

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

**The Ohio Organizing
Collaborative, *et al.*,**

Plaintiffs,

v.

Jon Husted, *et al.*,

Defendants.

Case No. 2:15–cv–1802

Judge Michael H. Watson

Magistrate Judge King

ORDER

Defendants move to stay the Court's May 24, 2016 Order, ECF No. 117, pending the resolution of their appeal of that Order. ECF No. 120. For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion.

I. BACKGROUND

Plaintiffs brought the instant suit challenging various Ohio election laws, directives, and policies. On May 24, 2016, the Court issued an Order finding that Senate Bill 238 ("S.B. 238"), which shortened Ohio's early in-person ("EIP") voting period and eliminated the opportunity for same day registration ("SDR"), violates the Fourteenth Amendment to the United States Constitution and the Voting Rights Act of 1965 ("VRA"). ECF No. 117. The Court further enjoined Defendants from enforcing and implementing S.B. 238. *Id.* at 120. In other

words, the Court reinstated the period known as “Golden Week.” The Court found in favor of Defendants on Plaintiffs’ remaining claims.

On May 26, 2016, Defendants appealed the Court’s decision to the United States Court of Appeals for the Sixth Circuit. ECF No. 119.

Defendants now move to stay the Court’s Order pending resolution of that appeal, arguing that implementing the Order ahead of Ohio’s August 2, 2016 special election and the November 8, 2016 general election will irreparably harm the Secretary, local boards of elections (“BOE”), and the voting public.

II. STANDARD OF REVIEW

The Court considers four factors when determining whether to issue a stay pending appeal:

(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.

Serv. Emp. Intern. Union Local 1 v. Husted, 698 F.3d 341, 343 (6th Cir. 2012) (quoting *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)). The factors are not prerequisites; rather, they must be balanced in considering the propriety of issuing a stay. *Id.*

III. ANALYSIS

A. Likelihood of Success on Appeal

Defendants aver that they are likely to succeed on the merits of their appeal. While the Court recognizes that the Sixth Circuit may take a different

view of what the record in this case establishes, many of the very same arguments Defendants offer in support of their likelihood of success on appeal were rejected by the Sixth Circuit in *Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524 (6th Cir. 2014).¹ The Court addresses each of those arguments below.

1. Equal Protection Claim

First, Defendants cite *United States v. McDonald*, 394 U.S. 802 (1969), to support their assertion that Plaintiffs' inability to prove that there is no other method by which their members can vote warrants rational basis review of Plaintiffs' equal protection claim. The Sixth Circuit has squarely rejected this argument. See *N.A.A.C.P. v. Husted*, 768 F.3d at 540–42 (explaining that in *Obama for America v. Husted*, 697 F.3d 423 (2012), the Sixth Circuit “did not read *McDonald* to require proof that there was *no* possibility that the plaintiffs would find a way to adjust and vote through the remaining options.”) (emphasis in original).

Second, Defendants rely on Ohio's national leadership in voting opportunities for the proposition that S.B. 238 survives a heightened level of review under the *Anderson/Burdick* standard. While Ohio's national leadership in voting opportunities is to be commended, the Sixth Circuit has explicitly rejected

¹ As explained in the Court's Findings of Facts and Conclusions of Law, although the Sixth Circuit's opinion was ultimately vacated, the Court gives it highly persuasive effect, as it was vacated for reasons other than the merits. See Findings of Fact and Conclusions of Law 29–30, 35, ECF No. 117. Defendants do not contend in their motion to stay that the Court erred in its treatment of the opinion.

Defendants' reliance on how Ohio's voting system compares to that of other states to defend against an equal protection claim based on S.B. 238:

We also note that how Ohio's early-voting system compares to that of other states is not relevant under the *Anderson–Burdick* balancing test. The test directs courts to weigh the burdens imposed on voters in a particular state against the justifications that that state has proffered for the challenged law or practice that imposes those burdens. Early voting does not necessarily play the same role in all jurisdictions in ensuring that certain groups of voters are actually able to vote. Thus, the same law may impose a significant burden in one state and only a minimal burden in another. Similarly, a particular state may have stronger justifications for a law that burdens voters than other states with the same law.

Id. at 546.

Third, Defendants contend that the Court erred in finding that voting by mail is not a viable alternative option to EIP voting for many African Americans. However, the Court's analysis of this issue, as well as the categories of evidence considered, mirrored that of the Sixth Circuit, which made the same finding. *Id.* at 542.

2. VRA Claim

Defendants first argue that Plaintiffs' VRA claim conflates the requirements under § 2 and § 5 of the VRA and is improperly based on a retrogression comparison of Ohio's new EIP voting schedule against Ohio's previous voting schedules. The Sixth Circuit has rejected this argument. *Id.* at 557–59.

Second, Defendants argue that evidence that African Americans use EIP and Golden Week voting at disproportionately higher rates than whites is insufficient to establish that any voter will actually be prevented from casting a

ballot. The Sixth Circuit has held, however, that a claim “that S.B. 238 . . . disproportionately place[s] burdens on African American voters that make it harder for them to exercise their right to vote than other groups of voters is encompassed within Section 2. *It does not matter that Plaintiffs do not argue that they are completely prevented from voting.*” *Id.* at 552 (emphasis added).

