Rick Perry v. Charles Judd

Doc. 11

Record Nos. 12-1042 & 12-1047

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE HONORABLE RICK PERRY,

Plaintiff-Appellee-Respondent,

v.

CHARLES JUDD, KIMBERLY BOWERS, and DON PALMER, members of the Virginia State Board of Elections, in their official capacities,

Defendants - Appellants - Movants.

RESPONDENT'S BRIEF IN OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION TO SUSPEND PRELIMINARY INJUNCTION WHILE AN APPEAL IS PENDING

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FACTS AND NATURE OF THE CASE

Plaintiff, the Honorable Rick Perry, Governor of the State of Texas, and Republican Candidate for the President of the United States, filed this lawsuit because he believes he was unconstitutionally restricted from having his name appear alongside others in the Republican primary for the Commonwealth of Virginia. On January 10, 2012, the District Court entered an Order (Document #54) directing the Defendants, members of the State Board of Elections, to send instructions to the local electoral boards (which are not parties), directing them not to order, print or mail ballots prior to the Court's hearing on the requested injunctive relief scheduled for January 13, 2012. The Court on page four of Document #54 recognizes the local boards may choose to disregard the Court's order, but finds there is ample time for local boards to comply with State and federal laws as well as a Consent Decree, after January 13, 2012.

On January 10, 2012, Defendants filed a Supplemental Emergency Motion to Suspend Amended Preliminary Injunction pending Appeal. Without citing any legal authority authorizing the Court to exercise jurisdiction over an appeal of the District Court's interlocutory Order, Defendants seek to suspend the District Court's Order under Federal Rule of Appellate Procedure 8(a)(2) by contending the Order constitutes a Preliminary Injunction. Defendants contend the Order (a) essentially grants all relief ultimately requested so the correct legal

standard of review was not used; (b) was not based upon evidence as to the balance of interests; and (c) improperly granted injunctive relief without finding all four prongs of the *Winters* requirements. *Winters v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 19 (2008).

Plaintiff would show this Court the District Court's Order does not constitute a granting of a preliminary injunction, so Defendants' appeal would in all respects be improper and suspending the Order pending an appeal should not be permitted. Plaintiff further contends, even if Defendants were entitled to appeal the Order as a grant of preliminary injunction, Defendants failed to show an abuse of discretion. Plaintiff further contends the Court's Order may not be suspended as (a) the burden is on Defendants to show the statute in question is constitutional; (b) there was no abuse of discretion since the correct legal standard was used by the Court; and (c) the Court's Order results in no harm to Defendants but merely orders them to send a directive or instruct non-parties not to incur costs for mailing, printing or ordering ballots pending the hearing on the merits of Plaintiff's request for injunctive relief.

DEFENDANTS ARE NOT ENTITLED TO APPEAL

The District Court's Order is not a grant of preliminary injunctive relief but rather is only an interim order prior to a hearing on the motion for injunctive relief. The order requires Defendants to notify and instruct local Virginia

election boards of this Court's Order not to print ballots, mail ballots or order ballots. This same Order does not yet grant Plaintiff the right to be listed on the Virginia Republican Primary ballots. Therefore, Defendants are incorrect in their assertion the Order essentially grants all relief ultimately requested.

Under section 1292(a)(1) of the United States Code, courts of appeals are given limited jurisdiction over appeals involving "[i]nterlocutory orders of the district courts of the United States, . . . , or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." 28 U.S.C. § 1292(a)(1). Because section 1292(a)(1) "was intended to carve out only a limited exception to the final-judgment rule, [the Supreme Court] has construed the statute narrowly . . . ." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (citations omitted).

"[T]here remain few disputes over which types of orders qualify as orders 'granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions' under [section] 1292(a)(1)." Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 203 (2001). "The Supreme Court has construed this category strictly [and] temporary restraining orders are not 'injunctions' under this section." *Id.* (citing *Carson*, 450 U.S. at 84; Robert J. Martineau, MODERN APPELLATE PRACTICE § 4.1 (1983)). "In addition,

preliminary orders that are not expressly injunctive, but which produce potentially injunctive effects, are appealable only if they relate to the merits of the action and will inflict serious harm that is preventable only by immediate appeal." *Id.* (citations omitted).

By its own terms, the District Court's Order "expires at 11:59 p.m. on January 13, 2012, or upon the Court's rendering of a decision on the Emergency Motion for Temporary Restraining Order and Preliminary Injunction on January 13, 2012, whichever occurs first." Its impact on Defendants is only to require them to instruct local election boards not to print ballots, mail ballots, or order ballots until the District Court hears oral arguments on Plaintiff's application for injunctive relief on Friday, January 13, 2012 (just three days after the District Court issued its order).

While the District Court's Order potentially has limited injunctive effects, the Order in no way inflicts serious harm on Defendants that is preventable only by an immediate appeal. Likewise, the District Court's Order is clearly not an injunction which impacts the merits of the case. Accordingly, section 1292(a)(1) does not provide this Court with jurisdiction to hear an appeal of the District Court's Order, and the Defendants are not entitled to an Order suspending the District Court's ruling pending such a premature appeal.

