

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

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

**DEFENDANTS’ OPPOSITION TO
PLAINTIFFS’ MOTION TO AMEND THE TRIAL SCHEDULE**

Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine (collectively “Ohio” or “Defendants”) file this opposition to Plaintiffs’ motion for reconsideration of the trial schedule and state as follows:

I. INTRODUCTION

Plaintiffs are the masters of their case. *Interstate Packaging Co. v. Century Indem. Co.*, 291 F.R.D. 139, 145 (M.D. Tenn. 2013) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). It is the timing of Plaintiffs’ lawsuit that places them (and the Court and Ohio) in the situation now faced—an expedited trial schedule necessary to bring certainty in the 2016 election cycle to Ohio’s voters.

Given the time (and even intervening litigation) that has passed since the enactment of the challenged laws, Plaintiffs cannot now be heard to complain that they have insufficient time to develop their case. The timing of this matter was in Plaintiffs’ control alone. The Court set a workable and fair trial schedule that will permit final resolution of this suit in advance of the

2016 presidential election cycle. Ohio opposes Plaintiffs' motion and requests that the trial schedule set by the Court stand.¹

The changes to the schedule that Plaintiffs are seeking would prejudice Ohio and make any alterations to election procedures all but impossible to implement before the presidential primary. *First*, moving the expert report due date to October 16 would give Ohio next to no time (two weeks) to prepare rebuttal reports and depose Plaintiffs' experts. In contrast, Plaintiffs would have over five months from the date they filed their Complaint to craft their own reports. Such a request is highly prejudicial to Ohio.

Second, Plaintiffs' request to move the trial date is also unworkable. Preparations for any election, including preparation for early voting, begin well in advance of election day. Under Ohio's expansive early voting system, for example, early voting for the presidential primary begins on February 17, 2016, and applications for absentee ballots will begin to be accepted on December 16, 2015. The widespread changes to election procedure that Plaintiffs are seeking in this lawsuit are not alterations that the State is capable of accomplishing in a few days, or in some cases even a few weeks. Early resolution is perhaps of the most benefit to Plaintiffs; if Plaintiffs are successful in any of their claims, as a quick resolution allows the State a reasonable opportunity to make the changes they seek.

It is in both sides' interest to move this case along quickly so that Ohio voters have certainty about election procedures far in advance of the next election. This Court's trial schedule accomplishes that goal. As outlined below, Plaintiffs' fail to articulate the "good cause" needed to alter the Court's schedule (and offer no authority in support of their position). Defendants therefore request that the trial schedule set by this Court stand.

¹ In the alternative, Ohio seeks adoption of the schedule it proposed in its Rule 26 report.

II. LAW AND ARGUMENT

A. The trial schedule is within the sound discretion of the Court, and the Court's schedule is the best outcome at this late stage before the presidential election.

“The timing of trials and docket control are matters best left to the discretion of the trial court,” *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 516-17 (6th Cir. 2003), and will only be disturbed for abuse of discretion, *Bentkowski v. Scene Magazine*, 637 F.3d 689, 697 (6th Cir. 2011). A trial schedule can only be modified for “good cause” and with the judge’s consent. Fed.R.Civ.P. 16(b)(4). “Good cause” encompasses both prejudice to the non-moving party, and the diligence of the moving party in attempting to meet the scheduling order. *Grant v. Target Corp.*, 281 F.R.D. 299, 304 (S.D. Ohio 2012) (citing *Inge v. Rock Financial Corp.*, 281 F.3d 613, 625 (6th Cir.2002)).

“[A]dherence to reasonable deadlines is . . . critical to maintaining integrity in court proceedings, and . . . pretrial scheduling orders are the essential mechanism for cases becoming trial-ready in an efficient, just, and certain manner.” *Greene v. Ab Coaster Holdings, Inc.*, No. 2:10-CV-234, 2012 WL 2342927, at *3 (S.D. Ohio June 20, 2012) (quotations and citations omitted) (second alteration in original). Indeed, the purpose of setting a scheduling order is to efficiently move cases to resolution, “forc[ing] litigants to establish discovery priorities and thus to do the most important work first.” *Zander v. Katz, Sapper & Miller, LLP*, No. 3:12-CV-0967, 2014 WL 2560511, at *3 (M.D. Tenn. June 6, 2014) (quotation omitted).

