

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

THE OHIO DEMOCRATIC PARTY, et al. :
 :
 Plaintiffs, : **Case No. 2:15-CV-1802**
 :
 v. : **JUDGE WATSON**
 :
 JON HUSTED, et al., : **MAGISTRATE JUDGE KING**
 :
 Defendants. :

DEFENDANTS' MOTION TO STAY PENDING APPEAL

Defendants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine hereby move under Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)(1)(C) for an order suspending the judgment issued by this Court on May 24, 2016, to avoid changes to the early voting calendar for upcoming elections.

In particular, under this Court's Order, early voting for the August special election must begin on June 28, 2016, just weeks away. The short timeframe for compliance and the possibility of a different voting schedule in the November general election risks harm to both local election officials and Ohio voters.

Defendants therefore request a stay of this Court's Order, pending appeal. At the least, Defendants request a stay for the August special election. The grounds for this motion are more fully set forth in the accompanying memorandum in support.

Respectfully submitted,

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Ohio Attorney General

/s/ Steven T. Voigt

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This Court's May 24, 2016 Order remakes Ohio's voting calendar by extending early voting past the voting registration deadline, from 30 to 35 days prior to Election Day. Defendants are appealing the Court's decision to the Sixth Circuit. In the interim, however, several jurisdictions across Ohio (including Ohio's most populous city, Columbus, with eligible voters in three different counties) will be holding a special election on August 2, 2016. The extended early voting period for that election must therefore begin June 28, 2016, just 35 days from the date of the Order.

Implementing this Court's Order for the August special election, just weeks away, threatens to harm the local boards of elections and the Ohio electorate. Notably, in 2014, the Supreme Court stayed a similar injunction issued by another judge of this Court; the suspended injunction (as here) was issued roughly one month in advance of the extended early voting period. Here, the Court's Order also risks the additional harm of a change in the early voting calendar between the August and November elections if Defendants succeed on appeal. The risk of voter confusion from a shifting voting schedule (and the inability to confidently educate voters about available voting opportunities) in such an important election year supports issuance of a stay pending final resolution on appeal.

For these reasons, Defendants request a stay of the Court's Order pending appeal. As a practical matter, such a stay will likely only effect the August special election. Because only a limited number of voting districts hold special elections, and given the low turnout during the start of early voting, few (if any) voters will be impacted by a stay. Defendants will seek expedited review in the Sixth Circuit, and anticipate that the appeal will be resolved prior to the

November general election. Therefore any stay issued by this Court will likely not impact early voting for the presidential election.

II. ARGUMENT

A. Standard of review

Evaluating a motion for a stay pending appeal involves four factors: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006) (granting motion for emergency stay pending appeal) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991)); *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir.2002) (per curiam). These factors are not prerequisites to grant of a stay, but are instead “interconnected considerations” to be balanced by the reviewing court. *Coalition*, 473 F.3d at 244. In the elections context, the State interest and the public interest both weigh heavily against having “the rules changed at the last minute.” *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004); *see also Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Defendants’ motion for a stay is supported by all four factors.

B. The equitable factors strongly support a stay.

“As a general rule, last-minute injunctions changing election procedures are strongly disfavored.” *Serv. Employees Int’l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012). Orders that change election procedures “can themselves result in voter confusion,” and the risk for confusion only increases as the election draws near. *Purcell*, 549 U.S. at 4–5. Changes to election procedures harm the “strong public interest in smooth and effective administration of the voting laws.” *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006);

see also Summit Cnty., 388 F.3d at 551. The Sixth Circuit has repeatedly vacated late-election cycle injunctions, noting the State's interest in focusing on running an election rather than responding to litigation and constantly-shifting rules. *See, e.g., Ne. Ohio Coal. for the Homeless*, 467 F.3d at 1012; *Summit Cnty.*, 388 F.3d at 551 (highlighting "State's interest in not having its voting processes interfered with"). Not only that, the Supreme Court already granted a stay of an injunction *addressing this very same law*. Back in 2014, a district court issued a similar injunction reinstating early voting 35 days before the election, and the Supreme Court *stayed* that injunction the day before the judicially mandated voting schedule was set to begin. *See Husted v. Ohio State Conference of the Nat'l Ass'n for the Advanced of Colored People*, 135 S. Ct. 42 (2014). Notably, the time period between the injunction in that case and the start of voting is roughly the same time period in between this Court's Order and the August special election.

