NO. 14-3030

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIBERTARIAN PARTY OF OHIO, et al.,

Plaintiffs-Appellees,

ROBER M. HART, et al.,

Intervenor Plaintiffs - Appellees,

v.

JON HUSTED,

Defendant-Appellant,

STATE OF OHIO,

Intervenor Defendant - Appellant.

On Appeal from the United States District Court
For the Southern District of Ohio

PLAINTIFFS-APPELLEES' RESPONSE TO DEFENDANT-APPELLANTS' MOTION TO EXPEDITE APPEAL

INTRODUCTION

Because of three prior successful suits, *see Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner,* 462 F. Supp.2d 1006 (S.D. Ohio 2008); *Libertarian Party of Ohio v. Husted*, No. 2:11-cv-722 (S.D. Ohio, Sep. 7, 2011), *vacated as moot*, 497 Fed. Appx. 581 (6th Cir. 2012), Plaintiff-Appellee, the Libertarian Party of Ohio (hereinafter "Plaintiff-LPO" or "LPO"), has since the 2008 general election remained a ballot-qualified political party in Ohio. Pursuant to three separate federal-court orders, Ohio's Secretary

of State (hereinafter "Defendant" or "Secretary"), has issued a series of Directives authorizing Plaintiff-LPO's ballot access. *See, e.g.,* Ohio Secretary of State Directive 2001-01 (Jan. 6, 2011); Ohio Secretary of State Directive 2011-38 (Nov. 1, 2011); Ohio Secretary of State Directive 2013-02 (Jan. 31, 2013).

As part of its court-ordered ballot access, Plaintiff-LPO has participated in Ohio's primaries since 2010. It has since 2008 ran candidates for local, state-wide, and federal office (including the Presidency in 2008 and 2012) in Ohio's general elections. In the most recent non-presidential election year, 2010, LPO's slate of state-wide candidates won nearly 5% of the total votes cast in their respective elections; specifically LPO's candidates won 184,478 votes (4.91% of the total) for State Treasurer in 2010, 182,977 votes (4.88% of the total) for Secretary of State in 2010, 182,534 votes (4.87% of the total) for State Auditor in 2010. The LPO expects even greater percentages and more votes in the next non-presidential election, 2014.

Ohio's Constitution, Article V, § 7, provides that "[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law ...." It has been interpreted by the Ohio Supreme Court to require that a qualified political party's candidates gain access to Ohio's general election ballot by "filing a declaration of candidacy accompanied by a petition entitling one to be a participant in the direct party primary wherein candidates from all political parties seek their nomination ...." *State ex rel. Gottlieb v. Sulligan*, 193 N.E.2d 270, 272-73 (Ohio 1963). Consequently, in order to run under the LPO banner in the 2014 general election, candidates, including Plaintiff-Earl and Plaintiff-Harris, must first run in Ohio's 2014 primary.

Running in party primaries in Ohio requires submitting a nominating petition supported by voters' signatures. *See* O.R.C. § 3513.05; *see, e.g.,* Ohio Secretary of State Directive 2013-02

at page 2 (Jan. 31, 2013). Signatures required by Ohio law to support nominating petitions, *see* O.R.C. § 3513.05, must be gathered and witnessed by "circulators." *See* O.R.C. § 3513.05.

Ohio Changes its Laws

On June 21, 2013 Ohio enacted S.B. 47, which changed its law, specifically O.R.C. § 3503.06, to require that circulators of candidates' petitions be residents of Ohio. Because of this change, codified at O.R.C. § 3503.06(C)(1)(a), the LPO's candidates for Ohio's 2014 primary, including Plaintiff-Earl and Plaintiff-Harris, were prevented from using non-residents to circulate the petitions required by Ohio law. Many of the LPO's candidates, including Plaintiff-Earl, sought to use non-residents to circulate the petitions required by Ohio law.