Third, Defendants argue that consideration of the *Gingles* factors is not appropriate in § 2 vote denial claims. Once again, the Sixth Circuit has explicitly rejected this argument. *See id.* at 554–55.

In sum, in addressing similar challenges to S.B. 238, the Sixth Circuit has rejected the arguments Defendants offer in support of their position. The Sixth Circuit may decide to change course on those issues; but that is within the province of the Sixth Circuit. This Court, given the guidance provided by *N.A.A.C.P. v. Husted*, declines to find that legal arguments that have been squarely rejected by the Sixth Circuit support a finding that Defendants are likely to succeed on the merits of those arguments on appeal. This factor therefore does not weigh in favor of granting a stay.

B. The Likelihood of Irreparable Harm to Defendants Absent a Stay

Defendants argue that absent a stay, the Secretary, BOEs, and local election officials will be irreparably harmed. Defendants first point to the August 2, 2016 special election, which will take place in some Ohio counties. In accordance with the Court’s May 24 Order, EIP voting for the special election is required to begin on June 28, 2015. Defendants aver that this leaves local

election officials with little time to prepare and print absentee ballots and identification envelopes, plan for appropriate staffing for EIP voting, and secure additional funding to do so.

Defendants next point to the November 8, 2016 general election. In accordance with the Court's May 24 Order, EIP voting is required to begin on October 4, 2016. Defendants assert that, as with the special election, BOEs have not planned or budgeted for the extended EIP voting period and will face logistical burdens in now accommodating for the re-implementation of Golden Week.

Defendants provide no evidence in support of any of the above assertions.

Defendants also argue that the Secretary will be harmed absent a stay because he will need to develop and distribute a new directive to the BOEs regarding the EIP voting schedule, and if the Court's decision is reversed on appeal, he must send out another directive including a new EIP voting schedule.

The Court finds that given that EIP voting for the August 2 special election would need to begin in under one month, the burdens imposed by the re-imposition of Golden Week on BOEs is likely to cause irreparable harm to the BOEs in the form of time and money. In so finding, the Court is cognizant of Defendants' failure to support with evidence their assertions regarding the administrative burdens the BOEs will face. The Court cannot, however, ignore the reality of the administrative burdens that would be imposed by being required to implement Golden Week in such a short period of time. This factor therefore

weighs in favor of staying the Court's Order as to the August 2, 2016 special election.

This factor does not, however, weigh in favor of staying the Court's Order as to the November 8, 2016 general election. While it is not unreasonable for the Court to accept the assertion that BOEs would have difficulty implementing Golden Week for the special election in under one month, Defendants have provided no evidence establishing that BOEs will be significantly burdened by having to implement Golden Week in the November 8, 2016 election, for which the EIP voting period remains five months away. Indeed, the BOEs of the three largest counties in Ohio were aware of the potential to reinstate Golden Week, as their officials testified during the trial. Moreover, any administrative burdens would be mitigated by the fact that BOEs will have planned for the remainder of the EIP voting period, that BOEs have experience in administering Golden Week previously, and that Golden Week would presumably take place during times when BOEs are already open for business. Further, five months before an election is a far cry from the times periods in recent cases where the Supreme Court acted to prevent last minute alterations to election procedures. See *Husted v. N.A.A.C.P.*, 153 S. Ct. 42 (2014) (less than one month); *Frank v. Walker*, 135 S. Ct. 7 (2014); *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014). Notably, the assertion that a change to election laws in May of 2016 would cause irreparable harm is belied by the fact that Defendants

initially proposed a trial date of April 11, 2016. See Rule 26(f) Report 6, ECF No. 20.

Accordingly, while this factor weighs in favor of granting a stay for the August 2, 2016 special election, it does not weigh in favor of granting a stay for the November 8, 2016 general election.

C. The Potential Harm to Others in Granting the Stay

This factor weighs in favor of granting a stay as to the August 2, 2016 special election. As special elections are not held in all Ohio jurisdictions and turnout is extremely low, the likelihood of disenfranchisement absent Golden Week is very minimal.

It does not, however, weigh in favor of granting a stay as to the November 8, 2016 general election. Indeed, if the Court stays its Order as to the November 8, 2016 general election and BOEs halt preparations for Golden Week, there is a potential for harm to Plaintiffs and to voters. Even if the Sixth Circuit were to affirm the Court's Order, there could be too little time for BOEs to implement Golden Week.

D. Public Interest

Defendants argue that the potential change in the EIP voting schedule resulting from a reversal on appeal will harm the public by risking voter confusion about the EIP voting schedule. This argument, however, assumes a reversal from the Sixth Circuit. Given the Court's finding with respect to the likelihood of

success on appeal, the Court finds that this factor does not weigh in favor of staying the Court's Order with respect to either election.


E. Balancing the Factors

Balancing the factors, the Court finds the following. Although the likelihood of success on appeal does not weigh in favor of staying the Court's Order with respect to the August 2, 2016 special election, the likely harm to BOEs resulting from having to implement Golden Week in under one month warrants a stay as to that election. With respect to the November 8, 2016 general election, however, Defendants have failed to show that any of the factors warrant a stay.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion, ECF No. 120. The Court **STAYS** its Order, ECF No. 117, **ONLY** with respect to the August 2, 2016 general election. The Order remains in effect with respect to the November 8, 2016 general election.

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT