IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

PROJECT VOTE/VOTING FOR AMERICA, INC. 737 ½ 8th St SE Washington, DC 20003 Plaintiff, v. **ELISA LONG**, *In Her Official Capacity as General Registrar of Norfolk, VA* City Hall Building, Room 808 810 Union Street Norfolk, VA 23510 **DONALD PALMER**, *In His Official Capacity as Secretary, State Board of Elections,* Washington Building, First Floor 1100 Bank Street Richmond, VA 23219 Defendants.	)	CIVIL ACTION NO.: 2:10cv75

PLAINTIFF PROJECT VOTE'S OPPOSITION TO DEFENDANTS' MOTION FOR STAY PENDING APPEAL

INTRODUCTION

During more than two years of requests to the Commonwealth and litigation in this Court, Plaintiff Project Vote has been seeking access to voter registration applications in Virginia under the National Voter Registration Act ("NVRA"). The Court recognized Project Vote's right to access voter registration applications under the NVRA's Public Disclosure Provision, 42 U.S.C. § 1973gg-6(i), when it denied Defendants' motion to dismiss, and now the Court has

granted summary judgment to Project Vote. Op.11, ECF No. 63. Defendants now ask the Court to stay its judgment under Federal Rule of Civil Procedure 62(c) for an indefinite time while they appeal the Court's decision. The Court should deny this stay because Defendants have not demonstrated that they are entitled to a stay. To the contrary, staying the Court's decision will prevent Project Vote from having access to voter records for the entire pendency of the appellate process, which could last a year or more. With a national election looming next fall, it is critical that Project Vote have access to the records to which the Court has found it is entitled.

Moreover, the length of stay requested by Defendants does not comport with their excuses about why they cannot comply with the Court's order. Defendant Donald Palmer has stated in an affidavit that Defendants can comply with the Court's order to produce records within six months. Decl. of Donald Palmer ¶ 7, ECF No. 67-1. The disconnect between the six months supposedly needed to comply with the Court's order and the long stay requested provides another reason for the Court to deny Defendant's motion.

Finally, the Court in its summary judgment order already weighed the public interest in this case and concluded that, while retrospective application of an injunction would require the production of registration records that were filled out by individuals who believed that those records would be kept confidential, a prospective injunction requiring the production of voter registration applications created after July 20, 2011, was in the public interest and did not raise confidentiality concerns. Op.11-15. By staying this case, the Court will allow Defendants to maintain the language of the current voter registration form, which *misstates* the law by informing Virginians that their registration applications will be kept secret. The plain language of the NVRA requires disclosure of voter registration applications, as this Court has recognized,

and it is time for the Commonwealth of Virginia to change its practices to conform to that federal requirement.

ARGUMENT

I. The Court Should Not Stay Its Order Pending Appeal.

Defendants' motion fails to meet their heavy burden to show that a stay is warranted. *See Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009); *Bragg v. Robertson*, 190 F.R.D. 194, 196 (S.D. W. Va. 1999) (movant has a "heavy burden under Rule 62(c)"). *See also* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2904 (2d ed. 1995) ("Because the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be denied."). In considering whether Defendants have shown that a stay is warranted, the court should examine each of the following factors: (i) whether Defendants have made a "strong showing" that they are likely to succeed on the merits on appeal; (ii) whether Defendants will suffer irreparable harm without a stay of the ordered relief; (iii) whether issuance of the stay will substantially injure Project Vote; and (iv) whether the public interest lies in favor of granting the stay. *See Hilton v. Braunskill*, 481 U.S. 770, 776-777 (1987) (citations omitted); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); *Columbus-Am. Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel,* No. 87-363-N, 2011 WL 2638160, at *3 (E.D. Va. June 15, 2011). In the Fourth Circuit, Defendants must establish that all four prongs weigh in their favor. *Citifinancial, Inc. v. Lightner*, No. 5:06CV145, 2007 WL 3088087, at *4 (N.D.W.Va. Oct. 22, 2007) ("*Robinson*, which is the law of the Fourth Circuit and to which this Court is bound, presents the test as four separate criteria—all of which must be met before a court may grant a stay—not as a balancing of the equities test."); *accord Robinson*, 432 F.2d at 979; *In re Garcia*, 436 B.R. 825, 829 (W.D. Va.