This Court established a schedule to attempt to achieve resolution of Plaintiffs’ claims before the 2016 presidential election cycle, a concern Plaintiffs share. (*See Mtn. for Recon.* at 5, Doc. 25, PageID# 179). While this litigation is pending, the constitutionality of the election procedures established by the Ohio General Assembly and the Secretary of State remain in question. Boards of elections prepare for elections far in advance of election day; as just two

examples, for the 2016 primary election, applications for absentee ballots will be accepted starting December 16, 2015, with early in-person voting beginning February 17, 2016. With a later trial date, any changes to Ohio's election laws will fall squarely within this time period. And, if any relief is reversed on appeal, Ohio could face two sets of election standards in 2016.² The trial schedule set by the Court goes as far as it can to reach a decision as early as possible. While the schedule certainly impacts both parties' litigation strategy, Ohio voters benefit by having these issues resolved before the 2016 presidential election cycle.

If anything, the trial schedule impacts Defendants more than Plaintiffs. Defendants face the same timeline for presenting their primary and rebuttal experts, exploring Plaintiffs' legal theories, testing the factual basis of Plaintiffs' standing, and preparing for trial. But Plaintiffs also benefited from the months of preparing for this litigation before they filed their Complaint. Despite the aggressive timeline, Ohio believes it is capable of addressing the merits of Plaintiffs' claims within that timeline. Modifying the discovery schedule as Plaintiffs suggest, however, tips the balance unfairly in their favor. Under Plaintiffs' suggestion, Defendants would have only two weeks to depose Plaintiffs' experts and to formulate and submit their own rebuttal expert reports. Rebuttal expert reports, of course, are generally limited to the conclusions and methodologies presented in the primary report they address, and necessarily, this work cannot begin until expert report are produced. *See United States v. Louisiana Generating, LLC*, 929 F. Supp. 2d 591, 596 (M.D. La. 2012) (finding challenged rebuttal report responsive to primary report and therefore not properly excluded).

² Securing a window for an appeal prior to an election is a proper consideration when fixing a trial schedule. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5, (2006).

B. The timing of this litigation is of the Plaintiffs' own making and does not present the "good cause" needed to modify the trial schedule.

To the extent the discovery schedule poses any challenge for Plaintiffs, any difficulty is an obstacle of their own making. As an initial matter, Plaintiffs over-state their burden. Plaintiffs admit that they already have documents and data from Ohio that they have been gathering through information requests. (Mtn. for Recon. at 2, Doc. 25, PageID# 176). Indeed, by letters dated December 29, 2014, and January 23, 2015, Plaintiffs' lawyers requested numerous categories of documents from the Ohio Secretary of State. *See* Def. Ex. A, Declaration of Matt Walsh. The Office of the Secretary of State responded to those letters on January 30, 2015, and on February 11, 2015, respectively. *See id.* Moreover, while Plaintiffs estimate that they will not "expect to receive any discovery from Defendants until the first week of August, at the earliest" (Mtn. for Recon. at 2, Doc. 25, PageID# 176), Ohio plans to have its first set of documents ready to produce next week, and will continue to move discovery along as quickly as possible.

Second, Plaintiffs chose to wait long after the laws that they challenge were enacted to file this lawsuit. Plaintiffs filed their Complaint on May 8, 2015. This was a delay of over fourteen months from when the bills Plaintiffs challenge, S.B. 200, 205, 216, and 238, were signed into law. (These bills were passed by the 130th General Assembly. The Governor signed S.B. 200 on December 19, 2013, S.B. 205 and S.B. 238 on February 21, 2014, and S.B. 216 on February 28, 2014.) An even more striking delay, Plaintiffs challenge a statute mandating a single early voting location for each Ohio county, a law that has been in place since early voting began in 2005.

Plaintiffs waited so long to litigate that an intervening case also relating to Ohio's early voting laws was filed and resolved in a settlement, all before Plaintiffs even filed their

Complaint. One year before this case began, the ACLU filed a lawsuit challenging S.B. 238 (Plaintiffs also challenge S.B. 238). That prior case was extensively litigated to the United States Supreme Court before returning to the Southern District of Ohio, where the case was settled earlier this year, leaving S.B. 238 intact. *See Ohio State NAACP, v. Husted*, No. 2:14cv-404 (S.D. Ohio 2014).

