

**IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND**

MARYLAND ELECTION INTEGRITY,
LLC, *et al.*,

Plaintiffs,

v.

No. 1:24-cv-00672-SAG

MARYLAND STATE BOARD OF
ELECTIONS,

Defendants.

* * * * *
**DEFENDANT’S OPPOSITION TO PLAINTIFFS’ MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Plaintiffs, Maryland Election Integrity, LLC, and United Sovereign Americans, Inc., (the “companies”), request that this Court immediately enjoin the Maryland State Board of Elections (the “State Board”) from administering or certifying any election in Maryland until the State’s voter registration system and voting system meet the companies’ standards for electoral operations. (ECF 20 at 6-7.) The companies made this request on April 15, 2024, with the presidential primary election well underway in Maryland, despite knowing of the alleged errors giving rise to their complaint for almost five months (ECF 20-19 ¶ 34); and, despite having filed their original complaint 40 days earlier (ECF 1). On that basis alone, this Court should deny the request to halt Maryland’s primary election.

Additionally, the companies’ request “to alter the status quo” of an ongoing election fails to justify such a “particularly aggressive form” of injunctive relief. *Pierce v. North Carolina Bd. Of Elec.*, ___ F.4th ___, ___, 2024 WL 1321267, *6 (4th Cir. 2024). There

is no likelihood that the companies' claims presented in their operative complaint will succeed on the merits. Nor does consideration of the equities and public interest weigh in favor of disenfranchising an entire state in the midst of its primary election. This Court should therefore deny the companies' request for a temporary restraining order and preliminary injunction.

STATEMENT OF FACTS

Timeline of Election and Case Events

1. On November 3, 2020, Maryland held its 2020 presidential general election. Md. State Bd. Of Elec., *Official Turnout (By Party and County): 2020 Presidential General Election*, accessible at https://elections.maryland.gov/press_room/2020_stats/Official%20by%20Party%20and%20County.pdf (last accessed Apr. 22, 2024).
2. Between August 2021 and November 2023, David Morseberger and “a team of other qualified programmers and volunteers” analyzed voter registration records for alleged inaccuracies. (ECF 20-19 ¶¶ 7-34.)
3. Between September 13, 2023, and November 23, 2023, “a team of trained volunteers” canvassed the State to uncover errors in the voting system from the 2020 election. (ECF 20-19 ¶ 34.)
4. On March 6, 2024, the companies initiated this suit. (ECF 1).
5. On March 11, 2024, the State Board was required to “certify and publicly display the content and arrangement” of all primary election ballots to be used in the 2024 presidential primary. Md. Code Ann. (2023 LexisNexis), Elec. Law § 9-207(a)(1).

6. On March 14, 2024, the State Board was required to start printing ballots for the 2024 presidential primary election. Elec. Law § 9-207(e).

7. On March 28, 2024, the State Board filed its responsive pleading, a motion to dismiss, in this suit. (ECF 8.)

8. On March 29, 2024, the companies filed a motion for a temporary restraining order and preliminary injunction. (ECF 9.)

9. By March 29, 2024, the State Board was required to transmit mail-in ballots for the 2024 presidential primary to all uniformed and overseas voters who had requested to vote in Maryland's primary election. 52 U.S.C. § 20302(a)(8)(A). The State Board transmitted those ballots, 5,535 in total, on March 29, 2024. Declaration of Katherine Berry, Deputy State Administrator of Elections, Maryland State Board of Elections, ¶ 5 (attached to this opposition and hereafter referred to as "Exhibit A.")

10. On April 8, 2024, the companies filed an amended complaint in this suit. (ECF 16.) The amended complaint added no new factual allegations related to the State Board's alleged election mismanagement. In response to the State Board's motion to dismiss, the amended complaint purported to address the shortcomings in the original complaint's pleading of subject matter jurisdiction.

