COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 19-CI-01043

THE KENTUCKY DEMOCRATIC PARTY **PLAINTIFF**

vs.

STATE BOARD OF ELECTIONS FOR THE COMMONWEALTH OF KENTUCKY

and

ALISON LUNDERGAN GRIMES, in her official capacity as Chief Election Official for the Commonwealth of Kentucky **DEFENDANTS**

ORDER

This matter is before the Court upon Plaintiff, the Kentucky Democratic Party's, *Motion for Injunctive Relief.* This matter was called before the Court on Monday, October 14, 2019. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Plaintiff's *Motion for Injunctive Relief.*

STATEMENT OF FACTS

Plaintiff, the Kentucky Democratic Party,[1] filed this action seeking a declaration of rights and injunctive relief against the State Board of Elections and Secretary of State Alison Lundergan Grimes, in her official capacity as Chief Election Official for the Commonwealth of Kentucky ("Secretary Grimes"). Plaintiff argues that the State Board of Elections has created two (2) lists of voters for the upcoming November 5, 2019, election.

[1] The Kentucky Democratic Party filed this lawsuit concerning all 175,000 Kentucky voters contained on the separate list and not just registered democrats.

The first list, "the Master Voter List," contains all registered voters in Kentucky, other than the names of voters on the second list. The second list, "the separate list," contains the names of approximately 175,000 Kentucky voters that may be stricken in the future due to their failure to return a copy of the 8(D)(2) postcard sent to their registered address or the return of the 8(D)(2) postcard as "Undeliverable as Addressed." Plaintiff categorizes the separate list as a segregated list and claims that being placed on the separate list subjects each of the voters to burdensome and unlawful restrictions that interferes with the voters' constitutional right to vote. Voters that appear on the separate list are still permitted to vote, however, when they arrive at their precinct, they will be required to sign an oath of voter prior to voting.

Defendants, the State Board of Elections and Secretary Grimes did not file responsive pleadings to Plaintiff's request for injunctive relief, but appeared separately at the October 14, 2019, hearing with individual counsel. The United States of America filed an Emergency Motion to Participate as Amicus, which contained the United States' statement of interest in this matter, and appeared at the October 14, 2019, hearing with counsel.

STANDARD OF REVIEW

Under CR 65.04, the Court may grant a temporary injunction where it is clearly shown that the applicant's rights are being or will be violated by the adverse party and the applicant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action. Injunctions should only be granted if the applicant can show irreparable injury, if the equities involved are best served by granting the injunction and when the applicant has shown that a substantial question on the merits is presented. The

landmark case in Kentucky on injunctive relief is *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. Ct. App. 1978). In *Bingo Palace v. Lackey*, 310 S.W.3d 215, 216 (Ky. 2009), the Supreme Court of Kentucky discussed the standard for granting injunctive relief established by the Court of Appeals in *Maupin*:

> In *Maupin*, the Court of Appeals stated: "Because the injunction is an extraordinary remedy, sufficiency of the evidence below must be evaluated in light of both substantive and equitable principles." *Maupin*, 575 S.W.2d at 697. CR 65.04 authorizes the granting of a temporary injunction (interlocutory relief) if the movant's rights are being violated and the movant will suffer immediate and irreparable injury pending a final judgment, or if waiting would render the final judgment meaningless. According to *Maupin*, "In order to show harm to his rights, a party must first allege possible abrogation of a concrete personal right." *Id.* at 698 (citing *Morrow v. City of Louisville*, 249 S.W.2d 721 (Ky. 1952)). "[D]oubtful cases should await trial of the merits." *Id.* (citing *Oscar Ewing, Inc. v. Melton*, 309 S.W.2d 760 (Ky. 1958)). And further, there must be "a clear showing that these rights will be immediately impaired." *Id.*