Third, Plaintiffs have more-than-able counsel who are able to meet the demands created by the timing of their lawsuit. Plaintiffs are represented by a large law firm with over 1,000 attorneys. The firm's web page devoted to election law litigation advertises that its "political law practice" is "one of the largest, oldest and most respected" in the country and that the firm has "unparalleled experience" in elections litigation.³ Certainly, lawyers in such a firm are aware of their own caseloads and, as experienced election lawyers, should have anticipated an expedited schedule in an election law case filed before a presidential election. In addition, Plaintiffs' representation also includes experienced local counsel.

Plaintiffs' lawyers have demonstrated in other cases that they are capable of fully litigating large election law matters on a short timeline. By way of example, Plaintiffs' counsel (representing different plaintiffs) sued North Carolina over its election laws in 2014, along with other law firms representing other North Carolina plaintiffs. On May 19, 2014, the North Carolina plaintiffs filed a motion for a preliminary injunction. Seven weeks later, beginning on July 7, 2014, a four-day trial began. The North Carolina plaintiffs introduced eleven expert reports and called eleven witnesses to the stand, including two experts. *See generally North Carolina State Conf. of the NAACP v. McCrory*, Case Nos. 1:13-CV-658, 660, and 861 (M.D. North Carolina).

³ <https://www.perkinscoie.com/en/practices/political-law-1/political-law-litigation.html>. The firm's website also notes that "these cases are often litigated on accelerated timetables".

In this case, Plaintiffs have not been overly active moving discovery forward. On June 9 and 11, 2015, the lawyers for Plaintiffs and Ohio held pre-trial conferences. During those conferences, Ohio's counsel told Plaintiffs' lawyers that they need not wait until the scheduled pre-trial conference with the Court to serve written discovery and that Ohio was ready and able to begin responding to Plaintiffs' discovery requests. It was not until one month later, on July 7, 2015, that Plaintiffs finally served a set of document requests on Defendant Jon Husted. As of the date of this filing, Plaintiffs have not yet served any other discovery in this case. Plaintiffs' decision not to move more quickly with their discovery stands in contrast with their purported need for extensive discovery and their claim of hardship.

C. Should the Court find modification of the trial schedule is necessary, Ohio requests the schedule that it put forward in its Rule 26 report to the Court.

The trial schedule set by the Court is swift, but fair. To the extent the Court believes modification of the discovery schedule is necessary, Ohio requests that the Court set a trial date in April 2016, after the primary, and include a dispositive briefing schedule. This schedule would prejudice neither side, give Plaintiffs additional time they seek to develop their case, delineate the dispositive briefing that Ohio has requested, and most importantly, avoid disruption to the presidential primary.

III. CONCLUSION

For the foregoing reasons, Ohio opposes Plaintiffs' motion for reconsideration of the trial schedule. Alternatively, to the extent the Court believes modification is necessary, Ohio requests that the schedule proposed in its Rule 26 report be adopted.

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General

/s/ Steven T. Voigt

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*Counsel for Defendants
Ohio Secretary of State Husted and
Ohio Attorney General DeWine*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on July 14, 2015, and served upon all parties of record via the court's electronic filing system.

/s/ Steven T. Voigt

STEVEN T. VOIGT

Senior Assistant Attorney General

PERKINScoie

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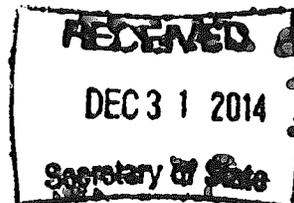
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December 29, 2014

Joseph P. Wenzinger
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VIA OVERNIGHT MAIL

Melanie Poole
Elections Administration Officer
Office of the Ohio Secretary of State
180 East Broad Street, 15th Floor
Columbus, Ohio 43215
(614) 995-2211



Re: Public-Records Request

Dear Ms. Poole:

I am making a request under Ohio's public-records law (*see* Ohio Rev. Code § 149.43).

