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

THE OHIO DEMOCRATIC PARTY, *et al.*,	:	
	:	
Plaintiffs,	:	**Case No. 2:15-CV-1802**
	:	
v.	:	**JUDGE WATSON**
	:	
JON HUSTED, *et al.*,	:	**MAGISTRATE JUDGE KING**
	:	
Defendants.	:	

DEFENDANTS' TRIAL BRIEF

Respectfully submitted,

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I. INTRODUCTION

It is easy to vote in Ohio. In fact, Ohio is a national leader in making voting convenient. Ohio offers its voters 23 days of no-excuse, early in-person voting over four weeks. This is the tenth highest early voting day total in the country. Ohio's 23 days of early voting are more than double the national median (11 days). Sixteen States—*e.g.*, New York, Michigan, Kentucky—do not allow *any* early voting. Ohio offers the ninth most early in-person voting hours (207 hours), the eleventh most hours outside of normal business hours (39 hours), and is one of only thirteen jurisdictions with early voting on Sundays. Ohio, unlike twenty-three States, offers voters the flexibility of no-excuse, mail-in voting, occurring over four weeks. Further, Ohio is one of the only States—if not *the* only—that mails ballot applications to all active, registered voters (as well as all inactive voters who voted in one of the last two general elections). And even when there is a problem, Ohio voters fare much better than most; in 2014, with current laws in effect, Ohio had one of the top five provisional ballot acceptance rates in the nation.

Unfortunately, being a large swing State, Ohio has also become a national leader in voting-law lawsuits. Earlier this year, following a 2014 preliminary ruling from the United States Supreme Court *in Ohio's favor*, Ohio settled an early-voting lawsuit with the Ohio NAACP and the League of Women Voters of Ohio. This settlement detailed uniform early voting hours, including 39 early voting hours on the evenings and weekends in 2016 (with weekend hours more than doubling the 2012 total). Yet, the present case was filed less than a month later. Plaintiffs claim to represent all African Americans, Latinos, and young people in Ohio. But given (i) Ohio's expansive voting system, (ii) Ohio's status as a political battleground State, and (iii) the fact that many States with far stricter voting laws (*e.g.*, New York, New Jersey, Rhode Island, Connecticut, Delaware) do not face such lawsuits, it is difficult not to wonder what this lawsuit is really about.

Regardless, Plaintiffs' claims all fail. Although Plaintiffs throw out an assortment of legal theories, their primary challenges invoke Section 2 of the Voting Rights Act and the Equal Protection Clause. These challenges have many problems.

Plaintiffs' Section 2 claim, for instance, fails to provide any objective benchmark by which to compare Ohio's laws. The benchmark for evaluating the challenged laws cannot simply be what particular litigants think voting laws "ought to be"—a limitless standard. Nor can it be what Ohio's laws "used to be," which would be a Section 5 retrogression analysis (a Voting Rights Act Section that has never applied to Ohio), not a Section 2 analysis. Ohio's voting laws pass any reasonable benchmark under Section 2, as Ohio's laws are more favorable to voters than those of most States. Plaintiffs also cannot prove other elements—causation, denial of meaningful access—of their Section 2 claim. Ohio's system undeniably provides all of its voters with broad opportunities to vote.

Plaintiffs' equal protection claims are similarly flawed. The Constitution balances the right to vote with the States' duties to administer elections. Thus, in addition to standard equal protection analysis, courts use the *Anderson-Burdick* framework, a flexible analysis that applies varying scrutiny based on the burdens at issue. The challenged laws readily pass these tests. The laws are facially neutral and impose, at most, minimal burdens on voters (especially considering the many options Ohio voters have). On the other side of the scale, Ohio has weighty interests in running fair, efficient, and reliable elections. The challenged laws represent reasonable, nondiscriminatory choices that weigh various administrative interests including the costs of early voting, standardization of voting methods, and the need to identify voters.

Underlying both Plaintiffs' Voting Rights Act and equal protection claims are unfounded allegations of discriminatory intent. Plaintiffs accuse the entire General Assembly of improper

motives, but they have failed to provide *any* proof supporting these serious accusations. Nor have they shown that the challenged laws have any disproportionate impact. Plaintiffs, at best, rely on arbitrary (and factually inaccurate) groupings of Ohio counties to make broad inferential leaps about the potential effects of the challenged laws. They have not, however, attempted to analyze the actual voting data to show that the challenged laws are affecting African Americans more than others. Actually, with the challenged laws in place in 2014, a *higher* percentage of African Americans voted early in-person than in the previous 2010 midterm election, before the challenged laws were in place.

At its core, this case is about incredibly minor adjustments to Ohio's voting laws. Plaintiffs challenge small changes like (i) reducing early voting from 26 to 23 days and (ii) requiring provisional voters to provide their dates of birth and current addresses. But in contrast to these slight adjustments, the overarching implications of this lawsuit are great. Plaintiffs' theories rest on the notion that once a State chooses to expand voting options, it cannot make later adjustments or reductions, no matter how minor. Accepting this one-way-street approach would make any State wary of expanding voting options. The types of regulatory adjustments at issue in this case should be left to democratically-elected officials—to whom the Constitution entrusts regulation of elections—based on considerations such as administrative costs and whether voting procedures are actually increasing turnout. The Court should decline Plaintiffs' invitation to rewrite Ohio's voting laws.

Ohio should be commended for its expansive voting laws, not sued. No State's laws would meet the standards Plaintiffs are seeking to impose. The Court should deny Plaintiffs' claims and requests for relief in their entirety.

II. STATEMENT OF FACTS

A. Ohio, A Leader in Voting Opportunities and Convenience

1. The opportunities to vote in Ohio

Ohio is a leader in voting opportunities and makes voting convenient for all its residents. The polls on Election Day in Ohio are open for thirteen hours—from 6:30 a.m. until 7:30 p.m. O.R.C. § 3501.32. Ohio could stop there, with only Election Day voting, and still be in the company of sixteen other States. Trende ¶37 **(Ex. 14)**.[1] Ohio, however, offers voters many more opportunities to cast a ballot.

Ohio also provides twenty-three days of early in-person voting spread over four weeks. *Id*. ¶¶34, 43.[2] These are more early voting days than the days in *forty-one* other States. *Id*. Put another way, when Washington D.C. is included, Ohio has the tenth-most days of early voting and the tenth-longest early voting period. *Id*. ¶¶34, 43, 52. The median jurisdiction offers eleven early voting days, less than half of Ohio's twenty-three. *Id*. ¶50.

For the 2016 presidential general election, there will be 207 hours of early in-person voting. *Id*. ¶92. Only eight States have more early in-person hours. *Id*. Ohio's early in-person voting includes a large number of evening and weekend hours. Thirty-nine of Ohio's early hours will be after 5 p.m. or on weekends. *Id*. ¶93. Ohio will offer two Sundays and two Saturdays for early voting. Trende Att.10 **(Ex. 14J)** (2016 early voting calendar). Ohio is one of only thirteen jurisdictions with early voting on Sundays. *Id*. ¶55.

In addition to early in-person voting, Ohio (unlike twenty-three States) offers no-excuse

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[1] "**(Ex.__)**" refers to Defendants' trial exhibits. A list of Defendants' trial exhibits is attached to this brief. The expert report of Sean Trende is abbreviated "Trende ¶__" and his rebuttal report is abbreviated "Trende Reb. ¶__." Attachments to the Trende reports are abbreviated "Att."

[2] In Ohio, unlike in many States, early voters do not need to provide a reason why they have chosen to vote early, *i.e.*, "no excuse" absentee voting. *See* Trende ¶¶29-30.

mail-in voting. Hood p.36 **(Ex. 15)**.[3] With the possible exception of North Carolina, Ohio is the *only* State that mails ballot applications to all active, registered voters. Trende ¶174. Ohio even mails applications to *inactive* voters who have voted in one of the last two federal general elections. Hood p.35. And Ohio's first mailing is followed by a second, supplemental mailing to new registrants or registrants who have altered their registration since the first mailing. *Id*.

Ohio's early voting process offers a lot of flexibility. Beginning 90 days before an election or on January 1 of the year of an election, whichever is earlier, a voter can apply for an absentee ballot. O.R.C. § 3509.03. Voters can return the application in-person at the board of elections, have another person return it on their behalf, or mail it to the board. *Id*. Once voters receive their ballots, beginning 28 days before Election Day, they can cast the ballot in a number of ways. Hood p.13. They can mark and cast the ballot at the board, mail the ballot to the board, mark the ballot at home and return it in-person, or have a family member return it to the board. O.R.C. § 3509.05(A); Damschroder[4] ¶16 **(Ex. 14Z)**.

The entire absentee voting experience can take place in one visit to the board of elections. It can also be accomplished entirely at home, with a simple trip to the mail box. Many counties, including Ohio's two largest counties (Cuyahoga and Franklin), have drop boxes located outside of their board that allow voters to drop off their ballots, any time of day, without entering the building. Walch ¶8 **(Ex. 14W)**; McDonald ¶10 **(Ex. 14KK)**.

Ohio's broad opportunities to vote early are even more striking when considering that in Ohio, *early in-person voting is by far the least-used method of voting*. For example, in the 2014

[3] The expert report of Trey Hood is abbreviated "Hood p.__" and the rebuttal expert report of Hood is abbreviated "Hood Reb.__."

[4] Matthew M. Damschroder is the Assistant Secretary of State and Chief of Staff for the Secretary of State. From 2003 to 2011 he worked for the Franklin County Board of Elections. He will be testifying at trial.

general election, 71.02% of the ballots were cast on Election Day, 22.82% of ballots were cast by mail, and only 4.62% of ballots were cast early in-person. 2014 Election Admin. & Voting Survey Comprehensive Report p.199-200 **(Ex. 47)**.

2. Ohio's election innovation

Ohio has shown its commitment to voting opportunities and convenience through important initiatives that Plaintiffs do not discuss. A few examples follow. It is important to provide this context to Plaintiffs' claims, because while Plaintiffs pick at minor changes in the law, they set aside the larger picture.

Mailing applications for absentee ballots. Ohio blankets the State with absentee ballot applications. Damschroder ¶42. The first statewide mailing of absentee ballot applications took place in 2012. *Id.* Ohio also mailed applications in 2014. *Id.* For the 2016 election, Ohio will once again mail applications across the State, at a cost of approximately $1.25 million. *Id.*

Online voter services. While most Ohio counties have offered various online services to voters for years, in February 2015, the Secretary established baselines for online voter access to information that all boards are required to implement. The requirements include: (1) the capability for voters to identify the address where they are registered to vote, (2) a link to a change of address form, (3) a link to a voter registration form, (4) the capability for absentee voters to track their ballots, (5) the ability for voters to identify their correct polling place, and (6) the ability to view and print a sample ballot. *See* Dir. 2015-02 **(Ex. 14G)**. The Secretary observed that these requirements "will further increase voters' confidence in casting ballots by mail and in elections overall." Rowland, *Husted: Allow Voters to Track Absentee Ballots*, Columbus Dispatch, 1/15/15 **(Ex. 53)**.

State funds for electronic poll books. Ohio has set aside $12.7 million to help counties purchase electronic poll books. Hood p.39. For the 2016 election, approximately 56 of Ohio's

88 counties are expected to use electronic poll books. *Id*. Electronic poll books have a number of advantages over paper books. They enable precinct election officials to identify the correct voting precinct for a voter who is registered in a different location. *Id*. They can alert officials if a registrant has already voted by mail absentee. *Id*. And they also significantly reduce check-in time. *Id*. *citing* Siegel, *Electronic Pollbooks a Possible Solution . . .*, Columbus Dispatch, 6/9/15, **(Ex. 58)** (reporting 28 seconds for average voter check-in in Montgomery County).

Streamlining absentee ballots. To increase efficiency, Ohio pre-prints voters' names and addresses on their absentee ballot envelopes and also notifies voters of any errors on their envelopes. Dir. 2014-27 **(Ex. 14C)**. Individual counties have also invested in novel election improvements that assist with processing absentee ballots. Montgomery County, for example, has "invested in a new inbound processor to more efficiently read identification envelopes." Kelly ¶6 **(Ex. 14Y)**. Franklin County has received national awards for its election administration, which includes voter registration software customized specifically for the county's needs. Anthony Dep. pp.80-81.[5]

Investing in DRE machines. Boards have discretion to decide their particular management software system. Damschroder ¶23. Some counties use direct-recording electronic ("DRE") voting machines, a type of touchscreen machine. *Id*. ¶24. Ohio has more DRE machines in its inventory *than any other State*. Trende ¶170. In addition, Ohio's ratio of DRE machines to eligible voters (1:175) is far better than every other State. *Id*. (noting the Mississippi data is likely flawed). As a few points of comparison, Michigan's DRE/Eligible Voting Population ration is 1:2158; Kentucky's is 1:591; Pennsylvania's is 1:410; Indiana's is 1:368;

[5] Depositions are cited in this brief as a placeholder to alert the Court of testimony it should anticipate from witnesses at trial. In an abundance of caution, to ensure compliance with this Court's standing order, Defendants are also filing the cited deposition transcripts with the Court.

and West Virginia's is 1:285. *Id*.

Uniformity. Beginning in 2012, Ohio adopted an early in-person voting schedule setting uniform voting hours for all counties. In addition to basic fairness considerations (all voters now receive the same hours), uniformity reduces confusion, makes it easier for the State to educate voters about election days and hours, and enables organizations to more effectively coordinate get out the vote messaging. Hood pp.12-14. Uniform early-voting also avoids potential confusion in media markets that extend to multiple counties. Anthony Dep. pp.75-76. Notably, the Ohio Association of Election Officials ("OAEO"), "a bipartisan organization that represents the members and employees of Ohio's county boards of election," supported uniform hours. Jones ¶2 Att.A **(Ex. 14QQ)**; OAEO webpages **(Ex. 24)**. The ACLU also supports uniform hours. ACLU letter, 11/15/12, **(Ex. 42)**; ACLU letter, 8/13/12 **(Ex. 41)**.

Education and training. The Secretary's office provides precinct election officials with training materials and its web site is frequently updated with election directives and announcements. **Ex. 51** (website pages). In addition, election officials are able to complete an online training program. This "online precinct election official training program is an important step toward uniformity in training standards for all 88 counties." *Id.* The Secretary's office also holds "regional office hours" where liaisons encourage voting, distribute registration forms, and provide information about voting in Ohio. Sec. Husted, Press Release, 9/29/15 **(Ex. 39)**.

These are just a few of the many ways that Ohio officials are striving to serve voters.

