No. 14-3877

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ohio State Conference of the National Association for the Advancement of Colored People, *et al.*,

Plaintiffs-Appellees

v.

Mike DeWine, *et al.*,

Defendants-Appellants

On Appeal from the United States District Court
for the Southern District of Ohio, Case No. 2:14-cv-00404

Plaintiffs-Appellees' Response in Opposition to Defendants-Appellants' Motion to Expedite Appeal

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Plaintiff-Appellees ("Plaintiffs") respectfully oppose Defendant-Appellants' ("Defendants") motion to expedite the instant appeal. Defendants' motion to expedite should be rejected because the considerable harm of granting the motion outweighs any conceivable harm in denying it. Granting Defendants' motion will cause delay and confusion among voter organizations and elections officials who have begun fervently publicizing and preparing for the same-day registration period to commence in 14 week days, on September 30, while denying the motion will cause *no* appreciable harm to the State, which has implemented these same voting opportunities without difficulty for the last eight years.

Furthermore, the "expedited" schedule proposed by Defendants is entirely impractical and inconsistent with prior election cases in this Court. By way of comparison, in *Obama for America v. Husted* ("*OFA*"), 697 F.3d 423 (6th Cir. 2012), the Sixth Circuit *completely resolved* the appeal *a full month before* the voting opportunities at issue (the last weekend before Election Day) were scheduled to take effect. Here, in contrast, the *briefing* has not yet even begun, and there are a mere thirteen business days before the doors of the Boards of Elections must open to provide the voting opportunities at issue. It is impracticable to resolve this appeal on such a compressed timetable. This impracticability is especially glaring when one considers the weeks of voter education and mobilization and the organizational efforts that must *precede* the beginning of

early voting to render the voting opportunities of any meaningful utility to voters.

There will be ample opportunity to address Defendants' legal contentions after the November 2014 election. Because the State cannot demonstrate any "good cause" to justify the confusion and delay that expediting this appeal will engender, Defendants' motion should be denied. Fed. R. App. P. 2, 6 Cir. R. 2, 6 Cir. R. 27(f).[1]

BACKGROUND

Contrary to what Defendants suggest, this case is about Ohio, and only Ohio.[2] In 2004, in response to disastrously long lines unique to Ohio that made a mockery of the democratic process, the Ohio General Assembly created the right to early voting, including the right to same-day registration (the ability for voters to register and vote on the same day). Memorandum Opinion and Order at 1-2, *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio Sep. 4, 2014), ECF No. 72 (hereinafter "Opinion and Order"). Since that time, tens of thousands of Ohio voters – particularly low-income, African-American, and other historically

[1] Because there is simply insufficient time for an appeal, Plaintiffs need not address the details of Defendants' proposed briefing schedule, other than to observe that it would be grossly inequitable to provide Defendants with nearly quadruple the time to brief the appeal than Plaintiffs would receive. Under Defendants' proposed schedule, they would receive a total of 15 days (11 for initial brief plus four for reply), while Plaintiffs would receive only four.

[2] The following facts are based on the district court's Memorandum Order and Opinion. Defendants do not suggest that any of these facts are clearly erroneous.

marginalized voters who cannot easily take time off during the day to vote – have relied on these opportunities. *Id.* at 50. And for the last eight years, Ohio has successfully implemented these voting opportunities without difficulty. *See, e.g.*, *Id.* at 1-2.

In early 2014, the State of Ohio passed a set of early voting cutbacks, seemingly surgically-targeted to disproportionately impact low-income voters. First, the Ohio General Assembly passed SB 238, eliminating same-day registration, which had been a fixture for eight years. Immediately thereafter, and with questionable state statutory authority, *Id.* at 4, Defendant Husted unilaterally banned evening early voting in *all* counties, also for the first time in eight years. *See, e.g.*, *Id.* at 59. In addition, and consistent with comments made by a Board of Elections official in Franklin County who openly admitted trying to reduce Sunday voting because too many African-Americans were using it,[3] Defendant Husted

