UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

THE LIBERTARIAN PARTY OF KENTUCKY, *et. al.*	:	**Case No. 3:15-CV-86 GFVT**
	:	***Electronically Filed***
Plaintiffs	:	
v.	:	
ALISON LUNDERGAN GRIMES, et. al.	:	
Defendants	:	

REPLY IN SUPPORT OF PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR EMERGENCY MOTION FOR EXPEDITED CONSIDERATION AND DEADLINES TO RESOLVE AND HEAR THIS MATTER

Defendants oppose expedited consideration on two separate grounds: (1) they claim there is no emergency since Plaintiffs allegedly waited to bring their suit eleven months prior to the 2016 general election; and (2) their counsel desires the ability to familiarize themselves with the pending litigation. Neither ground, in actuality, justifies denying the sought-after expedited consideration of this matter.

I. The timing of the lawsuit

This lawsuit was filed eleven months prior to the general election. In election cases, where time is critical, filing a case eleven months prior to a general election matter is more than sufficient. Indeed, until Plaintiffs were able to assert that they intended to field one or more candidates for the election in question, they arguably lacked standing. *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) (for standing, a Plaintiff must assert that he or she desires to do that which the statute prevents – and granting expedited consideration for the appeal notwithstanding the fact that the challenged electioneering law had been on the books for

approximately 10 years).[1] Indeed, the Sixth Circuit, this Court, and other Courts in the Sixth Circuit have been explicitly clear that, for election related cases, expedited consideration is appropriate. *Northeast Ohio Coalition v. Husted*, 696 F.3d 580 (6th Cir. 2012) (expedited consideration appropriate in election related case); *Green Party of Tenn. v. Hargett*, 2012 U.S. Dist. LEXIS 36739 (M.D. Tn. 2012) (similar ballot access challenge – granting expedited consideration); *Brown v. Kentucky*, 2013 U.S. Dist. LEXIS 90401 (ED Ky 2013) (denying request for Stay by Defendants, and granting expedited scheduling order in election-related matter that was filed in May, prior to a November election).

In fact, the case cited by Defendants actually supports the request for expedited relief. In *SEIU Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012), the Sixth Circuit was clear that the failure to wait until "days before an election" constituted a "failure to act earlier" that "significantly undermines their assertions of irreparable harm in the absence of the injunction." This was particularly problematic because it "chang[ed] election rules … while voting is occurring" which would "disrupts the electoral process and threaten[] its fairness." *Id.* at 346.

Indeed, in *Libertarian Party of Kentucky, et. al. v. Ehrler*, 776 F. Supp. 1200 (EDKY 1991) this Court faulted the Plaintiffs for not moving for expedited consideration of their ballot access claims (which were filed in May, and in which summary judgment had not been moved for until August).

Nor, incidentally, is a filing in early December, 2015, of any moment. As this Court articulated in *Brown v. Ky. Legislative Research Comm'n*, 966 F. Supp. 2d 709 (EDKY 2013), to

[1] Indeed, it is notable that notwithstanding Plaintiffs pleadings, that indicate their desire to run one – or actually more than one – candidates in the 2016 election cycle, and notwithstanding the fact that the Sixth Circuit clearly and, one would have thought, finally resolved the standing question in *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015) as to these Defendants, Plaintiffs still drew a standing motion to dismiss from the Defendants.

navigate arguments of ripeness, mootness, and statutes of limitations, a suit must be filed within one year of an election. Plaintiffs in this case did so within one month of the last, 2015, election.

Finally, brief mention is warranted concerning Defendants arguments about a scheduling order that is "overly burdensome" – that scheduling order contemplates 60 days for discovery. It contemplates the normal period for briefing on dispositive motions. It is a longer period of time than was provided in *Brown v. Kentucky*, 2013 U.S. Dist. LEXIS 90401 (E.D. Ky 2013). It is difficult to understand then, why this is allegedly "overly burdensome." And Defendants offer no specific details on why this is so, other than pure speculation.

Defendants next criticize the fact that the pending schedule overlooks the pending motions (RE#6 and #7). Those motions are so lacking and devoid of merit, particularly in light of *Russell v. Lundergan-Grimes*, 784 F.3d 1037 (6th Cir. 2015), that adjudicated the same standing issues, on this same section of Kentucky law enforced and administered by these same Defendants, adversely to these same Defendants, that they should not be permitted to serve as any sort of roadblock to moving forward.