3. Ohio, with so many voting opportunities, is an anomaly

With its many ways to conveniently vote, Ohio far surpasses the goals that some argue all other States should achieve. Presidential candidate Hillary Clinton has called for 20 early voting days in every State. Clinton Speech, 6/4/15 **(Ex. 59)**. In 2005, she sponsored a bill that called for 15 early voting days. S. 450, 2/17/05. In March 2015, Democrats in Congress introduced a

bill that would require an early voting period of 15 days in all States, with a minimum of only four hours of voting on each of those days, except Sundays, where States could establish less than four hours. H.R. 12, 3/19/15. In 2005, while current Secretary Husted was Speaker of the Ohio House of Representatives, Republicans in Ohio's General Assembly co-sponsored the bill that created Ohio's no-fault, early in-person voting period. Sub H.B. 234 (Ohio 2005).[6]

4. The typical wait time to vote in Ohio is reasonable

The average wait time to vote in Ohio is lower than in many other States. In a recent report, the U.S. Government Accountability Office determined that the average wait time to vote in Ohio was only about 10 minutes in 2012 and reported that voters in many other States experienced longer, sometimes much longer, wait times. Trende ¶249. In a study by Charles Stewart III of M.I.T. of the 2014 midterm federal election, 66% of Ohio respondents said there was no wait at all and 28% waited less than 10 minutes. Stewart, *2014 Survey of the Performance of Am. Elections*, 2/5/15, p.i **(Ex. 48)**. Only 2% said they waited more than one-half hour and no one waited more than one hour. *Id*. p.ii. His data showed that in Ohio "the longest wait times were experienced in a set of *small* counties." *Id*. p.37 (emphasis added). Stewart also calculated that for the 2012 election in Ohio, mean wait-time for early voters was 7.7 minutes, and for Election Day voters, 11.2 minutes. Damschroder ¶¶88-89; *see also* Hood Reb. p.9 **(Ex. 18)** *citing* Terry ¶9 **(Ex. 18D)** ("In 2014, voters did not wait more than 5 or 10

[6] Plaintiffs' expert Lorraine Minnite, who wrote in her report about purported "stark partisanship" when election laws change, admitted that she has no knowledge about the political history of early voting in Ohio; she further admitted that Republican support of early voting in Ohio would not fit her theme of "stark partisanship." Minnite Dep. pp.12, 107-110. Minnite's overall objectivity is questionable based on various controversial writings that are discussed more fully in her deposition transcript. *Id*. pp.51-53, 58, 61-62, 67, 69-72, 160-61. The value of her testimony is also limited in that she knows very little about Ohio's election laws and administration. *Id*. pp.10, 50, 108, 163-64.

minutes to cast their vote.").[7]

5. The minor changes in 2014 had no negative effect on voting

Plaintiffs hypothesize that the minor changes to Ohio's election procedures in 2014 impact minorities more than others. Am. Compl. ¶¶2, 15 **(Ex. 1)**; Timberlake p.62. Their assumption misses a crucial point—there already was an election during which the challenged laws were in effect (2014). Guessing is not needed here, nor is it sufficient to meet Plaintiffs' burden.

Comparing 2010 and 2014 (something Plaintiffs' experts did not do), Defendants' expert Nolan McCarty determined that "[t]hose who voted early in-person in 2010 were the most likely to vote in 2014." McCarty Reb. p.19 **(Ex. 20)**. In other words, the minor changes to Ohio's early voting laws had no negative affect, much less the profound effects that Plaintiffs allege. McCarty also found that voters are flexible; how a person voted in one year does not predict how he or she will vote in a future election. *Id*. p.13. He found no evidence that the challenged laws harmed African Americans. *Id*. p.8. Instead, in 2014, *after* all of the challenged laws had been implemented, the rate by which African American voters voted early in-person exceeded the rate in 2010, *before* the challenged laws were in place. *Id*. In 2010, 6.9% of African American voters chose to vote early in-person. *Id*. That number *increased* to 7.1% in 2014. *Id*. The challenged laws had *no negative effect* on African American's selection of a voting method.

* * *

In sum, Ohio is a leader in voting access. Yet, it continues to be in the crosshairs of

[7] In reaching their opinions, Hood and Trende considered the Declarations of 20 Ohio election officials. These election officials occupy a variety of positions (*e.g.*, board directors, board chairs, county commissioners); span several Ohio counties of various sizes (*e.g.*, Franklin, Fulton); and include members of different political parties. The following election officials have been identified on either Plaintiffs' preliminary witness list or Defendants' final witness list: Matthew Damschroder, Sherry Poland, Timothy Ward, Kerry Metzger, and Mark Munroe.

litigation. That says more about the nature of Plaintiffs' lawsuit than about the strength of Ohio's laws. The following sections discuss in more detail Plaintiffs' arguments that the minor changes brought about by the challenged laws denied voting rights.

B. Plaintiffs' Challenge to the Elimination of Same-Day Registration in Ohio

Until 2013, Ohioans had approximately five days at the beginning of the early in-person voting period when they could register and vote at the same time. The time period was known by some as "Golden Week" (*i.e.* same-day registration or SDR). Hood p.15. This no-fault, early in-person voting period was created because of an intersection of Ohio's Constitution, establishing the registration cut-off before an election at 30 days, and the 2005-enacted early voting period, which created an early in-person voting period of 35 days. Ohio Constitution Art. V §1; Sub. H.B. 234 (Ohio 2005).

Following legislation in 2014, Ohio's early in-person voting period was changed so that it would begin after the end of the registration cut-off. Hood pp.3, 12. Ohio joined thirty-five other States that do not offer SDR. Trende ¶¶108-09. Ohio's 2014 election was held without SDR. Trende Att.9 **(Ex. 14I)**.

1. Ohio has one of the longest early voting periods in the nation

Even after the elimination of Golden Week, Ohio's early voting period remains one of the longest in the nation. In the 2016 General Election there will be only *three* fewer days for early in-person voting than in the 2012 General Election, which included the SDR period. *Compare* Trende Att.8 (26 days) **(Ex. 14H)**; *with* Trende Att.10 (23 days).

In the 2016 General Election, Ohio will offer 23 days when a voter can cast a ballot early in-person. Trende ¶43. Those 23 days will be spread over a 29-day period. *Id*. ¶¶34-35. During those 23 days, there will be 207 hours during which a person will be able to cast a ballot before Election Day in-person. *Id*. ¶92. Only eight States offer more than the 207 hours that

Ohio will offer to cast a ballot early in-person. *Id*. Of Ohio's 207 early voting hours, 39 hours will fall after 5 p.m. or on weekends. *Id.* ¶93. In 2016, there will be 24 weekend early voting hours; in 2012, there were only 10. *Compare* Trende Att.8; *with* Trende Att.10. Including Election Day, Ohio will have 220 in-person voting hours.

All States that have a higher share of African Americans in their population offer fewer early voting days than Ohio, with the exception of Illinois. *Id*. ¶62. Of the 21 States (Washington D.C. included) with an African American population of 10% or greater, Ohio has the second-most number of early in-person voting days. *Id*. ¶¶62-63. Of those 21 States, nineteen do not offer same-day or election-day registration. *Id.* ¶¶62, 108. Only Illinois and Washington D.C. do. *Id*. Maryland will join them, but SDR has not yet been implemented there. Hood pp.20-21.

2. Few people registered and voted during Golden Week

When it existed, Ohioans infrequently used the overlap between voting and registration. In 2012, in Ohio's three most populous counties (Cuyahoga, Franklin, and Hamilton), there were only 1,789 new voter-registrations during Golden Week. Hood p.8. The numbers correspond to an extremely low percentage of the total vote: 0.10% in Cuyahoga, 0.16% in Franklin, and 0.05% in Hamilton. *Id*. Trende compared the use of same-day registration in Ohio with other States and found that "Ohio has, by an order of magnitude, the lowest ratio of votes cast to same day registrants." Trende ¶¶103-04. Similarly, McCarty, looking at the 2010 election, determined that only about 1,260 African Americans across all of Ohio voted either during Golden Week or on one of the other early voting days that were not in the 2014 calendar. McCarty Reb. p.12.

3. The elimination of Golden Week did not decrease voter participation

Plaintiffs have failed to present any evidence for their position that individuals who

previously voted during Golden Week will not simply shift their participation to other days.[8] In fact, the evidence shows the opposite. As Hood wrote:

> While some argued that eliminating same-day registration during the first week of the early in-person voting period will depress turnout, there is no empirical evidence that I am aware of to support this position. Again, examining turnout rates in Ohio fails to produce any evidence for this hypothesis.

Hood p.14. Indeed, comparing Golden Week voting in 2008 and 2012, data shows that only 3.35% of the individuals in Franklin County who voted during Golden Week in 2008 also voted during Golden Week in 2012. Damschroder ¶86. Regarding African American voting in particular, comparing 2010, an election with Golden Week, and 2014, an election without Golden Week, McCarty calculated that a *higher* percentage of African American voters chose to vote early in 2014. McCarty p.8. McCarty also established that African Americans who voted early in-person in 2010 during Golden Week, or on other early voting days that were eliminated in 2014, "voted at much *higher* rates than those who voted" early on calendar days in 2010 that were also in the 2014 early-voting calendar. *Id*. p.12. He concluded that the African Americans who voted in the past during Golden Week "are among the highest propensity voters" and "simply switched to another day of early voting or voted by mail." *Id*. pp.12-13.[9]

In other States where early voting has been shortened, the same pattern is evident. In

[8] Notably, the 30-day cut-off for *new* registrations prior to Election Day does not apply in the same way to *changes* in registrations. A qualified voter who merely needs to update his or her registration to reflect a current address will still be able to vote provisionally on Election Day. Hood p.8 n.14.

[9] The report of Jeffrey Timberlake discusses Golden Week. Many of Timberlake's Golden Week conclusions, however, derive not from his own work product. Instead, he principally relied on the conclusions of Daniel Smith's report from *NAACP v. Husted*. Timberlake Dep. pp.139-40. Timberlake did not do any work to account for the data errors in Smith's report nor did he look at Smith's data. *Id*. p.151. Reliability issues also exist with other portions of his report. Timberlake copied verbatim significant portions of Vincent Roscigno's report from *NAACP v. Husted*. *Id*. p.238. Timberlake acknowledged that all of the poverty calculations in his report are wrong and that those calculation errors caused at least four counties to be placed into the wrong category or "bin" for his analysis. *Id*. pp.182-83, 191-93, 195.

2013, North Carolina reduced its early voting period from 17 to 10 days and eliminated SDR. Hood p.21. In 2014, with the shorter early voting period and no SDR, there was a higher overall turnout than in 2010 (44.34% compared with 43.48%). *Id*. p.23. African American turnout greatly increased from 2010 to 2014, with a 45.03% turnout in 2014 compared with a 36.00% in 2010. *Id*. Georgia illustrates the same trend. In 2011, Georgia reduced its early voting period from 45 to 21 days and eliminated two-weeks of SDR. *Id*. p.29. Despite the 53.3% decrease in days of early voting, African American turnout in 2014 *exceeded* 2010 by 4.9%. *Id*. p.30. Notably, in 2011, Georgia was a Section 5 pre-clearance State and the Department of Justice did not interpose an objection to the reduction. *Id*.

4. Bipartisan support existed for the elimination of SDR

Both Democrats and Republicans in the General Assembly have advocated for the elimination of Golden Week. For example, in 2009, two House Democrats sponsored H.B. 260, a bill that would have eliminated SDR. Sub. H.B. 260 (Ohio 2009). In 2014, the General Assembly eliminated SDR with S.B. 238, which established that absentee voting would begin on the first day after the close of voter registration. The governor signed the bill into law on February 21, 2014. O.R.C. § 3509.01(B)(2)-(3).

Democratic Secretary Jennifer Brunner supported eliminating the overlap between registration and voting. Higgs, *Debates over Early Voting . . .*, Cleveland Plain Dealer, 3/10/14 **(Ex. 60)**. The OAEO has also consistently supported eliminating the overlap of registration and voting. Hood pp.15-16; Troy ¶20 **(Ex. 14Q)** ("the OAEO indicated near unanimous support of 28 days of early voting"). The OAEO is a bi-partisan organization comprised of the members of Ohio's 88 county boards of elections, as well as board directors, deputy directors, and the OAEO's trustees consist of 20 members—10 Democrats and 10 Republicans—from a diverse cross-section of Ohio's large, medium, and small counties. Hood p.16 n.44; *see also* OAEO

webpages **(Ex. 24)**; Jones ¶4; Troy ¶20 (The OAEO "is as bipartisan a group as you can get"). In testimony before the General Assembly regarding S.B. 238, the OAEO's Executive Director Aaron Ockerman stated, "Ohio has a registration system and a registration deadline for very clear purposes, namely so that we can confirm that a voter is who they say they are before they cast a ballot. The overlap between the close of registration and the beginning of early in-person absentee voting places this system of checks and balances in jeopardy." Ockerman, *S.B. 238; Interested Party Testimony*, p.3 (**Ex. 22)**. Testifying before the Senate in support of a different bill that would have eliminated SDR, Llyn McCoy, First Vice President of the OAEO, stated, "Most all election officials agree that the current 35 days is simply too long for in person voting . . . . Our suggestion is 21 days." McCoy, *S.B. 148; Testimony*, p.4 **(Ex. 50)**.

5. Golden Week created an opportunity for fraud

When there is no opportunity to confirm the registration of a voter before that voter casts a ballot, there is a risk of fraud. Hood p.15; Hood Reb. p.16; Minnite Dep. p.113 (admitting that SDR can create problems verifying voters). Hood relied on and referred to the accounts of several election officials who documented instances of fraud or potential fraud. Hood p.15 *citing* Triantafilou **(Ex. 14S)**; Cuckler **(Ex. 14LL)**; Ward **(Ex. 14PP)**. Hood concluded Golden Week presented several problems that could increase the possibility of fraud: (1) "Allowing SDR certainly increases the possibility that an individual may simultaneously register and cast a ballot who may not be a *qualified* elector", (2) "there is also the possibility that a voter could cast an absentee ballot and then register and vote in another county", and (3) "Local election officials have little time to carry out the verification process . . . therefore, closing off registration prior to the beginning of early in-person voting makes practical sense . . . ." Hood p.15 (emphasis in original). Considering the above factors, SDR also makes it more difficult to ensure that individuals with multiple State residences do not register and vote in multiple States. *See* Sec.

Husted letter, 5/23/13 **(Ex. 57)** (referencing 15 people who "appear to have voted both in Ohio and another State"); Sec. Husted letter, 6/25/15 **(Ex. 73)** (referencing 2 people who appear to have voted in Ohio and elsewhere).

Plaintiffs' expert Minnite concedes that she does not know the reasons behind removing SDR in Ohio or the reasons behind any of the other laws that Plaintiffs are challenging. Minnite Dep. pp.46-50, 129. She admitted, however, *that voter fraud exists, that voter fraud could affect the outcome of a close election, and that election procedures that are designed to avoid the possibility of fraud are a reasonable goal*. *Id*. pp.115-17. She did not do an analysis of whether the challenged laws prevented fraud in 2014, but she agreed that "we need rules to ensure free and fair elections." *Id*. pp.115-17, 136, 151-53.

6. SDR generated costs and created administrative burdens for the boards of elections

The former overlap in voting and registration in Ohio created administrative burdens for county boards and came with a price tag.