Because Ohio requires that nominating petitions for its 2014 primary be submitted by February 5, 2014, *see* O.R.C. § 3513.05, LPO candidates, including Plaintiff-Appellee-Earl and Plaintiff-Appellee-Harris, both of whom need to collect no less than 500 valid signatures of eligible voters, began circulating petitions in the summer of 2013 in order to meet Ohio's February 5, 2014 deadline. Several additional LPO candidates did so, and at least five of these, moreover, filed their nominating petitions (with supporting) and paid their filing fees for the 2014 primary before Ohio passed its second major change--and the focus of the present appeal--S.B. 193.

S.B. 193, passed on November 6, 2013, with a delayed-effective date of February 5, 2014, dispensed with LPO's candidates' need to collect signatures by dispensing with the LPO's ballot access in 2014. Section 3 of S.B. 197 specifically voided the prior Directives issued by the Secretary implementing the federal court orders awarding the LPO ballot access. The rest of S.B. 193 then stripped the LPO of its access to Ohio's 2014 primary and required that it submit additional signatures (thousands) after the primary to re-qualify its candidates (who are also required to collect more signatures under S.B. 193) for Ohio's 2014 general election ballot.

Plaintiffs' File Suit

Because candidates' nominating petitions are due no later than February 5, 2014, Plaintiffs on September 25, 2013 filed their initial Complaint challenging Ohio's residence requirement and requesting a preliminary injunction. The District Court immediately scheduled a briefing conference and instructed the parties, including the State of Ohio, which had intervened, to complete briefing on the constitutionality of the residence requirement by October 25, 2013.

On November 6, 2013, while Plaintiffs' first motion for preliminary relief was pending, Ohio passed S.B. 193, which the Governor immediately signed. S.B. 193's effective date was set at February 5, 2014, the last day candidates may qualify for Ohio's 2014 primary. Thus, although LPO candidates could continue to collect signatures, raise money, and spend money for the primary, on February 5, 2014 they would, under S.B. 193, be kicked off the ballot.

Because S.B. 193's stripping of the LPO's primary threatened Plaintiffs' standing to challenge Ohio's residence restriction, Plaintiffs immediately amended their Complaint as of right, *see Pertuso v. Ford Motor Co*., 233 F.3d 417, 420 (6th Cir. 2000), to challenge not only Ohio's residence restriction for circulators but also S.B. 193's retroactive application to Ohio's 2014 primary. Plaintiffs also immediately moved the District Court to preliminarily enjoin S.B. 193 from being applied retroactively to those Plaintiff-LPO's candidates who qualify for Ohio's 2014 primary before S.B. 193's effective of February 5, 2014.

The District Court's Decision

Following an expedited briefing schedule, that included expedited discovery by Defendants, the District Court on Tuesday, January 7, 2014, granted Plaintiffs' motion for a

preliminary injunction. Specifically, it enjoined Defendants from applying S.B. 193's changes to Plaintiffs' prior ballot access efforts. Plaintiffs had relied on prior federal court orders, Directives, and the legislature's failure to timely pass new legislation and had devoted significant resources to qualifying for Ohio's 2014 primary. Retroactively denying them the benefits of these efforts would be, the District Court correctly concluded, inconsistent with basic notions of fairness contained in the Constitution of the United States.

This Appeal

Defendants filed their Notice of Appeal on Friday, January 10, 2014. Defendants did not in the District Court request a stay of the preliminary injunction. Nor have Defendants requested a stay of the District Court's decision in this Court. Defendants, moreover, have yet to file an opening brief. Instead, ignoring the reliance interests of those acting pursuant to the injunction, Defendants have asked this Court to expedite proceedings in hopes of winning a final judgment--one that would undo all actions taken under the preliminary injunction -- before February 5, 2014, the final qualifying date for primary candidates.

ARGUMENT

Had Defendants immediately sought a stay in the District Court, *see* Fed. R. App. P. 8(a)(1)(C), and then immediately renewed their request before this Court (if it proved unsuccessful below), *see* Fed. R. App. P. 8(a)(2)(A), Defendants would be in the proper position to request extraordinary relief. More importantly, Plaintiffs would not be put in the position of guessing about how to proceed. As it stands, however, Defendants have decided to leave the preliminary injunction in place, only to (hopefully) have it overturned by February 5, 2014. Further complicating matters, Defendants delayed three days to notice their appeal, notwithstanding that time is obviously of the essence.

