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' WRITTEN OBJECTIONS TO THE ADMISSIBILITY OF PLAINTIFFS' EVIDENCE

I. INTRODUCTION

During trial, Plaintiffs on numerous occasions referred to or attempted to introduce evidence prohibited by the Federal Rules of Evidence or the Court's orders in this case. This brief addresses Defendants' objections to such evidence. Generally, Plaintiffs' objectionable evidence falls into the following categories: (1) videos of select legislative hearings of the Ohio General Assembly (and transcripts of some of those videos prepared at Plaintiffs' counsel's direction); (2) written statements to the Ohio General Assembly expressing opinions of non-parties regarding proposed Ohio laws; (3) e-mails to, from, and between employees of the Secretary of State's Office; (4) various other out-of-court statements and documents produced by non-parties; (5) testimony elicited from Plaintiffs' expert Dr. Jeffrey Timberlake regarding research and analyses Magistrate Judge King expressly excluded in a previous order; (6) transcripts of deposition testimony from witnesses who either testified at trial or whom Plaintiffs made no attempt to present at trial; and (7) other miscellaneous prejudicial and

irrelevant hearsay statements. The proffered evidence in each of these categories suffers from numerous evidentiary defects and should be excluded from the trial record in this matter.

II. LAW AND ARGUMENT

A. Ohio Government Channel videos (PX0001, PX0003, PX0005, PX0007, PX0009, PX0011, PX0013, PX0015, PX0017) and transcripts of those videos (PX0002, PX0004, PX0006, PX0008, PX0010, PX0012, PX0014, PX0016, PX0018) are inadmissible.

Without calling a witness to explain relevance or lay a proper foundation, Plaintiffs seek to admit videos of select legislative hearings of the Ohio General Assembly recorded by the Ohio Government Channel ("OGC"). Plaintiffs also want to admit transcripts of some of the videos, prepared by a court reporter at Plaintiffs' counsel's request and under the direction of a paralegal employed by Plaintiffs' counsel's firm. This evidence is inadmissible and must be excluded for a number of reasons.

1. Plaintiffs do not claim that the challenged laws are ambiguous; thus, any analysis of the intent behind their passage is improper.

As a threshold matter, any purported evidence of legislative intent is improper in this case because the statutes at issue are unambiguous. "[I]t is a cardinal rule of statutory construction that a court must first look to the language of the statute itself.'" *Katz v. Fidelity Nat. Title Ins. Co.*, 685 F.3d 588, 596 (6th Cir. 2012) (quoting *State v. Jordan*, 733 N.E.2d 601, 605 (Ohio 2000)). "If the statutory language is clear, the inquiry ends and the court must apply the plain language." *In re Kyle*, 510 B.R. 804, 811 (Bankr. S.D. Ohio 2014) (citing *Katz*, 685 F.3d at 596; *In re Depascale*, 496 B.R. 860, 869 (Bankr. N.D. Ohio 2013)).

In other words, it is improper to consider "legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors" unless the Court *first* finds

that "the language of the statute is, itself, capable of bearing more than one meaning." *Dunbar v. State*, 992 N.E.2d 1111, 1116 (Ohio 2013).

Critically, Plaintiffs here do not even claim that any of the challenged laws are subject to more than one interpretation or are otherwise ambiguous. Nor could they: testimony from their own witnesses confirm that Ohio's laws clearly set forth Ohio's early voting schedule, requirements regarding absentee ballot mailings, and provisional and absentee ballot requirements. Having failed to claim—much less prove—ambiguity, any review beyond the plain language of the challenged laws is improper. Instead, this Court is bound by the "cardinal rule," set forth by the Sixth Circuit in *Katz* and the Ohio Supreme Court in *Jordan*, that the General Assembly's intent in passing the challenged laws must be determined by the plain language of each statute.

2. The evidence Plaintiffs proffered in support of their claims regarding legislative intent and motivations is inadmissible.

Even if Ohio law permitted an inquiry into legislative intent (and it does not), the specific evidence Plaintiffs proffered for this point fails for several reasons.

a. Isolated statements by individual legislators captured on the Ohio government telecommunications videos are irrelevant to prove the intent of the entire General Assembly.