Pursuant to the *Maupin* standard, a party is not required to show success on the merits of a claim in order to be entitled to relief under CR 65.04. Rather, the balance-of-the-hardships test applies: "if the complaint shows a probability of irreparable injury and the equities are in favor of issuance, it is sufficient if the complaint raises a serious question warranting a trial on the merits." *Maupin*, 575 S.W.2d at 699 (internal citations omitted). In weighing the equities, the Court should consider such things as "possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Id.* The overall merits of the case are not to be considered in CR 65.04 motions for temporary injunctive relief. "An injunction will not be granted on the ground merely of an anticipated danger or an apprehension of it, but there must be a reasonable probability that injury will be done if no injunction is granted." *Hamlin v. Durham,* 32 S.W. 2d 413, 414 (Ky. Ct. App. 1930).

Moreover, the rule in Kentucky is well-settled that "the extraordinary remedy of injunction will not be granted for the protection of alleged rights, where the litigant seeking the injunction has an adequate remedy at law." *Heyser v. Brown*, 184 S.W.2d 893, 894 (Ky. 1945) *citing Commercial Credit Co., Inc., v. Martin, etc.*, 122 S.W.2d 135 (Ky. 1938); *Gregory et al. v. Crain*, 163 S.W.2d 289 (Ky. 1942). "[M]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Norsworthy v. Kentucky Bd. of Medical Licensure*, 330 S.W.3d 58, 62 (Ky. 2009) *citing Sampson,* 415 U.S. 61, 90, (1974) (*quoting Virginia Petroleum Jobbers Ass'n v. Federal Power,* 259 F.2d 921, 925 (D.C.Cir.1958)).

ANALYSIS

First, the Court must emphasize that the only issue before the Court today is Plaintiff's *Motion for Injunctive Relief.* The first element of *Mapin* requires Plaintiff to show that its rights will be irreparably harmed absent an injunction. The Court finds that this element is satisfied. Of utmost concern to the Court is the chilling effect raised by Plaintiff that the actions of the State Board of Elections will cause Kentucky voters placed on the separate list. At the October 14, 2019, hearing, the Court questioned what would happen to a voter on the separate list when they arrive at their precinct to vote. From the information the Court was provided it understands that first, for example, if the precinct uses an electronic database, a message would pop up stating: "Voter cannot vote a regular ballot. Read instructions below." The instructions below provide: "Voter must complete a voter registration card, oath of voter. Then they may sign the Supplemental Roster." The State Board of Elections submits that upon filling out the oath of voter card, the voter is still able to vote. The State Board of Elections reasons that it selected this process because

it is vitally necessary that the oath of voter card be filled out to update the address of the voter. While the Court agrees that it is vitally necessary to keep voters' addresses updated, the Court and Plaintiff disagree on the method the State Board of Elections is following due to the chilling effect that the oath of voter card is likely to have on voters. As Plaintiff notes, the oath of voter card states that the card shall be delivered by the County Clerk to the Commonwealth's Attorney for investigation. Plaintiff argues that this statement alone creates a chilling effect as it could cause eligible voters to be apprehensive about signing the oath of voter card. The Court would hope that any of the 175,000 persons on the separate list, or any other voter facing a possible voting roadblock, would demand their right to vote, and take steps to ensure their right. However, not every voter has the luxury of waiting for a possibly lengthy period of time to jump through unnecessary hoops when the State Board of Elections' intent can be achieved through simpler, less prejudicial means such as placing an asterisk by the names of the 175,000 individuals on the Mater Voter List and having poll workers confirm each voters' address. However, the Court must emphasize that despite the Court's disagreement with the process the State Board of Elections is attempting to use to "clean up" Kentucky's voter rolls, the Court does not believe that the State Board of Elections is attempting to disenfranchise Kentucky voters through its selected process.