11. On April 9, 2024, this Court issued a paperless order finding the companies' request for a temporary restraining order and preliminary injunction moot. (ECF 18.)

12. As of the filing of this opposition, over 600,000 voters in Maryland have requested a mail-in ballot for the primary election. (Exhibit A ¶ 6.) The State Board has transmitted over 558,00 mail-in ballots to voters in response to those requests. (*Id.* at ¶ 7.) And as of

April 18, 2024, 93,334 of those ballots have been completed and returned to local boards of elections. (*Id.* at ¶ 9.)

13. On April 2, 2024, the State Board was required to begin a public education campaign to “inform the public about early voting and the location of early voting centers in each county” for the 2024 presidential primary election. Elec. Law § 10-301.1(f); (Exhibit A ¶ 11.)

14. As of the filing of this opposition, 15 of the 24 local boards of elections have begun canvassing the mail-in ballots they have received. Elec. Law § 11-302(b)(1)(i); (Exhibit A ¶ 10.) Canvassing ballots includes separating ballots from ballot envelopes and running ballots through ballot scanners. *Id.* at § 11-101(c) & (h).

15. On Thursday May 2, 2024, the early voting period for Maryland’s 2024 presidential primary election will begin. Early voting will end on May 9, 2024. Elec. Law § 10-301.1(d)(1).

16. May 14, 2024, will be Maryland’s 2024 presidential primary election day. 2023 Md. Laws ch. 152, § 2.

ARGUMENT

I. LACHES BARS THE REQUEST FOR A PRELIMINARY INJUNCTION BECAUSE THE COMPANIES DELAYED THEIR EFFORT TO STOP MARYLAND’S PRIMARY ELECTION UNTIL THE START OF THE PRIMARY ELECTION.

Laches is a defense to claims for equitable relief. *Voters Organized for the Integrity of Elec. v. Baltimore City Elec. Bd.*, 214 F. Supp. 3d 448, 454 (D. Md. 2016). It bars injunctive relief when two elements are met: (1) the requesting party failed to act diligently

in making its injunctive request; and (2) the lack of diligence causes prejudice to the responsive party. *Id.*; see also *Curtin v. Virginia State Bd. Of Elec.*, 463 F. Supp. 3d 653, 659 (E.D. Va. 2020) (quoting *Perry v. Judd*, 471 Fed. App'x 219, 224 (4th Cir. 2012)). A party fails to act diligently when it “delay[s] inexcusably or unreasonably in filing” its request. *White v. Daniel*, 900 F.2d 99, 102 (4th Cir. 1990) (quotation omitted). And prejudice is “demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct.” *Id.*

Importantly, “[d]iligence in the compressed timeline applicable to elections is measured differently from how it might be measured in other contexts.” *Voters Organized*, 214 F. Supp. 3d at 454. A two-month delay is a failure of the requisite diligence when the injunctive request is made on the eve of an election. *Curtin*, 463 F. Supp. 3d at 659. And in asserting prejudice “the defendant is aided by the inference of prejudice warranted by the plaintiff’s delay.” *White*, 909 F.2d at 102. Where a plaintiff seeks injunctive relief that changes the rules of an election *while that election is ongoing*, prejudice is measured in the disruption to ongoing electoral operations. *Curtin*, 463 F. Supp. 3d at 660.

By November 23, 2023, the companies had collected all the data and information they cite as the basis for their allegations in this suit. The voter registration data underlying the companies’ voter registration allegations had been collected on a rolling, ongoing basis between August 2021 and July 2023 (ECF 20-19 ¶ 7), with some analysis of the records taking place as far back as August 2022 (ECF 20-19 ¶ 23). The voting system data underlying the companies’ error rate allegations was collected during a six-week

investigative canvass that took place “[f]rom September 13, 2023 to November 23, 2023.” (ECF 20-19 ¶ 34.) And the operative complaint alleges a failure to review source code in December 2014 (ECF 16 ¶¶ 97-98; ECF 1-3), improper use of modems in the voting system from 2017 (ECF 16 ¶¶ 125-128), and undated violations of Maryland’s Public Information Act (ECF ¶¶ 155, 184).¹