For purposes of this request, the term "records" shall mean all materials that are records pursuant to Ohio Rev. Code § 149.011(G). Please be aware that under the public-records law, the term "record" includes information that is maintained electronically, such as data files and unprinted emails.

For purposes of this request, the term "number" shall include, without limitation, total number and/or percentage.

I request copies of the following records:

Confirmation of Registration Notices

All records containing data and/or other information regarding the issuance of confirmation of residence notices pursuant to Ohio's statewide voter maintenance registration program in 2011, 2013, and 2014. This request includes, without limitation, all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, and/or partisan affiliation.

Direct Recording Electronic (DRE) Voting Machines

All records containing data and/or other information regarding the number of DRE voting machines used at any voting location in Ohio during any election from the time period from January 1, 2008, through the date of this request. This request includes, without limitation, any records pertaining to the process used by election authorities to calculate the number of machines to allocate to any particular voting location.

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All records containing data and/or other information regarding the number of notices distributed under Secretary of State Directive 2014-26 to confirm that a person was a registered voter for purposes of determining the amount of DRE machines to employ at any particular voting location in Ohio for the 2014 general election. This request includes, without limitation, the number of persons who were not counted as registered persons because they failed to respond to a confirmation notice. This request includes, without limitation, all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, and/or partisan affiliation.

All records containing data and/or other information regarding the number of persons who, because they requested absentee ballots, were not counted as registered voters for purposes of determining the amount of DRE machines to employ at any particular voting location in Ohio for the 2012 and 2014 general election. This request includes, without limitation, all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, and/or partisan affiliation.

Lines and Wait Times to Vote

All records containing data and/or other information regarding the length of lines and/or wait times to vote at any polling location in Ohio in any election that took place during the time period from January 1, 2008, through the date of this request.

All records containing data and/or other information regarding the number of voters who appeared at a polling location in Ohio but did not vote due to the length of lines and/or the expected wait time to vote in any election that took place during the time period from January 1, 2008, through the date of this request.

Early Voting

All records containing data and/or other information regarding the number of voters who voted early in the 2012 and 2014 general elections. This request includes, without limitation, all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, and/or partisan affiliation.

Absentee Voting

All records containing data and/or other information regarding the number of persons who requested, and/or cast, an absentee ballot for the 2012 and 2014 general elections. This request includes, without limitation, all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, and/or partisan/affiliation.

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All records containing data and/or other information regarding the number of absentee ballots cast, counted, and/or rejected in Ohio for any election during the 2012 and 2014 general elections. This request includes, without limitation, all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, partisan affiliation, date, and/or reason provision ballot was rejected.

The 2014 General Election Absentee Ballot report produced under Ohio Rev. Code § 3501.05(Y).

Provisional Voting

All records containing data and/or other information regarding the number of provisional ballots cast, counted, and/or rejected in Ohio for any election during the 2012 and 2014 general elections. This request includes, without limitation, all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, partisan affiliation, date, reason provisional ballot was cast, and/or reason provisional ballot was rejected.

The 2014 General Election Provisional Ballot Report produced under Ohio Rev. Code § 3501.05(Y).

If a record contains information that is subject to disclosure and information that is not subject to disclosure, I request that you provide the information that is subject to disclosure and delete or redact the information that is not subject to disclosure.

Pursuant to Ohio's public-records law, I request that you fill the request or notify me of a determination to deny the request in whole or in part and the reasons therefor "within a reasonable period of time." *See* Ohio Rev. Code § 149.43(B)(1). If you deny my request in whole or in part, the law requires you to provide a statement, including legal authority, of the reasons for denying the request. *Id.* § 149.43(B)(3).

Please be aware that the public-records law "is intended to be liberally construed to ensure that governmental records be open and made available to the public subject to only a few very limited and narrow exceptions." *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997) (internal citation, quotation marks, and alterations omitted). The law "provides for full access to all public records upon request unless the requested records fall within one of the specific exceptions listed in the Act." *Id.* Because this request does not fall within a specific exception, the request should be granted in full.

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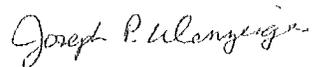
If requested records are held by you but are located in, or originated in, another agency, department, office, installation, or bureau, please refer this request or any relevant portion of this request to the appropriate entity and inform me that the request has been forwarded.