First, the videos from the Ohio government telecommunications ("OGT") service are irrelevant as a matter of law to the issue for which Plaintiffs offer them—*i.e.* establishing the intent or underlying motivations of the Ohio General Assembly in passing the challenged laws in this case.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *United States v. Lawson*, 535 F.3d 434, 442 (6th Cir. 2008); *see*

also Fed. R. Evid. 401. Even though the standard for relevancy is liberal, "such relevance does not exist when the proposed evidence, if true, is of no consequence to the trial." *United States v. Campana*, 429 Fed. App'x 586, 590 (6th Cir. 2011) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993); *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 905 (6th Cir. 2006)).

The videos fail the relevancy test. Even if true, the statements by individual legislators captured on the videos are not probative of legislative intent. It is well-settled that "[i]solated statements of individual legislators" do not represent "the intent of the legislature as a whole." *In re Davis*, 170 F.3d 475, 480 (5th Cir. 1999); *see also United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (holding that it is improper to determine the constitutionality of a statute "on the basis of what fewer than a handful of Congressmen said about it"); *Bread Political Action Comm. v. Fed. Election Comm.*, 455 U.S. 577, 582 n.3 (1982); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir.1996). Rather, "[t]o the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent," not the comments of individual legislators. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 912 n.3 (9th Cir. 1988); *see also Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." (quotation omitted) (alteration in original)); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 342 (1982) ("Reliance on . . . isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards . . . ."); *Cmty. Care Foundation v. Thompson*, 318 F.3d 219, 226 (D.C. Cir. 2003)

(holding that a "single statement from a House Report" was insufficient to prove congressional intent).

Even Plaintiffs' counsel admitted that one legislator's statements do not reflect the entire legislature, which speaks through its journal. *See* Vol. X at 5:2-6 (The Court and Mr. Kaul). Quite simply, one person does not speak for the whole body. The bill as passed does. The videos are irrelevant and therefore not admissible. Fed. R. Evid. 402.

Even if the videos were deemed to have some minimal probative value, the potential for confusion and prejudice far outweighs any such value. Even relevant evidence can be excluded by a court if its probative value is substantially outweighed by unfair prejudice. Fed. R. Evid. 403. In the context of Rule 403, unfair prejudice "means an undue tendency to suggest decision on an improper basis." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Notwithstanding Plaintiffs' arguments to the contrary, the only conceivable reason for introducing the videos is to improperly impute the particular statements of legislators to the rest of the body.

This inference would be particularly unfair and inaccurate here where the videos indisputably reflect only a snapshot of a single debate that occurred in the General Assembly surrounding the challenged laws. Put differently, they do not represent a complete record of what happened in the General Assembly. Additional components of a record would likely include: other debates related to the challenged laws, debates related to similar laws, negotiations and meetings among legislators, meetings with constituents, sub-committee meetings, analyses by advisors and staff, caucus meetings, meetings with groups such as the OAEO, background research, and of course the thought processes of every individual legislator.

And Plaintiffs did nothing to fill in the gaps. Indeed, after three weeks of trial, Plaintiffs did not even identify which statements they claim reflect legislative intent. They presented no evidence regarding the context in which any statement was made, how that statement compares to other statements a particular legislator may have made at different points during the legislative process, or any other details about the statement. And Plaintiffs similarly presented no evidence regarding (i) whether or which other legislators heard the statements, (ii) when they heard them in relation to the passage of the individual challenged laws, and/or (iii) whether any of the statements factored into the decision-making process for anyone.

On a record this bare, it would be inappropriate to infer that any particular statement reflects the overall position of *a particular legislator* much less the position of the entire body.

In short, the OGT videos reflect, at most, statements by individual legislators at particular a point in time during the legislative process. The position of a single legislator does not reflect the intent of the entire General Assembly and is not relevant here on any legitimate issue in this case. The videos could not be used as evidence of the intent or motivations of the General Assembly, even if such an inquiry were permitted. The videos should be excluded in their entirety. To the extent that Plaintiffs' snapshot of the debates are considered, the entirety of the legislative debates also should be considered, not simply portions designated by Plaintiffs. But even this, Defendants respectfully submit, would still be unreliable and highly prejudicial.

b. Ohio law precludes using Government Channel Videos in judicial proceedings.

Second, even apart from the relevance problems, the Ohio Government Channel videos must be excluded for the additional reason that Ohio law prohibits their use in any court proceeding. Ohio Rev. Code. § 3353.07.

