

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

OHIO ORGANIZING COLLABORATIVE;
JORDAN ISERN; CAROL BIEHLE; and
BRUCE BUTCHER

Plaintiffs,

v.

JON HUSTED, in his official capacity as
Secretary of State of the State of Ohio; and
MIKE DEWINE, in his official capacity as
Attorney General of the State of Ohio,

Defendants.

Case No. 2:15 CV 1802

Judge Watson

Magistrate Judge King

**Reply in Support of Plaintiffs' Motion for Reconsideration of Preliminary Pretrial Order
and for Continuance of Trial Date**

Plaintiffs The Ohio Organizing Collaborative, Bruce Butcher, Carol Biehle, and Jordan Isern ("Plaintiffs") respectfully submit this reply in support of their Motion for Reconsideration of this Court's Preliminary Pretrial Order and for Continuance of Trial Date. Plaintiffs share Defendants' concern with moving these proceedings along as expeditiously as possible. To that end, Plaintiffs have asked only for a one to two month extension of the trial date. This is not a tactic to delay or prolong these proceedings. To the contrary, Plaintiffs' request for a continuance asks for a date well before the trial date requested by Defendants in their Rule 26(f) report (which was April), as well as Plaintiffs' original trial date request (March). As such, Plaintiffs' request for a continuance can hardly be construed as unreasonable in light of the schedules proposed by the parties.

Furthermore, and regardless of the trial date ultimately required by this Court, Plaintiffs have good cause to request that the date for primary expert reports be continued. Plaintiffs'

claims will turn in large part on expert analysis of the impact of the challenged provisions on Ohio voters. The current deadline of August 28, 2015 provides insufficient time for Plaintiffs to obtain all of the materials and data necessary for their experts to prepare meaningful Rule 26(f) reports. The current deadline for expert reports would severely prejudice Plaintiffs' ability to litigate their claims. Unnecessarily hurried reports based on incomplete data also would not aid this Court in reaching a considered decision on the merits. In order to provide adequate time for Plaintiffs' experts to prepare their reports, Plaintiffs request that they be given at least until October 16 to submit primary expert reports.

I. PRIMARY EXPERT REPORTS SHOULD NOT BE DUE ON AUGUST 28

Plaintiffs maintain that an August 28, 2015 deadline for submitting primary expert reports is unworkable. As explained in Plaintiffs' initial motion for reconsideration, Plaintiffs' experts need more time to obtain and analyze the data they expect to receive from the State -- and county boards of elections -- and to litigate the potential objections Defendants might raise to Plaintiffs' discovery requests.

Defendants make much of the fact that Plaintiffs obtained information from the State of Ohio earlier in 2015 pursuant to public information requests. However, while useful in developing Plaintiffs' claims, this data was insufficient for purposes of analyzing the burdens the challenged provisions will place on voters and the impact they will have on wait times at the polls. For example, Plaintiffs' were unable to obtain from the State data regarding the number of DRE machines that were eliminated as a result of S.B. 200 because the State claimed not to possess that data. Plaintiffs have served their third-party requests for documents on the county Boards of Election to obtain this information, but do not expect to receive responses to these requests in time for their experts to analyze it and draft reports by August 28.

In order to allow enough time to collect the requisite data and for our experts to analyze it and write their reports, Plaintiffs request that, if this Court requires a November 16, 2015 trial date, primary expert reports be due on October 16, 2015 and rebuttals due on October 30. Defendants object to this on the grounds that they will not have enough time to depose Plaintiffs' experts or to prepare rebuttals. While Plaintiffs do not object to Defendants having additional time to prepare rebuttal reports and have proposed a short trial continuation to permit that, Defendants' protests that they have inadequate time to respond are exaggerated. Plaintiffs have indicated the types of reports they intend to submit in their Rule 26(f) reports and provided detailed allegations that demonstrate the factual predicates of their claims. Finally, Defendants have previously litigated similar issues in suits such as *NAACP v. Husted*,¹ and they are therefore familiar with the types of expert evidence that will likely be at issue. Moreover, Defendants present no basis whatsoever for requiring Plaintiffs to submit expert reports before the end of August, more than two months before the end of discovery.

