



ORIGINAL

FILED

05/17/2022

IN THE SUPREME COURT OF THE STATE OF MONTANA

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 22-0172

DA 22-0172

MONTANA DEMOCRATIC PARTY and MITCH
BOHN, WESTERN NATIVE VOICE, et al.,
MONTANA YOUTH ACTION, et al.,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, in her official capacity as
Montana Secretary of State,

Defendant and Appellant.

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Clerk of Supreme Court
State of Montana

ORDER

Appellant Christi Jacobsen, in her official capacity as Montana Secretary of State, moves pursuant to M. R. App. P. 22(2)(a) for relief from the April 22, 2022 Order Re: Defendant’s Motion to Suspend Preliminary Injunction Pending Appeal of the Thirteenth Judicial District Court, Yellowstone County, in Cause No. DV-21-0451. Jacobsen alleges that the District Court erred in refusing to suspend the preliminary injunction it issued that restrained and prohibited her from enforcing any aspect of HB 176 and Section 2 of SB 169¹ pending resolution of the request of Plaintiffs and Appellees Montana Democratic Party and Mitch Bohn, Western Native Voice, et al., and Montana Youth Action, et al. (collectively “Plaintiffs”), to permanently enjoin enforcement of those legislative enactments. Appellee Plaintiffs object to Jacobsen’s motion for relief, arguing that the District Court correctly concluded that suspension of its preliminary injunction was not warranted in this case.

At issue is whether the preliminary injunction imposed by the District Court should be suspended during this appeal. In the District Court, and now in this Court, Jacobsen

¹ Although the District Court’s April 6, 2022 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs’ Motion for Preliminary Injunctions ordered that Jacobsen was restrained and prohibited from enforcing “any aspect” of SB 169, the court later modified its ruling, asserting that Jacobsen was only restrained and prohibited from enforcing Section 2 of SB 169.

challenges the preliminary injunction only as it applies to Section 2 of SB 169 and to HB 176.

M. R. App. P. 22(2)(a) provides that a motion for relief under this Rule must, among other factors, demonstrate good cause for the relief requested. “Good cause” is generally defined as a legally sufficient reason and referred to as the burden placed on a litigant to show why a request should be granted. *Brookins v. Mote*, 2012 MT 283, ¶ 29, 367 Mont. 193, 292 P.3d 347 (citations omitted). Here, Jacobsen asserts that this preliminary injunction “upends nearly a year of voter education, election administrator and poll volunteer training, and administrative rules that successfully have been applied in three elections over the past year.” She urges this Court to grant her relief from the District Court’s Order denying her motion to suspend the preliminary injunction because it would allow Montana voters to “participate in Montana’s 2022 elections under the same election laws that governed Montana’s 2021 elections, without issue.”

SB 169 modifies Montana’s voter identification laws. Prior to its enactment, § 13-13-114(1), MCA, provided that an elector could prove their identity for in-person voting by showing an election judge a current photo identification that contained the elector’s name, including but not limited to a valid driver’s license, a school district or postsecondary education photo identification, or a tribal photo identification. Instead of a photo identification containing the elector’s name, an elector could present a current utility bill, bank statement, paycheck, notice of confirmation of voter registration, government check, or another government document that showed the elector’s name and current address. SB 169 amended § 13-13-114, MCA, to limit which types of photo identification, by themselves, are sufficient to prove identification for voting purposes. Under the current version of § 13-13-114(1)(a)(i), MCA, there are six specific types of identification which, standing alone, are sufficient to prove identity for voting purposes: Montana driver’s license, Montana state identification card issued pursuant to § 61-12-501, MCA, military identification card, tribal photo identification card, United States passport, and Montana concealed carry permit. Otherwise, under § 13-13-114(1)(a)(ii), MCA, an elector must

present either a current utility bill, bank statement, paycheck, government check, or other government document that shows the elector's name and current address, and must also present a photo identification that shows the elector's name, including but not limited to a school district or postsecondary education photo identification. One of the effects of SB 169 is the elimination of student identification as a sufficient form of identification for voting purposes without additional supporting documentation.

HB 176 amends § 13-2-304(1), MCA, to eliminate same-day voter registration. Prior to the enactment of HB 176, a person could register to vote or change their voter registration information prior to the close of the polls on election day. HB 176 changed the registration deadline to prior to noon on the day before the election.