Administrative burdens. Hood observed that "a number of local election officials pointed specifically to the . . . administrative burdens associated with the initial week of early in-person voting (*Golden Week*), including hiring additional staff and/or paying overtime." Hood p.15 *citing* McDonald ¶11; Triantafilou ¶¶8-9; Ward ¶¶6, 10; Munroe ¶¶6-7 **(Ex. 14EE)**; and Cuckler ¶10.

Costs. Hood also recognized "that there is a monetary cost associated with the administration of early in-person voting" and specifically Golden Week. Hood pp.15-16 *citing* McDonald ¶11;Walch ¶6; Metzger ¶6 **(Ex. 14V)**. He provided the example of Tuscarawas County, where the cost of elections increased by 41.7% from 2004 to 2012. Hood p.16 *citing* Metzger ¶6.

7. Golden Week created voter confusion and damaged voter confidence

Two final points deserve mention. First, the former overlap in registration and voting created significant potential for voter confusion. As Mahoning County Board of Election Chairman Mark E. Munroe explained, "Allowing a period where registration and voting happen at the same time (Golden Week) can create confusion among potential voters who may believe they can just show up and vote at other times, even if they are not registered, leading to disenfranchisement." Munroe ¶7; *see also* Hood Reb. p.17 (noting same and citing Munroe). Second, when Golden Week existed, some Ohioans raised concerns about the integrity of Ohio's election system. As Senator Frank LaRose testified in 2013 before the Senate State Government Oversight and Reform Committee, the overlap of registration and voting "perpetuates an election system that is susceptible to voter fraud and undermines citizens' confidence in this crucial aspect of our democratic process." Larose, *S.B.238; Sponsor Testimony*, 11/19/13, p.2 **(Ex. 49)**; *see also* Koehler letter **(Ex. 44)**.

C. Plaintiffs' Challenge to One Early Voting Site in Each County

Ohio counties have never had more than one early in-person voting location. O.R.C. § 3501.10(C). Boards are permitted to use their regular office for early voting or instead to use a different location. *Id.* Plaintiffs contend that Ohio is obligated to have many more early voting sites; they seek to "require Secretary Husted to direct each county to provide a reasonably equitable number of EIP voting locations on a population-per-county basis." Am. Compl. ¶99.

1. Plaintiffs' demand entails 784 additional centers and would cost over $60 million

Trende calculated the number of early voting centers that Ohio would be required to add under Plaintiffs' population-per-county theory. To obtain rough proportionality, he used the smallest counties as the baseline and assigned each of those counties one early voting center.

Trende ¶78. Ohio would need to add *784 early voting sites* to reach a roughly proportionate number of centers measured against the population size of each county. *Id*. ¶¶84-85. As a few examples, Cuyahoga County would need to add 97 early voting sites; Montgomery County, 40; Lake County, 17; Miami County, 7; and Belmont County, 5. Trende Reb. ¶64.

The cost for adding these additional voting sites would be enormous. Trende ¶85 *citing* Triantafilou ¶12. Using a conservative number, Hamilton County would need to spend $4.5 million on new voting locations. Trende ¶87. The cost to Montgomery County would be $3,032,000. *Id*. Cuyahoga County would have to spend $7,428,400. *Id*. ¶78 (98 sites x $75,800). The total cost, again conservatively counted, would be $60 million statewide. *Id*. ¶85.

If Plaintiffs' theory became the law, there would be profound implications for every State. Across the nation, there is great variation in the number of voters served by early voting centers. On one end of the spectrum is Loving County, Texas, which has one early voting center for 73 voters. Trende ¶70. At the other end is Los Angeles, which has one early voting center for 7,416,397 voters. *Id*. ¶72. No State, with the possible exception of Nevada, apportions early voting centers according to county population. *Id*. ¶¶74-82.

To reach Plaintiffs' formula, *every* State would need to make dramatic changes. All of the States that currently offer early voting would need to open or close numerous voting locations. As a few examples, Montana would be required to open 1,956 centers, Colorado 6,507, California 30,372, and Texas 249,550. *Id*. ¶84. States that do not have early voting would be forced to open numerous sites. Michigan, for example, would have to open 4,257 early voting locations. *Id*. ¶95. Pennsylvania would need to open 2,418 locations. *Id*.

2. Early voting centers are closer to minorities and Democrats

In nearly all of Ohio's counties, the early voting location is closer, on average, to minorities and Democrats. Trende depicted the location of early voting sites in every county

having an African American population of 5% or more. Trende ¶¶114-56. The maps speak for themselves. But, as Trende summarized, "The early voting centers tend to be placed closer to nonwhite and Democratic voters than to white and Republican voters." *Id*. ¶111. Hood likewise observed that the location of early voting sites "advantage[s] racial/ethnic minorities and Democrats." Hood p.10. Timberlake conceded the same. Timberlake Dep. p.220.

Across all counties, white voters must travel on average two miles farther than African Americans to reach the early voting center. Trende ¶157 (providing averages weighted by county population). Non-Hispanic white voters travel 1.4 miles farther than Hispanic voters. *Id.* Democrats are also favored. On average, Democrats are one mile closer than Republicans to the early voting location. *Id.*

The disparity in Cuyahoga and Montgomery Counties is much more pronounced. In Cuyahoga County, non-Hispanic whites are on average 3.7 miles farther from the early voting center than African Americans and 3.3 miles farther than Hispanics. *Id.* On average, a Cuyahoga Democrat voter is 2.5 miles closer than a Cuyahoga Republican to the early voting location. *Id.* In Montgomery County, non-Hispanic whites are on average 2.7 miles farther from the early voting center than African Americans and 1.3 miles farther than Hispanics. *Id.* A Montgomery Democrat is on average 1.8 miles closer than a Montgomery Republican to the early voting location. *Id*.

3. Spreading resources to multiple sites would create administrative burdens and lengthen wait times

The counties in Ohio that use DRE machines designate those machines for either early voting or for Election Day voting. Damschroder ¶35; Hood p.11. Technological and logistical issues effectively preclude counties from using early voting DRE machines again on Election Day. Hood p.11. Plaintiffs' theory, if implemented, would force Ohio counties to spread their

voting machines across numerous early voting sites. This would create overwhelming administrative problems. It would also result in long lines.

Allen calculated the effect of spreading out finite DRE resources to multiple sites and concluded "that using a single location in 2012 was more desirable from a waiting line point of view." Allen ¶1 **(Ex. 19)**.[10] He calculated that "if 100 machines had been spread out between 10 locations in Franklin County, my approximate model suggests that lines would have increased from approximately 7.7 minutes to approximately 83 minutes on average." *Id*. ¶¶1, 25. Of course, 10 early voting locations are far fewer than the 88 locations in Franklin County that would be required under Plaintiffs' case theory. Trende Reb. ¶64.

Counties would also either need to hire more staff or spread out existing staff to serve the early voting sites. Hood p.11. The logistical and financial burdens would be enormous. *See, e.g.*, Munroe ¶8; Weber ¶7 **(Ex. 14R)**; McDonald ¶21; Damschroder ¶¶71-84.

4. Boards are able to staff the early voting site according to need and to position it in a convenient location for access by public transportation

Ohio's counties are able to allocate resources at their early voting location according to need. Hood p.11. And, the capacity for early in-person voting is "very much a function of the resources deployed by a county to its early voting site." Hood Reb. p.12. In 2012, Franklin County, one of Ohio's most populous counties, allocated 100 DRE machines to its early voting location and had 35 poll workers available to assist with voter check-in. *Id*. p.11 *citing* Walch ¶13. In contrast, Fulton County, a county with a small population, has only two individuals who administer early voting. Weber ¶7. Counties can adjust their allocation of resources over time. For example, for the 2016 general election, Franklin County expects to increase the number of

[10] Theodore T. Allen's Report is cited as "Allen ¶__." Allen's rebuttal report is cited as "Allen Reb. ¶__."

DREs in the voting center to 125. Hood p.11 *citing* Payne ¶6 **(Ex. 14FF)**.[11]

The early voting location in most counties is situated in or near the county's major population center. Trende ¶¶115-56. Franklin County's early voting site is centrally located in the County and "on the public transportation route." Anthony Dep. p.85; Walch ¶12. Cuyahoga County selected its board's location based on its "[c]entral location within the county" and "[p]ublic transit accessibility." McDonald ¶20. In Hamilton County, the voting location is at the Board of Elections, "located in downtown Cincinnati—right off of Interstates 71 and 75. In addition, there is easy access to the Board's facility via public transportation." Poland ¶13 **(Ex. 14T)**.

D. Plaintiffs' Challenge to the DRE Formula

Counties in Ohio are permitted to choose the type of voting equipment that best fits their needs. O.R.C. § 3506.02; Damschroder ¶23. Some use DRE machines, while others do not. O.R.C. § 3506.01(F); Damschroder ¶24. Of the five most populous counties (Cuyahoga, Franklin, Hamilton, Summit, and Montgomery), only Franklin and Montgomery Counties use DRE machines. Damschroder Att.A **(Ex. 14AA)**. Only three of the seven counties that Timberlake considers "high minority" use DRE machines. Hood Reb. p.15.

By statute, counties that use DRE machines are required to maintain a certain number in their inventory. O.R.C. § 3506.22; Damschroder ¶¶26-27. In 2006, the General Assembly set the ratio at 1 machine for every 175 registered voters within a county. Damschroder ¶27. But after the DRE ratio was initially set, the voting landscape in Ohio changed with the introduction of early in-person and mail-in absentee voting. In 2014, the General Assembly updated the ratio.

[11] Plaintiffs' expert Timberlake argued in his report that there is a "mathematical certainty" that more populous counties will experience longer lines. Timberlake p.53. He did not know, however, that counties can add voting machines, staff, and other resources to their early voting site. Timberlake Dep. pp.104-05, 107-08. After learning about this, he agreed that "more staff and more machines" would in fact mean shorter lines. *Id.*

Am. S.B. 200 (Ohio 2014) (amending O.R.C. § 3506.22(B)) **(Ex. 40)**; Damschroder ¶29. Under the new formula, the ratio remains at 1:175, but the denominator is now calculated by subtracting the number of absentee ballots counted in the last presidential election from the greater of either, (i) the total number of registered voters in the county at the voter registration deadline in the last presidential election, or (ii) the average of the total number of registered voters in the county as of the voter registration deadlines for the last two presidential elections. O.R.C. § 3506.22(B); Damschroder ¶29. In other words, the ratio now accounts for absentee voting.

Given that about 26% to 33% of voters have voted early in recent elections (primarily by mail) (Hood p.6), the new formula is more appropriate, and is "qualitatively closer to an ideal provisioning approach." Allen ¶31. The original formula, one machine for every 175 registered voters, "is quite arbitrary" and does not account for relevant information, including the number of early voters. *Id*. ¶30. Thus, a change back to the old formula "would likely not help to ensure higher quality elections." *Id*. ¶31. The new formula also makes "intuitive sense." Hood p.31; *see also* Damschroder ¶30. As Trende said, "It makes sense that as fewer voters make their way to the polls, fewer machines will be needed to support Election Day electors." Trende Reb. ¶78. Furthermore, the new formula allows counties to account for this shift in voting opportunities when deciding how to allocate resources. Simply put, the new formula more accurately reflects voting realities and is tailored to the voting needs of Ohio.

The Secretary has instructed counties not to divest themselves of any voting equipment, even if their stock exceeds the statutory floor. Adv. 2014-03 **(Ex. 14BB)**. In addition, counties may (and do) exceed the required minimum number of machines to accommodate their voters. Damschroder ¶31. The new formula sets a *floor* for DRE machines, not a ceiling. Franklin County, for example, deployed machines at a 1:125 ratio for the 2015 general election. Hood p.31 n. 82 *citing* Payne ¶4.

Importantly, Ohio has the best ratio of DRE machines to population in the country. Trende ¶170. Ohio would have to divest itself of more than 60 percent of its DRE machines to drop below the national median for DRE machines per population. *Id.* ¶171. Ohio leads the nation in DRE resources.

The new formula provides more flexibility to counties in deploying their resources on Election Day. The 1:175 ratio applies, in addition to counties as a whole, to individual precincts. Dir. 2014-26 **(Ex. 62)**. Because existing DRE inventories have not gone down, counties may place their DRE machines where they expect higher turnout. Plaintiffs have presented no evidence that the extra DRE machines "will be removed from heavily minority neighborhoods" (Trende Reb. ¶77) or that existing DRE inventories will be depleted. Timberlake Dep. pp.126-27.

DRE voting machines are allocated to the precincts for use on Election Day during a public meeting of the county boards. O.R.C. § 3501.11(I); Damschroder ¶32. The Secretary directs the boards to consider "contests on the ballot in each political subdivision to determine whether or not the board should exceed the minimum requirements of state law" for DREs and ballots. Dir. 2015-15 **(Ex. 27)**. In other words, boards must account for the anticipated turnout in any given election when deciding how many DRE machines to deploy, even if that number exceeds the statutory floor. *See* Payne ¶5 (stating that more DREs would be allocated around campuses in the 2015 election based on higher expected turnout in those precincts).

Finally, counties that use DRE machines have a back-up plan in the event of unexpected long-lines. The plan involves giving voters the option of filling out paper ballots, which are placed into a secure ballot box and then later scanned. Dir. 2014-23 **(Ex. 63)**.

E. Plaintiffs' Challenge to Absentee Ballot Identifiers

Before 2006, Ohioans could only cast their ballot in advance of Election Day for specific,

limited reasons. Damschroder ¶54. In 2006, Ohio changed its laws to permit any registered voter to cast an early absentee ballot for any reason, *i.e.* "no-excuse absentee voting." Dir. 2014-18 **(Ex. 14E)**. Many States do not allow no-excuse absentee voting. Hood p.36.

To cast an absentee ballot, voters are required to fill out and return applications to their boards of elections. O.R.C. § 3509.03; Damschroder ¶7; Dir. 2014-18. For identification purposes, the application requires the voter's (i) name, (ii) address, (iii) date of birth, (iv) signature, and (v) a method of identification, such as a driver's license number or state identification number, the last four digits of the voter's social security number, or a copy of a document (*e.g.* a current utility bill) showing the voter's address. O.R.C. § 3509.03; Damschroder ¶56; Dir. 2014-18. When the board receives an application, the board verifies that the voter is eligible. Damschroder ¶¶55, 59-60. If the application is missing any of the required information, the board promptly notifies the voter and asks for the missing information. Dir. 2014-18.

After verifying eligibility, the board provides the voter with a ballot and a ballot envelope. Dir. 2014-18. The voter can return the ballot envelope by mail or drop it off at the board (a voter's family member can also drop the ballot off). *Id.* Some boards maintain a secure drop box, allowing voters to drop off their ballot at any time. Walch ¶8; McDonald ¶10.