The principal difficulty with Defendants' approach is that it ignores the reliance interests of the Plaintiffs. They have since Tuesday, January 7, 2014, the day the injunction was entered, redoubled their efforts to collect the needed signatures to qualify for Ohio's primary. Neither Plaintiff-Earl nor Plaintiff-Harris has qualified as of yet. Following the enactment of S.B. 193, they understandably hesitated to collect additional signatures. Now that the injunction has been entered, they have both devoted significant resources, including money for professional circulators, to collect the needed signatures. Defendants now seek to put this Court in the unenviable position of having to unravel the Plaintiffs' lawful efforts--efforts taken with the full backing of a federal injunction--at a later date.

Federal Rule of Appellate Procedure 8(a) was designed with reliance interests in mind. It directs that motions to stay preliminary injunctions should first be presented to the District Court, and then, if necessary, be addressed to this Court. *See Baker v. Adams County/Ohio Valley School Board*, 310 F.3d 927, 930 (6th Cir. 2002) (Under Rule 8 ...'[a] party must ordinarily move first in the district court' for an injunction pending appeal. This is '[t]he cardinal principle of stay applications.'" (quoting 16A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3954 (3d ed. 1999)). The rationale is obvious; parties aggrieved by preliminary injunctions should seek stays to provide appellate courts time to reach their judgments. They do not have to, *see, e.g., U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC,* 339 F.3d 23, 27 (1st Cir. 2003) (observing that motion to expedite is separate from motion to stay), but if they do not seek a stay they must justifiably bear the risk associated with that choice. And the risk here is that Plaintiffs (and the other minor parties and their candidates) will have relied on the injunction.

Of course, winning a stay is not easy. This may be the genesis of the Defendants' decision

in this case not to seek a stay in either the District Court or here. The Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), observed that although "[d]ifferent Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal, " in either case "the factors regulating the issuance of a stay are generally the same: (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." Defendants here likely recognized that they cannot make a "strong showing" of success, let alone demonstrate that the equities are otherwise in their favor. As observed by the District Court, after all, that while the denial of First Amendment freedoms for even a short time constitutes irreparable harm, Ohio has successfully included the LPO (and the other minor parties) in its primaries since 2010.

Had Defendants sought stays in the District Court and here, and had a stay in one court or the other been granted, Plaintiffs would not have objected to Defendants' motion to expedite this appeal. Indeed, Plaintiffs would have objected to the Defendants' proposed schedule. It is too long.

Plaintiffs have throughout this litigation acted with the utmost urgency. Now that the proverbial shoe is on the other foot, Plaintiffs expect no less from the Defendants. Here, Defendants waited three days to take this appeal. They have not sought a stay and propose a briefing schedule that delays resolution until the eve of February 5, 2014 (if then). *Contrast Hallmark-Phoenix 3, LLC v. United States*, 429 Fed. Appx. 983, 984 (Fed. Cir. 2011) ("Hallmark also has not expedited the filing of its opening brief and thus did not take advantage of the easiest way to expedite proceedings."). Defendants' delay, coupled with their failure to seek a stay,

constitutes equitable grounds for invoking the doctrine of *laches* and denying Defendants' motion. *See, e.g., Kay v. Austin,* 621 F.2d 809, 813 (6th Cir. 1980).

Should this Court agree to expedite these proceedings, Plaintiffs respectfully request that all briefing be completed as soon as possible, and no later than January 17, 2014. Resolution is required at the earliest date so that Plaintiffs (and the other minor parties) can know how to proceed. They need to know immediately whether they can (and should) continue collecting signatures.

CONCLUSION

Plaintiffs respectfully object to Defendants' motion to expedite. Should the motion be granted, Plaintiffs respectfully ask that all briefing be completed by January 17, 2014 and that a decision be rendered as soon as possible.

Respectfully submitted,

/s/ Mark R. Brown

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically and will be sent to all parties by operation of the electronic filing system.

/s/ Mark R. Brown
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