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 and DONALD PALMER,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO STAY JUDGMENT

The Court should reject Project Vote's arguments and stay this judgment pending appeal for the following reasons: (1) the Fourth Circuit's decision in *Robinson* does not require a party to prevail under all four prongs of the test for a stay of judgment; (2) the Defendants will face clear and significant prejudice if the ruling is not stayed, while Project Vote will face far less prejudice (if any) if the status quo is preserved; (3) the Defendants have raised significant issues for appeal, which are described in some added detail below; (4) the public interest will be served by a stay, including because of unaddressed privacy concerns that could chill voter registration; and (5) it is appropriate to stay a judgment which may conflict with another.

I. ARGUMENT

A. The Fourth Circuit's Holding in *Robinson* Does *Not* Require a Party to Show Likelihood of Success Under All Four Parts of the Test for Staying A Judgment.

Project Vote misconstrues the Fourth's Circuit's 1970 ruling in *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970), which does not mandate that a moving party prevail on all four parts of the test in *Hilton v. Braunskill*, 481 U.S. 770 (1987). In fact, the Fourth

Circuit in *Robinson* states at the end of that opinion that the decision was reached "under a *balancing* of the factors . . ." 432 F.2d at 981. The Plaintiff even concedes in its Opposition that a balancing may be required. Opp. at 4 ("even if the test required balancing . . .").

In support of this must-win-all-four-elements view, Project Vote cites an unreported district court case and a bankruptcy case [1] while disregarding a reported district court decision already cited by the Defendants,[2] which granted a stay of judgment by balancing these factors, and which was affirmed (without opinion) by the Fourth Circuit. *See Goldstein v. Miller*, 488 F. Supp. 156, 176 (D. Md. Apr. 25, 1980), *aff'd mem.,* 649 F.2d 863 (4th Cir. 1981). In *Miller,* the court balanced the four factors under *Hilton* when imposing a stay on a judgment in a case challenging a federal liquor regulation. Importantly, the *Miller* court applied the test from *Robinson.* 488 F. Supp. at 172. This Court should follow *Miller* and stay the judgment here pending appeal.

Even applying the all-four-parts standard, the Court should still grant the Motion on these facts and for the reasons stated here and in the Defendants' Memorandum of Law in Support.

---

[1] The first case cited by Project Vote, *CitiFinancial, Inc. v. Lightner,* 2007 U.S. Dist. LEXIS 78647, *5 (N.D.W.Va. Oct. 22, 2007), simply states that *Robinson* requires success under all four elements without any analysis to support that conclusion. The second is a bankruptcy case, *Garcia v. Direct Fin. Servs., LLC (In re Garcia)*, 436 B.R. 825, 829 (Bankr. W.D.Va. 2010), which relies on a district court case from another jurisdiction to apply the standard in *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008), to motions to stay a ruling pending appeal. 436 B.R. at 827. The Defendants believe it is inappropriate to apply the new, higher standard in *Winter* to post-judgment motions like this one which seek to simply preserve the status quo in a case of first impression.

[2] *See* Defendants' Memorandum of Law in Support at 6.

B. The Prejudice To The Defendants, If A Stay Is Not Imposed, Is Undeniable, While The Harm To Project Vote Is Minimal At Best. The Burden Of Redacting And Producing Potentially *All* Applications in Virginia Would Be Enormous And Would Threaten the Administration Of Virginia Elections.

If a stay is not imposed, the prejudice to the Defendants is undeniable while the "prejudice" to Project Vote is minimal, at best. The Defendants have demonstrated that it will take at least half a year of effort to change its Voter Registration Applications ("Applications"), all of which will be wasted if the Court's ruling of first impression is overturned.

But the prejudice facing the Defendants is not merely the threatened loss of significant time and taxpayer money: *it is the threat this poses to the administration of Virginia primaries and elections.* If a stay is not imposed, not only will Virginia officials have to expend significant time and resources to redo over 1 million Applications, they will be faced with changing these Applications in the months leading into a national election, then devoting very limited staff resources to redact information from post-July 20, 2011 Applications demanded by Project Vote *or* others.