Changing election rules this far into the election cycle disrupts the electoral process and threatens its fairness. *See Serv. Employees Int'l Union Local 1*, 698 F.3d at 345. Even in situations where election plans were declared unconstitutional, the Supreme Court has affirmed decisions to permit elections under those plans when they were not invalidated until late in the election cycle. *Watkins v. Mabus*, 502 U.S. 954 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-805 (S.D. Miss. 1991); *Republican Party of Shelby Cnty v. Dixon*, 429 U.S. 934 (1976) (summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976)). By way of example, in *Watkins*, the court allowed the existing election plan to proceed in light of "the numerous administrative tasks to be completed before the primary election, as well as items of other, and greater significance," such as voter confusion. *Watkins*, 771 F. Supp. at 794. That decision was issued just 91 days prior to the general election, in a state without Ohio's lengthy early voting schedule.

Defendants are appealing this Court's May 24, 2016 Order reinstating the period of early voting known as Golden Week, and will seek an expedited schedule in the Sixth Circuit Court of Appeals to obtain a decision in advance of the start of early voting for the November general election. In the interim, however, several jurisdictions across Ohio will be holding an August special election. With this Court's Order, early voting for that election must begin 35 days in advance, or on June 28, 2016. From the date of the Order, that leaves local election officials with only 35 days to prepare and print absentee ballots and identification envelopes, plan for appropriate staffing for early in-person voting, and secure funding for all of these functions.

All county boards of elections will also need to prepare and hold an extra week of early voting for the November general election, pursuant to this Court's Order. Early voting would therefore need to begin on October 4, 2016. Importantly, 35 days of early voting has not existed in Ohio for the last two years (or approximately six elections), and boards of elections have not planned or budgeted for extended early voting for either the upcoming August special election or the November general election. Planning and budgeting for the presidential election cycle is already well underway, if not complete, for all boards of elections. The boards of elections will have difficulty logistically accommodating the Court's Order in such a short amount of time, and many boards do not have the funds set aside for the expanded calendar.

Complicating matters further, another judge of this Court will likely issue a decision in another pending election case, *NEOCH v. Husted*, No. 06-cv-892 (S.D. Ohio), in the next few weeks. That decision might alter the forms associated with absentee voting, making it even more difficult for local election officials to begin early voting within the next few months for the November general election, let alone in the next few weeks for the August special election.

In addition to the harm to the boards, the Secretary of State will also be harmed without a stay pending appeal. The Secretary will need to develop and send a new directive to the boards and, if this Court's decision is overturned on appeal, yet another directive re-setting the early voting schedule. Not only will this cause harm to the Secretary of State, it more importantly will cause enormous harm to the public. The possibility of a mid-stream change to early voting in a presidential election year poses too great a risk of voter confusion. These harms to the public and its government officials are significant, and support issuance of a stay pending appeal.

A stay also does no harm to Plaintiffs. Plaintiffs will also want a final, definitive early voting schedule, in order to accurately inform their constituencies and make plans to provide access to those voting opportunities (whatever they turn out to be). It is to Plaintiffs' benefit to wait for review by the Sixth Circuit in order to provide certainty to their members and the voters for whom they advocate.

In short, all parties and the public have a strong interest in maintaining the status quo until the Sixth Circuit renders a decision on Defendants' appeal. Changing the days and hours now, only to have them potentially changed again in a few weeks, will create needless confusion that can be simply avoided by a stay of this Court's Order pending appeal. And, as a practical matter, such a stay will likely only impact the August special election. Defendants will seek expedited review in the Sixth Circuit in order to achieve finality for the November general election. Therefore, the only election impacted by the requested stay will likely be the August special election.

