

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD**

**CENTER FOR INDIVIDUAL
FREEDOM, INC.,**

Plaintiff,

v.

Civil Action No.: 1:08-00190

**BETTY IRELAND and
TIMOTHY BOGGESS,**

Defendants,

v.

**WEST VIRGINIA EDUCATION
ASSOCIATION, et al.,**

Intervenor Defendants,

**WEST VIRGINIANS FOR LIFE,
INC., and ZANE LAWHORN,**

Plaintiffs,

v.

Civil Action No.: 1:08-cv-1133

**BETTY IRELAND and
TIMOTHY D. BOGGESS, West Virginia,**

Defendants.

DEFENDANT BETTY IRELAND'S MOTION FOR STAY PENDING APPEAL

Now comes Defendant, Betty Ireland, West Virginia Secretary of State, who moves this Court to stay its October 17, 2008 Order granting the Plaintiff the injunctive relief it sought by enjoining enforcement of certain recently enacted provisions of West Virginia election law pending a prompt appeal to the U.S. Court of Appeals for the Fourth Circuit. The enjoined provisions are West Virginia Code §3-8-1a(13)(B) and those provisions of Code §3-8-1a(12)(A) related to “electioneering communications” in the form of mass mailings, telephone banks, billboards, newspapers, magazines and other periodicals is overly broad. This stay is sought in compliance with FRAP 8(a), and a Notice of Appeal will be filed shortly.

The factors regulating the issuance of a stay under Rule 8 are whether the stay applicant has made a strong showing that the applicant is likely to succeed on the merits, whether the applicant will be irreparably injured absent the stay, whether issuance of the stay will substantially injure other parties interested in the proceeding, and where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 107 S. Ct. 2113 (1987). In addition, it has been held that the first factor is ordinarily the most important, but a movant may also have the motion granted upon a lesser showing of a substantial case on the merits if the balance of equities identified in the second, third and fourth factors weighs heavily in favor of granting the stay. *Garcia-Mir v. Meese*, 781 F. 2d 1450 (1986 CA11 Ga).

The relief granted by the injunction effectively rewrites West Virginia’s election law some 17 days before the general election, which will undoubtedly result in a free-for-all of mud-slinging campaign attack ads by special interest groups that have no duty to report their expenditures or their sources of funding. In *Ruiz v. Estelle*, a motion for a stay of injunction pending appeal was granted where the injunction imposed sweeping and exacting changes upon a state’s prison system. 650 F. 2d 555 (1981 CA5 Tex). The changes imposed by the injunctive relief granted herein are equally

sweeping and the results are significant from an enforcement perspective. Other courts have withheld immediate injunctive or other equitable relief that would have affected an impending election. *See Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988); *Simpkins v. Gressette*, 631 F.2d 287, 295-296 (4th Cir. 1980); *Maryland Citizens for a Representative Gen. Assembly v. Governor of Maryland*, 429 F.2d 606, 609-611 (4th Cir. 1970) election cases are different from ordinary injunction cases. “Interference with impending elections is extraordinary and interference with an election after voting has begun is unprecedented.” *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3rd 914, 919 (9th Cir. 2003).

I.

Will the applicant succeed on the merits? It is respectfully submitted that the applicant, Secretary of State, will succeed on the merits. The legislative changes effected by the new statute complies with *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (2008) and the majority opinion in *McConnell v. FEC*, 540 U.S. 93(2003) and *FEC v. Wisconsin Right to Life, Inc.* 541 U.S. _____, 127 S.Ct. 1928 (2007).

II.

Will the applicant be injured if the stay is not granted? If the stay is not granted, the applicant, the chief election officer and the regulator of West Virginia’s elections, will essentially have no regulatory power or authority over non-broadcast and media campaigns and regulation over broadcast media will be limited to an out of date legal standard.

III.

Will issuance of the stay substantially injure other parties interested in the proceeding? Should the Court act favorably upon the motion for stay, West Virginia’s newly enacted election law

will remain in effect. The new statute, enacted in direct response to this Court's April ruling corrected the offending language of the Code sections. The new language conforms to applicable federal court decisions and allows anyone to produce political advertising, as long as their source of funding is disclosed. The new language was enacted by the West Virginia House of Delegates and the West Virginia Senate and signed into law by Governor Manchin. If, as it claims, CFIF is interested in the separation of powers, they should not so quickly ask the courts to second-guess the legislative process of those elected by the people of West Virginia.

IV.

Where does the public interest lie? The public interest clearly lies on the side of the applicant. No public interest is served by gutting the state's election laws 2 ½ weeks before an election. No public interest is served by allowing out-of-state corporations to engage in political activities without the disclosure of their funding sources or without the formation of a corporate PAC. The Center for Individual Freedom, Inc., (CFIF) one of the plaintiffs below, holds itself out as an "independent advocacy group." See "Appellant's Emergency Motion for Stay Pending Appeal and Other Expedited Procedures[.]" P. 2. The website for CFIF describes the corporation as follows:

Mission

Founded in 1998, the Center for Individual Freedom is a non-partisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution.

The Center seeks to focus public, legislative and judicial attention on the rule of law as embodied in the federal and state constitutions. Those fundamental documents both express and safeguard society's commitment to individual freedom, not only through specific protections such as the Bill of Rights, but also through structural protections that constrain and disperse governmental authority.

In addition, the Center seeks to foster intellectual discourse by bringing together

independent thinkers to examine broad-ranging issues of individual freedom in our global society. While the Center is decidedly for individual freedom, scholars and legal authorities who share that same basic philosophy differ as to the application of those principles in the complex world in which we live. The Center strives for balanced debate that encourages conflict resolution where there is tension between the rights of individuals and the requirements of government, as well as between individuals.

The Center engages in three distinct but complementary activities:

Legal activities. It is a fundamental premise of the Center that the courts are rapidly supplanting legislative and public initiatives, as our increasingly diverse Republic seeks to balance the interests of individuals, interest groups and government. The Center will engage constitutional authorities to participate in major litigation on behalf of fundamental individual rights protection.

Legislative activities. State legislatures and the US Congress at times introduce and pass legislation that violates the Constitution. The Center seeks to make its voice heard on important legislative issues affecting constitutional rights and freedoms.

Education. Through a variety of publications, seminar sponsorships, issues papers and briefings, news bulletins and broadsides, the Center seeks to reaffirm the plain language imperatives of the US Constitution, relating it to contemporary conflicts that cannot be allowed to erode or circumvent it.

Based in Alexandria, Virginia, the Center for Individual Freedom is a nonprofit, 501(c)(4) corporation that relies on private financial support from individuals, associations, foundations and corporations.

http://www.cfif.org/htdocs/about_cfif/index.htm

RELIEF SOUGHT

Defendant Ireland seeks a stay of this Court's ruling of October 17, 2008. The stay will allow Secretary of State Betty Ireland to review the Court's forth coming memorandum opinion and to promptly prosecute her appeal to the Fourth Circuit Court of Appeals and to allow her to enforce and

implement the recently enacted changes to West Virginia's election laws

Respectfully submitted,

BETTY IRELAND, SECRETARY OF
STATE OF WEST VIRGINIA

By Counsel,

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CERTIFICATE OF SERVICE

I, Thomas W. Smith, Managing Deputy Attorney General, do hereby certify that on the 17th of day of October 2008, I electronically filed the foregoing “Defendant Betty Ireland’s Motion for Stay Pending Appeal” with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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