IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LIBERTARIAN PARTY OF ARKANSAS, *et al.* **PLAINTIFFS**

v. **Case No. 4:19-cv-00214-KGB**

JOHN THURSTON, in his official capacity as Secretary of State for the State of Arkansas **DEFENDANT**

ORDER

Before the Court is defendant John Thurston's motion to stay preliminary injunction pending appeal (Dkt. No. 34). To the extent this Court retains jurisdiction over these matters, for the following reasons, the Court denies the motion to stay.

I. Procedural Background

On May 3, 2019, plaintiffs Libertarian Party of Arkansas (the "LPAR"), Sandra Richter, Michael Pakko, Ricky Harrington, Jr., Christopher Olson, and Michael Kalagias filed a motion for preliminary injunction (Dkt. No. 12). Defendant John Thurston, in his official capacity as Secretary of State for the State of Arkansas, responded in opposition (Dkt. No. 17). On June 4, 2019, the Court conducted an evidentiary hearing on the motion (Dkt. No. 28). The Court entered a preliminary injunction on July 3, 2019, enjoining enforcement of Arkansas Code Annotated §§ 7-7-101, 7-7-203(c)(1), 7-7-205(a)(2), 7-7-205(a)(4)(B), 7-7-205(a)(6), and 7-7-205(c)(3) to the extent that those statutes require the LPAR to file a petition containing signatures of registered voters in an amount that equals or exceeds three percent (3%) of the total votes cast for the Office of Governor in the immediately preceding general election for governor (Dkt. No. 31).[1] On July 12, 2019, Mr. Thurston filed a notice of appeal as to the preliminary injunction and a motion for

[1] The Court generally refers to this as the "three percent requirement."

stay pending appeal and to shorten plaintiffs' time to respond (Dkt. Nos. 33, 34). In his motion to stay, Mr. Thurston requested a stay pending appeal and "a temporary administrative stay of the preliminary injunction pending this Court's consideration of a full stay pending appeal" (Dkt. No. 34, at 1).

On July 17, 2019, the Court entered an Order granting in part Mr. Thurston's request by shortening plaintiffs' time to respond to 12 calendar days, or until July 24, 2019, though the Court noted that, "[b]eyond generally citing the 'time-sensitive nature of this case,' Mr. Thurston has not articulated any other reasons why plaintiffs' time to respond to the motion should be shortened . . . ." (Dkt. No. 39, at 1). The Court also noted that, in the event there were "time-pressing matters in this case of which the Court is not aware that inform such a time table, Mr. Thurston [could] file a motion to reconsider." (*Id.*). Mr. Thurston did not file a motion to reconsider, and on July 24, 2019, plaintiffs filed a response in opposition to the motion to stay (Dkt. No. 42).

On July 25, 2019, Mr. Thurston filed a motion for leave to file a reply, attaching as an exhibit the proposed reply and new record evidence in the form of a supplemental declaration of Peyton Murphy, a staff attorney in the Arkansas Secretary of State's Office (Dkt. No. 43). To the extent this Court retains jurisdiction over this issue, the Court grants Mr. Thurston's motion for leave to file a reply, directs Mr. Thurston to file his reply within 10 days from the entry of this Order, and has considered the proposed reply (Dkt. No. 43).

In a filing on August 5, 2019, Mr. Thurston set a deadline for this Court to rule by Wednesday, August 7, 2019, on his pending motion for stay (Dkt. No. 46). Due to other pressing matters on this Court's docket, the Court did not enter an Order on Mr. Thurston's motion to stay by that deadline, and Mr. Thurston filed a notice with this Court that he petitioned the United States

Court of Appeals for the Eighth Circuit for this relief because this Court "failed to afford the relief requested" by failing to act on or before August 7, 2019 (Dkt. No. 47).

To the extent the Court retains jurisdiction to consider the specific request for a stay or to rule on any issues presented by that request, including but not limited to Mr. Thurston's request for leave to file a reply, the Court does so now. *See Rakovich v. Wade*, 834 F.2d 673 (7th Cir. 1987) (examining Federal Rule of Appellate Procedure 8(a)); *Williams v. Kelley*, Case No. 5:02-cv-00045-JLH, 2017 WL 10350699, at *1 (E.D. Ark. Apr. 23, 2017) (deferring to the Eighth Circuit under Federal Rule of Appellate Procedure 8(a) to rule on motion to stay execution fully briefed in that court). For the following reasons, the Court grants Mr. Thurston's request for leave to file a reply, directs him to file that reply within 10 days from the entry of this Order, and denies Mr. Thurston's motion for stay pending appeal (Dkt. Nos. 34, 43).