[3] Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support of Motion at 4, *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio June 30, 2014), ECF No. 17 ("I guess I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter turnout machine.'"); Darrel Rowland, *Voting in Ohio: Fight Over Poll Hours Isn't Just Political*, COLUMBUS DISPATCH, Aug. 19, 2012, ECF No. 18-48 (same). Doug Priesse, the member of the Franklin County Board of Elections who made the aforementioned comment, also voted in opposition of Sunday voting hours in both 2010 and 2011. *See, e.g.*, Sec'y of State Tie Vote Sept. 22, 2010, *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio June 30, 2014), ECF No. 18-39; Sec'y of State Tie Vote Oct. 25, 2011, *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio June 30, 2014), ECF No. 18-42.

unilaterally banned *all* Sundays from the early voting period (though he was later forced to restore one Sunday[4]). Sunday voting was eliminated in the face of the fact that the largest counties in Ohio with the largest African-American populations had allowed early voting on multiple Sundays for years. *Id.* at 52.

Plaintiffs filed the instant lawsuit in May 2014 and compiled many dozens of exhibits and declarations – evidence which Defendants conceded was voluminous, *see, e.g.*, Secretary of State Jon Husted's Opposition to Plaintiffs' Motion for Preliminary Injunction at 40, *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio July 23, 2014), ECF No. 41 – to demonstrate precisely how these targeted early voting cutbacks harmed primarily low-income and African-American voters across the state. No fewer than eleven expert reports from seven different experts were filed by the parties, in addition to five full expert deposition transcripts and countless exhibits, including several declarations filed by Defendants and a last-minute amicus brief accompanied by five exhibits, totaling 472 pages, by the Ohio General Assembly. *See, e.g.*, Opinion and Order at 27-45 (describing expert evidence); *see generally* Brief of Amicus Curiae, The Ohio General Assembly, in Support of Defendants' Opposition to Plaintiffs' Motion for a Preliminary Injunction and Attached Exhibits, *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio Aug. 8, 2014), ECF Nos. 68-1–68-6.

[4] *OFA*, 697 F.3d 423 (6th Cir. 2012).

On September 4, 2014, the district court preliminarily enjoined SB 238, in a meticulously detailed, 71-page decision. It found that Defendants' post hoc justifications for these cutbacks – many of which were not even articulated in the short legislative record or the six-page OAEO report on which Defendants rely – were unsubstantiated by actual evidence and/or have been routinely intoned and rejected by this Court in other election law cases, and thus could not justify imposing such gratuitous burdens on traditionally marginalized voters. The district court's order ensured that Ohio's longstanding early voting opportunities continue for at least one more election, preventing irreparable harm while the issue of final judgment remains pending. The district court also required that a single schedule for early voting hours be implemented across all counties during the early voting period for the November 2014 General Election, a remedy that should completely satisfy Defendant Husted's expressed interest in uniformity. Lastly, the district court ordered Defendant Husted to permit Boards of Elections to establish additional hours by majority vote – relief that Plaintiffs did not specifically seek but observe is consistent with Ohio law. OHIO REV. CODE §§ 3501.10(B), 3501.11.

Four days after the ruling, Defendants filed the instant motion.

ARGUMENT

As an immediate result of the district court's closely-watched ruling on September 4, 2014, voters, voter advocates and other members of the public sprang

to action to prepare for the reinstituted same-day registration period, which was already rapidly approaching. Ohio voters and those who assist them require notice and lead-time in order to make use of the restored early voting opportunities. While salaried voters with flexible work hours and private cars at their disposal may be somewhat better able to learn about and adapt to well-announced changes in voting hours, voters who tend to rely upon the specific early in-person voting opportunities at issue in this case (same-day registration, evening voting, and Sunday voting) lack the resources and information to turn on a dime. But even the most flexible of voters will suffer frustration and confusion if hours and days are not established and publicized sufficiently in advance. In this regard, the district court noted that "many members of the public are already aware of the order" and that taking action to suspend its ruling would, "only increase the 'flip-flopping' of [early in-person] voting schedule changes, resulting in greater public confusion." Order at 5, *NAACP v. Husted*, No. 2:14-cv-404 (S.D. Ohio Sep. 10, 2014), ECF No. 82 (hereinafter "Order Denying Stay").

The Defendants' proposed compressed schedule would not have this appeal *briefed* until only a week before the same-day registration period is to start – and even then, *no decision will have been rendered.* Even if this Court could rule within days, the eleventh hour ruling would wreck havoc for voters and elections officials. Same-day registration and the other restored early voting opportunities

can not be properly implemented in such a narrow window. A last-minute ruling would bewilder a public already disoriented and confused by the enactment of the restrictions, the grant of a preliminary injunction, and the announcement of an appeal. Not only would a last-minute ruling substantially compound voters' confusion, but it could lead to problems in implementation causing voters to be disenfranchised. *OFA*, 697 F.3d 423, 437 (6th Cir. 2012) ("The public interest [] favors permitting as many qualified voters to vote as possible.").

Not only is Defendants' motion entirely impractical, but their arguments in favor of any expedited appeal fail to demonstrate "good cause." Fed. R. App. P. 2, 6 Cir. R. 2, 6 Cir. R. 27(f). *First*, Defendants cannot articulate how the State will be irreparably or even significantly harmed if the same methods of democratic participation that have been implemented for nearly a decade in Ohio are allowed to continue for one more election. As the district court found, "[a]t no point . . . have Defendants . . . argued that implementing Sunday or evening voting, as several counties have successfully implemented in the past without incident, was beyond their capacity," and further that, "the Boards cannot manage the additional costs incurred by Golden Week, as they were capable of doing prior to June of 2014." Order Denying Stay at 5. They certainly do not demonstrate clear error in the district court's factual finding that implementing these voting opportunities is not unmanageable, Opinion and Order at 68. Instead, Defendants rely on

conclusory and tangential assertions about cost or administrability (*see, e.g.*, Motion to Expedite Appeal and Memorandum in Support at 8-9, *NAACP v. Husted*, No. 14-3877 (6th Cir. Sept. 8, 2014), ECF No. 11 (hereinafter "Motion to Expedite")), assertions that were already tested in the district court (not to mention in numerous past election cases[5]) and found utterly wanting. Additionally, Defendants press upon the alleged *legal* magnitude of the district court's opinion (without any meaningful discussion of actual legal authority) (*Id.* at 10-12), false in its own right on the merits[6] but doubly false given that the district court's order is

[5] *See, e.g.*, *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006) ("Moving the filing deadline closer to the date of the primary . . . may impose some additional costs on the state, but this is the price imposed by the First Amendment."); *Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006) ("Governments almost always attempt to justify their conduct based on cost and administrative convenience . . . . The State has failed to put forth any evidence indicating that it cannot manage the costs . . . . None of these counties have encountered significant technological difficulties or undue financial burdens."), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007); *OFA*, 697 F.3d 423, 433 (6th Cir. 2012) ("[T]he State has shown no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595-96 (6th Cir. 2012) ("[T]he State argues that it has a strong interest in limiting precinct ballots to eligible races, which facilities the administration of elections . . . . No disagreement there, but these interests do not justify the precise restriction challenged here[.]").

[6] At this procedural posture, Plaintiffs need not address any of the unsubstantiated and scattershot legal arguments that suffuse Defendants' motion to expedite. Plaintiffs merely note that the district court's opinion was limited to the particular facts in Ohio, including the unprecedented long lines in 2004, massive voter habituation (numbering in the tens of thousands) to established opportunities over nearly a decade, and the specific, targeted elimination of same-day registration,

obviously not binding authority on any other State. Moreover, there is ample opportunity to address Defendant's legal arguments after the November 2014 elections when final judgment is entered.

Second, Defendants argue that their proposed schedule mirrors the schedule that was set in *OFA*, 697 F.3d 423 (6th Cir. 2012). (Motion to Expedite at 11.) This is patently misleading. In *OFA*, this Court *decided* the appeal on October 5, 2012, a full four weeks before the weekend days at issue starting on November 3, 2012. Here, there are *not even three weeks* before the same-day registration period at issue starting September 30, 2014, and *merits briefs have not even been submitted yet*. Nor are the other cited cases comparable. (*Id.* at 9-10.) Expedited consideration in *Hunter v. Hamilton County Board of Elections*, 635 F.3d 219 (6th Cir. 2011), was ordered in December *after* an election because the *results* of the November election were at stake. An order to expedite was entered in *Northeast Ohio Coalition for Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) on July 30, 2012, *several months* before the impacted November elections. And in *Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014), the order to expedite was entered on March 21, 2014, over *six weeks* before the impacted primary on May 6,

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evening and Sunday hours without allowing any Board of Elections to compensate for those lost hours (unlike in Florida and North Carolina). This Court has previously held that, in this unique context, the targeted elimination of early voting opportunities constitutes a burden on voters. *See OFA*, 697 F.3d at 431-32 (6th Cir. 2012).

2014, (and that case did not involve lead-time issues such as voter education or voter advocate preparation).

Third, it is disingenuous for Defendants to compare their motion to expedite an appeal with a similar motion filed by the Plaintiffs in *League of Women Voters of North Carolina v. North Carolina*, 4th Circuit Case No. 14-1859, (filed Aug. 25, 2014) (Motion to Expedite at 12-13.) In North Carolina, where the motion for a preliminary injunction was *denied*, at stake in the expedited appeal is the potential for imminent irreparable harm to thousands of low-income and African-American North Carolina voters. Here, where the preliminary injunction was *granted*, what is at stake in Defendants' motion to expedite is irreparable harm to the State, which as shown above is basically non-existent.[7] The worst thing that could happen, that *too many* low-income voters might receive the opportunity to vote in Ohio's November 2014 election, is not a sufficiently good reason to expedite this appeal. Furthermore, oral argument for the expedited appeal in North Carolina is scheduled for September 25, 2014, three weeks before the early voting days at issue in that case are to begin on October 16. Here, there are *already* less than three weeks until the same-day registration period, and merits briefs have not even

[7] Thus, for example, in *Libertarian Party of Ohio v. Husted*, No. 2:13-cv-953 (S.D. Ohio Jan. 7, 2014), ECF No. 47, the district court *granted* a preliminary injunction allowing ballot access for minor parties, and this Court *denied* the State's motion for an expedited appeal. Where the district court *denied* a preliminary injunction in *Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014), this Court *granted* the plaintiffs' motion for an expedited appeal.

been filed.

Fourth, Defendants present the curious argument that failing to expedite the appeal would irreparably harm *voters*. (*Id.* at 13.) Defendants then clarify that what they mean is not voters' right to vote, but some abstract harm arising from the preliminary invalidation of a legislative statute. (*Id.*) But if that type of "harm" were sufficient, then any preliminary injunction against a statute would always warrant expedited appeal. That is manifestly not the law. *See, e.g.*, *Libertarian Party of Ohio v. Husted*, No. 2:13-cv-953 (S.D. Ohio Jan. 7, 2014), ECF No. 47.

Lastly, Defendants blame Plaintiffs for "delay" (Motion to Expedite at 13-14), essentially a laches argument, but one that was already raised and rejected by the district court. Opinion and Order at 5-6. *See Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 231 (6th Cir. 2007) ("an appellate panel reviews 'a district court's resolution of a laches question for an abuse of discretion'") (citation omitted). The evidence which Defendants concede was voluminous did not materialize overnight, and that Defendants would essentially criticize Plaintiffs for amassing *too* much evidence of the harms imposed by these cutbacks simply illustrates the meritlessness of their motion.

CONCLUSION

For all the above reasons, this Court should deny Defendants' motion to expedite.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was filed this 10th day of September, 2014 on the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

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