C. Defendants are likely to prevail on appeal.

While the equitable factors alone justify a stay, Defendants are also likely to succeed on the merits of their appeal. "To justify the granting of a stay [] a movant need not always establish a high probability of success on the merits." *Michigan Coal. of Radioactive Material*

Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991) (citing *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987)). Instead, the “probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury”; that is, where sufficient injury is shown, a movant need only raise “serious questions going to the merits.” *Id.* at 154 (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

Plaintiffs challenge an early voting calendar that, even without the additional days of early voting, is among the most expansive in the United States. Without a stay, this calendar threatens to shift in the middle of a presidential election year, risking confusion among Ohio voters and election officials. In the face of this irreparable harm, and as briefly discussed below, Defendants raise serious questions as to the merits of Plaintiffs’ claims that S.B. 238 violates both Section 2 of the Voting Rights Act and the Fourteenth Amendment to the U.S. Constitution.

1. Equal Protection Claim.

First, rational basis review is the appropriate analytical framework for the extended early voting issue, and Defendants prevail under its deferential standards. There is no constitutional right to an absentee ballot where other opportunities to vote exist. *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969); *Prigmore v. Renfro*, 356 F. Supp. 427, 432 (N.D.Ala. 1972), *aff’d* 410 U.S. 919 (1972). That is, absentee-ballot laws receive a higher level of scrutiny *only if* a refusal to grant that option “absolutely prohibits [the challengers] from voting.” *Goosby v. Osser*, 409 U.S. 512, 521 (1973). Ohio’s extensive absentee voting opportunities (which, for the 2016 general election, include more than four weeks of early voting by mail or in-person, including evenings and weekends) provide every Ohio voter with convenient choices for casting a ballot, all in addition to 13 hours of voting on Election Day. This fact alone requires deferential rational basis review. See *Fidell v. Bd. of Elections of New York*, 343 F. Supp. 913, 915 (E.D.N.Y. 1972), *aff’d* 409 U.S. 972 (1972); *Prigmore*, 356 F. Supp. at 432. But even more

than that, because Plaintiffs cannot prove that there is *no other method* by which their members can vote, rational basis is the appropriate level of scrutiny. *See McDonald*, 394 U.S. at 808.

To succeed under rational basis review, Plaintiffs must negate “every conceivable basis which might support the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will.” *Id.* at 747 (quoting *Club Italia Soccer & Sports Org. v. Charger Twp. of Shelby, Mich.*, 470 F.3d 286, 298 (6th Cir. 2006)). This they certainly failed to do: Defendants clearly articulated, and provided evidence supporting, the interests underlying the elimination of an extra week of early voting. *See* Opinion at 49-57 (detailing the evidence supporting state interests in reducing risk of voter fraud, administrative costs, administrative burdens, and increasing voter confidence and mitigating voter confusion). Under rational basis review, Defendants prevail on this claim.

Second, the challenged provisions survive even under *Anderson-Burdick* review, as applied by the Court. While the Court did not credit Ohio’s national leadership in voting opportunities (including among states with a higher African-American population share), this expansive voting scheme seriously undermines the Court’s finding of a “modest” burden on African Americans’ right to vote. Opinion at 42. If 30 days of early voting burdens the rights of African-American voters in Ohio, then surely the single day of voting New York offers is also unconstitutional. *See* Defs’ Tr. Ex. 14, ¶¶ 62-63 (noting of the 21 states with an African-American population of 10% or greater, Ohio has the second-most number of early in-person voting days).

The Court also discounted the mitigating effects of mail-in voting, instead crediting anecdotal evidence that “many” African Americans cannot viably vote by mail. Opinion at 43. But the fact remains that any Ohio voter can vote at any time of the day or night for 28 full days

before the election. While Plaintiffs may prefer to vote early in-person (and, more specifically, vote early in-person in the 30 to 35 days before an election), this preference does not translate into a demonstrable burden on the right to vote. States have wide latitude in determining how to manage election procedures, and no state official is charged with the impossible task of setting an early in-person voting calendar that conveniently accommodates every voter's particular circumstances. *ACLU v. Santillanes*, 546 F.3d 1313, 1321 (10th Cir. 2008) (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999)). A preference for a particularized convenience—especially in light of evidence that does not account for the full panoply of voting opportunities—cannot demonstrate more than an incidental burden on the right to vote.