The required identifiers on the ballot envelope mirror the information required on the ballot application: the voter's (i) name, (ii) address, (iii) date of birth, (iv) signature, and (v) a form of identification. O.R.C. § 3509.06(D)(3)(a); Damschroder ¶57. The voter's name and address, however, are pre-printed on the envelope. *Id.* ¶58; Dir. 2014-17 **(Ex. 26)**. *That means that on the envelope, a voter needs to only provide three items*: (1) date of birth, (2) a form of identification, and (3) signature. The only identifiers S.B. 205 (the bill Plaintiffs challenge)

added to this process were date of birth and address (which is pre-printed). Sub. S.B. 205 (Ohio 2014). Notably, only the month and day of the date of birth need to be accurate; the year can be incorrect and the ballot will still be processed. O.R.C. § 3509.06(D)(3)(a)(iii)(I); Dir. 2014-18. And even if a voter provides a nonmatching date of birth, if the absentee voter provides all other information the vote may be counted. O.R.C. § 3509.06(D)(3)(a)(iii)(III) (providing that an inaccurate date of birth does not make an envelope incomplete if the board finds, by a vote of at least three members, that the voter has met all other requirements).

If an envelope is deficient, the board must send notice to the voter, detailing the defect, and the voter has until seven days after the election to cure the defect. O.R.C. § 3509.06(D)(3)(b). Specifically, Ohio law requires that boards contact voters who return an absentee ballot in an envelope that has missing or incorrect information. Hood pp.37-38; Dir. 2014-17; Dir. 2014-18. In such an instance, the board contacts the voter (with a courtesy reply envelope) to enable the voter to cure the defect. Dir. 2014-17. The board is permitted to identify the specific information that is missing or inaccurate. Dir. 2014-17.

Importantly, McCarty calculated that African Americans and other racial groups used vote-by-mail in 2014 at nearly identical rates. McCarty Reb. p.14. Thus, marking three identifiers on the ballot envelope did not dissuade minorities from voting by mail.

1. The identifiers on the envelope standardize the process

The above process standardizes absentee voter verification across Ohio's 88 counties. The information on the envelope also standardizes the process by having the same elements on the envelope that were on the application. Hood p.37. It also enables boards to verify a voter's identity. *Id*. *citing* Poland ¶11 (the information is "incredibly useful" to "verify" the ballot); Walch ¶14 (the information is "critically important in identifying voters").

2. The identifiers are needed to confirm the identity of voters and process ballots

The information on the envelope "ensures that the individual casting the ballot is, indeed, the individual who was sent the absentee ballot." Hood p. 37. Discussing the importance of "locating . . . elector[s] in the voter registration database," Hood cited to election officials Lisa Welch, Barbara Tuckerman, and others. *Id*. Welch noted that there are multiple people in her county with the same name and Tuckerman stated that the information helps prevent improper or double voting. Welch ¶15 **(Ex. 14X)**; Tuckerman ¶6 **(Ex. 14U)**. The ballot envelope, of course, also provides the additional important function of keeping identifiers off the ballot inside, keeping that ballot secret. Dir. 2014-18.[12]

3. Ohio has a low absentee ballot rejection rate

Plaintiffs have introduced no evidence that African American voters' absentee ballots are being rejected more than white voters' ballots. Trende Reb. ¶68; Timberlake Dep. pp.111-12. Furthermore, Plaintiffs have provided no expert testimony about *why* ballots are rejected. Trende Reb. ¶69. "Ohio has a relatively low rate of absentee ballot rejections" (1.5 percent), and two-thirds of the ballots that are rejected in Ohio are rejected because voters missed the filing deadline. *Id*. ¶70. Plaintiffs have presented no "empirical evidence" to show that the identifiers on the envelopes lead to higher rejection rates for minorities. *Id*. ¶74.

4. In Ohio, voters can track their ballot; in some other States there is no cure period and a notary is required

As discussed above, board websites enable voters to track the status of their absentee ballot, from application to acceptance. Dir. 2015-02. In the States that do permit early voting by mail, practices vary widely, with some States requiring much more than Ohio, such as a

[12] Plaintiffs' expert Minnite agreed that it is reasonable to ask a voter to sign his or her name on an absentee ballot envelope. Minnite Dep. p.121.

notarization. Trende ¶175; Trende Reb. ¶73. By way of example, Alabama requires a voter to provide an excuse and requires a notarized affidavit or two witnesses. Trende ¶175. Hawaii and North Dakota do not give voters an opportunity to cure mistakes. *Id.* ¶¶177, 179. In Illinois, there is no uniformity, with individual counties deciding whether to mail ballots and local boards given the discretion whether to strike ballots for errors. *Id*. ¶180.

5. Ohio is responsive to recommendations regarding voting procedures

Ohio has shown that it is responsive to input about absentee voting procedures. One example actually involves one of the Plaintiffs. In July 2014, Plaintiff ODP (represented by the same law firms here) recommended several changes to absentee voting procedures. *See* ODP letter, 7/10/14 **(Ex. 43)**. On September 5, 2014, the Secretary issued Directive 2014-27, which implemented many of those recommendations, including pre-printing voter names and addresses on absentee ballot envelopes. Despite the Secretary's interest in feedback and recommendations, and despite his decision to implement some of ODP's ideas, ODP decided to file this lawsuit anyway, simply selecting different issues.

F. Plaintiffs' Challenge to the Mailing of Absentee Ballots

Following the implementation of no-excuse early voting in 2006, a few Ohio counties began mailing unsolicited absentee ballot applications to voters. Damschroder ¶39. In 2008, the General Assembly appropriated funds for then-Secretary Brunner to mail unsolicited absentee ballot applications to voters prior to the 2008 election. Damschroder ¶40. Secretary Brunner allowed each of the 88 counties in Ohio to choose whether to mail the applications; some counties did, while others did not. *Id*. Even among the counties that chose to mail applications, variation existed. For example, in Franklin County, the board mailed applications only to "active-active" status voters (fewer voters than will receive applications in the upcoming 2016 mailing). *Id*. ¶41.

For both the 2012 and 2014 general elections, Secretary Husted mailed unsolicited absentee ballot applications to Ohio voters statewide. *Id*. ¶42. The statewide mailings eliminated the patchwork of some voters receiving an application while others did not. Dir. 2014-15 **(Ex. 14F)**. These mailings are broad. Applications are mailed to (i) every registered, active voter, and (ii) every registered voter who cast a ballot in one of the past two federal general elections. Hood p.35; Dir. 2014-15. The initial mailing is followed by a supplemental mailing to new registrants or registrants who have altered their registration. Hood p.35.

For the 2016 presidential election, Secretary Husted will again mail unsolicited absentee ballot applications statewide at a cost of approximately $1.25 million. Damschroder ¶42. Unsolicited absentee ballot applications will be mailed to: (i) active voters, and (ii) Ohioans who voted in either the 2012 or 2014 general elections. *Id*. ¶44. As in 2014, the first mailing will be followed by a second, supplemental mailing. Hood p.35.

The mailing is limited to the above categories of voters because ballot applications are "highly unlikely" to reach inactive voters. *Id.* p.36. Federal law requires States to verify that their voter registration rolls are accurate and current. Dir. 2015-09 **(Ex. 64)** *citing* 52 U.S.C.A. § 20507. The Secretary compares voter rolls against the National Change of Address database, to identify voters who may have moved. *Id.* The Secretary also, pursuant to federal law, utilizes Bureau of Motor Vehicles data to identify voters whose registration information may have changed, or who have passed away. Dir. 2012-16 **(Ex 65)**. County boards also compile lists of voters who have been inactive over a significant period of time, generally, the past two years. Dir. 2015-09. Voters identified under any of these processes are mailed a "confirmation card" by forwardable mail, asking that they either return the card to verify their registration or update their registration (which can be done online). Damschroder ¶45. Voters who do not respond are

moved to "confirmation (inactive)" status, where they remain for two general federal election cycles before being canceled from the voter rolls. Hood p.36.

The overwhelming majority of voters are in "active-active" status and will be mailed an absentee ballot application. Damschroder ¶46. Notably, boards may also place absentee ballot applications in public places, or post them on their website. Dir. 2014-18. In addition, any voter can request an absentee ballot application, in writing or verbally. *Id*.

Plaintiffs argue that ballot applications should be mailed to inactive voters who have not participated in recent elections. They have not introduced an expert opinion supporting this claim. Plaintiffs did not do any analysis of potential differences between white and minority mail-in voting. Timberlake Dep. pp.133-34. Plaintiffs' expert Timberlake even agreed that the current system of uniformly mailing ballots across Ohio is fairer than the old system where some counties mailed ballots and some did not. *Id*. pp.118-19.

Hood, Trende, and McCarty put Ohio's program in proper context. Hood observed that 23 States do not allow no-excuse absentee voting by mail. Hood p.36. He explained that, even including the two States that are exclusively vote-by-mail (Washington and Oregon), only one State other than Ohio has mailed unsolicited absentee ballot applications. *Id.*; *see also* Trende ¶174. McCarty calculated that African American and white voters in Ohio mailed in their ballots in 2014 at about the same rate. McCarty p.14 (22.9% versus 22.8%).

G. Plaintiffs' Challenge to Provisional Ballot Identifiers and Procedures

Ohio is also a national leader in accepting provisional ballots. In fact, "Ohio has one of the highest acceptance rates of provisional balloting in the country . . . ." Trende Reb. ¶75.

Provisional ballots provide a voter with the opportunity to vote on Election Day even when circumstances raise questions as to eligibility. Scenarios that raise eligibility questions, and thus require provisional ballots, include the following: (i) the individual does not appear on

the list of eligible voters for the precinct; (ii) the individual is unable to provide any form of acceptable identification; (iii) the individual has already requested an absentee ballot (thus creating the possibility of double voting); and (iv) the individual's signature does not appear to match the signature on his or her registration form. O.R.C. § 3505.181(A); Adv. 2014-04 p.3 **(Ex. 61)**.

A person voting provisionally must complete a ballot affirmation containing his or her (i) name, (ii) date of birth, (iii) current address, (iv) signature, and (v) include a method of identification (the broad list of permissible identification includes, among other categories, a driver's license number, the last four social security number digits, a current utility bill, a bank statement, a paycheck, a government check, and a state or federal photo identification). O.R.C. § 3505.182; Form 12-B **(Ex. 66)**. A provisional voter who does not provide identification at the time of voting has seven days after Election Day during which he or she can do so at the county board. O.R.C. §§ 3505.181(B)(7), 3505.182(D)(4). When an individual casts a provisional ballot, he or she receives notice (i) with a hotline for learning about the status of his or her ballot; (ii) explaining the reasons why additional information may be needed for his or her ballot to count; and (iii) giving instructions if he or she did not provide identification. Damschroder ¶70; Dir. 2014-20 **(Ex. 14D)**; Form 12-H **(Ex. 67)**.

The day after an election, boards begin reviewing provisional ballots. Dir. 2014-20; *see also* O.R.C. § 3505.183(G)(1). Boards may not start counting any provisional ballot until after the board members have determined, by majority vote at a public meeting, the validity of all of the provisional ballots within the county. O.R.C. § 3503.183(F); Dir. 2014-20. Boards must complete both this validity determination and the count of provisional ballots no later than twenty-one days after an election. O.R.C. § 3505.32(A).

1. The Challenged Laws made only minor changes to provisional ballot procedures

Ballot Affirmation Identifiers. Statutory changes in 2014 only added two new, and basic, identification requirements for provisional ballot affirmations: current address and date of birth. *See* O.R.C. § 3505.182; Form 12-B (provisional ballot affirmation form).

The changes have minimal effect on the counting of provisional ballots. "On its face asking a provisional voter to recall and record their date of birth and residential address does not appear unreasonable." Hood p.32. The date of birth addition only requires a correct month and day of birth (matching voter registration information). O.R.C. § 3505.183(B)(3)(e). Moreover, as long as provisional voters satisfy other requirements, providing a non-matching date of birth does not actually control whether their provisional ballots are counted. Hood p.32; O.R.C. § 3505.183(B)(3)(e)(ii) (providing that an inaccurate date of birth does not require invalidation if the board finds, by a vote of at least three members, that the voter has met all other requirements).

In addition, if a voter's current address does not match the information in the voter registration system, and if the voter indicates he or she has moved, then the individual's provisional ballot will be counted so long as the voter has not been found to have voted elsewhere. Hood p.32; O.R.C. § 3505.183(B)(3)(f); Dir. 2014-20 (Step 5).

The two new identification requirements do not mandate rejection of ballots for trivial errors. "[P]rovisional ballots are subject to scrutiny by a group of individuals who are able to screen out what could be termed trivial errors from substantive errors." Hood p.32. William Anthony, Director of Franklin County's Board of Elections, said that for a ballot to be rejected, there "would have to be really a fail" such as a voter not putting their name on the form. Anthony Dep. p.42.

Period for providing identification. The 2014 changes made a small reduction to the cure

period during which a provisional voter may provide identification, reducing the period from ten to seven days. *See* O.R.C. §§ 3505.181(B)(7), 3505.182(D)(4). The seven-day period provides a reasonable window for provisional voters to supply proper identification, while still allowing boards a reasonable time (beginning as early as 11 days after the election) to determine the validity of provisional ballots at public meetings and then count the ballots. O.R.C. § 3505.32(A); Damschroder ¶69.

Assistance to Voters. Finally, under the changes to the law, voters, rather than precinct election officials, are required to complete the provisional ballot affirmation. *See* Adv. 2014-04 p.4. This requirement, however, does not prevent a blind, disabled, or illiterate voter from receiving assistance. O.R.C. § 3505.181(F). Having the voter, as opposed to the precinct official, complete the affirmation makes sense because the voter is in the best position to be aware of and record his or her information. This approach also reduces the possibility that a provisional ballot will be invalidated because of a precinct election official's errors. Mr. Anthony stated that a voter has to fill out his or her own provisional ballot "for obvious reasons" because "we don't want our folks filling in information that may be erroneous." Anthony Dep. p.37.

2. Ohio accepts provisional ballots at a high rate and invalidates few ballots due to voter error

During the 2014 General Election (*after* the challenged laws were in effect), Ohio had one of the highest provisional ballot acceptance rates in the country. Trende Reb. ¶75. It was one of only five states in 2014 that counted 90 percent or more of provisional ballots. Trende Reb. ¶75; Damschroder ¶52.

In 2014, only 599 provisional ballots, 0.02% of the total votes cast, were rejected due to voter error. Hood pp.33-34. In fact, this rejection rate (by percentage of total votes cast) was

lower in 2014, with the challenged laws in effect, than the rejection rates in all of the three previous federal general elections, prior to the challenged laws. *Id.*

Most provisional ballots are rejected for reasons completely unrelated to identifiers on ballots, much less because of the two identifiers added in 2014. The most common reason for rejecting provisional ballots—representing more than half of all rejected provisional ballots in 2014—is that the individual failed to register. Hood p.33; Damschroder ¶53.

