

Case No. 14-3877
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO STATE CONFERENCE OF	:	
THE NATIONAL ASSOCIATION	:	On Appeal from the
FOR THE ADVANCEMENT OF	:	United States District Court
COLORED PEOPLE, et al.,	:	for the Southern District of Ohio
	:	Eastern Division
Plaintiffs-Appellees,	:	
	:	District Court Case No.
v.	:	2:14cv00404
	:	
OHIO SECRETARY OF STATE JON	:	
HUSTED and OHIO ATTORNEY	:	
GENERAL MIKE DEWINE	:	
	:	
Defendants-Appellants.	:	

MOTION TO EXPEDITE APPEAL AND MEMORANDUM IN SUPPORT

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MOTION TO EXPEDITE APPEAL

Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine (“Ohio” or “State”) jointly move the Court under Fed. R. App. P. 2 and Sixth Circuit Rule 27(f) for an order expediting this appeal. Ohio seeks an expedited appeal because the District Court’s order of September 4, 2014, directs Ohio to start early in-person voting by September 30, 2014. The order does so by preliminarily enjoining, for the upcoming 2014 election, Ohio’s statutes and Secretary of State Directive 2014-17, which together establish Ohio’s pre-election in-person voting calendar to begin on October 7, 2014, and by affirmatively ordering Ohio to allow counties to set non-uniform expanded dates and hours over the month-plus of voting.

This case should be expedited, with resolution as soon as practicable within September, as a matter of fairness to all sides. Ohio’s voters and elections officials need a quick answer. Ohio regrets asking for such speedy work from this Court, but as the Memorandum of Support details, this timing is not of Ohio’s making.

Ohio respectfully requests that the Court set a briefing schedule as follows:

- Ohio’s merit brief would be due on Monday, September 15, 2014;
- Plaintiffs’ merit brief would be due on Friday, September 19, 2014; and
- Ohio’s reply brief would be due on Tuesday, September 23, 2014.

Ohio also suggests that any *amicus* briefs be due on the same day as the party an *amicus* supports. Ohio is also willing to waive oral argument, despite the great importance of the issues here, in order to allow faster resolution of this case. Of course, Ohio will participate in oral argument if the Court believes that the benefit of oral argument would outweigh the time concerns.

Counsel for Plaintiffs have indicated that they oppose Ohio's request for expedition and the expedited briefing schedule.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Defendants-Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine (“Ohio” or “State”) respectfully ask the Court to expedite this appeal so that it may be resolved before September 30, 2014, which is when early in-person (“EIP”) voting must begin under the district court’s Order. In this appeal, Ohio seeks reversal of the district court’s September 4, 2014 Order (“Order”) granting Plaintiffs’ motion for a preliminary injunction.¹ The Order enjoined, for the 2014 federal general election, enforcement of Ohio’s statute setting voting to begin 28 days before the election (Ohio Rev. Code 3509.01), and enjoined Secretary of State Directive 2014-17 (“Directive 2014-17”), which set uniform hours for voting days, evenings, and weekends during the month. In place of those Ohio laws, the Order affirmatively requires Ohio to open voting a week earlier, orders the Secretary to “uniformly” direct county Boards of Election (“Boards”) to add additional days and hours of EIP voting, but also instructs the Secretary not to block individual Boards from adding EIP voting hours above a uniform statewide minimum, thus resulting in *non-uniform* hours statewide. And the Order “charged” the General Assembly with “passing legislation consistent” with the Opinion and Order. *See* Doc. 72, Order, at Page ID #5917-18.

¹ As in the district court, the Secretary limits his defense to Plaintiffs’ challenges to his Directive, while the Attorney General defends both the Secretary’s Directive and the statutes establishing the start date for early voting.

Ohio was ordered to expand its voting month from 28 to 35 days, and add hours and days over the month, because its hours—among the broadest in the nation—have been reduced modestly from their maximum. Since 2005, Ohio has had more EIP voting days and other voting options than most other States, and it continues to be in the top ten States for early-voting options. Ohio’s General Assembly this year reduced the calendar to start voting on October 7 rather than September 30, and the Secretary set uniform hours statewide so that all voters would have the same ample access. The Secretary also adopted the days and hours in the directive based on the bipartisan recommendations set forth by the Ohio Association of Election Officials (“OAE0”). The OAE0 plan was the only voting schedule garnering support from Republicans and Democrats, and the OAE0 recommended the plan as it balanced both access for the voter and the legitimate administrative and cost concerns for large, medium and small counties. Ohio’s 28-day-early-voting period includes EIP on top of Ohio’s no-excuse-needed absentee voting by mail. The Secretary of State mailed absentee ballot applications to nearly every registered voter in the State. Despite these expansive opportunities to vote, the district court held that Ohio’s *reduction* in hours violated equal protection and Section 2 of the Voting Rights Act. In forcing Ohio to maintain its maximum hours, the court imported a “retrogression” analysis that is reserved for “covered” States—not Ohio—under Section 5 of the Voting Rights Act. While that approach

is wrong and ultimately *discourages* States from expanding voting, the point for this motion is that an Order with such great impact deserves immediate review.