However, the companies did not initiate this suit until March 6, 2024. (ECF 1). And with their complaint, the companies communicated no urgency—they did not ask for an expedited hearing, they did not request a shortened responsive pleading schedule, and they did not move for immediate injunctive relief. Instead, over a month after initiating the suit, and one week after filing an amended complaint, the companies filed their request to have this Court halt Maryland’s primary election. Notably, the request for a temporary restraining order and preliminary injunction presented no new allegations or other justification for the 40-day gap in filing.

Within that 40-day period, though, the State began conducting its primary election. As of today, the State Board has issued over 563,000 mail-in ballots to voters. (Exhibit A ¶¶ 5, 7.) Voters completed and returned 93,334 of those ballots. (*Id.* at ¶ 9.) And today, 15 of Maryland’s 24 counties began canvassing the returned mail-in ballots. Elec. Law § 11-302(b)(1)(i); (Exhibit A ¶ 10.) The State Board also undertook a public education

¹ The companies attach one request for records to their injunctive motion, rather than their complaint. (ECF 20-18.) But the requestor is “Michael Fletcher,” who is not alleged to be a member of either plaintiff-company, and the request was made in October 2023. (*Id.*)

campaign highlighting the dates for the early voting period and primary election day. (Exhibit A ¶ 11.) Maryland’s voters and election officials, then, have already invested substantial time, energy, and resources into the conduct of the State’s primary election.

The companies therefore failed to act diligently twice in this case. First, in the context of a “compressed timeline applicable to elections,” *Voters Organized*, 214 F. Supp. 3d at 454, the companies unjustifiably failed to initiate any civil action against the State Board for at least four months, between November 23, 2023 and March 6, 2024. And second, the companies further waited over month, and allowed the 2024 primary election to begin, before making any effort to obtain injunctive relief. Where the crux of the companies’ allegations stem from the conduct of the 2020 and 2022 general elections, and elections prior, the timing of their filings in this suit is “inexcusable.” *White*, 909 F.2d at 102.

As for resulting prejudice, any grant of the companies’ requested injunctive relief would prevent Maryland from holding its 2024 presidential primary election for an indefinite period. The primary would only resume at some point with either the conclusion of this litigation in favor of the State Board or this Court ordering the State Board to use a new voting system for the conduct of Maryland’s elections. But “[b]allots and elections do not magically materialize. They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed.” *Voters Organized*, 214 F. Supp. 3d at 455. Resumption of an election after an indefinite period in which voters may vote by one of three methods (mail-in, in-person early, in-person on election day) at distinct and separate times would, at best, “result in confusion amongst

election officials as well as voters” and, at worst, “tax the system and . . . breed more chaos.” *Curtin*, 463 F. Supp. 3d at 660. And resuming the primary election with a new voting system would be functionally impossible because the 558,000 mail-in ballots already issued and 93,334 mail-in ballots voted and returned would be rendered useless (those ballots having been designed and printed to work with the State’s current ballot scanners and voting system. (Exhibit A ¶¶ 7, 9, 12.))

Moreover, any preliminary injunction would not only indefinitely delay Maryland’s primary but could also delay the State’s general election in November. *Voters Organized*, 214 F. Supp. 3d at 455 (“Obviously, the results of a primary election are a necessary prerequisite for composition of a general election ballot”). At best, postponing the primary to permit this litigation to run its course could cause the State to contravene federal and state deadlines for the preparation of the general election. *See e.g.* 52 U.S.C. § 20302(a)(8)(A) (requiring the transmission of general election ballots to overseas voters by the 45th day preceding an election); Elec. Law § 9-207(a)(2) (requiring the certification of the ballot for the general election at least 64 days before the election). And, at worst, the knock-along effect of postponing the primary past the point of being able to prepare adequately for a general election would disenfranchise every voter in the State. Federal law sets the date on which Maryland must conduct its elections for Congress and the President. *See* 2 U.S.C. § 1 (setting the date for senatorial elections); *see also* 2 U.S.C. § 7 (setting the same for congressional elections); 3 U.S.C. § 1 (setting the same for electors for president and vice president). If this litigation is not timely resolved, Maryland would be left without eight Representatives and one Senator in the upcoming Congress, and ten

