UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1845 (L)
(1:13-cv-00660-TDS-JEP)
(1:13-cv-00658-TDS-JEP)
(1:13-cv-00861-TDS-JEP)

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA; A. PHILIP RANDOLPH INSTITUTE; UNIFOUR ONESTOP COLLABORATIVE; COMMON CAUSE NORTH CAROLINA; GOLDIE WELLS; KAY BRANDON; OCTAVIA RAINEY; SARA STOHLER; HUGH STOHLER

Plaintiffs

and

LOUIS M. DUKE; CHARLES M. GRAY; ASGOD BARRANTES; JOSUE E. BERDUO; BRIAN M. MILLER; NANCY J. LUND; BECKY HURLEY MOCK; MARY-WREN RITCHIE; LYNNE M. WALTER; EBONY N. WEST

Intervenors/Plaintiffs – Appellants

v.

STATE OF NORTH CAROLINA; JOSHUA B. HOWARD, in his official capacity as a member of the State Board of Elections; RHONDA K. AMOROSO, in her official capacity as a member of the State Board of Elections; JOSHUA D. MALCOLM, in his official capacity as a member of the State Board of Elections; PAUL J. FOLEY, in his official capacity as a member of the State Board of Elections; MAJA KRICKER, in her official capacity as a member of the State Board of Elections; PATRICK L. MCCRORY, in his official capacity as Governor of the state of North Carolina

Defendants – Appellees

APPELLANTS' RESPONSE TO APPELLEES' MOTION FOR RECALL AND STAY OF MANDATE PENDING FILING AND DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

After full briefing and extended oral argument, this Court issued a well-reasoned decision declaring that the district court made "numerous grave" errors of law and abused its discretion in denying Plaintiffs/Appellants' Motion for a Preliminary Injunction as to the State's attempted elimination of same-day registration (SDR) and the counting of out-of-precinct provisional ballots. After considering the State's arguments regarding confusion and burdens, the Court denied enjoining other provisions of the new law although legal errors were made by the District Court. Since the decision, the public has been made aware that the status quo will be maintained with respect to SDR and out of precinct voting. Moreover, election administrators have already publicly indicated that they are ready and willing to comply with this Court's mandate. *See, e.g., Michael Gordon, Appeals Court Restores Same-day Registration in North Carolina but Doesn't Expand Early Voting*, CHARLOTTE OBSERVER, October 1, 2014, available at http://www.charlotteobserver.com/2014/10/01/5212815/federal-appeals-court-restores.html#.VC1-YfldVqU#storylink=cpy ("Mecklenburg Elections Director Michael Dickerson said Wednesday that the county has enough time to re-institute same-day registration and out-of-precinct voting, as a three-judge panel from the

4th Circuit Court of Appeals ordered on Wednesday."). Against this background, the Appellees/Movants now ask this Court to take the extraordinary step of recalling and staying its mandate, despite no Fourth Circuit case law supporting their request and contrary to the showing required under Fourth Circuit Local Rule 41 and Federal Rule of Appellate Procedure 41. Appellees have failed to meet their burden pursuant to Fed. R. App. P. 41 and the Local Rules of this Court and therefore the Motion should be denied.

Procedurally, Appellees' Motion fails to comply with the requirements of Fourth Circuit Local Rule 41, which states in relevant part: "A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion shall be denied unless there is a *specific showing that it is not frivolous* or *filed merely for delay*." (emphasis added). Nowhere in Appellees' Motion do they address this standard.

Further, pursuant to Fed. R. App. P. 41(d)(2), "The motion must be served on all parties and must show that the certiorari petition would present a *substantial question* and that there is *good cause* for a stay." (emphasis added). In construing the Rule 41 standard, Circuit Courts of Appeal have looked to the Supreme Court's standard for issuing a stay which states:

> Relief . . . is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that

> the decisions below--both on the merits and on the proper interim disposition of the case--are correct. . . . In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. . . . Second, the applicant must persuade [the Circuit Justice] that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. . Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. . . . And fourth, in a close case it may be appropriate to "balance the equities"--to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (*citing Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980)).

This Court has decided that voters in North Carolina will be irreparably harmed absent an injunction of the elimination of same-day registration and out of precinct provisional voting. Op. at 53 ("The injury to these voters is real and completely irreparable if nothing is done to enjoin this law.") Indeed, this Court was already asked to stay its mandate in oral argument, and it declined to do so when it issued its mandate. There is no reason for this Court to respond differently now. Granting a stay now would effectively negate the relief that the Court has determined Appellants are entitled to at this stage of the litigation. The Court's decision was correct.