2010) ("[F]ailure to satisfy all four requirements is fatal to a movant's request for a stay pending appeal.") (citing *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008)). But even if the test required balancing, rather than satisfying, all four considerations, an analysis of the four prongs weighs against staying this Court's order.

A. Defendants Are Not Likely To Prevail On Appeal Because This Court's Ruling That The NVRA Affords Project Vote Access To Registration Records is Supported By The Statute's Plain Language.

Defendants must make a "strong showing" that they are likely to prevail on appeal, *Hilton*, 481 U.S. at 776, not just that their chances of success are "'better than negligible.'" *Nken*, 129 S. Ct. at 1761 (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)). This first prong of the test is not satisfied here because Defendants are unlikely to prevail on appeal, since the Court's decision was based on repeated, careful analysis of the NVRA's plain language and established canons of statutory interpretation. *See Robinson*, 432 F.2d at 980 (concluding that the moving party was unlikely to prevail where "[a]ll of the legal authorities which the parties claim are pertinent to the litigation were considered by the district judge and appear to have been correctly applied"). Indeed, the Court had at least two occasions to consider whether the records at issue were covered by the NVRA—once on the motion to dismiss and once on summary judgment—and it concluded both times that the plain language of the statute supported Project Vote's position.

Defendants, of course, disagree with the Court's ruling, but they have not demonstrated why an appellate court is any more likely to rule for them than this Court was. In granting summary judgment in favor of Project Vote, this Court again considered Defendants' arguments before reiterating its plain-meaning analysis of the NVRA's statutory language. *See* Op.7-8 (citing *Project Vote/Voting for America, Inc. v. Long*, 752 F. Supp. 2d 697, 706, 708-09 (E.D.

Va. 2010). The Court should not second-guess its ruling simply because Defendants have expressed their intention to raise their arguments on appeal. *See, e.g., Columbus-Am. Discovery Group, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 2011 WL 2638160, at *3 ("[T]he court finds that there is little likelihood that … [plaintiff] will succeed on the merits, for the reasons enumerated in this court's April 22, 2011, and June 15, 2011, Orders."); *Mylan Labs., Inc. v. Leavitt*, 495 F. Supp. 2d 43, 48 (D.D.C. 2007) (finding a failure to show probable success on appeal where "[t]he plaintiff fails to argue that an intervening change of law or some other circumstance compels this court to revisit its prior conclusion"); *Staley v. Harris County*, 332 F. Supp. 2d 1041, 1043 (S.D. Tex. 2004) (denying motion to stay under similar four-part test where the moving party "merely incorporates the arguments and authorities raised during and after trial … [after the court's opinion] … explained in detail why none of those arguments presented a substantial case on the merits"); *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 16 (D.D.C. 2003) (finding failure to show a likelihood of success on the merits because "respondent has offered no new arguments in its motion, but rather it rehashes arguments that have been rejected in multiple forums" (footnote omitted)); *Schwartz v. Dolan*, 159 F.R.D. 380, 383-84 (N.D.N.Y. 1995) ("For the reasons stated in the … [prior] Order, the court concludes that defendant does not and cannot demonstrate a likelihood of success … [m]ere repetition of arguments previously considered and rejected cannot be characterized as a 'strong showing' [under *Hilton*].").[1]

[1] In addition to determining that the plain language of the NVRA required disclosure of the records sought by Project Vote, the Court also considered and rejected Defendants' arguments that the MOVE Act and HAVA prohibit disclosure of voter registration records. In concluding that the statutes "'are capable of co-existence,'" Op.9-10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)), the Court relied on a plain language interpretation of each statute. *Id.* at 8-9.

When it concludes that a party is unlikely to prevail on appeal, a court should not hesitate to deny the motion for a stay. *Bragg*, 190 F.R.D. 194, cited by Defendants, does not alter this central principle. In *Bragg*, although the "four factors militate[d] in favor of denying a stay," the court chose to set aside its ruling in light of "dire predictions" of "unprecedented economic and social dislocation" resulting from the court's decision. *Bragg*, 190 F.R.D. at 196 (describing the "firestorm reaction" and "shrill atmosphere of discord" following the injunction as coal workers were laid off and the Governor ordered the State to budget-cut). The *Bragg* court also found that the community reaction to its decision could be so severe as to distract the appellate court from the legal issues. *See id.* (finding it "preferable to attempt to defuse invective and diminish irrational fears [by granting the stay] so that reasoned decisions can be made with all deliberate speed, but with distractions minimized."). While Defendants' stated estimate of $78,000 to comply with the Court's order is not insignificant, this case is plainly different from *Bragg*, and there is no reason for the Court to abandon the four-prong analysis.