Please provide an estimate of the costs of meeting my request before undertaking the task. In addition, an acknowledgement of receipt of this request would be appreciated.

To the extent that the records are readily reproducible in an electronic format, I would prefer to receive the records in that format. However, if certain records are not available in that format, I am willing to accept the best available copy of each such record.

Thank you for your time and consideration.

Very truly yours,

A handwritten signature in cursive script that reads "Joseph P. Wenzinger".

Joseph P. Wenzinger

RECEIVED

January 23, 2015

JAN 26 2015

Ohio Secretary of State, Elections Division
Attn: Public Records Officer
180 E. Broad Street, 16th Floor
Columbus, OH 43215

OHIO SECRETARY OF STATE

Re: Request Pursuant to Ohio Public Records Act (O.R.C. 149.43)

Dear Sir or Madam:

Pursuant to the Ohio Public Records Act (O.R.C. 149.43), and on behalf of Every Citizen's Vote, I hereby request the following public information and data:

1. A copy of all information obtained from the national change of address service pursuant to Ohio Revised Code section 3503.21(D) during calendar years 2011 and 2012.
2. A copy of all lists of Ohio voters or other information transmitted to any county board of elections during calendar years 2011 and 2012 pursuant to Ohio Revised Code section 3503.21(D).
3. Any records identifying those Ohio voters who were sent notices during calendar years 2011 and 2012 pursuant to Ohio Revised Code section 3503.21(D).
4. A list of all Ohio voters whose voter registration was restored to "active" status because the voter responded to the Form 10-S confirmation notice or other confirmation notice sent by the county board of elections. *See* O.R.C. § 3503.21(D); *see also* Secretary of State Directive 2014-14.
5. A list of all Ohio voters whose voter registration was restored to "active" status because the voter properly updated or confirmed his or her address with a county board of elections or using your office's online change of address system. *See* O.R.C. § 3503.21(D); *see also* Secretary of State Directive 2014-14.
6. A list of all Ohio voters whose voter registration was restored to "active" status because the voter has voted in an election in calendar year 2012, 2013 or 2014. *See* O.R.C. § 3503.21(D); *see also* Secretary of State Directive 2014-14.
7. A list of all Ohio voters whose registration has been cancelled pursuant to O.R.C. § 3503.21 and copies of all notices sent to the same pursuant to O.R.C. § 3503.21(F)(1).
8. A list of all Ohio voters whose registration has been cancelled in error pursuant to O.R.C. § 3503.21 and restored pursuant to O.R.C. § 3503.21(F)(2).

For each request above, please include the first name, middle name, surname, applicable voter identification reference (County ID and/or Secretary of State ID), address of residence (including city and zip code), and phone number of all individuals. Please also include whether the voter's registration status is currently listed as active or inactive, or has been cancelled.

The Ohio legislature requires that you must promptly prepare and make available all records responsive to this request. O.R.C. § 149.43(B)(1). Accordingly, if you anticipate being unable to comply with any part of this request, please let us know immediately. If you intend to deny this request in whole or part, please advise us in writing of the particular statutory exemption upon which you are relying, as required by Ohio Revised Code section 149.43(B)(3). If you contend that less than all of the requested records are exempt from disclosure, please produce any portion that you do not contend is exempt, as required by Ohio Revised Code section 149.43(B)(1).

Where applicable, electronic formats (.xls, .xlsx, .csv, .dbf) are preferred. If documents, information or data can be e-mailed, you may email them to thagenbuch@gmail.com. If documents, information, and data cannot be emailed, please direct your reply by U.S. Mail, FedEx or UPS to Tyler Hagenbuch, Perkins Coie, 700 13th Street NW, Suite 600, Washington, D.C. 20005.

Please inform us of any charges associated with these request and the method of payment requested.

If you have any questions or concerns, please do not hesitate to call Tyler Hagenbuch (202) 654-6248.

Sincerely,

Oren Shur

General Information

Court	United States District Court for the Southern District of Ohio; United States District Court for the Southern District of Ohio
Federal Nature of Suit	Civil Rights - Voting[441]
Docket Number	2:15-cv-01802