Absent an expedited consideration of this matter, Plaintiffs will run into the issues that concerned the Sixth Circuit in *Husted*, 698 F.3d 341, 345. Plaintiffs also desire to avoid being legitimately criticized for not moving for expedited consideration as was the case in *Ehrler*, 776 F. Supp. 1200. Nor is there any doubt that absent expedited consideration of this matter, Plaintiffs will be irreparably harmed. *Connection Dist. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (irreparable harm is established by the loss of constitutional freedoms for even minimal periods of time); *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (same); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002)

(same); *In re Syncora Guar. Inc.*, 757 F.3d 511 (6th Cir. 2014) (irreparable harm occurs if a judgment mandamus lies against District Court if a failure to rule results in irreparable harm).

II. Counsel's request to "familiarize themselves" with the litigation

Defendants next complain that their counsel needs time to "review the pleadings to date" and "form a view as to whether discovery is necessary to respond to the pending motion for summary judgment and motion for temporary restraining order and preliminary injunction." If current counsel cannot withdraw without prejudicing Defendants, then they should not do so. KY SCR 3.130(1.16). Too, attorneys are prohibited from taking on a representation if they cannot diligently and expeditiously handle the matter. KY SCR 3.130(1.3); KY SCR 3.130(3.2).

That is not to call into question the competence, diligence, or expeditiousness of newly retained counsel. The fact of the matter is that Defendants' Counsel are highly well-regarded, competent, and thorough defense counsel. This Court and the undersigned are aware of their involvement in *Brown v. Kentucky*, 2013 U.S. Dist. LEXIS 90401 (E.D. Ky 2013), among a host of other time-sensitive matters, such as this case. And there is, in actuality, little doubt that Defendants' Counsel have likely already formulated a plan for responding to the pending motions, and for discovery. Nor is there any serious argument that counsel as well-regarded as Defendants' Counsel can "familiarize themselves with the pending litigation" in a matter of days.

Nor is there anything particularly "confusing" about moving for expedited consideration and summary judgment at the same time. (Memo. At 3). Indeed, this Court suggested that Plaintiffs should have done exactly that in *Ehrler*, 776 F. Supp. 1200.

The undersigned do not anticipate much in the way of discovery. But we do anticipate some discovery. What we do anticipate in the way of discovery can be completed in 60 days, on

an expedited basis, or even 75 days on perhaps a "normal" schedule.[2] The request is not "extremely aggressive" – but rather orderly and perhaps even leisurely in the context of an elections related case, where tight timelines are the norm. The timelines in Rule 26, particularly with a six month or longer discovery window, simply does not result in an adjudication in time for the 2016 general election and causes irreparably harm to the Plaintiffs.

Plaintiffs have already given Defendants a head start – they have seen our witnesses, proof, and evidence, all attached to the pending Motion (RE#16). There should be no serious difficulty, or prejudice, with all parties proceeding diligently to resolve this matter. It is therefore difficult, if not impossible, to understand Defendants arguments about prejudice (none of which they assert concretely).

The only prejudice that will occur – perhaps to all parties – is if this matter is not determined expeditiously. Plaintiffs will have their rights violated. The Defendants may have the Commonwealth's election machinery tampered with via a Court order after it is set in motion.

[2] It does not change the outcome, but if Defendants were to propose an alternative, but still somewhat expedited schedule that would allow for a decision of this matter in a timely fashion, and permit a meaningful time for any appeal, Plaintiffs would not object. Defendants offer no such alternatives in their Response at RE#19.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have sent a copy of the foregoing to all counsel of record via filing in the Court's CM/ECF system, which provides notice and service of same to each party of record, this _8__ day of February, 2016.

/s/ Christopher Wiest
Christopher Wiest (KBA 90725)

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ORDER GRANTING PLAINTIFFS' MOTION FOR EMERGENCY EXPEDITED CONSIDERATION OF THIS MATTER

The Court, being fully apprised in the premises, GRANTS Plaintiffs' Motion for Expedited Consideration of this Matter.

Defendants' shall file a response, if any, to Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Summary Judgment by February 29, 2016. Plaintiffs may file a Reply on or before March 17, 2016.

Plaintiffs and Defendants may conduct discovery, for a period of 60 days from this Order. Any party propounding written discovery shall do so within 14 days of this Order. Any party's response to written discovery shall be within 21 days of service of same. The parties shall immediately schedule any depositions they desire to take, including FRCP 30(b)(6) of the Kentucky State Board of Elections, to occur after within the period of receipt of written discovery responses and the close of discovery.

The parties may supplement the record with evidence obtained in discovery within 14 days of the close of discovery.

IT IS SO ORDERED:

_____
Judge Van Tatenhove