Contrary to Movants' vague and conclusory allegations that enforcing the mandate will cause "voter confusion," it is *staying* the mandate that will not only cause confusion, but will disenfranchise otherwise eligible North Carolina voters. First, baseless cries of "voter confusion" cannot themselves be grounds for enforcing laws that both this Court and the district court found will disenfranchise voters, and minority voters in particular, in the November 2014 election without an injunction. In any election, many voters do not perfectly understand the laws governing elections, and that would be true of this election even in the absence of the Court's mandate. Indeed, as the record demonstrates, it often takes several election cycles before the citizenry adjusts to new election laws. Thus, voter confusion in this cycle is more likely to be the result of the changes in the law wrought by HB 589, not the Court's mandate. Moreover, enforcing the Court's mandate will actually have the effect of ensuring that those voters that are not aware that the state has attempted to repeal same day registration and out of precinct balloting, discover at the polls that their registration was not effective for some reason, or mistakenly attempt to cast their vote in the wrong precinct but the right county, are *enfranchised*. In other words, in this case, enforcing the Court's mandate will protect against the dangers that claims of voter confusion are ordinarily meant to evoke--the fear that the citizenry might be disenfranchised

because of their misunderstanding of the governing election laws. As to registration, those who register per H.B. 589 by the close of books are unaffected. Those who become aware of the added SDR option allowed by the order simply have another mechanism to exercise their fundamental right to vote. And those who are unaware of either H.B. 589 or this court's order will have a failsafe open to them should they encounter problems with their registration status during early voting. There is no potential for confusion, and certainly no confusion that would have a harmful, disenfranchising effect.

With regard to out of precinct voting, there will neither be the potential for confusion that would harm voters nor will the procedures on Election Day be disrupted—and it is troubling that the State would argue as much after its concessions at oral argument. Counsel for the State admitted at oral argument that, as required by federal law, provisional ballots will be given to voters who go to the wrong precinct whether the new law is in effect or not. *See*, Help America Vote Act, 42 U.S. Code § 15482. Those voters who go to the wrong precinct will cast a provisional ballot in the exact same manner required by federal law and H.B. 589. The only difference will be that the provisional ballot will be counted for every office for which the voter is eligible to vote instead of being completely discounted. In other words, the change is invisible to the voter—but the voter that

exercised his or her right to vote will actually have his or her voted counted by the State of North Carolina. Those voters who are aware of this Court's mandate will simply have the added option of going to any precinct in the county should they be unable to get to their correct precinct before polls close on Election Day.

If the mandate is stayed, harmful confusion certainly will result in voters being unable to cast a ballot that will count. This Court's order has received wide publicity. Some voters will be unaware of the stay, and will believe that they have the option of registering during early voting, as they have had for years. By the time they realize their mistake, it will be too late, and they will be disenfranchised. On Election Day, some voters will go to a precinct other than their own, under the belief that their vote will be counted at least for U.S. Senate and judicial races. But those provisional ballots will not be counted, and voters may not have the ability to remedy that by getting to the correct precinct in time. Thus, the potential for confusion by staying the mandate vastly outweighs the potential for voter confusion if the mandate remains in place.

Importantly, the Court's order does not require the state of North Carolina to offer any additional voting services on any days that it was not already planning to do so. The State does not have to expand early voting. It simply has to register voters during early voting by mechanisms that already exist and that election

administrators have been using for years. The mandate further does not affect any voting on Election Day. The mandate is a remedial step, and unlike requiring the state to offer extra early voting days, does not require county boards of election to do anything else before the election starts.[1]

Movants have offered no legal or factual reason to subject North Carolina voters to confusion and uncertainty pending a possible Supreme Court decision on the stay application, and confusion and uncertainty are what would result from granting Movants' requested relief.

For the foregoing reasons, Appellants/Respondents respectfully request that this Court deny Appellees' motion for recall and stay of mandate pending filing and disposition of a petition for a writ of certiorari.

[1] In addition to making the same day registration electronic SEIMS application that already exists and has been used by election administrators available again, the state and county boards have other options for complying with this Court's mandate. For example, people who come to vote and are not registered are routinely given a voter registration application and offered the opportunity to register on the spot. Under H.B. 589, that registration is effective only for future elections. Many of those people are also given provisional ballots. If the state truly cannot turn on its well-designed and well-tested SEIMS application, it could simply instruct the counties to give unregistered voters provisional ballots, and review the registration applications after the election. The counting of provisional ballots from valid registrations would comply with this Court's mandate, and it would not add any significant work at the polls. Appellants suspect, though, that the state would opt to just reinstate the SEIMS application.

Dated: October 2, 2014

Respectfully submitted,

By: /s/ Allison J. Riggs

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on October 2, 2014, I served a copy of the foregoing Response, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action, namely:

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