

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION**

| | |
|---|----------------------------|
| TOMMY RAY MAYS, II, <i>et al.</i> , | : |
| | : |
| Petitioners, | : Case No. 2:18-cv-1376 |
| | : |
| v. | : JUDGE WATSON |
| | : |
| FRANK LAROSE, in his official capacity as | : MAGISTRATE JUDGE VASCURA |
| Secretary of State of Ohio, | : |
| | : |
| Defendant. | : |

**DEFENDANT SECRETARY OF STATE FRANK LAROSE'S
MOTION TO STAY PENDING APPEAL**

Defendant Ohio Secretary of State Frank LaRose moves the Court for a stay of its order issued on November 6, 2019, pending appeal. Doc. 70. A memorandum in support follows.

Respectfully submitted,
DAVE YOST
Ohio Attorney General

s/ Julie M. Pfeiffer

JULIE M. PFEIFFER (0069762) *

** Trial Attorney*

ANN YACKSHAW (0090623)

JEFFREY J. BOUCHER (0092374)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: (614) 466-2872; Fax: (614) 728-7592

Julie.Pfeiffer@OhioAttorneyGeneral.gov

Ann.Yackshaw@OhioAttorneyGeneral.gov

Jeffrey.Boucher@OhioAttorneyGeneral.gov

Counsel for Defendant Ohio Secretary of State

MEMORANDUM IN SUPPORT

On November 6, 2019, the Court certified a class under Federal Rule of Civil Procedure 23(b)(2) and granted Plaintiffs' motion for summary judgment. Further, the Court enjoined Secretary LaRose "from imposing a different deadline" for absentee-ballot applications for late-jailed voters than for hospital-confined voters and directed Ohio Boards of Elections "to accept an application for an absentee ballot that is properly delivered" by a late-jailed voter by 3:00 p.m. on Election Day, the same deadline for hospital-confined voters. Doc. 70 at PageID 4332.

Boards must implement the Court's order for the March 2020 presidential primary election, just over four months away. With high turnout expected and an already chaotic set of Election Day responsibilities, boards' many Election Day burdens will only increase. Given Ohio's strong interests supporting the laws challenged in this case, and the wide-ranging implications of the Court's order, Secretary LaRose requests a stay pending appeal.

ARGUMENT

A. Standard of Review

Evaluating a motion for a stay pending appeal involves four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). These factors are not prerequisites to grant of a stay, but are instead

“interconnected considerations to be balanced by the reviewing court. *Coal. to Defend Affirmative Action*, 473 F.3d at 244.

B. Defendant is likely to succeed on appeal.

The Equal Protection Clause does not require the State to treat unexpectedly hospitalized voters the same way that it treats unexpectedly jailed voters. Instead, it requires that the State treat alike “all persons similarly situated.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In an Equal Protection challenge in the elections context, a court considers the “character and magnitude of the asserted injury to the rights protected by the” Equal Protection Clause against the interests put forward by Ohio “as justifications for the burden imposed by” the challenged statute. *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012). In this case, Plaintiffs failed to show an injury to the rights protected by the Equal Protection Clause because unexpectedly hospitalized and jailed voters are not alike in all relevant respects. Further, Secretary LaRose presented extensive evidence of the State’s interests in the challenged statute. Although the State’s interests in easing administrative burdens and ensuring orderly elections justify any minimal burden, the Court never considered them.

Jails and hospitals are different. The process of delivering absentee ballots to jails presents a number of logistical problems that do not arise in the hospital context. As one example, access to and movement within jails requires careful preparation, patience, and time, none of which are in ample supply on Election Day. For example, when election-board employees deliver *timely* requested absentee ballots to jailed voters, they must bring a list of voters’ names to the jail, wait for an escort to the voting location, and further wait for the listed inmates to be located within the jail and brought to the voting location. Doc. 68 at

PageID 4257. This contrasts sharply with the protocol in hospitals, where election-board officials can generally “roam the halls” to locate voters. Doc. 65 at PageID 4187. These access differences make unexpectedly hospitalized and unexpectedly jailed voters dissimilar for purposes of Election Day voting. Because there is no injury to any rights protected by the Equal Protection Clause, Defendant LaRose is likely to succeed on appeal.

