

Tennessee Election Officials' Motion to Stay Injunction "Too Little, Too Late," So First-Time Voters May Continue to Vote by Mail

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This post arrives thanks to Erica M. Van Heyde, a 2020 graduate of The Ohio State University Mortiz College of Law, who joins Squire Patton Boggs as an associate in 2021.

Last week, in [Memphis A. Philip Randolph Institute v. Hargett](#), the Sixth Circuit considered the application of the factors for a stay pending appeal of a district court's injunction regarding the mechanics of the election in Tennessee, issuing a published decision that is the court's latest contribution to the burgeoning case law about voting rights, COVID-19, and the role of the federal courts.

In Tennessee, as in many other states, the convergence of the COVID-19 pandemic and the 2020 presidential election is expected to result in a steep increase in absentee voting. In May of this year, one Tennessee voter and several voter outreach organizations brought suit against state elections officials to challenge the state's statutory scheme governing absentee voting. The plaintiffs specifically sought a preliminary injunction to enjoin the enforcement of a law that prevents some first-time voters from voting absentee. A district court in Nashville granted that injunction early in September, holding that the restriction violated the constitutional rights of first-time voters.

Election officials did not appeal the injunction until October 5th, nearly a month after it was granted. Last week a panel of the Sixth Circuit (Moore, Gibbons, Readler, JJ.) denied the defendants' motion to stay the injunction, relying principally on the non-merits factors for a stay, meaning that the absentee voting restriction will not be enforced against the approximately 128,000 first-time voters in Tennessee this election.

District Court Grants Preliminary Injunction

Tennessee's absentee voting laws restrict absentee voting to certain enumerated categories. For example, voters who will be out of the country during the voting period, observing a religious holiday, on jury duty, or over sixty years old may vote absentee. Voters are also qualified to vote absentee if they are "hospitalized or ill, persons with physical disabilities, or caretakers for such persons." Tennessee has recently interpreted these criteria to include voters with underlying health conditions that make them more vulnerable to COVID-19 and voters who are caretakers for people who are

vulnerable.

But Tennessee's statutory scheme places a further limitation on absentee voting for first-time voters who completed their voter registration online or by-mail. These mail-registered voters are required to vote in person for their first election so that they can present "satisfactory proof of identity." They are therefore not allowed to vote absentee even if they would otherwise qualify.

The plaintiffs sought a preliminary injunction to enjoin enforcement of this first-time voter restriction. The district court analyzed the restriction under the *Anderson-Burdick* framework. Under the framework, courts weigh the character and magnitude of the asserted injury to voters' First and Fourteenth Amendment rights against the state's interest justifying the law. "Severe" restrictions on voting rights are subject to strict scrutiny, "moderate" restrictions are subject to intermediate scrutiny, and "reasonable, nondiscriminatory" restrictions must only face rational basis review.

The district court concluded that Tennessee's first-time voter restrictions amounted to a moderate burden on the right to vote. While rejecting the plaintiffs' argument that, in the COVID-19 era, preventing someone from voting absentee is tantamount to preventing him or her from voting altogether, the court nonetheless decided that the privilege to vote absentee affects the fundamental right to vote, such that restricting absentee voting during the current pandemic constituted a moderate burden on voting rights.

Because the burden was moderate, the district court determined that the restrictions were subject to intermediate scrutiny. The court held that the state did have some legitimate interest in requiring first-time voters to show identification but that this interest did not require mail-registered voters to vote in person. Instead, the court noted that voters could provide identification with their mailed-in ballots. Similarly, while recognizing that the state had a legitimate interest in preventing voter fraud and ensuring the integrity of its elections, the court decided that the defendants did not offer any evidence that the restriction on first-time voters helped preserve election integrity. The court held that these justifications were not sufficient under intermediate scrutiny, and, because the plaintiffs were likely to succeed on the merits of their claim, granted the preliminary injunction.

Sixth Circuit Denies Motion to Stay Preliminary Injunction

The district court issued its ruling on September 9. It was not until nearly one month later that the defendant state elections officials appealed, and it was exactly one month later that they moved the Sixth Circuit for a stay of the district court's injunction.

When ruling on a motion to stay a preliminary injunction, the court of appeals considers four factors: (1) whether the party requesting the stay has made a strong showing that he is likely to succeed on the merits; (2) whether denying the stay will cause the applicant irreparable injury; (3) whether issuing a stay will substantially injure the other parties; and (4) the public interest.

In denying the defendants' motion to stay, Judge Gibbons's majority opinion reasoned that "the strength of the final three factors of the stay analysis outweigh any probability of defendants' success on the merits." The court noted, "partly from defendants' own doing, the electoral calendar works against their request for a stay of the district court's preliminary injunction." Critically, by the time the defendants moved to stay the preliminary injunction, Tennessee's election was already well under way. Both absentee voting and early in-person voting had begun and election officials had already received absentee ballots from first-time voters who would have been unable to vote if the restrictions were enforced. The court also noted that the preliminary injunction was well publicized. Many voters

in Tennessee had already been told that first-time voters would not be required to vote in-person this year. The majority opinion stressed the importance of consistency in the weeks ahead of an election to avoid voter confusion, determined that defendants faced no substantial harm from continuing to comply with the rules they were already following, and concluded that altering the rules in the middle of the election would substantially injure the plaintiffs and be against the public interest.

In a concurring opinion, Judge Moore expanded on the majority's rationale for denying the stay. Judge Moore noted that while concerns about voter confusion or disincentivizing voter turnout sometimes cause courts of appeals to stay preliminary injunctions enjoining state election laws ahead of an election, "the equities do not always require that result." Here, where a lower court order had been in place for some time, disturbing that order in the lead up to the election could result in more voter confusion than would result from letting the injunction stand. Therefore, the state must offer sound reasons for justifying the risk of confusion. What they offered here, however, was "too little, too late."

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National Law Review, Volume X, Number 301

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