Indeed, the evidence suggests that Golden Week voting is not even widely preferred among Ohio voters: only 61 Franklin County voters, for example, chose to vote during this period in all of the past three even-year general elections. Trial Tr., Vol. IX, 104:11-13. Moreover, even if all of the Golden Week voters in Ohio move to other early in-person voting days or Election Day, there is simply no evidence to suggest that this will dramatically impact wait times for other voters. *See* Defs' Tr. Ex. 15, p. 8 (noting 2012 Golden Week voters were just 0.10% of the total vote in Cuyahoga, 0.16% in Franklin, and 0.05% in Hamilton); *see, contra*, Opinion at 38-39 (finding that elimination of extended early voting will result in longer lines). Finally, the Court failed to consider the variety and ease of opportunities to both register and update a registration in Ohio. *See* Opinion 39-42 (considering burdens of same-day registration and voting); *see also* Defs' Tr. Ex. 14G (Dir. 2015-02) (requiring registration update to be available online); Trial Tr., Vol. II, 268:13-24 (detailing wide availability of voter registration cards).

This minimal burden on the right to vote is easily outweighed by the clear state interests supporting the elimination of Golden Week. If a voting regulation “imposes only reasonable, nondiscriminatory restrictions” on voting, “the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, n.9 (1983)). While the Court found the number of discovered instances of voter fraud unpersuasive, evidence established that Golden Week increased the likelihood of voter fraud (many instances of which may have gone undetected). *See* Opinion at 49 (discounting “general opinion evidence” of increased opportunity for fraud). Defendants also presented specific evidence that the elimination of the extra week of early voting reduced costs that were spent serving a very limited number of voters; decreased administrative burdens on local election officials; and reduced voter confusion by removing the blurred line between registration and voting. *See* Opinion at 49-57; *see also Bullock v. Carter*, 405 U.S. 134, 147 (1972) (recognizing state interest in reducing administrative burdens); *Dudum v. Arntz*, 640 F.3d 1098, 1116 (9th Cir. 2011) (recognizing state interest in cost efficiency and conserving public money); *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181, 196 (2008) (Stevens, J.) (recognizing state interest in “orderly administration” of elections); *Werme v. Merrill*, 84 F.3d 479, 487 (1st Cir. 1996) (recognizing state interest in “dispelling confusion”). The fact that election officials managed to run elections with these administrative costs and burdens does not make them any less real, or diminish the importance of these state interests. *See* Opinion at 54-55 (finding Defendants did not present sufficient evidence that boards were “unable to manage” Golden Week).

Under any analytic framework, the evidence presented at trial demonstrates that Defendants should prevail on the extended early voting issue.

2. Voting Rights Act.

Defendants are also likely to succeed on appeal on the Voting Rights Act claim. In presenting their claim under Section 2 of the VRA, Plaintiffs conflated the differing requirements of Section 2 and Section 5, and improperly sought a retrogression comparison of the new early in-person voting schedule against previous voting schedules. *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1251 (M.D. Fla. 2012) (discussing the standards for analyzing a vote denial claim). Plaintiffs further confused the required showing of a “vote dilution” claim under Section 2, with the required showing for a “vote denial” claim. These differences are critical – in a Section 2 claim, the court must determine whether the protected class will have “less opportunity than other members of the electorate” to exercise their right to vote. *See Order at 97*. Plaintiffs’ evidence fails to meet this burden.