The videos that Plaintiffs seek to admit were recorded by OGT, which provides state government with multimedia support, including audio, visual, and internet services. *Id.* The services related to the official activities of the Ohio General Assembly are funded through grants to an educational television broadcast station, namely the Ohio Channel, that manages staff and provides the OGT services including archived videos of General Assembly floor debates. *Id.*; *see also* www.ohiochannel.org.

But Ohio law dictates that the OGT videos aired on the Ohio Channel are inadmissible. It provides that "[s]ervices provided by the Ohio governmental telecommunications services shall not be used for political purposes included in campaign materials, or otherwise used to influence an election, legislation, issue, *judicial decision*, or other policy of state government." Ohio Rev. Code § 3353.07(A) (emphasis added). Neither party can use them in a state court proceeding. That rule does not change for the State of Ohio once in federal court. That is, the State cannot ignore this clear legislative mandate and attempt to admit them in a federal court proceeding. That law should be equally applied to Plaintiffs in this case.

c. The OGT videos are inadmissible hearsay.

Third, the OGT videos must be excluded as inadmissible hearsay. In general, a statement, other than one made by the declarant while testifying at a trial or hearing, is not admissible if it is offered to "prove the truth of the matter asserted." Fed. R. Evid. 801(c); Fed. R. Evid. 802. Such out-of-court statements are inadmissible unless an exclusion or exception set forth in the Federal Rules of Evidence applies.

The videos of statements legislators made during legislative hearings and transcripts of those videos are all indisputably out-of-court statements, and none of the hearsay exceptions apply.

Of the twenty-three exceptions in Rule 803, only two could even arguable apply—(6) Records of a Regularly Conducted Activity and (8) Public Records. Fed. R. Evid. 803 (6), (8). However, neither of these exceptions applies if circumstances indicate a lack of trustworthiness. *Id.* The Sixth Circuit has held that recordings must be accurate and are inadmissible if substantial portions of the recordings are unintelligible. *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1983). In order to be accurate and trustworthy, a recording must be complete in order "to ensure that it is framed in its proper context" to avoid being misleading. *Eid v. Saint-Goabin Abrasives, Inc.*, No. 06-12392, 2008-WL-2221977, *3 (E.D.Mich. May 27, 2008).

Here, it is undisputed that these videos do not represent a complete record of everything that happens in the General Assembly, and therefore do not reflect all of the debate concerning the challenged laws. For example, the videos may not capture all the activity of the floor sessions, may not include every floor session, do not include proceedings in the legislative committees, and may be edited. *See* Stipulation; Vol. X at 4:6-22. Because the videos do not reflect the entire record, there is no way to determine whether prior or subsequent statements were edited out of the videos or simply not captured by the videos. The videos do not provide a full and complete depiction of the debate concerning the challenged laws. Furthermore, substantial portions of the recordings are inaudible, including the particular vote of Senators. *See e.g.*, PX0004-003, 0010-011; PX0006-009-010.[1] Thus, the videos cannot overcome the general inadmissibility of hearsay. *Robinson*, 707 F.2d at 876; *Eid*, 2008-WL-2221977 at *3.

Other exceptions can be found in Rule 804 regarding an unavailable witness, but Plaintiffs did not even contend during trial that any of the challenged exhibits fall within

[1] "PX0__" refers to Plaintiffs' Supplemental List of Trial Exhibits (Doc. 77).

Rule 804. Nor could they. To rely on Rule 804, the declarant must be unavailable and the proponent of the hearsay statement bears the burden of showing that the declarant is so. *Williams v. United Dairy Farmers*, 188 F.R.D. 266, 271 (S.D. Ohio 1999). Under Rule 804(a), a declarant is unavailable only if he is exempt from testifying based on a court ruling that a privilege applies, refuses to testify despite a court order, testifies that they cannot remember, is dead, or is absent from the trial and the statement's proponent has not been able to procure attendance or testimony despite proper process. Fed. R. Evid. 804(a)(1)-(5). It is important to note, however, that the "mere absence of the declarant from the hearing, alone, does not establish unavailability." *Williams*, 188 F.R.D. at 272 (citing Fed. R. Evid. 804(a)(5) Advisory Committee Notes). The proponent of the statement must "establish that reasonable efforts were undertaken to secure the declarant's attendance" at trial. *Id.*

Plaintiffs established none of the criteria under which a declarant is considered unavailable. No effort was made to call the legislators shown in the videos, so there is no ruling from this Court that a privilege applies, no refusal to testify, and no testimony that the declarant cannot remember. Furthermore, there was no argument that any of the declarants are dead or that Plaintiffs were unable to procure their attendance.

