United States District Court
District of Maine

PUBLIC INTEREST LEGAL FOUNDATION, INC. *Plaintiff*, *v.* **SHENNA BELLOWS,** in her official capacity as the Secretary of State for the State of Maine *Defendant*.	Case No. 1:20-cv-00061-GZS

Plaintiff Public Interest Legal Foundation's
Response in Opposition to Defendant Secretary of State's
Motion for Partial Stay Pending Appeal

The Secretary is not entitled to a stay for three reasons: (1) the Foundation does not have the Voter File and so the Secretary cannot demonstrate any harm; (2) any alleged harm is speculative, and the Secretary's years-long policy of disclosing registrants' personal information undermines any alleged privacy interests; and, (3) Congress's goal of fostering election transparency supersedes the Secretary's interests.

For these reasons, the Secretary's Motion for Partial Stay should be denied.

STANDARD OF REVIEW

"In reviewing a motion to stay a judgment pending appeal, [the Court] considers the following factors: '(1) [W]hether the stay applicant has made a strong showing that [it] 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.'" *Bos. Parent Coal. for Acad. Excellence*

Corp. v. Sch. Comm. of Bos., 996 F.3d 37, 44 (1st Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

"The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. "It is not enough that the chance of success on the merits be better than negligible." *Id*. (citations and quotations omitted). "By the same token, simply showing some possibility of irreparable injury … fails to satisfy the second factor." *Id*. at 434-35 (citations and quotations omitted).

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Id*. at 433. Issuing a stay is "an exercise of judicial discretion." *Id*. at 433. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 434-34.

ARGUMENT

I. The Secretary Ignores the "Critical" Likelihood-of-Success Factor, Which Weighs Against a Stay.

Whether the applicant is likely to succeed on the merits of her appeal is a "critical factor." *Nken*, 556 U.S. at 434. Yet the Secretary completely ignores it. The Secretary points to *Providence Journal Co. v. Fed. Bureau of Invest.*, 595 F.2d 889, 890 (1st Cir. 1979) to justify this omission. (ECF No. 93 at 2.) *Providence Journal Co.* does not say that the likelihood of success is irrelevant. It says the opposite: "Appellants are not, of course, entitled to a stay pending appeal without showing that their appeals have potential merit." 595 F.2d at 890.

The Secretary has not shown—or even attempted to show—that her appeal has merit. That omission is alone fatal to her stay request. *See id*. Nor could the Secretary make the necessary showing. This Court correctly concluded on the uncontested facts that 21-A M.R.S.A.

§ 196-A(1)(J)(2) conflicts with the NVRA. (ECF No. 87 at 15-16.) The Secretary provides no reason to revisit that holding and there is no such reason.

As this Court recognized, the only federal appellate court to consider the NVRA's Public Disclosure Provision concluded,

> It is not the province of [the] court . . . to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by the legislature, not the courts, and Congress has already answered the question by enacting NVRA Section 8(i)(1), which plainly requires disclosure of completed voter registration applications. Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections.

(ECF No. 87 at 16 (quoting *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335-36 (4th Cir. 2012).) What authority exists thus supports the Foundation's case on appeal.

The mere possibility that the First Circuit could rule differently on appeal is not enough to warrant a stay. *Nken*, 556 U.S. at 434 ("It is not enough that the chance of success on the merits be better than negligible.") (citations and quotations omitted). If it was, a stay would be warranted in virtually every appeal because a mere possibility exists in every case. Having shown no merit to her appeal, the Secretary's motion should fail.

II. The Secretary's Feared Harms Are Speculative.

A. The Secretary Cannot Face Any Harm Because She Is Concealing the Voter File.

The Secretary claims she will be irreparably harmed absent a stay because the Foundation will publish information derived from the Voter File. (ECF No. 93 at 3.) There's just one problem: the Foundation does not have the Voter File. The Secretary stipulated to this fact when summary judgment motions were filed, (ECF No. 73 ¶ 10 ("The Secretary has not provided the 'Party/Campaign Use Voter File' to the Foundation.), and this fact remains true. Indeed, the Secretary's entire argument depends on events that, in her view, have yet to occur. (ECF No. 93

at 1 ("**If** the Plaintiff requests the confidential statewide voter registration list (the "Voter File"), the Secretary will provide it.") (emphasis added).) The Secretary's feared injury is presently speculative and thus insufficient to warrant a stay. *Tebbs v. Springfield Press & Mach. Co.*, Civ. No. 91-416 PC, 1992 U.S. Dist. LEXIS 14334, at *4 (D. Me. May 15, 1992) ("Speculative injury does not constitute a showing of irreparable harm.") (citing *Public Service Co. v. West Newbury*, 835 F.2d 380, 383 (1st Cir. 1987)).