Any nationwide comparison of provisional voting laws is difficult because States use many different approaches. *See* Trende ¶173. But Ohio's requirements are not outliers. Alabama's laws, for example, require a provisional voter's signature, name, address, date of birth, and telephone number. *Id.* ¶175. In Delaware, the provisional ballot process is left to the discretion of reviewers, and voters receive no notice/opportunity to cure. *Id.* ¶176. Virginia requires provisional voters to provide their name, address, last four digits of their social security number, birth date, phone number, a copy of photo identification, and a signature; Virginia voters receive only three days to cure, and only as to lack of photo identification. *Id.* ¶181.

Importantly, Plaintiffs have failed to produce evidence that the minor 2014 changes will disproportionately affect minority or Democratic voters. Hood Reb. p.14; Trende Reb. ¶75.

3. Information on provisional ballot affirmations helps identify voters, determine their eligibility, and update their registration

The identification information on provisional ballot affirmations serves a number of important purposes. It "aids local election officials in locating a voter in the state's voter registration database." Hood p.32 *citing* Poland ¶11 (provisional ballot identifiers are "useful in determining whether the voter is registered, voted in the wrong precinct, or has already voted"). The identification also helps determine whether a voter is eligible. Hood p.32 *citing* Tuckerman ¶6 (example of a provisional voter who previously voted in a different county).

Having multiple pieces of information is useful because many voters share the same or similar information. Damschroder ¶49; Welch ¶15 (multiple Roy A. Millers within same county). In addition to people having the same or similar first names, last names, or both, people can share the same last four digits of their Social Security Number. For example, in the statewide voter database, for a single election there were 7,218 potential instances of overlap involving voters sharing the same last name, first name, and last four digits of their Social Security Number. Defs.' Interr. Resp.9 **(Ex. 69)**. Any overlapping information can raise identification concerns, especially when other factors influencing identification (*e.g.*, reading handwriting) come into play. Having more pieces of information helps: Sherry Poland, Director of the Hamilton County Board of Elections, said that the new identifiers have "led to a decrease in the number of wrong location provisional [ballots] rejected." Poland Dep. p.47.

The identification information on provisional ballot affirmations also allows boards to update a voter's address in the registration records and enables boards to register previously unregistered individuals. Hood p.32; Damschroder ¶50. This latter point helps a voter avoid needing to cast provisional ballots in successive elections. Damschroder ¶50.

The changes also create standardization. The two new identifiers create uniformity with the information required for voter registration. *Compare* O.R.C. § 3505.182; *with* O.R.C. § 3503.14(A). They also conform to the requirements for absentee ballots. Damschroder ¶48. And the change in the cure period "makes the time period congruent with the cure period for absentee by mail ballots." Hood p.33; *see also* Dir. 2014-27.

Finally, it is important to recognize the differences between provisional ballots and other types of ballots, such as absentee ballots. *See* Hood Reb. p.14 ("Provisional balloting is not a regular form of balloting and should [not be] [sic] considered as such."). Ohio's provisional

ballot process is a "second chance" process. Damschroder ¶47; *see also* O.R.C. § 3505.181(A). Absentee voting, by contrast, is simply an alternative voting method. Unlike absentee ballots, the majority of provisional ballots are cast on Election Day at polling places without the benefit of a "database environment of a county registration system." Damschroder ¶66. There is no way for officials to pre-check the eligibility of provisional voters as they do for absentee voters. *Id.* Accordingly, there is no method (comparable to the absentee process) by which a precinct election official can a match deficient provisional ballot affirmation envelope to an individual voter's record. *Id.* A "cure" period for deficient ballot affirmation identifiers would require boards to: create a database of provisional ballot voters for the given election; review each provisional voters ballot affirmation for potential deficiencies and determine those deficiencies; assign each provisional voter a ballot affirmation status (complete or incomplete); and mail letters notifying provisional voters of any deficiency with their provisional ballot affirmation. *See* Damschroder ¶67. These tasks would all have to be completed on Election Day or immediately thereafter, all while boards are busy completing the many other tasks required at this busy time.

H. Plaintiffs' Challenge relating to Correct Location, Wrong Precinct Voters in Multi-Precinct Voting Locations

As the name suggests, a multi-precinct voting location is a location that serves voters from more than one precinct. Boards have discretion to decide whether to use consolidated poll books for multi-precinct voting locations. O.R.C. § 3501.22(A)(2)(b). Using a consolidated poll book at multi-precinct locations, at least in theory, decreases the risk that a voter will show up at the correct voting location, but still attempt to vote in the wrong precinct. This is because—with a consolidated poll book—the voter can check in at any precinct within the multi-precinct location. *See* Hood p.38. With unconsolidated poll books, the voter must go to the correct

precinct (with the correct poll book for that precinct).

To combat the "correct location, wrong precinct" scenario, precinct election officials are required to direct an individual attempting to vote in the wrong precinct to the correct precinct. Adv. 2014-04 p.4-5. If the voter insists on voting in the incorrect precinct, the individual may cast a provisional ballot. The election official must then complete a form, under penalty of election falsification, stating (i) the individual's correct precinct, (ii) that the official instructed the individual to go to that precinct, and (iii) that the official informed the individual of the consequences of voting in the wrong precinct. *Id.*; Form 12-D **(Ex. 68)**.

Given the above requirements, the scope of this "correct location, wrong precinct" issue is extremely limited. *See* Hood pp.38-39. Applying the above process, if a voter attempts to vote at the wrong precinct, a precinct election official is required to direct them to the correct precinct. And it is only when an official properly provides instructions *and a voter still insists* on voting in the wrong precinct that a provisional ballot will be rejected. In the 2014 general election, only six provisional ballots were rejected because of a correct location, wrong precinct issue. *Id.* p.39.

Technological developments are helping to completely eliminate this already limited issue. *Id.* pp.39-40. As detailed above, Ohio counties are currently in the process (with the help of State funding) of switching to electronic poll books. *Supra* p.6-7. Beyond their other advantages, electronic poll books contain the *entire* voter registration roll for a county, giving election officials increased information when processing voters.

As a final point, Plaintiffs' multi-precinct claim will likely become moot in December 2015. The Secretary has posted a proposed permanent directive for public comment that is set to become effective in December 2015. Hood p.40. The directive provides that, if boards choose

to have multi-precinct locations, they must "[c]ombine the poll books for those precincts to create a single poll book for the voting location." *Id.*; Prop. Dir. on Election Admin. p.57 **(Ex. 14CC)**.

III. LEGAL ARGUMENT

A. Plaintiffs Cannot Succeed under the Voting Right Act (Count IV)

Ohio's convenient elections laws do not violate Section 2 of the Voting Rights Act.

1. The requirements of a Section 2 Voting Rights Act claim

In 1965, Congress enacted Section 2 of the Voting Rights Act, which "prompted little criticism" because it mirrored the Fifteenth Amendment by requiring parties to show *intentional* discrimination to invalidate state laws. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (plurality). In 1982, Congress amended Section 2 to its current form: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a) (renumbered from 42 U.S.C §1973(a)) (emphasis added). The Supreme Court has observed that the Act was "justified by 'exceptional' and 'unique' conditions," and while "voting discrimination still exists," American elections today are different than they were in many places in 1965. *Shelby Cnty., Alabama v. Holder*, 133 S.Ct. 2612, 2619, 2630 (2013).

For a Section 2 claim, a plaintiff must prove (1) that the challenged law *harms* the right to vote of a minority group, (2) that the law *causes* the group's right to vote to be denied or abridged, *and* (3) that under the totality of the circumstances, the minority group lacks *meaningful access* to the polls, on account of race.

Proof of harm. A plaintiff must prove an actual injury—that the challenged practice harms a minority group's right to vote. To prove harm, the Supreme Court has required a

comparison of the law's impact on minorities with the impact on minorities from an *alternative* practice that the State could adopt. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("*Bossier II*") ("It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice."); *Holder v. Hall*, 512 U.S. 874, 880 (1994) (noting that "a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice").

In many cases, "the benchmark for comparison" will be "obvious." *Holder*, 512 U.S. at 880. When, for example, a requirement imposes an affirmative *burden* on the right to vote—such as "literacy tests" or "poll taxes," *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009)—the comparator (or "benchmark") will be a system *without* that burden. *See Holder*, 512 U.S. at 880-81 (noting that a rule "can be evaluated by comparing the system with that rule to the system without that rule"). For other practices, however, the benchmark will be far from obvious.

Holder provides a good example. There, challengers brought a vote-dilution claim against a county's choice to have a *single* commissioner. Plaintiffs sought to compare that choice to a "hypothetical *five*-member commission." *Id.* at 881 (emphasis added). That was not a valid benchmark. The plurality found "no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* at 881. Instead, the choice "was 'inherently standardless.'" *Id.* at 885 (citation omitted). Thus, the challengers could not state a Section 2 claim because "there [was] no objective and workable standard for choosing a reasonable benchmark . . . ." *Id.* at 881; *see also Concerned Citizens for Equal. v. McDonald*, 63 F.3d 413, 418 (5th Cir. 1995) (holding that the Texas Constitution's "elastic and amorphous phrase, 'for the convenience of the people,' cannot supply the type of 'objective and workable standard' that the Supreme Court envisions'" under Section 2 (citation omitted)).

One thing is clear: the benchmark in a Section 2 claim cannot be the old law. Using the old law as the benchmark would eliminate the important differences between a Section 2 and a Section 5 claim. Section 5 of the VRA requires certain States to submit a *change* in election procedure to preclearance proceedings in which the States must show that the *change* "neither has the purpose nor will have the *effect* of denying or abridging the right to vote on account of race or color . . . ." 52 U.S.C. § 10304(a) (renumbered from 42 U.S.C. § 1973c(a)) (emphasis added). Section 5 "uniquely deal[s] only and specifically with *changes* in voting procedures." *Bossier II*, 528 U.S. 320 at 334 (emphasis in original). Under Section 5, therefore, "[t]he baseline for comparison is present by definition; it is the existing status." *Holder*, 512 U.S. at 883. In contrast, under Section 2, "[r]etrogression is not the inquiry . . . ." *Id.* at 884; *see also* S. Rep. No. 97-417, at 68 n.224 (1982) (stating that a plaintiff "could not establish a Section 2 violation involved a retrogressive effect"). That is precisely why—unlike with Section 5's built-in baseline—a plaintiff in a Section 2 case "must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997) (*Bossier I*) (citation omitted).

Causation. Essential in any VRA claim is proof that the challenged law "results" in a denial or abridgement of voting rights. "The essence of a §2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions *to cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis added); *see also Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310 (3rd Cir. 1994) (Section 2 claims require a "causal connection"). By way of example, in 2012, a district court declined to enjoin a reduction in early voting days in Florida because the plaintiffs failed to

prove that the new schedule would "result in a denial or abridgement of the right to vote on account of race." *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1255 (M.D. Fla. 2012).

A plaintiff cannot establish Section 2 causation by simply pointing to statistical differences between racial groups (*i.e.* disproportionate impact). As the *Brown* court stated, "[A] mere showing of disproportionate impact is not sufficient to demonstrate a Section 2 violation." *Id*. at 1250 n.14; *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986). The Ninth Circuit's decision in *Smith v. Salt River Project Agricultural Improvement and Power District*, 109 F.3d 586, 595 (9th Cir. 1997), demonstrates this principle. There, the Ninth Circuit upheld a district's land-owner voting requirement (a *far* stricter requirement than any here) because it did not result in discrimination "on account of race or color," even though whites were more likely to have a vote under the system because their rate of home ownership was allegedly higher than that of African Americans. *Id.* at 590, 595-96. The Court held that a Section 2 vote denial claim cannot be based on an alleged statistical "disproportionate *impact* on a racial minority" and stated that "[t]he real question . . . is whether the land ownership requirement denies African-Americans the right and opportunity to vote in District elections." *Id.* at 595-96 (emphasis in original).

No meaningful access. A plaintiff also must prove that under the "totality of circumstances," a law prevents a minority group from having "meaningful access" to the polls. *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004). In re-districting cases, the nine factors of *Gingles*—which include areas such as whether elections are racially polarized, whether there is a candidate slating process, and whether a subdivision has unusually large districts—are typically followed. *Gingles*, 478 U.S. at 36-37. Indeed, *Gingles*, itself a redistricting case, observed that the factors were derived from an analytical framework in another redistricting case, *White v. Regester*, 412 U.S. 755 (1973). *See Gingles*, 478 U.S. at 36.

The *Gingles* factors are "of little use in vote denial cases." *Brown*, 895 F. Supp. 2d at 1249. Instead, in litigation alleging vote denial, decisions have rested on different considerations, including: (1) the adequacy and scope of voting opportunities (*Salas v. SW. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992)); (2) the implications of relief on other States (*Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326 (M.D.Fla. 2004)); (3) a State's "legitimate and compelling rationale for enacting the statute" (*Wesley*, 791 F.2d at 1261); and (4) "current" or "present day" political conditions (*id.*; *see also Shelby Cnty.*, 133 S.Ct. at 2628 (focusing on "current political conditions")).

2. Plaintiffs have not identified any benchmark for the challenged laws

Plaintiffs fail to meet any of the Section 2 elements. To begin, Plaintiffs have not shown an objective benchmark against which to compare the challenged laws. The choice of a benchmark is just as "inherently standardless" in this case as it was in *Holder*. 512 U.S. at 885.

Plaintiffs' analysis of the challenged laws primarily consists of ten pages in Timberlake's report. Timberlake pp.50-60. Timberlake's report does not include any benchmark for comparison. Timberlake claims that African Americans are more likely to vote early than whites. *Id.* pp.50-53. Even if Timberlake is right, Ohio's early-voting schedule would *benefit*—not *harm*—African-Americans compared to the vast majority of alternative benchmarks.

Early voting comparisons illustrate the point. Overall, Ohio has the tenth-longest early voting period in America. Trende ¶35. Or consider the median number of voting days. Ohio beats that by 12 days. *Id.* ¶¶43, 50. Perhaps the benchmark should consider the percentage of African Americans in the State. That too does not work for Plaintiffs. Ohio has more voting days than 19 of the 21 jurisdictions with 10% or higher populations of African Americans. *Id.* ¶62. Or maybe the benchmark should be whether other States offer SDR. Again, that would

not work for Plaintiffs. Only 12 States offer SDR. Hood p.21.[13] How about the popularity of SDR? "Ohio has, by an order of magnitude, the lowest ratio of votes cast to same day registrants of [any SDR-State]." Trende ¶104. Nor can a plaintiff's preferred hypothetical "schedule" to expand options further, such as "unlimited evenings and weekends," provide an *objective* alternative. The "ever more" standard has no limiting principle.

The same problem exists with the other challenged laws. For early voting centers, no State has anything close to the standard that Plaintiffs seek to impose on Ohio: a population-per-county calculation. Trende ¶64. Under this proportionality theory, every single State would either need to add voting centers or eliminate them. All but three States would need to add early voting centers, and the numbers astound (*e.g.* Texas 249,550 sites, California 30,372 sites, Hawaii 11,732 sites). If the benchmark is a hypothetical population-per-county, not a single State passes. *Id*. ¶¶64-89. If Plaintiffs want to use the benchmark of where early voting sites are located, again the claim fails. In Ohio, white voters on average must travel longer distances to reach early voting centers than African Americans. *Id*. ¶158. In Cuyahoga County, the disparity is 3.7 miles; in Montgomery, it is 2.7 miles. *Id*. ¶157.