II. Discussion

Mr. Thurston filed a motion for stay pending appeal, citing Federal Rule of Civil Procedure 62(c).[2] Federal Rule of Civil Procedure 62(d) provides that, "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d).

The Court must consider four factors to determine whether Mr. Thurston has made a sufficient showing for this Court to grant a stay of the preliminary injunction pending appeal.

[2] The Court acknowledges that, in his motion to stay, Mr. Thurston requests a stay pending appeal and "a temporary administrative stay of the preliminary injunction pending this Court's consideration of a full stay pending appeal" (Dkt. No. 34, at 1). Mr. Thurston does not argue that a different legal rule or standard applies to his request for "a temporary administrative stay." Plaintiffs do not address the matter. As a result, the Court will evaluate both of Mr. Thurston's requests for stay, both a temporary administrative stay and stay pending appeal, under the same standard.

These factors are: (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether granting the stay would substantially harm the other parties, and (4) whether granting the stay would serve the public interest. *Brady v. National Football League*, 640 F.3d 785, 789 (8th Cir. 2011) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *Dakota, Minnesota & E. R.R. Corp. v. Schieffer*, 742 F. Supp.2d 1055, 1060 (D.S.D. 2010). The Eighth Circuit has emphasized a balancing of equities approach to determine whether to grant a stay pending appeal. *See Walker v. Lockhart*, 678 F.2d 68, 70-71 (8th Cir. 1982) (the court maintains a flexible approach when applying the factors and balancing the equities between the parties, and the court "need not engage in detailed analysis of [movant's] probability of success on the merits"). The Eighth Circuit has noted that the stay procedure of Rule 62(d) is "to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered." *Mesabi Iron Co. v. Reserve Min. Co.*, 268 F.2d 782, 783 (8th Cir. 1959).

Because Mr. Thurston filed a notice of appeal of this Court's preliminary injunction (Dkt. No. 33), the Court first addresses the limit of its jurisdiction with respect to that Order before considering the merits of Mr. Thurston's motion. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). The Eighth Circuit has created a limited exception to the general rule of divestiture of district court jurisdiction so that the district court may modify an injunction pending appeal "in the kinds of cases where the court supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required . . . ." *Bd. of Educ. of St. Louis v. State of Mo.*, 936 F.2d 993, 996 (8th Cir. 1991) (quoting

Hoffmann v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d 1268, 1276 (9th Cir. 1976)). "The rule codifies the long-established and narrowly limited right of the trial court to make orders appropriate to preserve the status quo while the case is pending in an appellate court, but does not restore the jurisdiction to the district court to adjudicate anew the merits of the case after either party has invoked its right to appeal and jurisdiction has passed to an appellate court." *GP Indus., LLC v. Bachman*, 514 F. Supp. 2d 1156, 1170 (D. Neb. 2007).

Here, the relief Mr. Thurston appears to seek is reconsideration on the merits of the Court's preliminary injunction. Complete reconsideration of the Court's preliminary injunction is unavailable under Rule 62(d). Prior to filing his notice of appeal, Mr. Thurston did not file a motion for reconsideration under Rule 54 or a motion to modify the preliminary injunction under Rule 65.

Regardless, the Court denies Mr. Thurston's motion under Rule 62 and the traditional *Dataphase* factors for the reasons stated in the Court's preliminary injunction. With regard to the first factor—likelihood of success on the merits—this Court has already reviewed the record evidence and applicable law and found that plaintiffs are likely to prevail on their claims. Furthermore, Mr. Thurston's motion repeats many of the arguments already ruled upon by this Court, and the Court is not persuaded to reconsider its prior decisions based on the arguments Mr. Thurston now makes. Mr. Thurston's proposed reply includes new record evidence, submitted for the first time after this Court entered its preliminary injunction, in the form of a new affidavit from Mr. Murphy (Dkt. No. 43-2). The Court determines that, given the procedural posture of this case, the Court cannot consider this new record evidence. Mr. Thurston's notice of appeal divested the Court of jurisdiction except to the limited extent allowed by Rule 62. Because Mr. Thurston did not file a motion for reconsideration under Rule 54 or a motion to modify the preliminary

injunction under Rule 65, it is unclear on what legal basis Mr. Thurston requests that this Court consider new record evidence. Further, plaintiffs have been afforded no opportunity to challenge this new record evidence submitted for the first time by Mr. Thurston with a proposed reply to his motion for stay.