As noted, the time and resources expended by Defendant Long's office in 2008 required six staff people *eight weeks* to gather, redact and produce 6,000 Applications. Mem. of Law in Supp. at 6. Under the Court's ruling, groups like Project Vote *or any individual in Virginia* could demand copies of *all* Applications completed after July 20, 2011, which will likely total more than 1 million for the upcoming national election, based on prior years. The time and resources required for such redaction and production would *severely* jeopardize the ability of Virginia Registrar's to function in the weeks or months leading up to the 2012 national election.

Meanwhile, all rejected applicants in Virginia already receive notice on how to appeal those denials to a Virginia circuit court, and Project Vote has full access to a list of all such rejected applicants under Virginia Code § 24.2-444(A). This provides Project Vote ample opportunity to monitor the application process in Virginia, and to contact any and all rejected applicants they like, who can seek redress in a state court under current law. This strongly favors granting a stay to preserve the status quo during appeal when balancing the respective hardship of the parties.

C. The Defendants Have A Strong Case For Appeal, Which Meets The Fourth Prong For Granting A Stay.

1. The Court Does Not Have To Second-Guess Its Ruling To Stay It.

With regard to success on the merits, the Defendants note that a Court does not need to second-guess itself to grant a motion for a stay of judgment. The court in *Miller* relied on two well-reasoned decisions, including one from the D.C. Circuit, which held that courts should balance the four factors under *Hilton,* then require only a significant issue for appeal if the equities otherwise support a stay.

In *Miller,* the court noted that when a court considers likelihood of success on appeal, that "does not mean that the trial court needs to change its mind or develop serious doubts concerning the correctness of its decision in order to grant a stay pending appeal." 488 F. Supp. at 172. The court then cited the well-reasoned D.C. Circuit decision in *Washington Metropolitan Area Transit Com. v. Holiday Tours, Inc.,* 559 F.2d 841, 843-45 (D.C. Cir. 1977), where the court denied a litigant's request to lift the stay placed on a judgment by a district court. The D.C. Circuit held:

> [W]hen confronted with a case in which the other three factors strongly favor interim relief [a court] may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not

> required to find that ultim ate success by the movant is a m athematical probability, and indeed, as in this case, may grant a s tay even though its own approach m ay be contrary to movant's view of the m erits. The necessary "level" or "degree" of possibility of success will v ary according to the court's assessment of the other factors.
>
> * * *
>
> Prior recourse to the initia l decision-maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. *What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal ques tion and when the equ ities of the cas e suggest that the status quo should be maintained*.

Miller, 488 F. Supp. at 172-73 (emphasis added). Th at is the situation here: the Court realizes that this is a case of first impression, with challenging legal questions warranting review. And here, the Defendants have dem onstrated that the equities favor a tem porary stay pending appeal.

The *Miller* court then cited another decision, *Evans v. Buchanan*, 435 F. Supp. 832, 843-44 (D. Del. 1977), involving school desegregation, which held:

> According to the test accepted by v irtually all courts, including this one, one seeking a stay pending appeal on disposition of writ of certiorari must make "a strong showing that he is lik ely to succeed on the m erits of the appeal." *Reserve Mining Co. v. United States*, supra (8 Cir.), 498 F.2d (1073) at 1076. Although th is standard is sim ilar to one of the tests for issuance of a prelim inary injunction, *the posture of a case is significantly different when preliminary injunc tive relief is sought fr om when a stay is requested.* In the form er, the Court has not ruled on the m erits of the case and need only m ake an initial determ ination of the reasonable probability of the applicant's eventual succ ess. (Citation omitted). In the latter, th e Court has issued its determ ination, after a full cons ideration of the m erits. The above-quoted standard would seem to require that a district court confess to having erred in its ruling before issuing a stay.
>
> It seems illogical * * * to require th at the court in effect conclude that its original decision in the m atter was wrong before a stay can be issued. Rather, *a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult qu estions of law in an area where the*

> *law is somewhat unclear and the interests of the other parties and the public are not harmed substantially*. This is not to say, however, that every time a case presents difficult questions of law a stay should be entered. As noted earlier, the four factors must be viewed together and the interest of the movant balanced against the interests of the other parties and the public. It is the duty of the court to exercise its discretion so that an equitable resolution is achieved. * * * (Footnotes omitted).