electoral votes in the electoral college, because the companies waited until mid-April to seek injunctive relief.

The companies' request for a temporary restraining order and preliminary injunction should therefore be denied for being barred by laches.

II. THE REQUEST FOR A PRELIMINARY INJUNCTION MUST FAIL BECAUSE THE COMPANIES' SUIT CANNOT SUCCEED AND THE BALANCE OF EQUITIES WEIGHS AGAINST ENJOINING AN ENTIRE ELECTION DURING THAT ELECTION.

A preliminary injunction maintains the status quo between the parties “until after a trial and final judgment.” *Pierce*, ___ F. 4th at ___, 2024 WL 1321267, *6. Such an “extraordinary remedy” requires a “clear showing that the plaintiff is entitled to such relief.” *Id.* (quoting *Winter v. Natural Resources Def. Council*, 555 U.S. 7, 22 (2008)). Entitlement is proved by the plaintiff showing that they are “likely to succeed on the merits . . . likely to suffer irreparable harm in the absence of preliminary relief . . . that the balance of equities tips in [their] favor, and that an injunction is in the public interest.” *Id.* (quoting *Winter*, 555 U.S. at 20)). The weighing of equities and consideration of the public interest “merge” into a single factor “when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The companies, however, do not seek a preliminary injunction insofar as they do not ask this Court to maintain the status quo. By asking this Court to enjoin an ongoing election until novel, affirmative conditions are met (ECF 20 at 6-7), the companies seek a “mandatory injunction” that alters the status quo before any litigation begins. *Pierce*, ___

F. 4th at ___, 2024 WL 1321267, *6. This “particularly aggressive” form of injunctive relief is “disfavored in any circumstance.” *Id.* (quotation omitted).

The companies have not shown that they are likely to succeed on the merits of their complaint. In their request for injunctive relief, they argue that a private cause of action exists for them under HAVA because the private cause of action afforded “the Attorney General” “creates a conflict of interest” where “the Attorney General is defending MDSBE in this action.” (ECF 20-1 at 9-10.) But the Maryland Office of the Attorney General, a State agency, *see* Md. Code Ann. (LexisNexis 2021), St. Govt. § 6-104, is defending the State Board in this suit; “[t]he Attorney General” in 52 U.S.C. § 21111 refers to the United States’ Attorney General. 28 U.S.C. § 503.

The companies also argue that HAVA grants them an enforceable right under 42 U.S.C. § 1983 and that the NVRA grants them a cognizable private cause of action for this suit. As explained and argued in the State Board’s motion to dismiss (ECF 24),² these arguments cannot prevail. The companies have no standing to maintain the current suit, have failed to plead a cognizable federal question, and have failed to state a claim upon which relief may be granted. The companies are therefore not likely to succeed on the merits of their claims.

Moreover, the consideration of equities and public interest weigh heavily against the grant of any kind of injunction in this case. Requests for injunctive relief “immediately

² Rather than reprint the motion to dismiss, the State Board hereby incorporates by reference its arguments from (ECF 24) into this opposition.

before or immediately after the preparation and printing of ballots [are] particularly disruptive and costly for state governments.” *Perry v. Judd*, 471 Fed. App’x 219, 225 (4th Cir.) (alteration in original). Equity in these circumstances “ministers to the vigilant, not those who sleep upon their rights.” *Id.* at 224.