As for DRE machines, Ohio *already is* the *exemplary* benchmark. Ohio has the best ratio of DRE machines to voting population of any State. Trende ¶171. So that is not a winner for Plaintiffs. Regarding Plaintiffs' challenges to absentee, Ohio has *the most expansive* program of any State for mailing ballots. Hood p.36; Trende ¶174. The particular practices for absentee and provisional ballots "vary widely" State by State. Trende ¶¶175, 182. No comparison is possible.

In short, "it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place." *Holder*, 512 U.S. at 882. Ohio would comply

[13] Three of those twelve States have not yet implemented SDR. Hood p.21.

with Section 2 under any *reasonable* benchmark. Because Plaintiffs' hypothetical choice is standardless, it should not be made.

Situating Section 2 in its place in history confirms that it does not cover Ohio's expansive voting system. "[R]easonable statutory interpretation must account for . . . 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp. v. E.P.A.*, 134 S.Ct. 2427, 2442 (2014) (citation omitted). It is inconceivable that the Congress that amended Section 2 *in 1982* would have intended to cover Ohio's *present day* early-voting schedule. Early absentee voting, or "convenience voting," barely existed when the Voting Rights Act was passed in 1965 and amended in 1982. A little over a decade before the amendment, the Supreme Court held that the constitutional "right to vote" did not include the "right to receive absentee ballots." *McDonald*, 394 U.S. at 807. Accepting Plaintiffs' view would mean that Congress, by amending Section 2, immediately outlawed *all 50 States*' voting regimes because *none* offered the broad opportunities currently available in Ohio. In fact, no State *presently* "would meet the overall standard" that Plaintiffs are trying to impose on Ohio. Trende ¶94. Plaintiffs' misapplication of Section 2, if ever realized, "would render the statute 'unrecognizable to the Congress that designed' it." *Util. Air*, 134 S.Ct. at 2444 (citation omitted).

3. Plaintiffs are unable to prove causation

Plaintiffs cannot prove that any of the challenged laws cause a denial of the right to vote. Plaintiffs have provided no evidence that the challenged laws have caused, or will cause, minorities to be unable to vote. Hood Reb. p.2. As Hood noted, "blacks and whites are on equal footing in Ohio" regarding "registration and turnout." *Id*. p.4.

Not surprisingly, Plaintiffs have not named a single person who has been unable to vote as a result of any of the challenged laws. ODP Interr. Resp.3 **(Ex. 8)**; DPCC Interr. Resp.3 **(Ex. 9)**; MCDP Interr. Resp.3 **(Ex. 10)**. Nor did Plaintiffs' primary expert, Timberlake, do any

causation analysis. Timberlake said that in his first report he did not consider any "data on registered voters by race"; and in his second report he said that his analysis of Golden Week "does not mean that black voters who would have used Golden Week to vote will not be able to vote." Timberlake p.53; Timberlake Reb. p.7. He also agreed that his examination of the "Senate Factors" did not include any analysis of whether demographic disparities actually caused individuals not to vote. Timberlake Dep. p.57.

McCarty, in contrast, did look at demographics, and found that in 2014, after all of the challenged laws had been implemented, a *higher* percentage of African Americans voted early in-person than had voted in 2010, before the challenged laws were in place. McCarty p.8. He also found that African Americans who voted in 2010 on early voting days that were eliminated from the 2014 calendar voted in 2014 at a higher rate than other 2010 voters. *Id*. p.12. Plaintiffs have not—and cannot—show that the challenged laws *caused* vote denial.

And even when a plaintiff does show a statistical disparity between whites and minorities (which Plaintiffs have not done), courts *still* deny Section 2 claims when the plaintiff fails to prove that an election practice *actually caused the disparity*. The Sixth Circuit rejected a Section 2 challenge to Tennessee's felon-disenfranchisement law that rested primarily on a statistical difference between minority and white felony-conviction rates. *Wesley*, 791 F.2d at 1262. The Seventh Circuit denied a Section 2 claim against Wisconsin's photo ID law because, while more whites than minorities in Wisconsin possessed the required ID, Wisconsin did not make it "*needlessly* hard to get photo ID." *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014). Where there was a "significant disparity" in the racial make-up of school boards, the Fourth Circuit held that lack of participation rather than anything in the appointive process created the difference. *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989). The

Third Circuit rejected the contention that Pennsylvania's voter list maintenance violated Section 2 simply because more minority members than whites were inactive voters. *Ortiz*, 28 F.3d at 314-15. And, in *Salas*, plaintiffs failed to link lower Hispanic turnout with voting procedures, as opposed to Hispanics participation in the political process generally. 964 F.2d at 1556.

In Ohio, there is no statistical disparity that Plaintiffs can even try to link to Ohio's voting practices. African American turnout exceeded white turnout in 2012, and was similar to white turnout in 2008. Trende ¶242. Trende examined various causes behind this increase in minority turnout in recent elections, including "the vast sums of money poured into the state, the historic nature of the Obama candidacy, and the changing strategies of the parties." Trende ¶188. He observed that the Democratic Party has recently been spending enormous sums of money to encourage early voting. *Id*. ¶¶187, 211, 223, 225, 233, 236. Both Trende and Hood reported that in other States where early voting has been reduced, African American participation has *increased*. Trende ¶¶199-200 (North Carolina): Hood pp.21-31 (North Carolina and Georgia). In contrast, Plaintiffs have produced no expert testimony regarding a causal link or addressing alternative causation.

4. Every voter in Ohio has meaningful access to the polls

Under the totality of circumstances, there can be no doubt that Ohio's broad voting opportunities provide all registered voters with meaningful access to the polls, and that the modest 2014 changes to the election procedures did not eliminate that meaningful access. *Jacksonville Coal.*, 351 F. Supp. 2d at 1335 (claims of "inconvenience" are not "a denial of 'meaningful access to the political process'").

First, rigid application of "the Senate Factors" (by Timberlake and presumably by Plaintiffs at trial) is inappropriate for Plaintiffs' vote denial claims. *Brown*, 895 F. Supp. 2d at

1249. Instead, more relevant factors include the scope of voting opportunities in Ohio; the implications of relief on other States; Ohio's legitimate and compelling rationales for its laws; and present day political conditions. *Supra* pp.40-41 (collecting case authority). Plaintiffs' expert Timberlake admitted there were several factors he did not consider—including turnout across demographics, the opportunities to vote, and whether a State offers evening and weekend voting hours—that are relevant when analyzing burdens on voting or the calculus of voting. Timberlake Dep. pp.58-59, 70, 72.

The implications of relief on other States would be profound. Tellingly, the *Brown* court was concerned about "far-reaching implications" or requiring more early voting days even though Florida has many fewer days (8) than Ohio (23). 895 F. Supp. 2d at 1254. Needless to say, if the *Brown* decision would have had far-reaching implications, the implications of a decision for Plaintiffs in Ohio—where Ohio is a nationwide leader in the areas Plaintiffs challenge—would be astounding.

Ohio has legitimate and compelling state justifications for all of the challenged laws. In his expert report, Hood walked through many of these justifications. In addition to all of the other justifications below, all of the challenged laws promote voter confidence in Ohio's election practices. *See Frank*, 768 F.3d at 751 (promoting voter confidence is a legitimate and compelling State interest).

SDR. The elimination of SDR increased voter confidence (*supra* pp.15-17), decreased the probability of fraud (Hood p.15; *supra* pp.15-16), saved money (Hood pp.15-16; *supra* p.16), reduced administrative burdens (Hood pp.16-17; *supra* p.16), and did not have a significant impact on voting (McCarty pp.14-19; *supra* pp.12-14). *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (voter confidence and stopping fraud are legitimate and important state interests).

One Early Voting Location. A single early voting location in each county promotes uniformity and fairness (Hood p.10) and is sufficient to handle early in-person voting needs, particularly given that counties have discretion to move their location and determine the resources that will be present (Hood p.10; *supra* pp.20-21). Adding more sites would be cost-prohibitive, if not impossible (Hood p.11; Trende ¶85; *supra* pp.17-18). *See Jacksonville Coal.*, 351 F. Supp. 2d at 1335 (courts do not "have the authority to order the opening of additional [early voting] sites based merely on the convenience of voters"). Also, spreading resources across multiple early voting sites would likely be harmful to voter convenience. Allen ¶¶22-26; *supra* pp.19-21.

The DRE Formula. Change to the DRE formula accounts for absentee voting in Ohio (Hood p.31; Trende ¶167; *supra* pp.21-22), provides more flexibility to counties to apportion DRE resources (Hood p.31; Trende ¶168; *supra* pp.22-23), and still leaves Ohio at or near the top of the nation in terms of the number of machines per voting population (Trende ¶171).

Absentee Ballots. The identifiers on the absentee ballot envelopes prevent fraud (Hood p.37) and assist in the orderly administration of elections. *Crawford*, 553 U.S. at 196 (citing "orderly administration" and "accurate recordkeeping" as justified state interests). At most, signing one's name, writing down a birthdate, and providing one of several types of identification is a minor inconvenience. *South Carolina v. United States*, 898 F. Supp.2 d 30, 41-42 (D.D.C. 2012) (minor inconveniences do not create a violation of the Voting Rights Act). Mailing absentee ballots statewide promotes uniformity and it is intended to encourage voting. Damschroder ¶¶40-42.

Provisional Ballots. Similarly, adding two minor provisional ballot identifiers helps identify voters (especially voters with similar information to others), update/register voter

information, and standardizes the provisional ballot information with other voting requirements. Hood pp.32-33; *supra* pp.29-32. With the challenged laws in place, Ohio had one of the top five provisional ballot acceptance rates (accepting over 90% of such ballots) in 2014. Trende Reb. ¶75; Damschroder ¶53. Reducing the provisional ballot cure period, for providing identification, balances (i) providing voters a reasonable time to supply identification with (ii) allowing boards sufficient time to process provisional ballots, a multi-step process. Damschroder ¶69; *supra* pp.31-32, 35. Moreover, requiring voters to complete their own provisional ballot affirmation eliminates the possibility that ballots will be rejected due to an election official's errors in transcribing a different person's information. Anthony Dep. p.37; *supra* p.32.

Even moving past the many justifications for the challenged laws, the Senate Factors Timberlake considered still favor Ohio. Timberlake agreed that "the data from 1875 would not be relevant to the impact of a recent law." Timberlake Dep. p.98. He is aware of no "racialized appeals" by the General Assembly or by the Secretary. *Id*. pp.84-85. He admitted that the "five examples" in his report of "racial appeals" "would not be acceptable in a peer-review setting." *Id*. p.93. And he said that "Ohio has made significant progress when it comes to minority representation at state and federal levels." *Id*. p.96. In Hood's analysis of the Senate Factors, he recognized that "data collected on registration and turnout by race in Ohio over the last decade demonstrates that on these important metrics of political participation, blacks and whites are on equal footing in Ohio." Hood Reb. p.4. From this data Hood found it "difficult to argue that Ohio's election system is denying racial minorities equal opportunities to participate in the political process." *Id.*

Finally, Ohio's laws need to be viewed against present-day political conditions; and, *in present-day Ohio*, it is easy for everyone to vote. *Shelby Cnty.*, 133 S.Ct. at 2629; *see also*

Wesley, 791 F.2d at 1261 (distinguishing "past discrimination" and "present day" conditions). In present day Ohio, African American turn-out is the same or higher than that of whites. Trende ¶242; Hood Reb. pp.3-4. In present day Ohio, designating poll watchers is not limited to one political party; and Plaintiffs have introduced no evidence that poll watchers have harmed minority turnout. Hood Reb. p.5. In present day Ohio, African American representation in the General Assembly is comparable to their share of Ohio's voting age population and, in large Ohio cities, African American city council membership is again comparable to or higher than the share of the voting age population. Hood Reb. pp.7-8; *see Coleman v. Bd. of Educ. of the City of Mount Vernon*, 990 F. Supp. 221, 233 (S.D.N.Y. 1997) (noting the election of African Americans to positions of political significance). In present day Ohio, a voter can cast a ballot in-person during a span of 220 hours spread over 24 separate days, or entirely by mail without ever leaving the house. Hood Reb. p.8. In present day Ohio, even Plaintiffs' primary expert agrees that Ohio is "more responsive" to the needs of voters than many other States (with only one day of voting). Timberlake Dep. p.103.

B. Plaintiffs' Traditional Equal Protection Claims (Counts I and II) Fail

States have broad authority to regulate elections with neutral election laws that do not severely burden the right to vote. *Frank*, 768 F.3d at 751; *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).

1. States have broad discretion to adopt neutral election laws

The Constitution balances competing objectives in the voting context—"confer[ring] on the states broad authority to regulate" elections, while protecting the "right to vote." *Griffin*, 385 F.3d at 1130. Courts often confront these dueling concerns when analyzing neutral election regulations—that do not make invidious distinctions among voters—but that place some "restrictions on the right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012).

A neutral regulation might require, for example, that voters show photo identification, *Crawford*, 553 U.S. at 185 (2008), register 50 days before an election, *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973), or use touchscreens to vote, *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003). Courts reviewing facially neutral election laws traditionally do so in two ways: (1) using a unique test with a variable level of scrutiny and (2) a standard equal protection analysis where Plaintiffs' must prove discriminatory intent. These correspond to Counts I and II, respectively, of Plaintiffs' Amended Complaint; both legal theories should be denied here.

2. Count I and the *Anderson-Burdick* analysis

A unique "fundamental right[s]" test governing neutral election laws asks whether the law at issue unconstitutionally "burdens" the right to vote. *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591-92 (6th Cir. 2012) ("*NEOCH*"). The level of scrutiny that applies to an election law "depends upon the extent to which [it] burdens" that right. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The more severe the burden, the more rigorous the scrutiny.

Under this *Anderson-Burdick* framework, courts must initially measure the size of the burden. When doing so—at least for *facial* attacks—courts "consider only the statute's broad application to all [the State's] voters." *Crawford*, 553 U.S. at 202. In addition, courts measure the burden of a particular provision by looking at the *entire* election regime, not at the provision in a vacuum. *See Burdick*, 504 U.S. at 435-37.

After identifying the burden's size, courts apply a corresponding tier of review. At one end, courts apply "strict scrutiny" to laws that impose "severe" burdens. *NEOCH*, 696 F.3d at 592. Courts, for example, have strictly scrutinized laws that made it impossible for minor parties to gain ballot access. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588-90 (6th Cir. 2006). In the middle sit laws imposing burdens that, while not severe, are more than minimal.