Ohio's voters and elections officials deserve an answer from this Court before the election begins. Ohio regrets asking the Court to act so quickly on such momentous issues, but Ohio did not create the timing crunch. Ohio's General Assembly enacted the statute in February and the Secretary issued an earlier directive that same month, so the calendar that Plaintiffs challenge was set then. But Plaintiffs sued in May, and did not move for an injunction until June 30. Ohio's citizens should not be stuck with court-ordered changes so late in the game, especially changes that threaten to give unequal access to voters in different counties. Ohio seeks expedited review, as the Court has done in many similar cases, and it ultimately seeks restoration of the broad hours Ohio chose.

I. BACKGROUND FACTS

A. Ohio continues to be a national leader in expansive voting options.

Ohio's current voting calendar was changed by Senate Bill 238 ("SB 238"), signed into law on February 21, 2014, and by the Secretary's Directive 2014-17, issued on June 17, 2014. The statute and directive establish, over the course of four weeks in the upcoming 2014 general election, the 22 days on which Ohioans can vote EIP, including two Saturdays and one Sunday. In addition, Ohio has no-excuse mail-in balloting—something 23 states do not allow—so Ohioans can vote

early 24 hours a day by dropping their ballot in any mailbox. Further, on September 29, 2014, the Secretary mailed an application for a no-excuse absentee ballot to nearly every registered voter in the State of Ohio.

In Ohio, a voter can cast a ballot either through traditional, in-person voting on Election Day, or by in-person or mail-in “absentee ballot” before Election Day. Doc. 41, Ohio’s Brief in Opp. to Preliminary Injunction, at Page ID #975. Many Boards of Election (“Boards”) have ballot boxes located outside of their offices to allow electors returning their voted ballot in person to do so outside of normal business hours and/or without having to enter the building. *Id.* at Page ID #977. Absentee ballots may be placed in the mail at any time of the day or night. *Id.* An absentee ballot will be counted as long as it is delivered in-person to the BOE by 7:30 pm on Election Day. *Id.* A valid absentee ballot returned by mail will be counted if it is postmarked the day before Election Day and received by the Board by the tenth day after the election. *Id.* Ohioans also have thirteen hours (6:30 a.m. to 7:30 p.m.) to vote on Election Day. *Id.*

Ohio’s opportunities to vote are not only greater than what most States provide, but are dramatically broader than those in large States such as New York, Pennsylvania, Michigan, New Jersey, Missouri, and Virginia. *Id.* at Page ID #972-75. Those six States, and eleven other states, have no EIP voting *at all.* *Id.* at Page ID #974-75. In those states, in-person voting occurs just once—Election

Day. *Id.* Indeed, every State with a percentage of African-American population equal to or greater than Ohio's offers *less* opportunity for early voting. *Id.* Again, seventeen States allow no early voting at all, and among all States (adding the District of Columbia), the median number of early voting days is eleven. *Id.* at Page ID # 975. Ohio, by contrast, offers twice that—twenty-two EIP voting days for the 2014 general election. *Id.* Twenty-eight states offer no early voting on the weekends, and thirty-nine offer no voting on a Sunday. *Id.* Ohio is one of only nine States that definitely include at least some Sunday voting. *Id.* Overall, Ohio currently ranks 9th in terms of the number of early-voting days offered. *Id.* This, coupled with the broad access to mail-in absentee balloting, makes Ohio one of the most accessible States for voting in the country.

B. Ohio enacted SB 238 this year, and the Secretary issued Directive 2014-17, to eliminate problems and provide uniformity.