And injunctive relief granted close to, or during, an election can “result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Federal district courts are therefore heavily cautioned to avoid “alter[ing] the election rules on the eve of an election.” *Republican National Comm. v. Democratic National Comm.*, 589 U.S. 423, 425 (2020). This is true even when a plaintiff shows a likelihood of success on the merits. *See Moore v. Circosta*, 494 F. Supp. 3d 289, 322 (2020). The companies therefore have not, and cannot, show that any consideration of equities or public interest inures in their favor.

The companies’ request for a temporary restraining order and preliminary injunction should therefore be denied.

Respectfully submitted,

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/s/ Daniel M. Kobrin

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April 22, 2024

Attorneys for the Maryland State Board
of Elections

CERTIFICATE OF SERVICE

I certify that, on this 22nd day of April, 2024 the foregoing was served by CM/ECF
on all registered CMF users.

/s/ Daniel M. Kobrin

Daniel M. Kobrin

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MARYLAND STATE BOARD OF
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No. 1:24-cv-00672-SAG

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**DECLARATION OF KATHERINE BERRY, DEPUTY STATE
ADMINISTRATOR OF ELECTIONS**

Katherine Berry hereby deposes and states as follows:

1. I am more than 18 years of age and am competent to testify, upon personal knowledge, to the facts set forth herein.
2. I have been employed by the Maryland State Board of Elections (“SBE”) since 2009.
3. I am currently employed as Deputy State Administrator of Elections with SBE. My job duties include supervising statewide electoral operations. To that end, I have personal knowledge of SBE’s practice and conduct administering mail-in voting for the 2024 Presidential Election Cycle. I also have personal knowledge of SBE’s practice and conduct procuring, implementing, and operating a statewide voting system.

4. SBE was required by federal law to send mail-in ballots for the 2024 presidential primary election to voters who live overseas by March 29, 2024.
5. SBE met its obligation to send mail-in ballots for the 2024 presidential primary election to overseas voters by mailing 5,535 ballots to overseas voters on March 29, 2024.
6. Additionally, SBE is required by state law to send a mail-in ballot for the 2024 presidential primary election to a domestic voter who requests a mail-in ballot. To date, over 600,000 voters have requested a ballot.
7. As of April 18, 2024, in response to requests, SBE has mailed over 558,000 mail-in ballots to voters in Maryland.
8. Once a voter completes a mail-in ballot, they may vote it by returning the sealed ballot to a local board of elections.
9. As of April 18, 2024, 93,334 mail-in ballots have been returned to the 24 local boards of elections in the State.
10. As of today, April 22, 2024, 15 local boards of elections have begun canvassing the returned mail-in ballots.
11. SBE is also required by law to conduct a public campaign raising awareness about the primary election. The public awareness campaign seeks to educate Maryland's voters about how they can participate in the 2024 primary election, and the dates for early voting and election day.
12. Maryland's current voting system is the only means by which Maryland may lawfully conduct an election. The voting system includes, among other things,

specially designed and printed ballots, ballot scanners for recording and tabulating votes from ballots, and electronic ballot marking devices to assist voters who may need it.

13. To set up and operate the current voting system, thousands of election judges have undergone countless hours of training and election employees have begun logic and accuracy testing all of the equipment in preparation for the election that are specific to the current system.
14. Procurement of a new voting system, including the solicitation of competitive bids, review of those bids, certification of systems, and submission of a bid for award approval to Maryland's Board of Public Works, would require at least 18 months to complete.
15. Implementation of a new voting system, including retraining election officials, distributing equipment throughout the State, and securely testing and preparing equipment for real-world application, would require an additional 6 to 12 months to complete.
16. SBE could not procure and implement a new voting system in time to lawfully conduct a primary and general election in 2024.

I declare under penalty of perjury that the foregoing is true and correct.

Katherine Berry
Katherine Berry, Deputy State Administrator of Elections

4/22/2024
Date