Miller, 488 F. Supp. at 173 (emphasis added).

Under the sound analysis in these decisions and *Miller*, the Court need not conclude that it was incorrect to grant a stay, or that it is convinced the Defendants will prevail on appeal. Rather, the Court need only conclude that the Defendants raise a substantial argument on appeal and show real likelihood of harm without a stay. The fact that this is a case of first impression can suffice for meeting this prong of the four-part test. *See, e.g., Center for International Environmental Law v. Office of U.S. Trade Representative,* 240 F. Supp. 2d 21, 22 (D.D.C. 2003).

2. There Is Clear Conflict Between This Ruling And Two Statutes.

As noted previously, the Court's July 20 ruling conflicts with provisions both in the Help America Vote Act ("HAVA") and in the Uniformed and Overseas Citizens Absentee Voting Act's ("UOCAVA"), as amended by the Military and Overseas Voter Empowerment ("MOVE") Act in 2009. For example, and to provide some additional detail, UOCAVA and implementing Virginia statutes allow eligible military and overseas voters to use a single combined form to register, request an absentee ballot, and in some cases vote their ballot, all in one transaction using forms available through the Federal Voting Assistance Program.[3] These forms, called the Federal Post Card Application

[3] Va. Code §§ 24.2-419, 24.2-441, 24.2-443.2, 24.2-701(B)(2), 24.2-702.1, 24.2-703; 1 VAC 20-40-80 (preclearance pending); 42 U.S.C. § 1973ff-1(a)(3) and (4).

("FPCA") and the Federal Write-In Absentee Ballot ("FWAB"),[4] were created as a remedy to alleviate the difficulties that overseas and military voters have in registering to vote, applying for absentee ballots, and voting absentee.

Put simply, this Court's July 20 ruling requires Virginia to violate UOCAVA by disclosing Voter Registration Applications contained within FPCA and FWAB forms. As amended by the MOVE Act, UOCAVA expressly requires states to protect the security and the privacy of the "*identity and other personal data*" of all voters eligible to register and vote by mail under that statute. *See* 42 U.S.C. § 1973ff-1(e)(6) and (f)(3) (emphasis added).[5] This protection extends not only from the time of application to register but up to and including the transmission of a ballot to the voter. Clearly a registration Application combined with a voter ballot cannot be released without violating a voter's fundamental right to ballot secrecy.

For these reasons, and for the statutory construction reasons raised by Defendant Long in her Opposition to Motion for Summary Judgment, the Defendants have raised significant issues for appeal, meeting the fourth prong of the test under *Hilton.*

---

[4] The FWAB is a back-up ballot to the regular state-designed absentee ballot that allows the eligible voter to write in their choice(s) on the ballot form. It is designed for use when the regular state absentee ballot is not received by the voter on time. The FWAB also includes a voter registration application called a voter declaration.

[5] The MOVE Act not only applies to forms such as the FPCA and the FWAB; it applies to "any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter." 42 U.S.C. § 1973ff-1(a)(2). The Virginia-specific Voter Registration Applications would fall under the definition in 42 U.S.C. 1973ff-1(a)(2) and thus, like the FWAB and FPCA, would fall under the privacy protections mandated by UOCAVA. In practice, Virginia's eligible military and overseas voters use the federal forms (FPCA and FWAB) and the Virginia-specific Voter Registration Application when registering to vote.

D. The Public Interest Would Be Served By A Stay, Including To Address Additional Voter Privacy Concerns.

Because of the enormous time it would take for Virginia election officials to comply with the July 20 order (collecting, redacting and producing all Applications in Virginia), the public interest is best served by staying this judgment to avoid significant or *severe* interference to Virginia elections. The public interest is also best served by avoiding the expenditure of the time and resources which will be wasted if this ruling is overturned on appeal.