Essentially, the Court found that Plaintiffs presented evidence that African Americans use early in-person voting, and Golden Week specifically, at higher rates than whites. *See Order at 35-38, 98*. This “disproportionate burden” evidence that Plaintiffs presented is simply not sufficient to establish their Section 2 claims. *Brown*, 895 F.Supp.2d at 1250 n. 14; *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986). Importantly, this evidence does not establish that those African-American voters will be negatively impacted by the change in the law; that is, that any voter will actually be *prevented* from casting a ballot. All Ohio voters, of course, have four weeks of early in-person voting, including evenings and weekends, to cast an early ballot. Inconvenience to voters does not equal discrimination, or a denial of meaningful access to the political process. *See Jacksonville Coal. for Voter Protection v. Hood*, 351 F.Supp.2d 1326, 1335-36 (M.D. Fla. 2004). Evidence presented by Defendants shows that voters tend to roll to alternate days of voting; that is, they will vote in another fashion and are not prevented from voting if an additional week of early voting is no longer available. *See Defs’ Tr. Ex. 20 at 12-13*;

see also Trial Tr., Vol. IX, 104:8-13. And given the very few Golden Week voters, nothing in the record suggests that this movement will cause appreciably longer lines. *See supra* at 9. There is simply no evidence to suggest that African-American voters will have any fewer meaningful opportunities to cast a ballot.

The elimination of the same-day registration component of Golden Week also does not deny any Ohio voter a meaningful opportunity to vote. The Court notes that the separation of early in-person voting and registration increases the costs of voting for African-American voters, due to anecdotal and statistical evidence of African Americans' lower outcomes on several socioeconomic factors. Order at 39-42. But the Court fails to consider evidence presented about the ease of registration and updating registrations in Ohio – a voter need not make two separate, physical trips to a board of elections to register and vote. *See supra* at 9.

Moreover, Plaintiffs presented no evidence of a causal connection between the law and the denial of meaningful opportunities to vote. *See Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310 (3rd Cir. 1994); *Mark Wandering Medicine v. McCulloch*, 906 F.Supp.2d, 1083, 1088 (D. Mont. 2012), *vacated as moot* by 544 Fed. Appx. 699 (9th Cir. 2013) (finding “a § 2 challenge ‘based purely on a showing of some relevant statistical disparity between minorities and whites,’ without any evidence that the challenged voting qualification causes that disparity, will be rejected”). That is, Plaintiffs made no showing that the changes to early in-person voting opportunities will actually deny any voter the ability to exercise their vote, or that African-American voters will not simply take advantage of the other early in-person voting days under current Ohio law (or any of the other myriad voting opportunities in Ohio). In contrast, evidence in the record confirms that this assumption—that voters will not take advantage of available voting opportunities—is unsound.

See supra at 11. Moreover, Ohio provides a number of options to register or update a registration. *See supra* at 9; *see also N. Carolina State Conference of the NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774, at *124 (M.D.N.C. Apr. 25, 2016) (detailing convenience of registration in North Carolina to deny same-day registration claims). At best, Plaintiffs evidence indicates that the elimination of Golden Week might be inconvenient for some voters, not that it denies an equally meaningful opportunity to vote. *See N. Carolina State Conference of the NAACP*, 2016 WL 1650774, at *117 (noting “[t]he question is not whether the voting law could be made more convenient [but] whether the electoral system as applied treats protected classes the same as everyone else”).

Consideration of the *Gingles* factors does not negate this failure of proof. Plaintiffs bring a vote denial claim, while the *Gingles* factors are appropriate for consideration of a vote dilution claim under Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (evaluating appellants’ claim alleging that redistricting scheme impaired black citizens’ ability to elect representatives of their choice). Consideration of the *Gingles* factors does not support a vote denial claim under Section 2.

III. CONCLUSION

For these reasons, Defendants ask the Court to stay May 24, 2016 Order, to avoid voter confusion pending resolution of Defendants’ appeal to the Sixth Circuit. At the least, the Court should issue a stay of its Order for the August 2, 2016 special election.

Respectfully submitted,

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/s/ Steven T. Voigt

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on May 31, 2016, and served upon all parties of record via the Court's electronic filing system.

/s/ Sarah E. Pierce

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