No one disputes that Ohio's General Assembly enacted SB 238, and started the EIP calendar a week later than before, for the express purpose of eliminating a week—sometimes called “Golden Week”—in which voters could register and vote on the same day. That week arose under the old law, because voter registration has long been allowed in Ohio up to the date thirty days before the election, and the more-recent establishment of EIP days placed a few of those days in the period when registration was still open. The bipartisan OAEO urged lawmakers to eliminate that overlap week because of the difficulty that same-day registration and

voting presented in confirming voters' identities and eligibility to vote. Ohio's General Assembly carefully deliberated the issue and decided to eliminate that overlap. While the parties and others dispute whether that is good or bad policy, all agree that the calendar was not changed primarily because of a general quantitative concern with a thirty-five day early voting period versus twenty-eight, but because of a specific concern with that "Golden Week" or overlap week.

Separately, the Secretary of State issued Directive 2014-17 to set uniform, expansive early voting hours to ensure that all Ohioans, no matter where they live, have ample opportunities to vote even before Election Day. The Secretary partly based his Directive on an OAE0 report, but he added days and hours beyond what the OAE0 recommended. He had initially issued a directive on February 25, 2014 (Directive 2014-06), but issued the replacement Directive 2014-17 to conform to a district court order in other litigation, which ordered the addition of EIP hours for the final weekend before the election (not at issue here).

While the parties dispute whether these changes are good, Ohio presented extensive evidence supporting the State's interests for both the statute and the directive, including the importance of uniformity across all counties, reduction of administrative burdens, improved ability to educate voters about uniform voting laws, reduction in voter fraud, efficient management of elections, the ability to allow counties to effectively budget ahead of future elections, consideration of the

needs of all of Ohio's counties, tailoring days and hours to account for differences in voter turnout between higher volume presidential years and lower turnout in mid-term years, cost-savings, and bipartisan compromise. Doc. 41, Ohio's Brief in Opp. to Preliminary Injunction, at Page ID #970-72; Doc. 61, Ohio's Statement of Contested Facts, at Page ID #2208-10.

The bill changing the start date for voting, SB 238, was introduced on November 13, 2013, was enacted by the General Assembly on February 19, 2014, and signed into law by the Governor on February 21, 2014. Plaintiffs sued on May 1, and moved for preliminary injunction on June 30. The district court held a hearing on August 11, and issued its Order on September 4.

II. ARGUMENT

Ohio recognizes that it seeks a tight window for briefing and decision, but urges that the Court should expedite the appeal because time is short, and Ohioans deserve an answer from this Court on such a major issue before the month-plus of voting starts, under the district court's revised schedule, on September 30.

First, the Court routinely expedites appeals in election cases like this one, given their time-sensitive nature. Most recently, for example, the Court ordered an expedited appeal to consider the Libertarian Party's claim that certain candidates should have been included on Ohio's May 2014 primary-election ballot. *See Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 412 (6th Cir. 2014). During

the 2012 election cycle, the Court likewise expedited more than one election case. *See, e.g., Ne. Ohio Coalition for Homeless v. Husted*, 696 F.3d 580, 583 (6th Cir. 2012) (“Given the time-sensitive nature of these appeals with the November election approaching, we ordered expedited briefing . . .”); *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012) (expedition order on September 4, 2012); *see also Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 231 (6th Cir. 2011) (noting that the court ordered “expedited briefing” in election case).

Expediting this case is proper for the same reasons. The district court’s September 4, 2014, Order changes Ohio election law for the pending election, with ordered changes beginning on September 30 for an Election Day on November 4, 2014. And the issue is important as well as urgent, as both its concrete effect and its expansive legal theory are momentous. The Order says that the U.S. Constitution and Section 2 of the federal Voting Rights Act both require Ohio to do something *almost no* other State does—have early voting beginning on the 35th day before the election (September 30, 2014), rather than on the 28th day before the election (October 7, 2014), as Ohio law currently directs. *See* Doc. 72, Order, at Page ID #5917. Expedition is needed for this Court to review that Order before Ohio is forced to begin implementing the district court’s revised election calendar. And Ohio deserves to have a change of this magnitude—again, one of great practical import, based on an expansive theory—reviewed by an appellate court.

The issues here can be briefed and decided within that time. Indeed, the proposed schedule here is not much different from the one that this Court set in *Obama for America*. There, the Appellants' Brief was filed on September 10, 2012, the Appellees' Brief was filed on September 17, 2012, and the Appellants' Reply Brief was filed on September 21, 2012. *See Obama for America*, 697 F.3d 423 (expedition order on September 4, 2012).