B. Defendants' Economic And Administrative Burdens In Complying With The Court's Order Do Not Rise To The Level Of Irreparable Harm.

"[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to satisfy the "irreparable harm" prong of the Rule 62(c) test. *Robinson*, 432 F.2d at 980 (quoting *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). For example, in *Mowbray v. Kozlowski*, the court found that the Commonwealth of Virginia would not suffer irreparable harm by complying with an order enjoining the state from using excessively restrictive metrics for determining Medicaid eligibility. 725 F. Supp. 888, 890-81 (W.D. Va. 1989). The Commonwealth had claimed that denial of the stay would result in economic and administrative costs that could detract from its obligations to other citizens. *Id.* at 890. The court held, though,

that a government entity's expected economic burden in complying with a court order did not qualify as irreparable harm. *Id.* at 891.

Similarly, in *Long v. Robinson*, the Fourth Circuit held that the defendant, the city of Baltimore, did not suffer irreparable harm in having to construct public facilities and hire employees to staff juvenile adjudication and detention facilities so that minors between the ages of sixteen and eighteen were no longer tried as adults for criminal violations, even though those expenditures "would prove unnecessary and would not be reimbursable if the order is reversed on appeal." 432 F.2d at 978-79. Here, Defendants' claimed injury is similar to that of the city of Baltimore in *Robinson* and the Commonwealth of Virginia in *Mowbray.* Administrative steps such as obtaining records, hiring personnel to transmit files, and responding to inquiries are all steps that must be taken to comply with the Court's order.

Defendants' repeated mentions of the consent decree in *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993), are nothing more than a diversion. Defendants claim that, without the requested stay, they will be faced with "conflicting" court orders in light of the consent decree approved by the district court in *Greidinger*. As an initial matter, consent orders are merely court-approved agreements between parties to a dispute, are not precedential, and cannot place the State in a position of conflict with this Court's judgment. *See, e.g., Baptist Mem'l Hosp.—Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009) (stating that a "settlement does not create binding precedent" (citation omitted)); *High Country Home Health, Inc. v. Thompson*, 359 F.3d 1307, 1314-15 (10th Cir. 2004) (stating that "settlement agreements have no precedential weight").

In an attempt to puff up the significance of the consent decree in *Greidinger*, Defendants suggest it was entered into, ruled upon, or enforced by the Fourth Circuit. Defs.' Mem. In Supp.

of Mot. To Stay J. 9-10, ECF No. 67. But the face of the order shows this is incorrect—the decree is an agreement between the parties in *Greidinger* to resolve their dispute, signed by the Honorable James R. Spencer of the Eastern District of Virginia. *See* Notice of Filing, Ex. A, ECF No. 70, "Consent Decree." The Fourth Circuit's holding in *Greidinger* was that the public disclosure of one's Social Security Number ("SSN") as a prerequisite to register to vote in Virginia was an unconstitutional infringement on the right to vote. *See Greidinger*, 988 F.2d 1344. Throughout this litigation, Project Vote has respected that holding and sought records with the SSNs redacted. The Court's order was also consistent with this principle**.** Op.10-15. Therefore, nothing in this Court's judgment is inconsistent with the Fourth Circuit's decision in *Greidinger*—if anything, it reinforces that decision.

Finally, Defendants claim that complying with the Court's order will require them to change the Privacy Act notice that was approved in the *Greidinger* consent decree and thus place them in "conflict" with the text of the order. It is true that the notice must be altered to reflect a correct statement of the law, given this Court's decision, but there is nothing in the consent order that prohibits that alteration.[2] Indeed, the very text of that order contemplates that the Privacy Act notice may be revised. *See* Consent Decree ¶ 6 ("Any future revisions to the … [Privacy Act notice] shall comply with the Privacy Act and be consistent with the decision of the United States Court of Appeals in this case."). The state can simply revise the notice to inform voters that the registration card will be available to the public, with SSNs redacted.

C. Project Vote Will Be Harmed By A Stay.

Granting Defendants' motion would eviscerate the court's decision by denying Project Vote all forms of injunctive relief pending appeal. Project Vote has been waiting for two and a

[2] Even if language in the consent decree did prohibit changing the notice, this Court's decision would trump the agreement between the *Greidinger* parties.

half years for recognition of its statutory right to access voter registration records. As the 2012 election approaches, Project Vote wishes to take advantage of its statutory right to access registration materials. The Court has already determined not only that Project Vote has a right to these records, but that it is in the public interest for Project Vote to access them.

Moreover, Project Vote acts on behalf of disenfranchised individuals to ensure that their voter registration applications are not wrongfully or unfairly rejected. Citizens of the Commonwealth will continue to submit voter registration applications during the pendency of this appeal, and a stay would render the effect of the Court's decision meaningless pending a lengthy appeals process. If the Court's order is stayed, Virginians will continue to be misinformed by the Commonwealth about the confidentiality of their voter registration applications for an indefinite period of time. One federal election has already occurred during the pendency of this litigation, and Project Vote should be granted immediate access to new voter registration applications to ensure that it can participate fully in registration activities related to the next federal election.

D. The Public Interest Weighs In Favor of Denying This Motion To Help Ensure An Accurate And Inclusive Voting Process.

When evaluating the propriety of permanent injunctive relief, the Court determined that the public interest weighs in favor of granting Project Vote prospective injunctive relief and access to registration records. Op.14 ("The public interest will be served if Defendants are permanently enjoined from refusing to permit inspection and photocopying of completed voter registration applications with the voters' SSNs redacted to the extent such applications are

completed subsequent to final judgment in this case." (footnote omitted)). Defendant's motion asks the Court to re-think the carefully struck balance of its decision.[3]

Indeed, staying relief here would cause substantial harm to the public interest in assuring the accuracy and currency of official voting records. The NVRA reflects this critical interest by citing the important goals of increasing voter registration and protecting the integrity and accuracy of the voting process. *See* 42 U.S.C. § 1973gg(b). In the words of the Court, the statutory purposes "point toward increasing voter registration and ensuring that the right to vote is not disrupted by illegal and improper impediments to registering to vote or to casting a vote." *Project Vote*, 752 F. Supp. 2d at 710. Staying prospective relief pending appeal could deprive many newly registered voters of the benefit of an accurate, inclusive electoral process. For these reasons, Defendants' motion is not in the public interest or consistent with the purposes of the NVRA in ensuring the integrity of Virginia's voting process.

II. By Defendants' Own Admission, They Can Comply with the Court's Order Within Six Months, and Thus an Indefinite Stay is Unnecessary.

As discussed above, all relevant considerations weigh against granting Defendants a stay of any length. Additionally, by their own admission, the indefinite stay Defendants request is unnecessarily broad in scope. Defendants state that it will take them only six months to make the needed changes to the pre-printed voter registration applications and comply with the Court's order. Defs.' Mem. in Supp. of Mot. to Stay J. 1-2. But Defendants have requested a stay pending the entire appellate process. Any stay longer than six months does nothing to address

[3] Defendants suggest that Project Vote has acted contrary to the Court's statements about confidentiality by refusing to agree to a stay, *see* Defs.' Mem. in Supp. of Mot. for Expedited Ruling 3, ECF No. 69, but Project Vote believes the Court chose to alleviate its concerns by granting only prospective injunctive relief.

the harms that Defendants claim they face, and thus such a stay unquestionably fail to satisfy the four-prong standard for granting a stay.

In fact, the actual length of a stay could stretch well into 2012—perhaps even past the 2012 federal elections. It is unclear whether the Defendants intend to begin their efforts to comply with the Court's order (which they say will take six months) if a stay is granted. But if they do not, this means that the Defendants are effectively asking for a stay not only for the entirety of the appellate process, but for another six months after its conclusion. The Court should deny this request.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Stay Judgment should be denied.

Respectfully submitted,

/s/ Ryan M. Malone

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2011, I electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

_/s/___ Ryan M. Malone_____
Ryan M. Malone