DEFENDANTS HAVE NOT SHOWN ABUSE OF DISCRETION

Even if Defendants correctly interpreted the District Court's Order as an order granting injunctive relief, they cannot meet the Abuse of Discretion standard necessary to overturn such an order. Appellate Courts review an order granting an injunction for abuse of discretion, reviewing factual findings for clear error and legal conclusions *de novo. Muffley ex rel. N.L.R.B. v. Spartan Mining Co.*, 570 F.3d 534, 543 (4th Cir. 2009) (citing *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004)). A court "has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Brown v. Nucor Corp.*, 576 F.3d 149, 161 (4th Cir. 2009).

A. No Incorrect Legal Standard Was Applied

Here, Defendants contend the District Court applied an incorrect legal standard to the determination of a likelihood of success on the merits. In making this argument, Defendants rely heavily on the Supreme Court decision in *Lux v. Rodriguez,* 131 S. Ct. 5 (2010) (Roberts, C.J. Circuit Justice). Citing *Lux* Defendants try to convince the Court the correct legal standard in this case is that success is "indisputably clear." Such reliance is misguided. In that case, Supreme Court Justice Roberts was sitting as a Circuit Judge for the Fourth Court of Appeals to consider Lux' request for injunctive relief. He held that a Circuit Justice's issuance of an injunction "does not simply suspend judicial

alteration of the status quo but grants judicial intervention that has been withheld by lower courts," and therefore "demands a significantly higher justification" than that required for a stay. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (SCALIA, J., in chambers). Justice Roberts noted that the District Court's legal authority may well have been superseded by Supreme Court cases of *Buckley* and *Meyers* but denied injunctive relief because there was a split of authority in decisions by the Courts of Appeals on residency requirements and the Supreme Court did not specifically address those so the right to recover was not "indisputably clear". *Buckley v. Am. Constitutional Law Foundation*, 525 U.S. 182 (1999); *Meyer v. Grant*, 486 U.S. 414, 422, 428, (1988) (invalidating a law criminalizing circulator compensation and describing petition circulation as "core political speech"). Here, the District Court correctly relied upon the *Buckley* and *Meyers* decisions and there is no requested injunctive relief from a Circuit Judge.

As the District Court recognized, the *Buckley v. Am. Constitutional Law Foundation* case mandates a "strict scrutiny" standard placing the burden on the Commonwealth to justify a restriction on free speech. *Buckley*, 525 U.S. at 192 n.12 (1999). In this case, the Defendants have failed to provide any compelling justification for the burden on Plaintiff's constitutional rights. *Id.* Under *Buckley,* the applicable standard, Plaintiff's position is likely to succeed on the

merits.

The District Court applied a correct legal standard so there is no abuse of discretion. Defendants' attempts to litigate the merits of their claims prior to the actual hearing on Injunctive Relief is entirely improper and this Court need not consider such arguments. There is simply no authority to suspend the District Court's Order. The Order directing Defendants to instruct non-parties not to incur costs and to refrain from causing harm to Plaintiff by mailing ballots prior to the scheduled hearing is merely protecting the District Court's jurisdiction and authority in the underlying dispute.

B. No Clear Error in Factual Findings

Neither have Defendants shown an Abuse of Discretion due to Clear Error in Factual Findings. Again, a preliminary injunction was not issued. Rather, the District Court required Defendants to instruct non-parties to prevent harm to either side before evidence could be heard. The District Court pointed out what common sense tell us, that printing ballots without Plaintiff's name would be irreparable harm to Plaintiff and would deny members of the public a right to vote for their chosen candidate; while a delay in mailing, printing or ordering ballots would at most only cause minimal inconvenience to the Commonwealth, or the local electoral boards. Defendants' unsupported statement they intend to produce evidence that such a delay will "violate the law and disrupt elections"

does not provide any legal or factual basis to vacate the District Court's Order at this time. Defendants will still have the right to produce evidence on January 13, 2012. The ballots will still be printed and distributed in a timely, yet constitutional manner.

DEFENDANTS HAVE NOT SHOWN AUTHORITY TO VACATE THE ORDER

Lastly, Defendants assert the District Court's Order should be vacated pending Appeal because the District Court did not make a final determination on all four prongs of the *Winters* requirements for injunctive relief. While this may be true, this complaint is premature. The hearing to make such a determination is scheduled for January 13, 2012. The only action taken by the District Court at this point is to order Defendants to notify and instruct non-party local electoral boards not to cause harm by mailing ballots or to incur harm by printing or ordering ballots until the Court exercises its jurisdiction over Plaintiff's request for Injunctive Relief and issues a ruling. Defendants have cited no authority allowing this Court to vacate the order in question before the January 13, 2012 hearing where no harm is alleged, no right to appeal is shown, and no final decision has been made.

CONCLUSION

The District Court's Order (Docket #54) does not constitute a granting of a preliminary injunction, so Defendants' appeal is improper and suspending the

Order pending an appeal is not permitted. Even if Defendants were entitled to appeal the Order as a grant of preliminary injunction, Defendants failed to show an abuse of discretion by showing an improper legal standard was used or the District Court relied upon clearly erroneous findings of fact. Defendants failed to meet their burden to show the statute in question is constitutional. Furthermore, the District Court's Order results in no harm to Defendants but merely orders them to instruct non-parties not to incur costs for mailing, printing or ordering ballots pending the hearing on the merits of Plaintiff's request for injunctive relief.

Respectfully Submitted,
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