Accordingly, because the OGT videos are hearsay and no exception applies to the videos, they are inadmissible under the Federal Rules of Evidence and should be excluded.

d. Transcriptions of OGT videos are also inadmissible.

Transcribing inadmissible statements does not make them any less inadmissible. For the same reasons that the OGT videos are inadmissible, so are their transcriptions. Additionally, Plaintiffs cannot credibly argue that the transcriptions accurately and completely reflect everything that happened when the challenged laws were passed through the General Assembly.

With respect to their completeness, the transcripts are excerpts from possibly edited videos of only portions of General Assembly floor debate. *See* Stipulation; Vol. X at 4:6-22. With respect to their accuracy, statements by—and most notably votes of—Senators are repeatedly recorded as "Inaudible" throughout. *See, e.g.*, PX0004-003, 0010-011; PX0006-009-010.

Rachel Roberts's declaration regarding the transcriptions does not alter that conclusion. Ms. Roberts's declares that she is "submitting" the transcriptions (Roberts Declaration November 30, 2015, ¶ 2), but she does not state that she prepared the transcriptions, nor does she state that she compared the transcriptions to the videos that Plaintiffs are attempting to admit into evidence. Ultimately, it is not clear why Ms. Roberts is declaring anything related to the transcripts *at all*.

Once again, Plaintiffs do not claim that the challenged laws are ambiguous, and any attempt to look to any evidence beyond the plain language of the statutes is improper. Looking to excerpts of transcripts of portions of videos that reflect a fraction of what happened when the challenged laws were passed through the General Assembly is simply inappropriate. This is especially true here where Plaintiffs made no effort to call a witness to connect the dots between the videos, the transcripts, and the challenged laws.

B. Written statements submitted to the General Assembly (PX0020, PX0067-71, PX0096, PX0121) are inadmissible.

The second category of objectionable evidence Plaintiffs proffered at trial can be described as written statements to the General Assembly regarding proposed legislation. Specifically, Plaintiffs seek to introduce the written statements of two testifying witnesses, Hamilton County Board of Elections Chair Tim Burke and Cuyahoga County Board of Elections member Sandy McNair, *see* PX0067, PX0070, PX0071, PX0121, as well as the written statements submitted by non-testifying witnesses Brian Davis and Cuyahoga County Board of

Elections' Director Pat McDonald. Plaintiffs should be precluded from introducing these statements for two reasons: (1) they are inadmissible hearsay and (2) they are irrelevant to the issues in this case.

Like the OGT videos, the written statements submitted to the General Assembly are inadmissible hearsay.

Although Mr. Burke and Mr. McNair testified over Defendants' objections about the statements they purportedly submitted to the General Assembly regarding various proposed elections laws, Plaintiffs cannot admit the underlying statements themselves. First, the statements are clearly out-of-court statements being offered for the truth of the matter asserted—*i.e*. the alleged impact of the challenged laws. Thus, for them to be admitted an exclusion or exception must apply. None does. The documents cannot constitute a recorded recollection, Fed. R. Evid. 803(5), because an exhibit purporting to be a recorded recollection can "be received as an exhibit only if offered by an adverse party," which Plaintiffs are not. *Id.* Nor do the documents qualify as "records of a regulatory conducted activity." Fed. R. Evid. 803(6). Testimony confirmed that these statements were merely *personal* statements by the individual authors and did *not* represent the official regularly conducted activity of either the Hamilton County Board of Elections or the Cuyahoga Board of Elections. *See* Fed. R. Evid. 803(6); *see also* Vol. V at 185:6-25 (Burke) (testifying that these letters were his personal statements, not Board statements, even though the letters were on Board letterhead). The statements also do not set out either Board's activities, a matter observed while under a legal duty to report, or factual findings of an investigation; and thus, the statements are not public records. *See* Fed. R. Evid. 803(8). Lastly, the exceptions in Rule 804 cannot apply because the witnesses were available to testify and in fact testified at trial.