As a threshold concern, we must determine the criteria by which a party may establish "good cause" for relief under M. R. App. P. 22(2)(a)(i) in a case in which a district court denied a party's request for an order suspending a preliminary injunction pending appeal under M. R. App. P. 22(1)(a)(iii). In *Stapleton v. Thirteenth Judicial Dist. Court*, No. OP 20-0293, Order (Mont. May 27, 2020), we were faced with a similar request to stay the enforcement of a preliminary injunction that enjoined enforcement of the election-day receipt deadline for ballots. In *Stapleton*, the request to stay the District Court's preliminary injunction did not come in the form of a motion for relief under M. R. App. P. 22(2); rather it came in the form of a petition for supervisory control under M. R. App. P. 14(3). Due to urgency, then-Montana Secretary of State Corey Stapleton filed a motion for stay in the District Court under M. R. App. P. 22(1) while concurrently appealing the preliminary injunction to this Court under M. R. App. P. 6(3)(e) and petitioning for supervisory control in an attempt to stay the preliminary injunction as expediently as possible. In considering whether to stay the preliminary injunction, we determined that it was appropriate to do so because it would "maintain the status quo pending consideration of the issues." *Stapleton* at 3.

We note that determining whether to stay a preliminary injunction is an entirely different question, with distinct analysis, from the issue of whether the preliminary

injunction was correctly granted. Compare *Stapleton v. Thirteenth Judicial Dist. Court*, No. OP 20-0293, Order (Mont. May 27, 2020), with *Driscoll v. Stapleton*, 2020 MT 247, 401 Mont. 405, 473 P.3d 386. It is also distinct from the criteria a district court employs in determining whether to grant a stay. The present motion under consideration is Jacobsen's motion for relief from the District Court's denial of her motion to stay the preliminary injunction; the merits of the preliminary injunction are to be determined after full consideration of the issues on appeal.

The purpose of equitable injunctive relief is to preserve the status quo and minimize the harm to all parties pending final resolution on the merits. *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 18, 395 Mont. 160, 437 P.3d 142 (internal quotations and citations omitted). Status quo means "the last actual, peaceable, noncontested condition which preceded the pending controversy." *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, 440 P.3d 4 (internal quotations and citations omitted).

In *Stapleton*, we found that the status quo was the "condition, in place for many years, . . . that ballots cast by mail must be received in the election administrator's office by 8:00 p.m. on election day." We further found good cause to stay the preliminary injunction "in order to avoid voter confusion and disruption of election administration." In that case, ballots had already been mailed to voters which expressly stated that they would not be counted unless received by that deadline. Thus, we found good cause to stay the District Court's preliminary injunction as it disrupted the status quo, and maintaining the status quo would avoid voter confusion and disruption of election administration.

In the present case, we must therefore first determine whether the "status quo" is the condition that existed prior to the enactment of SB 169 and HB 176, as the Plaintiffs and District Court assert, or whether, given that local elections were held in 2021 with SB 169 and HB 176 in effect, the status quo is maintained by allowing those laws to remain in effect for the upcoming elections, as Jacobsen asserts.

As Jacobsen notes in her motion for relief, Plaintiffs initiated proceedings challenging SB 169 and HB 176 on April 19, 2021, but they did not seek injunctive relief

until January 12, 2022. By the time Plaintiffs sought injunctive relief, some local elections were conducted in 2021 under the amended statutes. Jacobsen asserts that more than 337,000 Montanans voted in elections conducted under the new enactments in 2021. Thus she argues that maintaining the status quo would be accomplished by staying the District Court's preliminary injunction as it pertains to Section 2 of SB 169 and HB 176. Jacobsen argues that Plaintiffs chose not to file for injunctive relief until months after the new enactments were implemented and successfully employed in the elections conducted during 2021.

In its Order denying Jacobsen's motion for stay, the District Court found that enjoining Section 2 of SB 169 would allow voters to use the same kinds of photo identification as they had since 2003 and enjoining HB 176 would allow voters to be able to register to vote on election day as they had since 2005. However, the court did not account for the intervening 2021 elections, where voters were required to present identification consistent with that described in § 13-13-114(1), MCA (2021), and where voters could register no later than noon on the day prior to the election pursuant to § 13-2-304(1), MCA (2021). Thus, while the District Court found it indisputable that the "status quo" was that time prior to the enactment of SB 169 and HB 176, the question of which point in time is the last "noncontested condition" is not so clearcut, as Plaintiffs had not yet pursued a preliminary injunction at the time these elections occurred.