The Defendants again note their serious concerns about the chilling effect this ruling may have on voter registration, since under this ruling, a voter's signature would be subject to public disclosure, and signatures can be used for identity theft. Making a person's mental incapacity and criminal histories also publicly available, all on a single document, is also likely to chill voter registration. If the Court stays its ruling, the Fourth Circuit can further consider *all* the interests involved here, including registration transparency and the voter privacy concerns noted here and in other filings.

E. The *Greidinger* Consent Order Is No "Diversion": Conflicting Judgments Support Staying A Ruling During Appeal.

The Plaintiff incorrectly states that the conflict between this Court's judgment and the Consent Order in *Greidinger* is a "diversion." Opp. at 7. It is not. Where a court is concerned about the possibility of conflicting judgments, it is perfectly appropriate to stay one of those judgments. *See Arlington Industries, Inc. v. Bridgeport Fittings, Inc.*, 2010 U.S. Dist. LEXIS 21426, at *16-21 (M.D.Pa. March 9, 2010)(staying injunction pending appeal due to concern about conflicting judgments).

The Fourth Circuit should have the opportunity to determine whether the only rationale behind the broad confidentiality placed on Applications in *Greidinger* is the issue of Social Security Numbers ("SSNs"). Since those could have been redacted when the Consent Order was entered (as the Court has ordered here), it is *not* clear that SSNs were the only factor supporting the broad confidentiality mandated under the Consent Decree. In order to avoid the effects of conflicting judgments, the Court should stay its July 20 ruling pending appeal. *Id.*

II. CONCLUSION

For the reasons stated above and in the earlier-filed Memorandum of Law, the Court should grant the Motion to Stay Judgment pending appeal.

Respectfully submitted,

DONALD PALMER

Defendant

By /s/
Stephen M. Hall, VSB #44132
Attorney for Defendant Palmer
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Phone: (804) 785-1586
Fax: (804) 371-2087
Email: shall@oag.state.va.us

Kenneth T. Cuccinelli, II
Attorney General of Virginia

E. Duncan Getchell, VSB # 14156
Solicitor General of Virginia
Email: dgetchell@oag.state.va.us

Wesley G. Russell, Jr., VSB # 38756
Deputy Attorney General
Email: wrussell@oag.state.va.us

Stephen M. Hall, VSB # 44132*
Assistant Attorney General III
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Phone: (804) 786-1586
Fax: (804) 371-2087
Email: shall@oag.state.va.us

*Counsel of Record

ELISA LONG

Defendant

By /s/
Jeff W. Rosen, Esquire
Virginia Bar No. 22689
Attorney for Elisa Long
Pender & Coward
222 Central Park Avenue
Virginia Beach, Virginia 23462
Phone: (757) 490-6253
Fax: (757) 497-1914
Email: jrosen@pendercoward.com

Lisa Ehrich, Esquire
Virginia Bar No. 32205
Attorney for Elisa Long
Pender & Coward
222 Central Park Avenue
Virginia Beach, Virginia 23462
Phone: (757) 490-6253
Fax: (757) 497-1914
Email: lehrich@pendercoward.com

CERTIFICATE OF SERVICE

I certify that on this 29th 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:

Ryan M. Malone, Esquire
Augustine M. Ripa, Esquire
Jason Gassan Idilbi, Esquire
David O. Stewart, Esquire
Douglas H. Hallward-Driemeier, Esquire
Ropes & Gray LLP
700 12th Street NW
Suite 900
Washington, D.C. 20005

Jeff W. Rosen, Esquire
Lisa Ehrich, Esquire
Pender & Coward
222 Central Park Avenue
Virginia Beach, Virginia 23462

/s/

Stephen M. Hall, VSB #44132
Attorney for Defendant Palmer
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Phone: (804) 785-1586
Fax: (804) 371-2087
Email: shall@oag.state.va.us