Furthermore, none of the exclusions to the hearsay rule apply. First, the statements are not from a party opponent. *See* Fed. R. Evid. 801(d)(2). Contrary to Plaintiffs' arguments at trial, county boards of election are not agents of the Secretary of State but are members of the county government. *See State v. Rousseau*, 822 N.E.2d 847, 849-52 (Ohio Ct. App. 2004). Thus, statements from board members or board employees cannot be construed as statements of a party opponent under Rule 801(d)(2).

Second, a prior statement by a testifying witness may be introduced as non-hearsay only if it is: (1) inconsistent with the witness's testimony at trial (Rule 801(d)(1)(A)); (2) consistent with the witness's testimony but is being used to rebut a charge of recent fabrication or to rehabilitate a declarant's credibility, (Rule 801(d)(1)(B)); or (3) involves identification of a person, (Rule 801(d)(1)(C)). None of these circumstances are present here. Furthermore, with regard to PX0070, the Court already has sustained Defendants' hearsay objections for the very reasons stated herein. *See* Vol. V at 28:14-30:2. Thus, because Plaintiffs did not show that the prior statements are not hearsay, such statements are inadmissible.

The unauthenticated written statements purportedly submitted to the General Assembly by other, non-testifying witnesses are even more problematic. *See* PX0020 (Brian Davis, Written Testimony Submitted to the Ohio House of Representatives in Opposition to SB 238); PX0068 (Testimony of J. Sherman on Ohio SB 216); PX0069 (*Saving Votes: An Easy Fix to the Problem of Wasting Provisional Ballots Cast Out of Precinct*, Jon Sherman (Fair Elections Legal Network)); PX0096 (Written testimony from Cuyahoga County Board of Elections' Director Pat McDonald). These statements suffer from the same hearsay problems that require exclusion of Mr. Burke's and Mr. McNair's statements. Because Plaintiffs elected not to call the declarants to testify at trial, however, these statements must be excluded for the additional reason that

Plaintiffs failed to authenticate or lay any proper foundation regarding the documents. *See* Fed. R. Evid. 901. Plaintiffs effectively seek to foreclose any opportunity for the Defendants to cross-examine these witnesses, while still affirmatively offering their statements. The hearsay rules preclude this result.

Even if Plaintiffs could overcome the hearsay problems, they nonetheless fail to demonstrate that any of the written statements are relevant to any issue in this case. Plaintiffs claimed that statements sent to the General Assembly are probative of legislative intent and motivations. But, again, inquiry into legislative intent is inappropriate. And in any case, Plaintiffs presented no evidence that any legislator, much less the entire legislative body, received or considered the statements in passing the challenged laws. Indeed, some of the statements Plaintiffs attempt to introduce do not even relate to the challenged laws. *See, e.g.*, PX0121 (Written Statement by T. Burke regarding S.B. 380).

Quite simply, the written statements submitted to the General Assembly are inadmissible, irrelevant hearsay and should be excluded in their entirety.

C. The Secretary of State e-mails and correspondence Plaintiffs seek to introduce are inadmissible hearsay and irrelevant to the issues in this case.

The next category of objectionable evidence Plaintiffs seek to admit is a group of Secretary of State e-mails and documents. These e-mails can be broken down into two groups: e-mails and documents received by the Secretary of State's Office and e-mails and documents exchanged between Secretary of State personnel.

All of the e-mails fall within the definition of hearsay, as they are out-of-court statements being offered for the truth of the matter asserted. Fed. R. Evid. 801(c). To the extent that Plaintiffs seek to admit e-mails in any of these categories as statements of a party opponent, they would need to show that the statement:

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Fed. R. Evid. 801(d)(2). However, as will be explained below, Plaintiffs failed to establish facts to prove any of these circumstances. Furthermore, none of the e-mails meets any of the exceptions under Rules 803 or 804. Accordingly, all are inadmissible hearsay. Moreover, these e-mails and documents are irrelevant to Plaintiffs' claims.

Category One: E-mails and Correspondence Received by the SOS:

Plaintiffs seek to admit a number of e-mails or letters that were directed to the Secretary of State's office. The following proffered exhibits fall into that category:

- PX0060, E-mail from S.Gill to M.Damschroder regarding Early Voting Study;
- PX0061, E-mail from a constituent sent via info@sos.sate.oh.us to Election regarding early voting hours;
- PX0063, E-mail from P. McDonald to M. Damschroder regarding early voting hours;
- PX0064, E-mail from A. Gilson to M. Damschroder;
- PX0065, E-mail from M. Dilley to M. McClellan regarding Democratic Party Press release;
- PX0085, Letter from K. Clyde to Secretary Husted regarding HB 194;
- PX0087, E-mail from M. Brickner to M. Damschroder (with attachments);
- PX0095, E-mail from P. McDonald regarding early voting report.
- PX0124, "Early Voting Patterns by Race in Cuyahoga County, Ohio: A Statistical Analysis of the 2008 General Election."