For these, courts balance "the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule." *NEOCH*, 696 F.3d at 592-93 (internal quotation marks omitted). In this middle-ground, "[i]f the burden is merely 'reasonable' and 'nondiscriminatory,' . . . the government's legitimate regulatory interests will generally carry the day." *Stone v. Bd. of Election Comm'rs for Chicago*, 750 F.3d 678, 681 (7th Cir. 2014) (quoting *Burdick*, 504 U.S. at 434). Finally, at the other end of the spectrum, courts apply rational-basis review to laws that impose no burdens or minimal burdens. *See NEOCH*, 696 F.3d at 592; *Biener v. Calio*, 361 F.3d 206, 214-15 & n.3 (3d Cir. 2004). The "statute need only be 'rationally related to legitimate government interests,'" and the challenger must negate "'every conceivable basis which might support the government action.'" *Johnson v. Bredesen*, 624 F.3d 742, 746-47 (6th Cir. 2010) (citations omitted).

a. Rational basis applies to Count I and Ohio's laws easily pass the test

The "right to vote" has never included the "right to receive absentee ballots." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). An absentee ballot affords a voter a "privilege as a matter of convenience, not of right." *Prigmore v. Renfro*, 356 F. Supp. 427, 432 (N.D.Ala. 1972), *aff'd* 410 U.S. 919 (1972). The challenged laws are "generally applicable, nondiscriminatory voting regulation[s]." *Crawford*, 553 U.S. at 207 (Scalia, J. concurring).

It is axiomatic that all laws almost certainly affect some people differently than others. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). It is only when a law significantly affects a fundamental right that it is examined by something higher than rational basis. *Id.* Even when a college student and flight attendant alleged that their plans took them out-of-state on Election

Day, such burdens triggered rational-basis review. *Fidell v. Bd. of Elections of New York*, 343 F. Supp. 913, 915 (E.D.N.Y. 1972), *aff'd* 409 U.S. 972 (1972); *Prigmore*, 356 F. Supp. at 432. Thus, absentee-ballot laws receive higher scrutiny *only if* a refusal to grant that option "absolutely prohibits [the challengers] from voting." *Goosby v. Osser*, 409 U.S. 512, 521 (1973). That is not the situation in a challenge to early voting laws, such as in *Gustafson v. Illinois State Board of Elections*, No. 06 C 1159, 2007 WL 2892667 (N.D.Ill. Sept. 30, 2007), where the court selected rational basis based on "the severity of the burden being imposed on the right to vote" and the plaintiffs raised "questions of ease of voting rather than outright denial of any fundamental right." *Id.* at *9. Or in *Fidell*, where the decision not to provide absentee ballots before primary elections was tested against rational basis. 343 F. Supp. at 915; *see also Weber*, 347 F.3d at 1107; *Biener*, 361 F.3d at 214-15 & n.3. As the *Griffin* Court stated, it is "obvious" that federal courts cannot "decree weekend voting, multi-day voting, all-mail voting, or Internet voting." 385 F.3d at 1130.

Rational-basis review applies to the challenged laws. *All* of the laws relate to absentee or provisional voting, *all* are facially neutral, *all* pose little or no burden, and *none* absolutely prohibit voting.

All early voters in Ohio have multiple voting options, and the rules by which a person votes are the same regardless of the person's race, whether they are a student, or with which party they are affiliated. The importance of this facial neutrality cannot be overstated. The Sixth Circuit's decision in *Obama for America*, turned on the distinction between facial discrimination and facial neutrality. The Court suggested at the preliminary-injunction stage that a facially *discriminatory* law granting three additional early in-person voting days only to military personnel likely would not survive constitutional scrutiny. 697 F.3d at 436. But the Court said it

would have reached a *different* result had the law been *neutral*: "If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its 'important regulatory interests' *would likely be sufficient* to justify the restriction." *Id.* at 433-34 (citation omitted; emphasis added).

Common sense applies. It is illogical to think that a State with one of the most expansive early voting systems somehow is burdening the right to vote *because of* its expansive system. Comparison to other States cannot be overstated. Ohio is a leader in early voting days and voting opportunities and *the* leader in DRE machines. *Supra* pp.11-12, 23. Ohio's early polling places are situated where they are more convenient for minorities and Democrats than for white or Republican voters. *Supra* pp.18-19. Common sense identifiers apply to absentee ballots. *Supra* pp.24-25. Ohio is a leader in counting provisional ballots. *Supra* pp.32-33. If anything, Ohio's laws have a *beneficial* impact on the right to vote. A State that goes this far to make voting easy is not violating the Constitution.

To carry their burden under rational basis, Plaintiffs must negate "every conceivable basis which might support the government action." *Johnson*, 624 F.3d at 747. This Plaintiffs cannot do. All of the challenged laws are supported by multiple legitimate state interests. *Supra* pp.46-48; *see also supra* pp.11-37. Count I fails.

b. Even under a higher level of scrutiny, Ohio's laws are constitutional

Even if increased scrutiny applies to Count I, Plaintiffs' claim still fails. Ohio's expansive early-voting laws further "relevant and legitimate state interests 'sufficiently weighty to justify'" them. *Crawford*, 553 U.S. at 191 (citation omitted). Weighty justifications exist for all of the challenged laws. They are described above, as well as in the expert reports of Hood, Trende, McCarty, and Allen.

Briefly, with respect to the elimination of SDR, Ohio still has one of the longest early voting periods, few people used Golden Week, most States do not have SDR, the elimination of SDR did not decrease participation, bipartisan support existed for the elimination of Golden Week, SDR created an opportunity for fraud, SDR generated costs and administrative burdens, there are numerous other opportunities to register, and SDR created confusion and damaged voter confidence. *Supra* pp.11-17.

Regarding one early voting site, Plaintiffs' demand would be fiscally burdensome if not impossible, the early voting sites are located in convenient places, boards can apportion resources to the early voting site based on need, multiple early sites would create administrative burdens, and multiple sites would lengthen wait times. *Supra* pp.17-21.

Regarding the DRE formula, the change reflects voting patterns, the formula merely sets the floor, fiscal considerations support the revision, under the revised formula counties now have more flexibility to apportion resources, and Ohio has the best DRE to voting population ratio. *Supra* pp.21-23.

The absentee ballot identifiers are needed to process ballots, minimize opportunities for fraud, and standardize the process. *Supra* pp.23-27. Absentee ballots are not mailed to inactive voters because such mailings would be unlikely to reach the voters, at most only one other State does this mailing, and the mailing is designed to encourage voting. *Supra* pp.27-29.

Finally, the provisional ballot process sets forth basic identification requirements that help election officials identify voters, even when there is a problem on Election Day. *Supra* pp.29-35. With the current laws in place, Ohio's provisional ballot acceptance rate was among the highest in the country. Trende Reb ¶75; Damschroder ¶53.

All of these challenged laws promote confidence in the system and are supported by

Ohio's election officials. *See supra* pp.11-37. "[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems" and decide on the one that best fits their constituents' diverse needs. *Weber*, 347 F.3d at 1107. Ohio appropriately did so.

3. The challenged laws were not passed with discriminatory intent (Count II)

When challengers cannot show that a neutral voting law (i) severely burdens the right to vote of the *general* class of state voters, they can alternatively show (ii) that the law's *specific* effect on a discrete class under a traditional equal-protection analysis. That analysis requires a challenger to show *both* that the law has a disparately harmful impact on the class *and* that the legislature intended to discriminate against the class. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001). The latter requirement is critical, as "[t]he Equal Protection Clause forbids only intentional discrimination." *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

Plaintiffs have not proven, nor can they, that the challenged laws have a disparate impact. Indeed, Ohio's expansive early-voting options *encourage* the right to vote by allowing everyone numerous opportunities for voting; they do not *hinder* that right. *McDonald* made the same point: "Ironically, it is Illinois' willingness to go further than many States in extending the absentee voting privileges . . . that has provided [the challengers] with a basis for arguing that the provisions seem to operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise." *McDonald*, 394 U.S. at 810-11.

Plaintiffs also fail to show discriminatory intent. They cite to only three points: (1) a statement of a county party member who did not vote for any of the laws; (2) a statement of a Senator that does not reference any group; (3) and an unsupported claim that information was

presented to the General Assembly and the Secretary that African Americans, students, and Democrats disproportionately use early voting. ODP Interr. Resp.10; DPCC Interr. Resp.10; MCDP Interr. Resp.10. None of this is sufficient. A "solitary statement from a House Report" does not show legislative intent. *Cmty. Care Found. v. Thompson*, 318 F.3d 219, 226 (D.C. Cir. 2003); *see also Kirby v. Tennessee Valley Auth.*, 877 F. Supp. 589, 591 (N.D.Ala. 1994) (for legislative intent, "the court will not be influenced" by the "motives of individual members of the legislature"). Furthermore, even if a "disproportionate effect" does exist and "was foreseen," this is not enough to prove a constitutional violation. *United States v. Blewett*, 746 F.3d 647, 659 (6th Cir. 2013). Intent is required. *Id*. Plaintiffs have not demonstrated that any member of General Assembly, much less the entire General Assembly, was acting with discriminatory motives.

C. Plaintiffs' "Partisan Fencing" Claim (Count III) Fails

Transitioning to Plaintiffs' ancillary claims, the Court should deny Plaintiffs' claim that the challenged laws "fenc[e] out" Democrats. Am. Compl. ¶¶189-93. "Partisan fencing" is not a recognized cause of action. Plaintiffs rely on selective quotations from one case, *Carrington v. Rash*, 380 U.S. 89, 94 (1965), and a concurrence in another case, *Vieth v. Jubelirer*, 541 U.S. 267 (2004), to try to create this new theory of relief. *Carrington* is a 1965 Fourteenth Amendment opinion that pre-dated the *Anderson-Burdick* framework. *Veith* is a redistricting case that, like *Carrington*, has no relevance.

In *Carrington*, the Court invalidated a law that "absolute[ly] deni[ed]" armed service-members from voting while stationed in Texas. 380 U.S. at 93. Texas argued that absolutely denying service-members the franchise was necessary to prevent the "concentrated balloting of military personnel" from overwhelming small communities. *Id.* The Court disagreed and held that while Texas "has the right to require that all military personnel enrolled to vote be bona fide

residents of the community" and may take "reasonable and adequate steps" to ensure they fulfill residence requirements, Texas is not permitted to "obliterate[]" their voting rights. *Id.* at 93-94, 96. Subsequent Supreme Court decisions applying the "fencing out" language from *Carrington*, *id.* at 94, likewise involved voting laws completely denying certain groups the right to participate. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. Houma*, 395 U.S. 701 (1969).

Carrington's rationale does not extend to neutral election laws having proper justifications (such as the challenged laws). *See Levy v. Scranton*, 780 F. Supp. 897, 900-02 (N.D.N.Y. 1991). The *Levy* court, for example, contrasted a residency law in New York that was "neutral on its face" with the law in *Carrington* that "by its very terms" prevented one group from voting. *Id*. The court recognized that while students and other transient groups would be "affected" by New York's residency law, the challenged legislation served the "constitutionally permissible purpose of providing guidelines for determining bona fide residency." *Id*. The court also held that the plaintiffs had not proved the discriminatory intent required for their claim and cautioned that "proper deference" should be given to the legislature to decide the purpose of laws. *Id.* at 900, 902.

Unlike in *Carrington*, the challenged laws apply to everyone and do not single out any group to be excluded from the ballot box. These laws also serve a variety of important state interests by setting forth a reasonable process for election administration. Again, Plaintiffs have failed to show that any Ohio lawmaker (and certainly not the Legislature as a whole) or the Ohio Secretary enacted or issued the challenged laws with improper motivations. *See supra* pp.55-56.

Plaintiffs' reliance on the concurrence in *Vieth*, which addressed the role of political affiliation during redistricting, is likewise unavailing. None of the challenged laws have

anything to do with redistricting. The plurality in *Veith* determined that there is no judicially enforceable limit on the political considerations that lawmakers can consider when drawing district maps. 541 U.S. at 305. In the concurrence upon which Plaintiffs rely, Justice Kennedy agreed that the claims failed, but also wrote that the First Amendment principles might provide some guidance in future redistricting cases. He added, however, that even if the First Amendment would have a place in redistricting, invidious discrimination would still be required, just as it is required with an equal-protection-based redistricting claim. *Id.* at 306-07, 317. Thus, even if the *Veith* concurrence created a new First Amendment claim (and it did not), Plaintiffs would still lose because they have introduced no evidence that the challenged laws were enacted with the intent to prevent Democrats from participating in the political process.

D. Count V Does not State a Cause of Action

Plaintiffs purport to bring a claim under Section 1971 of the Civil Rights Act (renumbered as 52 U.S.C. §10101). *See* Am. Compl. ¶¶201-04. But there is no private cause of action under Section 1971. As the Sixth Circuit has correctly held, "Section 1971 is enforceable by the Attorney General, not by private citizens." *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000); *see also* 52 U.S.C. §10101(c) (assigning enforcement of 52 U.S.C. §100101(a)-(b) to the Attorney General); *Mixon v. Ohio*, 193 F.3d 389, 406 n.12 (6th Cir. 1999) ("Section 1971, however, is not part of the enforcement provisions of the Voting Rights Act and only the Attorney General can bring a cause of action . . . ."). Plaintiffs recognize this binding authority and concede they are simply preserving the issue for appeal. Am. Compl. ¶204 n.8. This Court should, therefore, follow the Sixth Circuit's published precedent and reject this claim.

E. Plaintiffs' Due Process Claim (Count VI) Fails

Contrary to Plaintiffs' contentions, Ohio's provisional ballot system does not violate procedural due process. Am. Compl. ¶¶205-10. Ohio's procedures put voters on notice when

there are questions about their eligibility. By casting a provisional ballot, and completing the ballot affirmation, provisional voters receive an opportunity to provide information demonstrating their eligibility. Considering the time-sensitive context of elections, and the weighty public interests in reaching accurate and efficient results, this approach easily satisfies procedural due process.

Procedural due process "is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal quotations omitted). Generally speaking, procedural process requires that a person receive notice and an opportunity to be heard when a property or liberty interest is in question. *Jahn v. Farnswoth*, — F. App'x —, No. 14-1916, 2015 WL 3938035, at *5 (6th Cir. June 29, 2015). But due process is context specific; it does not require the same procedures for every situation. *Mathews*, 424 U.S. at 334 ("[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotations omitted)).

The Court must consider the specific circumstances involved, looking to (1) "the private interest affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the government and public interests at stake. *Id.* at 335. The final public interest factor "includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right," additional procedures. *Id.* at 347.

When evaluating procedural due process within the context of elections, it is important to recognize the State's compelling public interests in operating fair and efficient elections. *See Wilson v. Birnberg*, 667 F.3d 591, 601 (5th Cir. 2012) (recognizing that "'the ability of States to operate elections fairly and efficiently'" is "[p]articularly salient" to the procedural due process

inquiry) (quoting *Burdick*, 504 U.S. at 438)). After all, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433 (internal quotations omitted).