In fact, the Foundation has requested the Voter File, but the Secretary has not produced it. The Secretary similarly stipulated to this fact when summary judgment motions were filed. (ECF No. 73 ¶ 8 ("Prior to the filing of this action, the Foundation requested from the Secretary Maine's 'Party/Campaign Use Voter File,' which is described in Title 21-A, Section 196-A(1)(B).").) Even before the parties reached that stipulation, the Court was satisfied that the Foundation's preemption claims were ripe. (ECF No. 61 at 8 n.3.) The Secretary cannot simultaneously continue to deny the Foundation's request and claim she will face irreparable harm absent a stay.

The Secretary continues to insist that the Foundation must submit the proper "request form" to obtain the Voter File. (ECF No. 93 at 1 n.1.) The Secretary has yet to revise the request form to account for this Court's judgment.[1] In other words, to obtain the Voter File, the Foundation must still swear to abide by the very use restrictions this Court held were invalid. The Foundation has no obligation to do that, and the Foundation may be liable for the crime of "unsworn falsification" if it does. *See* 17-A M.R.S. § 453(1)(A). In any event, the Foundation has already requested the Voter File.

[1] https://www.maine.gov/sos/cec/elec/data/2021-10%20Request%20Form%20for%20Obtaining%20Data%20from%20CVR.doc (last accessed May 12, 2023).

B. There Is No Factual Support for the Secretary's Claim That Disclosure Will Have a Chilling Effect on Voter Registration.

Even if the Secretary eventually produces the Voter File, it remains entirely speculative, and unlikely, that any harm will follow, much less irreparable harm that would justify a stay.

The Secretary claims that public disclosure of information derived from the Voter File will cause a "chilling effect on voter registration." (ECF No. 93 at 3.) The Secretary offers no factual support for this statement. If what the Secretary says was true, we would expect to see large-scale evidence of it nationwide, and specifically in Maine. Personally identifying information has been publicly available under the NVRA since 1993, 52 U.S.C. § 20507(i)(1)-(2), and for years, Maine's political parties and others have been able to obtain personally identifying information for every Maine registrant and use it to make intrusive, at-home contact, with those registrants, *see* 21-A M.R.S. § 196-A(1)(B). Yet the Secretary does not offer a single instance where voter participation was discouraged.

In fact, the opposite is true. "Maine's 2020 election turnout was among highest in US," according to reports.[2] And according to the Secretary, Maine's turnout in the 2022 election—which occurred after the passage of Exception J—was potentially the best in the nation.

> "Mainers should be so proud," Bellows said in an interview. "In 2020, we were third in the nation in voter participation. Given the high absentee ballot returns and the lines at polls today, we think we may on track to be first in the country."[3]

Neither history nor the record supports the Secretary's arguments. It has been Maine's policy to disclose registrants' names and home addresses for years, and voter participation has only continued to rise. The Secretary's arguments to the contrary rest on baseless speculation, which

[2] https://bangordailynews.com/2020/11/25/politics/maines-2020-election-turnout-was-among-highest-in-us/ (last accessed May 11, 2023).

[3] https://www.mainepublic.org/politics/2022-11-08/maine-voter-turnout-is-very-high-on-election-day-says-secretary-of-state (last accessed May 11, 2023).

is insufficient to justify a stay. *Nken*, 556 U.S. at 434-35 ("By the same token, simply showing some possibility of irreparable injury … fails to satisfy the second factor.").

C. Staying the Court's Judgment Would Likely Frustrate Congress's Objectives Through Additional Federal Elections.

In Section 8(i)(2) Congress made personally identifying information public—specifically, "names and addresses." 52 U.S.C. § 20507(i)(2). This makes sense because without personally identifying information, one registrant cannot be distinguished from another. It is unreasonable to think that Congress would *require* the public disclosure of voter's names and addresses while tolerating the state's ability to punish—with crushing fines—the mere publication of that same information. What is reasonable—and what is consistent with the NVRA's purposes—is to conclude that Congress believed public disclosure of names and addresses to be necessary to achieve the statute's goals.

The Foundation has been waiting since October 17, 2019, to receive the Voter File. Since then, two federal elections have occurred without the transparency Congress intended. If a stay is entered, it is possible, if not likely that more federal elections will occur without such transparency. *See* https://www.maine.gov/sos/cec/elec/upcoming/index.html (providing that Maine's Presidential Primary will occur on March 5, 2024). Enough is enough.

CONCLUSION

The Secretary has not satisfied her burden to justify her request for a stay of this Court's judgment. The Secretary's Motion should therefore be denied.

Dated: May 15, 2023.

Respectfully submitted,

/s/ Noel H. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2023, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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