Maupin's second element requires Plaintiff to demonstrate that in weighing the equities, injunctive relief will merely maintain the status quo. In weighing the equities, the Court should consider such things as "possible detriment to the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo." *Maupin*, 575 S.W.2d at 699. Plaintiff correctly points out that there is no "second election," or the ability

to add or subtract votes after the Court decides this matter in the future on the merits. The Court questioned the difficulty of recreating one (1) Master Voter List in order to return to the status quo for the November 5, 2019, election. From the proof offered at the October 14, 2019, hearing, it is clear to the Court that a Master Voter List with asterisks next to the names of the 175,000 voters at issue can be easily generated, which makes any need for a "separate list" pointless. The Court agrees that the relief Plaintiff seeks through an injunction will merely restore the status quo and is in the public interest.

Finally, the third *Maupin* element requires Plaintiff to show a substantial question on the merits, essentially pleading a case where there is a substantial possibility that Plaintiff will prevail on the merits. *Norsworthy*, 330 S.W.3d at 63. The Court finds that Plaintiff meets this element as there is no doubt that Plaintiff presents a substantial question on the merits: whether the State Board of Elections has taken illegal action to strike approximately 175,000 Kentucky voters from the Master Voter List for failing to return postal notices sent to the voters registered address or the return of a postal notice as "Undeliverable as Addressed." At the October 14, 2019, hearing, the State Board of Elections repeatedly stated that it relied on the October 2, 2006, Order entered by this Court in Franklin County Civil Action No. 06-CI-00610, *Commonwealth of Kentucky, Attorney General Gregory Stumbo v. Commonwealth of Kentucky, State Board of Elections and Commonwealth of Kentucky, Secretary of State*, in making its decision to create the separate list and order voters contained on that list to sign an oath of voter prior to voting. Plaintiff disagrees that the Court's October 2, 2006, Order is relevant to the present matter as it concerned approximately 8,000 already purged voters based on a state data match project between Kentucky, South Carolina, and Tennessee. Plaintiff maintains that the

Court's October 2, 2006, Order does not allow the State Board of Elections to circumvent the requirement set forth in KRS 116.112(4) that two (2) federal elections cycles must pass prior to placing voters on an inactive list. As the Court today is merely considering whether Plaintiff meets the standard for injunctive relief, the Court will refrain from considering this argument any further and finds that this argument is enough to demonstrate a substantial question on the merits.

Based on the above findings, the Court holds that Plaintiff is entitled to injunctive relief. Despite the statement made by Jared Dearing that the practice currently being employed by the State Board of Elections is "what has been done for decades," Secretary Grimes interestingly claims otherwise. Anyways, it is the Court's understanding that the process presently being used by the State Board of Elections has not been voted on, and in fact will come for a vote before the Board on Tuesday, October 15, 2019. As federal law requires any changes to the voter list to happen ninety (90) days prior to an election, it is the Courts finding that the best practice to ensure a just and fair election throughout the Commonwealth is to, for the time being, return to the status quo and utilize one (1) Master Voter List and place and asterisk by the necessary names of voters to alert poll worker to confirm the voters' address. The use of the oath of voter cards is unnecessary and has a strong chilling effect on voters in the Commonwealth. Thus, the Court finds that Plaintiff meets the standard set forth in *Maupin* and is entitled to injunctive relief.

WHEREFORE, Plaintiff's *Motion for Injunctive Relief* is hereby **GRANTED**. The State Board of Elections and Secretary Grimes are **ORDERED** to return all Kentucky voters to one (1) Master Voter List and place an asterisk by the necessary names of voters

to alert poll workers to confirm the voters' address. The State Board of Elections shall notify County Clerks and poll works to make any needed training corrections.

Plaintiff shall post a nominal bond in the amount of $500.00.

This order is appealable pursuant to CR 65.

SO ORDERED, this 14th day of October, 2019.

Time: 3:30 pm

THOMAS D. WINGATE
Judge, Franklin Circuit Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order was mailed, this 14 day of October, 2019, to the following:

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Amy Feldman, Franklin County Circuit Court Clerk