II. PLAINTIFFS HAVE NOT UNREASONABLY DELAYED IN BRINGING THIS SUIT

Defendants object to Plaintiffs' motion for a continuance primarily on the ground that the Plaintiffs waited too long in bringing this suit. In particular, Defendants assert that Plaintiffs waited over fourteen months to challenge the bills that are the subject of this suit. This is a misleading assertion.

First, there was no way to assess the impact of these laws before the November 2014 elections. For example, any prediction of the impact of S.B. 205 and S.B. 216 on absentee and provisional voters would have been purely speculative until those provisions went into effect.

¹ See, e.g., Order Granting Preliminary Injunction, *Ohio State Conference of N.A.A.C.P. v. Husted*, 2:14-CV-404, 2014 WL 4377869 (S.D. Ohio Sept. 4, 2014) (Dkt. No. 72).

Similarly, the effect of S.B. 200 on the number of Direct Recording Electronic (“DRE”) voting machines could not be assessed until after the November 2014 elections. Plaintiffs brought this suit when they had determined that the challenged provisions impermissibly burdened the right of Ohio’s voters. To have done so before would have been premature, and Defendants’ contentions on this point misconstrue Plaintiffs’ diligence in developing these claims as inexcusable delay.

Similarly, Defendants contend that Plaintiffs unreasonably delayed in challenging Ohio Rev. Code § 3501.10(C), which limits each county to a single early voting location regardless of population. *See* Defs.’ Opp. at 5. (“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.”). This contention rests on a willful mischaracterization of Plaintiffs’ claim. As set forth clearly in Plaintiffs’ complaint, the limitation on one early voting location per county only became a problem when Secretary Husted succeeded in eliminating the discretion each county had to set its own days and times for early voting. Cmpl. at ¶¶ 5–6, 90–99. The discretion the county Boards of Election previously had to set an early voting schedule according to their particularized needs ameliorated the discriminatory impact of this limitation. After that discretion was eliminated, the limitation on early voting locations became an actionable problem.

Thus, to assert that this suit should have been filed earlier mischaracterizes the nature of Plaintiffs’ claims and the grounds on which they rest.

III. PLAINTIFFS REQUEST A CONTINUANCE OF THE TRIAL DATE

Plaintiffs have brought this suit in order to make it easier for Ohio’s citizens to vote. To that end, and to balance the competing interests of a speedy resolution and the time needed to develop their case, Plaintiffs have asked only for a one- to two-month extension of the trial date

until either December 14, 2015 or January 11, 2016. Contrary to Defendants' arguments, both dates would be compatible with the needs of Ohio's election administration.

First, Defendants argue that an extension is unworkable, in part, because applications for absentee ballots will begin to be accepted on December 16, 2015. However, while Plaintiffs are challenging S.B. 205's new requirements for *counting* an absentee ballot. None of Plaintiffs' claims would, if successful, interfere with receiving or sending absentee ballot applications.

Second, Defendants oppose an extension on the ground that early in-person voting during the primaries will begin on February 17, 2016. However, Plaintiffs submit that a December trial date would give Defendants sufficient time to implement any changes to their early voting schedule that might be required as a result of a favorable decision.

In sum, Plaintiffs' overriding concern is in obtaining a full resolution of the merits of their claims that improves Ohio's election system. This requires a full opportunity for both parties to develop and present their case. Plaintiffs would of course prefer to see the benefits of any favorable decision implemented in time for the March 2015 primaries, but their interest in having a fair opportunity to fully develop and present their case after adequate discovery is paramount. For the reasons stated above and in Plaintiff's initial motion for reconsideration, Plaintiffs submit that either a December or January trial date would allow them sufficient time to prepare their case without adversely affecting the administration of the March 2016 primaries.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that 1) this Court set a deadline for submitting primary expert reports no earlier than October 16, 2015, with rebuttal reports due on October 30 (or such later date as the Court permits), and 2) continue the trial date until either December 14, 2015 or January 11, 2016.

Dated: July 24, 2015

Respectfully submitted,

/s/ Donald J. McTigue

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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 July 24, 2015, and served upon all parties of record via the court's electronic filing system.

/s/ Donald J. McTigue

DONALD J. MCTIGUE

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