm From a Stay.

The Plaintiff will not suffer irreparable harm from a stay. The next national election is more than a year away, and voter registration drives are normally conducted in the months immediately before an election.

The Defendants again note that current law still provides that anyone whose Application is rejected be notified of that decision, and provides information telling that person how he or she can appeal that decision to a Virginia circuit court. *See, e.g.,* Long Aff., Docket No. 57, ¶¶ 7-11. Under current law, the Plaintiff also has access to a list of all rejected applicants whom the Plaintiff can contact at any time. Va. Code § 24.2-444(A). This enables the Plaintiff to monitor Application rejections in Virginia during appeal even if the judgment is stayed.

4. The Defendants Have Sound Arguments for Appeal.

Regarding the likelihood of success on appeal, the Defendants have presented several arguments that have potential merit, notwithstanding the Court's differing opinion. This includes that information contained in these applications is kept confidential under at least two more recent federal statutes, including the Help America Vote Act ("HAVA"), under which the information in provisional ballots, which include these Applications, must be kept confidential by local election officials. 42 U.S.C. § 15482(a)(5)(B).

The Uniformed and Overseas Citizens Absentee Voting Act's ("UOCAVA") requirement under 42 U.S.C. §§ 1973ff-1(e)(6) and (f)(3), regarding the privacy of

individual absentee voter information during the application *and* ballot transmission process, requires that certain information in these Applications must remain confidential during that process (at the very least) as a matter of federal policy. Under the July 20 ruling, all Applications would be subject to immediate public disclosure upon receipt by a local Registrar once SSNs are removed. The Defendants believe this violates provisions in both HAVA and UOCAVA (as amended by the Military and Overseas Voter Empowerment Act, or "MOVE Act").

Even if a court is less than certain about a party's likely success on appeal, the practical effects of a ruling may best be stayed to confirm whether the court's ruling is correct on appeal, especially if the ruling will have wide-ranging effects like this one. *See, e.g., Bragg v. Robertson,* 190 F.R.D. 194, 195-96 (S.D.W.Va. 1999)(granting motion to stay a permanent injunction barring state environmental regulators from approving further buffer zone variances). For all these reasons, the Court should stay the judgment under the four-part test in *Hilton v. Braunskill*.

B. The Court Should Stay This Judgment In Light of the Conflict Between that Judgment and the Consent Degree in *Greidinger*.

As noted above, the Consent Decree entered into under the Fourth Circuit's ruling in *Greidinger*, 988 F.2d at 1353, mandates the inclusion of a Privacy Act Notice on the applications which conflicts with the Court's July 20 ruling. *See* Exhibit A ¶ 6 and Exhibit thereto. That Notice states, among other things, that voter registration cards (applications) "will not be open to inspection by the public." *Id.* Changing such an order would require both approval by the Court and the consent of the plaintiff in that action.

The Defendants ask the Court to stay its ruling pending appeal so that the issue in this case can be considered and harmonized by the Fourth Circuit on appeal in light of the

decree reached in *Greidinger*. Otherwise the Defendants will be faced with conflicting court orders from this Court regarding these Applications. Indeed, obeying the Court's July 20 order would place the SBE in direct violation of the Consent Order in *Greidinger*. The Fourth Circuit should have the opportunity to rule on this case before the SBE is placed in the untenable position of obeying this Court's ruling which conflicts in any way with another ruling from this Court, entered pursuant to a Fourth Circuit ruling.

IV. CONCLUSION

For the reasons stated above, the Defendants respectfully ask the Court to stay its judgment pending appeal.

Respectfully submitted,

DONALD PALMER

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CERTIFICATE OF SERVICE

I certify that on this 25th day of July, 2011, I filed with the Court's ECF system a true copy of the forgoing instrument, which will then be sent electronically to the following counsel of record:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

PROJECT VOTE/VOTING FOR AMERICA,

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v. **Case No. 2:10-CV-75**

ELISA LONG, General Registrar for the City of Norfolk, Virginia, and DONALD PALMER, Secretary of the Virginia State Board of Elections,

Defendants.

DECLARATION OF DONALD PALMER

I, DONALD PALMER, state as follows based upon my personal knowledge and belief, for my Declaration in this case:

1. I am over 18 years of age. I am the Secretary of the Virginia State Board of Elections ("SBE"), a position I have held since January 28, 2011. In this position, I am responsible for overseeing the operations and policies of the SBE.

2. The SBE would have to amend the Virginia Voter Registration Application ("Application") authorized by the United States Constitution Article I, Sections 2 and 4, and 42 U.S.C. § 1973gg-4. The SBE would also be required by Virginia Constitution Article II, Section 2, and Virginia Code § 24.2-418, to edit the Privacy Act Notice on the Applications, which requires securing approval from the members of the SBE, the United States Department of Justice ("DOJ") under Section 5 of the Voting Rights Act (42 U.S.C. § 1973c), and the plaintiff in *Greidinger v. Davis*, Case No. 3:91-CV-00476 (E.D.Va.), who previously objected to making any change to that Notice. A copy of the Consent Decree in that litigation is attached as Exhibit A.

3. Consistent with Public Participation Guidelines adopted by the SBE in July 2010, SBE staff would request that the three-member SBE Board approve publishing an edited version of the draft Application, inviting comments from the public, including the plaintiff in *Greidinger*, for a period of 30 days.

4. Based on comments received, the SBE would approve a revised draft and request that the Office of Attorney General submit the revised text to the U.S. District Court in the *Greidinger* case for its approval consistent with the terms of the Consent Decree.

5. After a text was approved by the federal district court under *Greidinger*, the SBE would request that the Office of the Attorney General submit that final text for approval to the DOJ under Section 5 of the Voting Rights Act.

6. Once the SBE obtains approval from the DOJ, contracts to edit and print the new Applications would be obtained following Virginia Public Procurement Act procedures. Based on recent experience with firms under contract to design and print such Applications, revision and printing would take at least one month to complete.

7. Based on the foregoing, it would take approximately six months to rewrite and print these new Applications, depending on the time required for district court and DOJ approvals.

8. The SBE and applicable voter registration offices across Virginia would also be required to dispose of over a million Applications and stock these offices with new Applications soon before the August 23, 2011 state primaries, and the November 8, 2011 statewide elections, take place. The estimated cost to the SBE for making these

changes, then printing and distributing an estimated 1.2 million new Applications, is approximately $78,500.

9. Given the required SBE, DOJ and other approvals needed, by law, for changing these Applications, it is impossible for the SBE to comply with the Court's July 20, 2011 Order in time for the 2011 primaries and elections in Virginia.

10. Based on discussions with General Registrars across Virginia and my observations of election administration processes, the cost of implementing the Court's July 20, 2011 Order at the local level, to properly copy/scan and redact voter Applications, before new Applications are approved, would have a significant negative impact on election administration. For example, under the July 20 Order, completed Applications would now have to be disclosed. If a county or local registrar office were required to use existing personnel to pull, redact and make copies of current Applications, such a request could jeopardize that county or registrar's ability to conduct an election if the request came in the weeks leading up to a primary or election.

I state that the forgoing in true to the best of my knowledge, declared and signed under penalty of perjury under 28 U.S.C. § 1746, on this 25th day of July, 2011.

DONALD PALMER