Applying these standards, Plaintiffs' procedural due process claim fails for many reasons. To begin, Plaintiffs misunderstand the nature of provisional voting: the provisional ballot process *is, in and of itself, a procedural safeguard protecting voters' rights*. A voter only has to vote provisionally when the circumstances raise eligibility concerns. *Supra* pp.29-30. At the time voters cast provisional ballots, which is typically Election Day and always in-person, they are put on notice of these concerns. *Supra* p.30. Voters complete an affirmation providing information that assists election officials in confirming their identity and eligibility. *Supra* pp.33-34. Voters who fail to provide identification may supply such identification within seven days of the election. O.R.C. §§ 3505.181(B)(7), 3505.182(D)(4). The ultimate validity of these provisional ballots is then determined by board members at meetings open to the public. Dir. 2014-14 p.2 **(Ex. 70)**.

In addition to providing a valuable safeguard for voters, the provisional ballot process allows for effective and efficient election administration. The public interests at stake are far from "marginal", Am. Compl. ¶208, as Plaintiffs seem to suggest. Rather, to ensure both the integrity of the elections and the public's confidence in the process, election officials must process/report election results both reliably and quickly. *See Burdick*, 504 U.S. at 438. Boards are statutorily required to determine the validity of provisional ballots and count them no later than twenty-one days after an election. O.R.C. § 3505.32. Despite these circumstances,

Plaintiffs request relief (*i.e.*, a post-election period to cure provisional affirmation mistakes) that would require board employees to create an entirely new system for (i) inputting provisional ballots into a database, (ii) evaluating provisional ballots for deficiencies, (iii) assigning provisional ballots a status, and (iv) notifying provisional voters of this status. *Supra* p.35. Such a process would have to occur on or directly after Election Day, before boards decide the validity of the provisional ballots, and when board employees are already busy performing various tasks.

In making their demand, Plaintiffs rely on an apples to oranges comparison between the absentee ballot cure period and provisional voting. Absentee and provisional voting are different. *Supra* pp.34-35. With absentee voters, boards can verify voter eligibility before sending an absentee ballot, and prior to Election Day. *Supra* p.35. Provisional voting, on the other hand, takes place (by and large) on Election Day, outside of an election database environment, with no way to pre-check voter eligibility. *Supra* p.35. Such ballots cannot be reviewed until after Election Day and cannot be counted until the board determines the validity of all provisional ballots within a county. *Supra* p.30.

Finally, it is important not to conflate procedural due process with substantive due process. *See League of Women Voters v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008) (recognizing that not all concerns regarding the right to vote "implicate procedural due process"). Plaintiffs' request here stretches outside the confines of procedural due process. They do not simply request that provisional voters receive additional notice and opportunity to be heard regarding their ballots (on top of the provisional ballot procedures already in place); they seek a post-election opportunity for voters to *alter* their ballot affirmations—an "Opportunity to Cure Mistakes on the Provisional Ballot Affirmation Form." Am. Compl. p.60 (Count VI heading). Litigants do not have the constitutional right to substantively change election procedures to suit

their preferences. Ohio, however, has the authority to establish a reasonable process, including reasonable provisional ballot procedures, to allow for fair and efficient elections.

F. Plaintiffs' "Bush v. Gore" Claim Fails (Count VII)

The Court should also reject Plaintiffs' claim concerning right location, wrong precinct voters. Am. Compl. ¶¶211-15. This issue is on the verge of mootness without judicial intervention. The Secretary has already posted a proposed permanent directive—set to become effective in December 2015—requiring boards to consolidate poll books in multi-precinct locations. *Supra* pp.36-37. Regardless, even assuming a live issue remains, this election-administration decision should be made by Ohio and its boards, not this Court via constitutional mandate.

The Equal Protection Clause protects the rights of voters to have their votes counted on equal terms. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000). In *Bush v. Gore*, the Supreme Court held that a recount of Florida ballots violated this principle due largely to a lack of "adequate statewide standards for determining what is a legal vote . . . ." *Id.* at 110. The Court reasoned that "once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05.

But *Bush v. Gore*, which was "limited to the present circumstances" and dealt with the counting of ballots post-election, did not undermine the authority of local boards to make discretionary choices regarding the nuts and bolts of elections. *Id.* at 109. The Court expressly stated that "[t]he question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.*; *see also id.* at 134 (J. Souter, dissenting) ("[T]he Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction."). Applying *Bush v. Gore*, the Sixth Circuit has likewise distinguished between (i) "'regulatory-type' actions" and "general administrative decisions"

regarding election implementation and (ii) "'adjudicatory-type' action[s]", such as counting ballots, which cause greater constitutional concerns. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 235 (6th Cir. 2011); *cf. also Weber*, 347 F.3d at 1107 & n.2 ("[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems.").

Ohio's process for addressing correct location, wrong precinct voters does not violate equal protection. Ohio provides uniform statewide standards by which boards consider provisional ballots. Dir. 2014-20. When voters attempt to vote in the wrong precinct, election officials must direct voters to the correct precinct. Adv. 2014-04 p.4. Provisional ballots cast in the correct location, but wrong precinct are, therefore, only screened out if the election official directs the voter to the correct precinct (and completes a form affirming as much). Dir. 2014-20 pp.4-5; Form 12-D. Treating these ballots differently is not arbitrary because, in this scenario, the voter has refused, despite instructions, to go to the correct precinct. As one would expect, this issue is highly limited; it happened only six times in 2014. Hood pp.38-39; *supra* p.36. Requiring voters to follow express instructions imposes little, if any, burden. Given the limited scope of this issue, and the miniscule burden, Ohio and its boards should be able to weigh the pros and cons (*e.g.*, inherent costs/training involved in switching to different poll book system) of consolidating poll books. This is a quintessentially administrative decision about the implementation of elections.

G. Federalism, Anti-Commandeering, and Constitutional Avoidance Preclude Plaintiffs' Claims

Three additional legal principles confirm that the Constitution and the Voting Rights Act do not permit compelled, far-reaching, and extravagant changes to Ohio's election laws.

Federalism. The Constitution conferred upon the federal government only "discrete,

enumerated" powers. *Printz v. United States*, 521 U.S. 898, 919 (1997). This implication was rendered express by the Tenth Amendment. *Id.* The Supreme Court has often reiterated the importance of federal "[d]eference to state lawmaking," particularly given the important role of States as "laboratories" to devise different solutions to various issues. *See, e.g.*, *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S.Ct. 2652 (2015); *see also Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (acknowledging the "unique nature of state decisions that 'go to the heart of representative government'") (citation omitted)). For example, in *Marston v. Lewis*, the Supreme Court held that the "Constitution is not so rigid" as to preclude a State's registration cut-off 50 days before an election. 410 U.S. at 681. Such deference to state-lawmaking is especially important in the context of early voting, as States consider and experiment with various options. If Ohio loses because it decided to *expand* its early voting opportunities further than most other States and thereafter made minor adjustments to its procedures, what other State would ever dare tread such a perilous path?

Beyond moderating the federal judiciary's oversight of state action, federalism also places limits on Congress and the Voting Rights Act. In the context of congressional action, the Supreme Court requires Congress to include a clear statement if it intends to take away traditional state powers: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). State law, of course, has long governed elections, so when a "federal statute concerns congressional regulation of elections . . . a court must not lightly infer a congressional directive to negate the States' otherwise proper exercise of their sovereign power." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2261 (2013) (Kennedy, J., concurring in part and concurring in the judgment). Congress has not expressly stated that the Voting Rights Act

supplants the discretion of States and thus courts are left with the usual "starting presumption that Congress does not intend to supplant state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). If the Voting Rights Act is read otherwise here, this would effectively overturn the laws of almost every State, because all States handle elections differently and few come close to the broad voting opportunities in Ohio. *Brown*, 895 F. Supp. 2d at 1254 (accepting the argument that only eight days of early voting violate the Voting Rights Act would have "far-reaching implications").

Anti-commandeering. The rule against the federal government commandeering state sovereignty is also implicated. In *Printz*, the Supreme Court invalidated a federal law that obligated state and local officials to conduct background checks on gun purchases and held that "[t]he Federal Government may neither issue directives requiring States to address particular problems, nor command the States' officers, of those of their political subdivision, to administer or enforce a federal regulatory program." 521 U.S. at 935. Likewise, in *New York v. United States*, 505 U.S. 144, 147 (1992), the Supreme Court held that while Congress can *encourage* States to dispose of radioactive waste within their borders, it cannot *compel* them to do so. If the Constitution or the Voting Rights Act *requires* Ohio to have 784 early voting sites, or *compels* Ohio not to require dates of birth on absentee ballot envelopes, or *mandates* any of the other changes sought by Plaintiffs, such compulsion would amount to a federal regulatory regime over internal state affairs. *Printz* and *New York* make clear that the federal government is not able to mandate a one-size-fits-all set of election rules.

Avoidance. Under the canon of constitutional avoidance, courts interpret statutes with ambiguous scopes in a manner that avoids constitutional questions. *See Davet v. Cleveland*, 456 F.3d 549, 554-55 (6th Cir. 2006); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. &*

Const. Trades Council, 485 U.S. 568, 575 (1988). This canon applies to the Voting Rights Act. *See, e.g.*, *Shelby Cnty.*, 133 S.Ct. at 2631 (invalidating coverage formula). In an early Voting Rights Act case, the Supreme Court explained that Congress's power to enforce voting rights was limited to practices that had a demonstrated history of use for racial discrimination. *See Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), *superseded by* U.S. Const. amend. XXVI. In *Mitchell*, the Court affirmed Congress's temporary ban on literacy tests, because "Congress had before it a long history of discriminatory use of literacy tests to disenfranchise voters on account of their race." *Id.* at 132. By contrast, the Eleventh Circuit in *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) rejected application of Section 2 to felon-disenfranchisement laws, noting the "complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters." *Id.* at 1231. Here, Plaintiffs have provided no evidence that States historically set early-voting schedules to discriminate. That is because early in-person voting for all voters is a recent innovation that Ohio designed to *encourage* voting.

H. Plaintiffs Do Not Have Standing

On top of their many problems on the merits, Plaintiffs also lack standing. To demonstrate standing they "must show an injury in fact, fairly traceable to the defendant's conduct, that is likely to be redressed by a favorable decision from the court." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014). Plaintiffs have the burden, and must support "[e]ach element of standing . . . in in the same way as any other matter . . . [with the] degree of evidence required at successive stages of the litigation." *Id.* (internal quotations omitted).

To establish sufficient injury, an organization must show more than abstract harm. *Id.* at 461. Moreover, at trial, an organization must go beyond "mere allegations" of injury and present "specific facts" to meet its burden of proof. *Id.* at 459-60 (holding that organization failed to show it had diverted resources because of challenged laws). An organization may generally sue

on behalf of its members if such members would have standing in their own right. *Friends of Tims Ford v. Tennessee Valley Auth.*, 585 F.3d 955, 967 (6th Cir. 2009). But organizations cannot vote, and they do not automatically receive standing to pursue the rights of unidentified voters. *Fair Elections Ohio*, 770 F.3d at 461.

Plaintiffs do not satisfy these standing principles. The organizational Plaintiffs—consisting of the Ohio Democratic Party and two county branches of the Democratic Party—have not provided any specific facts showing that the challenged laws have directly injured them. Nor have these organizations identified any specific member that was, or imminently will be, denied the right to vote because of the challenged laws.

Additionally, Plaintiffs are not sufficiently aligned with the broad groups they claim to represent. Defendants recognize that political parties may at times sue to protect the rights of theirs members. *See, e.g.*, *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004). Plaintiffs, however, seek to push the envelope further here, purporting to represent all of Ohio's "African American[s], Latino[s], and young people," Am. Compl. ¶2, because of their voting tendencies. Recent history illustrates the oddities this expansive approach creates. Ohio just settled an early-voting case with the Ohio NAACP brought on behalf of African American voters. After the settlement, lead counsel for the plaintiffs praised Ohio's election practices, stating, "We have an incredibly robust system of early voting thanks to this settlement." Frizell, *Democrats Play Hardball . . .*, TIME, 5/14/15 **(Ex. 54)**. Despite these circumstances, Ohio is now being sued by different organizations on behalf of African American voters—organizations whose relationship with these voters is less direct than the NAACP.

The three individual Plaintiffs (Am. Compl. ¶¶30-33) also lack standing. None of these individuals have pleaded, much less proven, that they have been, or will be, denied the right to

vote. And these individuals also have not demonstrated standing to sue on behalf of others. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (detailing third party standing requirements).

I. Plaintiffs' SDR Claim is Barred by Laches

In the *NAACP* settlement (*NAACP v. Husted*, Case No. 2:14-CV-404 (2014)), the plaintiffs agreed to leave Golden Week out of the early voting schedule. The only change to the 2016 general election consisted of adding four hours on one additional Sunday. Settlement Agreement **(Ex. 14K)**. Plaintiffs admit there are no differences between their claim here and the claim that was settled. *See, e.g.*, ODP Interr. Resp.16. Plaintiffs should have participated in the prior lawsuit instead of waiting. The one EIP polling place per county issue is also belated. Each county has had one early in-person voting location since early voting began and uniform early voting hours since 2012.

J. Plaintiffs Seek to Introduce Inadmissible Deposition Transcripts

One final housekeeping matter remains. On November 6, 2015, Plaintiffs disclosed 15 deposition transcripts they seek to introduce as affirmative evidence rather than calling the individuals as trial. To take this approach, Plaintiffs must show these witnesses are unavailable. *Allgeier v. United States*, 909 F.2d 869, 876 (6th Cir. 1990). Notably, any witness within 100 miles is subject to the Court's subpoena power. Fed. R. Civ. P. 32(a)(4)(B). All 15 of these depositions were discovery depositions; none were preservation depositions. Accordingly, Defendants asked very few questions of any of these witnesses, and will be unfairly prejudiced if all of these transcript are admitted in lieu of live testimony. *Cf. Allgeier*, 909 F.2d at 876-77 (finding no prejudice when witness was cross examined during deposition).

Under these circumstances, Defendants propose the following approach. Of the 15 witnesses, 3 (Perlatti, Munroe, and McNair) have been listed as trial witnesses and, therefore, are presumably available. Mr. McNair has also stated he will voluntarily appear. These depositions

should, therefore, be excluded as affirmative evidence. The State does not oppose designation of the depositions—individual and Rule 30(b)(6)—of Mr. Damschroder subject to the opportunity for objections and counter-designations. For the remaining witnesses, Rule 32 requires a showing of unavailability before their transcripts may be used. Notably, 6 of these witnesses (Terry, Metzger, Triantafilou, Tuckerman, Poland, and Baldridge) are within 100 miles, Conover ¶¶3-4 Att.A **(Ex. 71)**, and thus within the Court's subpoena power. As Mr. Walch resides in Las Vegas, Defendants do not oppose presuming unavailability and designating his deposition subject to the opportunity for objections and counter-designations.

IV. CONCLUSION

For the above reasons, the Court should deny Plaintiffs claims and their requests for relief in their entirety.

Respectfully submitted,

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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 November 12, 2015, and served upon all parties of record via the Court's electronic filing system.

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