The Court also finds that Mr. Thurston has not established that: (1) he will suffer irreparable harm absent a stay of the preliminary injunction; (2) plaintiffs will not suffer an irreparable harm absent a stay; and (3) the public interest favors a stay. Mr. Thurston argues that the State's inability to enforce its ballot access scheme constitutes an irreparable harm because "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). The Supreme Court noted that such irreparable harm does not occur if "that statute is unconstitutional . . . ." *Id.* at 2324. This Court found that plaintiffs are likely to prevail on their claim that Arkansas' ballot-access scheme, as a whole, is unconstitutional as applied to LPAR for the reasons stated in the preliminary injunction. The Court therefore declines to find that the State of Arkansas will be irreparably harmed if it cannot enforce what likely will be proven to be an unconstitutional ballot-access scheme.

Further, the Court previously found that plaintiffs were likely to prevail in showing that they could not comply with Arkansas' ballot-access scheme challenged in this lawsuit, and the arguments presented by Mr. Thurston do not persuade the Court to reconsider this decision. Accordingly, the Court declines to reconsider its finding that plaintiffs face an imminent and irreparable harm if Arkansas' ballot-access scheme is enforced against them.

Similarly, the Court concludes that a stay pending appeal would harm plaintiffs and is not in the public interest. As explained in this Court's preliminary injunction, the record evidence demonstrates that the LPAR is likely to prevail on its claim that allowing Arkansas to enforce its

ballot-access scheme against the LPAR would deny the LPAR ballot access. Further, the Court determined that the harm to LPAR as a result outweighed any harm to the State of Arkansas in enjoining the State of Arkansas from failing to recognize the LPAR as a new political party and from enjoining the State of Arkansas from restricting ballot access to the LPAR as a new political party if the LPAR petitions for the certification of a new political party containing, at the time of filing, the signatures of at least 10,000 registered voters in Arkansas and otherwise complies with the remaining requirements of Arkansas law, save and except for the enjoined three percent requirement. Mr. Thurston's arguments do not persuade the Court otherwise.

Accordingly, for all of these reasons, the Court finds that Mr. Thurston has failed to establish that either the public interest or the balance of equities favor a stay at this time.

Finally, the Court writes to address Mr. Thurston's argument that a stay pending appeal is appropriate because the "Court's decision to enjoin the modicum-of-support requirement does not address" the harm facing plaintiffs (Dkt. No. 35, at 9). As the Eighth Circuit has explained, "the entire election scheme must be analyzed to determine whether undue constraints on access to the ballot exist." *Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985) (citations omitted). The Court in its preliminary injunction concluded that Arkansas' entire ballot-access scheme imposed a severe burden upon plaintiffs' associational rights under the First and Fourteenth Amendments. Then, the Court fashioned a remedy that went "no further than necessary to address the constitutional wrong supported" by the record. *Gerlich v. Leath*, 152 F. Supp. 3d 1152, 1180 (S.D. Iowa 2016) (citations omitted). The Court concluded that the narrowest form of relief to remedy the burdens imposed by Arkansas' entire ballot-access scheme upon plaintiffs was to enjoin the three percent requirement, rather than adjusting the election calendar. None of Mr. Thurston's arguments convince the Court that alternative injunctive relief is more appropriate.

III. Conclusion

As Mr. Thurston has failed to meet his burden for a stay of the preliminary injunction pending appeal, the Court also finds that Mr. Thurston has failed to meet his burden for a temporary administrative stay of the preliminary injunction. To the extent it retains jurisdiction over these matters, the Court grants Mr. Thurston's motion for leave to file a reply, directs Mr. Thurston to file his reply within 10 days from the entry of this Order, and denies Mr. Thurston's motion for stay pending appeal (Dkt. Nos. 34, 43).

So ordered this 12th day of August 2019.

Kristine G. Baker
United States District Judge