Further, any minimal burden is more than justified by the State’s interest in orderly elections. Secretary LaRose presented ample evidence of the many tasks occupying Ohio’s Boards of Elections as Election Day approaches. The boards process absentee ballot applications and completed absentee ballots, locate and train poll workers, set up polling locations, staff voter and poll worker help desks, send teams of employees to locations with confined voters, and administer in-person voting before and on Election Day. With all this activity, the boards cannot accommodate an additional Election Day process—that is, hand delivering ballots to jails—without some significant increase in resources. Testimony from the Butler County Board of Elections established that it would be “difficult, yes, to reach out and make sure everyone was in place.” Doc. 54 at 28 (citing Smith Dep. 53:14-15). The director of the Hamilton County Board of Elections agreed, opining that the Board would need additional staff to have the capacity to vote late-jailed individuals on Election Day. *Id.* (citing Poland Dep. 45:20-46:3). None of this evidence factored into the decision granting an injunction. Defendant LaRose will succeed on appeal because Ohio’s interests in the ballot deadline will be considered for the first time. And when considered, these interests will justify the law.

C. The equitable factors also support a stay.

Although the Secretary is the movant here, he represents Ohio's citizens. An injunction would irreparably injure Ohio citizens because "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (granting stay) (citation omitted). This is especially so in the context of voting laws, as "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Shelby Cty. v. Holder*, 570 U.S. 529, 543 (2013). Thus, an injunction "seriously and irreparably harms" a State any time it wrongly "bar[s] the State from conducting . . . elections pursuant to a statute enacted by the Legislature." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

Moreover, staying the injunction poses little threat of harm to Plaintiffs. The named Plaintiffs already voted in the 2018 election. Others who are worried about being in jail on Election Day can plan to vote beforehand. Ohio even allows them to vote by absentee ballot, provided they seek a ballot no later than noon on the Saturday before the Tuesday election. To the extent they are willing to bear the risk of being jailed after noon on Saturday, that risk is no different than the risk faced by every other citizen who may find himself unable to vote for reasons unrelated to hospitalization—car trouble, a busy day at work, or anything else.

Finally, the public interest lies in a correct application of the relevant federal constitutional and statutory provisions, "and ultimately . . . upon the will of the people of [the state] being effected in accordance with [state] law." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir.2006). Because Ohio's distinction between hospitalized voters and jailed voters is valid, the public's interest is harmed by the injunction,

which prevents “the will of the people” from “being effected.” *Id.* A stay will allow their will to be done, thereby advancing the public interest.

CONCLUSION

For these reasons, Defendant Ohio Secretary of State Frank LaRose respectfully requests that this Court stay enforcement of its order dated November 6, 2019, pending appeal.

Respectfully submitted,
DAVE YOST
Ohio Attorney General

s/ Julie M. Pfeiffer

JULIE M. PFEIFFER (0069762) *

** Trial Attorney*

ANN YACKSHAW (0090623)

JEFFREY J. BOUCHER (0092374)

Assistant Attorneys General

Constitutional Offices Section

30 East Broad Street, 16th Floor

Columbus, Ohio 43215

Tel: (614) 466-2872; Fax: (614) 728-7592

Julie.Pfeiffer@OhioAttorneyGeneral.gov

Ann.Yackshaw@OhioAttorneyGeneral.gov

Jeffrey.Boucher@OhioAttorneyGeneral.gov

Counsel for Defendant Ohio Secretary of State

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, 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.

s/ Julie M. Pfeiffer

JULIE M. PFEIFFER (0069762) *
Assistant Attorney General