

requests that the Court stay its Order pending completion of the expedited proceedings before the Sixth Circuit.

1. On Friday, August 31, 2012, the Court granted Plaintiffs' motion for preliminary injunction. In that decision, the Court declared Ohio Revised Code § 3509.03 unconstitutional because the amendments made to that statute by Senate Bill 295 and House Bill 224 "violate[] the Equal Protection Clause of the United States Constitution." Order at 22-23. The Court enjoined Secretary Husted from "implementing or enforcing" that statutory provision. *Id.* at 23. The Court further ordered "that in-person early voting **IS RESTORED** on the three days immediately preceding Election Day for all eligible voters." *Id.* The Court also "anticipate[d]" that the Secretary "will direct all Ohio elections boards to maintain a specific, consistent schedule on those three days, in keeping with his earlier directive that only by doing so can he ensure that Ohio's election process is 'uniform, accessible for all, fair, and secure.'" *Id.*

The Secretary understood the Order to return state law to where it stood before House Bill 194, House Bill 224, and Senate Bill 295 amended Ohio Revised Code § 3509.03. That understanding followed from the nature of Plaintiffs' complaint and the relief they sought from this Court. Their only constitutional claim is that UOCAVA and non-UOCAVA voters must be treated equally and given the same hours for in-person absentee voting over that three-day period; in other words, Plaintiffs only sought to restore equal treatment between these two groups—not to create a new right to early in-person absentee voting during this three-day period. *See* Compl. ¶ 6 [Doc. 1]; Motion for Preliminary Injunction at 21 [Doc. 2]. Absent a directive from the Secretary, then, the county boards of elections would be entitled to vote on: (1) whether to allow early in-person absentee voting for all eligible voters on the Saturday, Sunday, and Monday before Election Day or any combination thereof and; (2) if they decided to allow such

voting on any or all of those days, the particular hours that would be offered. *See, e.g.*, Ohio Rev. Code § 3501.11; Doc. 40, Exh. 1 (Directive 2012-35).

The Secretary further understood the Order to instruct him to issue a directive establishing a uniform schedule throughout the State over that three-day period that is “uniform, accessible for all, fair, and secure.” *See* Order at 23. But in light of the absence of a particular date by which the directive must be issued, the Secretary believed that the Order afforded him a reasonable time to do so. This made particular sense given that the three days in question were still two months away.

2. On the morning of September 4, 2012, the next business day after the Court issued its ruling, the Secretary set out to accomplish the task of preventing county boards of elections from acting in contravention of the Court’s Order and preserving the Secretary’s ability to establish a uniform schedule for the three-day period in question within a reasonable period of time. To that end, the Secretary issued Directive 2012-40, which did three things. First, the Directive notified the boards that the Court had “struck the portion of Ohio Revised Code 3509.03 that ends in-person absentee voting the Friday before the election at 6:00 p.m.” and that the decision would be appealed. Second, the Directive informed the boards that the Order required the Secretary “to issue a consistent uniform schedule for statewide in-person voting hours for the last three days before the election.” And third, the Directive informed the boards that it “would only serve to confuse voters to set hours now that the court may change later.” “As such, th[e] Directive strictly prohibit[ed] county boards of elections from determining hours for the Friday, Saturday, Sunday, or Monday before the election.”

The Secretary’s intention was not to create a stay of this Court’s order as Plaintiffs have suggested; rather the Secretary sought to prevent the setting of non-uniform hours by individual

boards of elections and ultimately prevent any confusion for voters. In light of the fact that the Secretary anticipated the Sixth Circuit would expedite the appeal (as it has now done, setting a briefing schedule that concludes by September 21, 2012), the Court did not establish a date certain by which the Secretary must establish a uniform schedule, and the three days in question were still nearly two months away, the Secretary believed this was a reasonable and responsible course of action that was consistent with the Order.

But the Secretary has since learned that the Court views the Directive as inconsistent with the Order. The Secretary would never intentionally contravene an order issued by the federal district court or any other court—and this case is no exception. Therefore, the Secretary has today rescinded Directive 2012-40.

3. The Secretary respectfully requests that this Court stay the Order pending appeal pursuant to Federal Rule of Civil Procedure 62. Although the factors relevant to a stay of a preliminary injunction are the same as those relevant to issuing the preliminary injunction in the first place, *see Northeast Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006), there are unique “public interest” concerns that justify a stay. Foremost are voter confusion and voter reliance. Absent a stay, the Secretary will be required to set uniform hours for early in-person absentee voting during the last three days for all voters. But if the Sixth Circuit or the Supreme Court reverses this Court’s decision, the Secretary will be required to change those hours because early in-person absentee voting by non-UOCAVA voters will have to end by 6 p.m. on the Friday before Election Day. Non-UOCAVA voters may be confused by those changing hours. A stay pending appeal would avoid these issues. *See, e.g., Miller v. Brown*, 465 F. Supp. 2d 584, 596-97 (E.D. Va. 2006).

At a minimum, the Court should issue a stay so that the Secretary has a reasonable period of time to choose a schedule that would be “uniform, accessible for all, fair, and secure.” Doc. 40, Exh. 1, at 2 (Directive 2012-35). Absent a stay or a directive by the Secretary, there is a real concern that county boards of elections will begin issuing early in-person absentee voting schedules for the three-day period before the Secretary can issue a uniform schedule. County-by-county action on this issue would only lead to significant administrative difficulties and further voter confusion. Finally, a stay would not harm Plaintiffs as there will be sufficient time after the appeal to establish a uniform schedule for early in-person absentee voting on the three days in question should the Sixth Circuit and the Supreme Court uphold the preliminary injunction upon expedited consideration. The Secretary remains committed to a uniform solution that gives sufficient notice to county boards of elections and voters as to the early in-person absentee voting hours that will be in place if the injunction is upheld.¹

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For all these reasons, the Secretary respectfully requests that this Court stay the Order pending appeal.

¹ Due to the high likelihood of voter confusion, and in particular the concern over action that may be taken by various boards of elections, the Secretary may request a stay from the Sixth Circuit while this request is pending. *See* Fed. R. App. Proc. 8(a)(2).

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Respectfully submitted,

/s/ William S. Consovoy

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on September 7, 2012, and served upon all parties of record via the court's electronic filing system.

/s/ William S. Consovoy

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