

No. 10-4481

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRACIE HUNTER, Committee to Elect Tracie M.)
 Hunter for Judge,)
)
 Plaintiff - Appellee,)
)
)
 NORTHEAST OHIO COALITION FOR THE)
 HOMELESS; OHIO DEMOCRATIC PARTY,)
)
 Intervenor - Appellees,)
)
)
 v.)
)
 HAMILTON COUNTY BOARD OF)
 ELECTIONS, et al.,)
)
 Defendants,)
)
)
 JOHN WILLIAMS,)
)
 Intervenor - Appellant)
)
)
 OHIO REPUBLICAN PARTY,)
)
)
 Amicus Curiae.)

FILED
Dec 01, 2010
 LEONARD GREEN, Clerk

ORDER

Before: MERRITT, GILMAN, and COOK, Circuit Judges.

Following an emergency hearing, the district court issued a preliminary injunction directing the Hamilton County Board of Elections (“Board”) to “immediately begin an investigation into whether poll worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error.” At the same time, the court denied a request to stay the Board’s “certifying abstracts of the results of the November 2 election.” John

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Williams was leading the race by 23 votes at the time the Board initially approved the election results. He appeals the district court's order and moves for a stay of that order. On November 24, 2010, a temporary stay was granted to permit consideration by a full panel of this court.

The factors relevant to a stay pending appeal are: 1) whether the stay applicant has demonstrated a likelihood of success on the merits; 2) whether the stay applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004).

Williams argues that a stay is necessary to prevent irreparable harm. The claim of irreparable harm is based primarily upon the possible opening and counting of the provisional ballots in question. Ohio law provides that in counting provisional ballots, “[n]o person shall recklessly disclose the count or any portion of the count of provisional ballots in such a manner as to jeopardize the secrecy of any individual ballot.” Ohio Rev. Code § 3505.183(D). Williams argues that if a ballot is removed, separated from its envelope, and later deemed to have been incorrectly counted, it will be impossible to undo the act—“opening the provisional ballots would ring a bell that cannot be unrung.” But the challenge in this case appears to not be over individual ballots, but the treatment of groups of ballots. A group of provisional ballots can be segregated after opening without jeopardizing the secrecy of an individual ballot. We thus are unconvinced that Williams faces irreparable harm in the absence of a stay.

We next turn to whether Williams has demonstrated a likelihood of success on the merits. In reviewing which provisional ballots to count, the Board counted 26 provisional ballots that were cast in early voting at its main office on the incorrect precinct-ballot form. The Board decided to count these 26 ballots because it concluded that incorrect precinct-ballot forms were used solely due

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to poll-worker error. But the Board decided not to count 849 provisional ballots that were cast in the wrong precinct at the regular polling stations on election day without investigating whether poll-worker error was equally at fault in causing any of these ballots to be cast in the wrong precinct. This disparate treatment—counting the 26 wrong-precinct ballots based on poll-worker error during early voting without similarly investigating whether poll-worker error led to any of the 849 ballots being cast in the wrong precinct on election day—forms the basis for the injunctive order in this case. We cannot conclude that the district court abused its discretion in determining that this disparate treatment made it “likely enough that [the likelihood-of-success] factor weighs in favor of granting the preliminary injunction.” *See United States Student Ass’n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008) (reviewing a district court’s decision to grant a preliminary injunction under the abuse-of-discretion standard). This analysis weighs against Williams’s motion to stay the district court’s preliminary injunction.

Further, the balance of the remaining factors does not persuade us to grant the motion for a stay. This case shall thus proceed in the normal course. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1174 (6th Cir. 1995) (holding that appeal from preliminary injunction does not divest the district court of jurisdiction to proceed on the merits).

Therefore, the motion for a stay is **DENIED**, and the temporary stay is **DISSOLVED**.

ENTERED BY ORDER OF THE COURT



Clerk