

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

<b>KENNETH L. SIMON, et al.,</b>	:
	:
<i>Plaintiffs,</i>	: Case No. 4:22-cv-612
	:
v.	: <b>CIRCUIT JUDGE JOAN L. LARSEN</b>
	: <b>JUDGE SOLOMON OLIVER</b>
<b>GOVERNOR MIKE DeWINE, et al.,</b>	: <b>JUDGE JOHN R. ADAMS</b>
	:
<i>Defendants.</i>	:

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**DEFENDANTS' POSITION STATEMENT**

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Defendants Governor Mike DeWine, Secretary of State Frank LaRose, Auditor of State Keith Faber, House Speaker Jason Stephens, and Senate President Matt Huffman hereby submit their position statement pursuant to the Court's May 10, 2024 order.

**I. Background**

On April 15, 2022, Plaintiffs filed this suit challenging, pursuant to Section 2 of the Voting Rights Act and the U.S. Constitution, the validity of the March 2, 2022 congressional redistricting map drawn by the Ohio Redistricting Commission. Compl. ¶ 4-5, Doc. 1 at PageID #4. Plaintiffs also filed a motion for a three-judge panel under 28 U.S.C. § 2284 (Doc. 2 at PageID #462-67), a motion for class certification (Doc. 3 at PageID #471-87), and a motion for a temporary restraining order, preliminary injunction, partial summary judgment, and appointment of a special master (Doc. 4 at PageID #488-520). Specifically, Plaintiffs sought an order “enjoining certification of the results of the [May 6, 2022] primary election for the 6th U.S. House district because the district violates the Voting Rights Act.” *Id.* at PageID #492. Defendants opposed the motions and filed motions to dismiss for failure to state a claim. Memo. in Opp., Doc. 14 at PageID #1045-47; Mot. to Dism. and Memo. in Opp., Doc. 15 at PageID #1048-85; Mot. to Dism. and Memo. in Opp., Doc. 18 at PageID #1094-1105.

The motions were referred to a magistrate judge. Order, Doc. 25 at PageID #1158. The magistrate judge issued a report and recommendation concluding that Plaintiffs' complaint should be dismissed for failure to state a claim. Rep. and Rec., Doc. 27 at PageID #1160. The district court adopted the report and recommendation, dismissing Plaintiffs' complaint and further denying Plaintiffs' motion for a three-judge panel, as well as their motions for a temporary restraining order and class certification. Order, Doc. 33 at PageID #1208-12. Plaintiffs appealed. Not. of App., Doc. 35 at PageID #1214.

On appeal, the Sixth Circuit reversed and remanded solely on the procedural ground that this Court was required to convene a three-judge panel under 28 U.S.C. § 2284. Opinion, Doc. 36 at PageID #1220. Accordingly, the Sixth Circuit reversed the Court's order denying the motion for a three-judge panel, vacated the orders granting the motions to dismiss, and remanded the case with instructions to convene a three-judge court. *Id.* On remand, Plaintiffs filed renewed motions for a temporary restraining order, preliminary injunction, and partial summary judgment. Renewed Mots., Doc. 39 at PageID #1224-49. Plaintiffs' renewed motions are substantively the same as their original motions with one exception: they now seek an order enjoining certification of the results of the June 11, 2024 special election for representative of the Ohio 6th Congressional District, rather than the May 6, 2022 primary election. *Id.* at PageID #1224.

**II. The Court should permit limited additional briefing on whether there is a private cause of action under Section 2 of the Voting Rights Act, then proceed to a decision on the parties' pending motions.**

Because the Sixth Circuit vacated this Court's order granting Defendants' motions to dismiss and denying Plaintiffs' motions for injunctive relief and partial summary judgment, those motions remain fully briefed and pending before this court. Indeed, with the exception that Plaintiffs now set their sights on the June 11, 2024 special election rather than the May 6, 2022

primary election, Plaintiffs' recent renewed motions are substantively the same as their original motions. Thus, Defendants maintain that, for the same reasons set forth in their previously-filed motions to dismiss, reply in support, and memorandums in opposition to Plaintiffs' motions (Doc. 15 at PageID #1048-85; Doc. 18 at PageID #1094-1105; Doc. 23 at PageID #1144-55), Plaintiffs have failed to state a claim upon which relief can be granted and their complaint should be dismissed.

In addition to the reasons set forth in Defendants' prior briefing, a recent ruling in the Eighth Circuit provides another reason for dismissal of Plaintiffs' VRA claims. Courts have widely assumed, without a thorough analysis, that a private cause of action exists under Section 2 of the Voting Rights Act. In his concurring opinion in *Brnovich v. Democratic National Committee*, Justice Gorsuch (joined by Justice Thomas) flagged the issue; noting that whether the VRA furnishes an implied cause of action under Section 2 is an "open question" and that the Supreme Court has assumed, without deciding, that such an implied cause of action exists. 141 S.Ct. 2321, 2350, 210 L.Ed.2d 753 (2021) (Gorsuch, J., concurring). Based on this long-held assumption, Defendants did not raise the argument against the existence of private cause of action at the time they filed their motions to dismiss. In the interim, the issue was finally addressed in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204, 1208 (8th Cir.2023) ("The who-gets-to-sue question is the centerpiece of today's case."). The Eighth Circuit concluded that no implied private right of action exists under Section 2 of the VRA based on the review of text and structure of the statute. *Id.* at 1216 ("Following [*Sandoval's*] guideposts here leads to the conclusion that there is no 'private remedy' to enforce § 2, even assuming the existence of a 'private right.'"). Defendants raised this issue on appeal but, for purposes of its decision on

convening a three-judge panel, the Sixth Circuit “assume[d] without deciding that the Voting Rights Act confers a private right of action.” Opinion, fn. 1, Doc. 36 at PageID #1220.

With the foregoing background in mind, and in the interest of judicial economy, preservation of the time and resources of the parties and the Court, and fully addressing the merits of this case, Defendants respectfully submit that the Court proceed as follows:

- 1) Permit Defendants to file a combined motion to dismiss and memorandum in opposition to Plaintiffs’ renewed motions by May 17, 2024, incorporating the arguments already raised in Defendants’ prior briefing and setting forth Defendants’ no-private-cause-of-action argument;
- 2) Permit Plaintiffs to respond solely to Defendants’ no-private-cause-of-action argument by May 31, 2024; and
- 3) Permit Defendants to reply to Plaintiffs’ response by June 7, 2024.

After this limited additional briefing is concluded, Plaintiffs’ and Defendants’ pending motions will be fully briefed and decisional.

Respectfully submitted,

DAVE YOST  
Ohio Attorney General

*/s/ Julie M. Pfeiffer*

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Keith Faber, House Speaker Robert Cupp, and  
Senate President Matt Huffman*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 2022, the foregoing was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. Parties may access this filing through the Court's system.

*/s/ Julie M. Pfeiffer*

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