Second, this appeal involves two important issues—one under the U.S. Constitution and the other under Section 2 of the Voting Rights Act. While Ohio believes the legal theory here is wrong, even those who support it cannot deny that it is novel and expansive. To Ohio's knowledge, no court has ever adopted such a "retrogression" theory under either equal protection or Section 2. Indeed, Section 5 of the Voting Rights Act has long used a retrogression principle—and even there, only for "covered" jurisdictions, and Ohio has never been such a jurisdiction. But Congress would not have needed to enact Section 5 for *covered* jurisdictions, if anti-retrogression principles were already imposed by Section 2, and even by equal-protection requirements, for *all* jurisdictions.

And as a practical matter, such retrogression analysis undoubtedly *discourages* Ohio and every other State from offering expanded opportunities, if any experiment in expansion is a one-way ratchet, and States are stuck with whatever maximum they reach, regardless of cost or lack of improvement in voting

turnout. After all, the demographic and sociological claims made regarding voters in Ohio are surely similar in many other States. And if the ruling is somehow *not* based on retrogression, it is even more novel, as it means that all of the States with just an Election Day, or anything less than voting by the end of September, are violating the Constitution and federal law. On top of all that, the Order says that in the name of equal protection, some counties must be allowed to have *non-equal* hours greater than other counties.

None of that is to say, for purposes of *this* Motion to Expedite, that the Order needs reversal yet, but only to say that an issue this momentous warrants this Court's review in time. After all, if precedent generally stands against federal courts making last-minute changes *at all* in State election law, then surely it follows that any such changes at least warrant appellate review. *See, e.g., SEIU Local 1 v. Husted*, 698 F.3d 341, 345-46 (6th Cir. 2012); *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

Third, Plaintiffs would not be prejudiced by expediting the appeal. In fact, the ACLU (Appellees' counsel) has requested expedited briefing in a similar case that the ACLU lost in North Carolina. In the ACLU's briefing in North Carolina, the ACLU argues that "[a]lthough this proposed schedule is highly expedited, it is not unreasonable" in the elections context. *See* Appellants' Motion to Expedite Appeal; to Proceed on the Original Record or to Defer Filing of Joint Appendix;

and to Shorten Response Deadlines, in *League of Women Voters of North Carolina v. North Carolina*, 4th Circuit Case No. 14-1859, at 7 (filed Aug. 25, 2014). The same is true here.

Fourth, failure to expedite the appeal would irreparably harm Ohio and its voters, and that is wrong when Ohio did not cause this time crunch. If the appeal is not expedited and resolved, a normal appeal schedule would likely extend even beyond the November election, meaning that Ohio would not only have to start the calendar early, but would also have to operate under the Order's revised calendar for all of October. Ohio has an interest in operating its elections under the standards that Ohio enacted, and in not having such last-minute changes ordered. *SEIU Local 1*, 698 F.3d at 345-46; *Purcell*, 549 U.S. at 4-5. And Ohio's voters share that interest, in that the decisions made by their elected officials are ultimately *their decisions, too*, in a republican form of a democracy. Ohio's voters also have an interest in all counties being treated equally, rather than giving some counties additional time. Further, Ohioans share an interest in not paying for the changes county Boards will have to undergo to meet the Order's demands, which will require additional time and money.

Finally, this last-minute change, if unreviewed, is especially unfair to Ohio because Plaintiffs, not Ohio, caused the time crunch by delaying their case. Federal and state law agree that election litigation requires Plaintiffs to be diligent,

and States should not suffer for Plaintiffs' delay. *SEIU Local 1*, 698 F.3d at 345-46; *Purcell*, 549 U.S. at 4-5; *State ex rel. Comm. for the Referendum of Ordinance No. 3543-00 v. White*, 90 Ohio St. 3d 212, 214, 736 N.E.2d 873 (2000) ("in election-related matters, extreme diligence and promptness are required.").

The delay is undeniable. The challenged legislation was introduced in November 2013 and enacted in February 2014. Further, Plaintiffs' claims against the Secretary of State directives could have been made in 2012 or at least in February 2014 when the earlier Directive 2014-06 was issued. Plaintiffs did not sue until May 1, and though the Complaint promised they would seek a preliminary injunction, they waited two more months until June 30 to do so. The injunction request came more than *four months* after the law was enacted and the directive was issued, and seven months after the law was introduced and discussed publicly.

III. CONCLUSION

Ohio respectfully asks the Court expedited this case to allow a decision on the merits of this appeal before EIP voting starts on September 30 under the district court's revised calendar. Ohio urges the adoption of the schedule listed above, or any alternative schedule that would allow a decision in time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2014, the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by e-mail or facsimile upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

s/Eric E. Murphy

ERIC E. MURPHY