Regarding the issues of voter confusion and the disruption of election administration, Jacobsen argues that the same circumstances that existed in *Stapleton* are present here, where many Montanans participated in a local election in 2021 under the present statutes and where the Office of the Secretary of State has spent "nearly a year of voter education, election administrator and poll volunteer training, and [drafting and application of] administrative rules." Jacobsen asserts that this voter education included airing thousands of public service announcements on broadcast television and radio, and sending a mailing to every registered voter that noted the new registration deadline. She argues that in light of the education that has occurred, voter confidence in the election

process will be undermined if the preliminary injunction is allowed to stand. Training of election administrators and poll volunteers included the issuance of updated Election Judge Handbooks and Polling Place Quick Guides, and conducting extensive staff and administrator trainings. Jacobsen further noted that the administrative rules governing elections were revised to implement the new laws, and allowing the preliminary injunction to stand “effectively guts the guidance election officials rely upon to administer elections[.]”

However, the District Court found the present case distinguishable from the situation *Stapleton* presented. In that case, as the court noted here, “The District Court entered its preliminary injunction ten days before the June 2, 2020 primary election and two weeks after election administrators mailed ballots to all Montana voters.” *Stapleton* at 2. This Court concluded in *Stapleton* that maintaining the deadline for ballot return as indicated on the mailed ballots was prudent “to avoid voter confusion and disruption of election administration.” In the present case, the District Court found *Stapleton* distinguishable as the current preliminary injunction was issued two months—not 10 days—before the next election and no ballots had been mailed; therefore Jacobsen has more time “to manage the enjoining of these laws.” Furthermore, the District Court was unconvinced that any resultant voter confusion would be harmful, as the enjoined laws were more restrictive than the laws they had replaced. It explained, “If voters function under the theory that they are no longer able to register on election day they will likely register prior to that day, and no harm will come to them. On the other hand, if voters function under the theory that they can register to vote on election day—but HB 176 was not enjoined—they would be harmed because they would be unable to cast their vote.”

In this case the status quo for the electorate—“the last actual, peaceable, noncontested condition which preceded the pending controversy”—leaves SB 169 and HB 176 in effect. Plaintiffs have not contradicted Jacobsen’s assertion that 337,000 Montanans voted under the current statutory provisions in 2021, and Plaintiffs did not move to enjoin the enactments prior to the occurrence of those elections. While in

Stapleton, we determined that the status quo would be maintained by staying the preliminary injunction because ballots had already been mailed which expressly set forth their return deadline, in this case elections have already occurred under the provisions enacted in SB 169 and HB 176.

Moreover, some voter confusion and disruption of election administration appears inevitable whether the preliminary injunction is stayed or not. Montana Youth Action states that staying the injunction would constitute the third change in these laws in advance of the June primary election, which it argues is “far likelier to promote confusion, not least because the laws in question are new and unfamiliar to Montana voters.” However, we place greater weight on the fact that elections have actually been conducted under the statutes as enacted by SB 169 and HB 176—elections that a large portion of Montana voters participated in. Staying a preliminary injunction, which was not in effect during the 2021 elections, means that voters will continue to operate under the laws that have been in effect for over a year at this point.

Since we have determined that the status quo is best maintained by staying the preliminary injunction and since we are further convinced that staying the preliminary injunction would cause less voter confusion and disruption of election administration, we conclude that Jacobsen has met her burden to show the requisite good cause for relief from the District Court’s denial of her motion to stay the preliminary injunction.

Therefore,

IT IS ORDERED that the M. R. App. P. 22(2)(a) motion of Defendant and Appellant Christi Jacobsen, in her official capacity as Montana Secretary of State, for relief from the District Court’s order is GRANTED.

The Clerk is directed to provide copies of this order to all counsel of record.

DATED this 17th day of May, 2022.

Chief Justice

Debra M. Latham

James J. H. [unclear]

[unclear]

John Rice

Justices

Chief Justice Mike McGrath would deny the motion.