Except for PX0064, none of these exhibits contain statements from Secretary Husted or his office. Thus, except for PX0064, none of these e-mails can fall within the hearsay exclusion in Rule 801(d)(2) for a statement of a party opponent. Furthermore, the e-mails cannot be records of a regularly conducted activity or a public record as the e-mails were not recording any act or activity of the Secretary's office. *See* Fed. R. Evid. 803(6), (8). To the extent that

Plaintiffs argue that the report in PX0095 is a public record of the Cuyahoga County Board of Elections, Plaintiffs did not authenticate or identify the report as required by Rule 901(a), and the report is not a self-authenticating document under Rule 902. Thus, the report, even if it falls within a hearsay exception, is not properly before this Court and should be excluded.

The only remaining exception for these e-mails is witness unavailability pursuant to Rule 804. However, Plaintiffs did not call any of the senders or authors of the above-listed e-mails and correspondence, and they made no effort to demonstrate their unavailability. None of the criteria for unavailability in Rule 804(a) applies to these e-mails; and therefore, the exception cannot apply. Nonetheless, Plaintiffs are attempting to admit these out-of-court statements for the truth of the matters asserted, but they cannot cite any authority for the proposition that these out-of-court statements are not hearsay simply because the Secretary of State's office *received* them. Ultimately, what they seek is an unprecedented ruling that every statement sent to a public office by the general public can be used against the public office without calling the declarant as a witness.

To the extent Plaintiffs argue that they are not seeking to admit these documents for the truth of the matter asserted but just to establish that Secretary Husted had notice of the documents, they have failed to lay the proper foundation or to show how notice is relevant. First, only three documents—PX0060, PX0124, and PX0063—were even shown to the sole testifying witness from the Secretary's office. *See* Vol. IX and Vol. X (Damschroder). PX0060 states only that the sender wanted to forward a report to Mr. Damschroder, but it does not contain the report. PX0060. Notice that a person wants to send a report to the Secretary's office is wholly irrelevant to the issues in the case. Furthermore, Mr. Damschroder stated that he did not recall reviewing the alleged report. Vol. IX at 169:23-171:7. Plaintiffs then asserted, without any evidence, that

PX0124 was the attachment to PX0060, but when shown the report, Mr. Damschroder did not recall reviewing it. Vol. X at 46:15-19; 48:4-49:17. Accordingly, because Plaintiffs did not establish that the Secretary's office had notice of the report, it cannot be introduced to show that the Secretary had such notice.

The only other exhibit discussed with Mr. Damschroder was PX0063. *Id.* 25:19-20. However, PX0063 was sent to Mr. Damschroder on September 6, 2014. *See* PX0063. All of the challenged statutes and all but one challenged directive were passed prior to September 6, 2014. *See generally* Am. Compl., Doc. 41. Directive 2014-30 was passed on September 29, 2014, but as admitted by Plaintiffs, this directive merely reinstated Directive 2014-17, which was passed prior to September 6, 2014. *See id.*, ¶ 96 n.5. Therefore, notice of this e-mail has no relevance to the challenged laws, as they all were in place before the alleged notice was provided to the Secretary's office.

For the remaining e-mails, Plaintiffs did not elicit testimony as to whether the Secretary's office reviewed the e-mails or attachments; and therefore, Plaintiffs cannot establish that the Secretary had notice of those e-mails. Accordingly, because notice was either not established or irrelevant, this Court should not admit the e-mails on the basis of showing notice and should exclude the e-mails as inadmissible hearsay.

With regard to PX0064, Defendants do not object to the admission of Mr. Damschroder's e-mail to the county boards of elections. However, the subsequent reply by Adam Gilson is hearsay, and none of the exceptions or exclusions applies to Mr. Gilson's out-of-court statements. Accordingly, the portion of PX0064 that represents the hearsay statements of Mr. Gilson should be excluded.

Category Two: E-mail Exchanges Between SOS personnel:

Plaintiffs also seek to admit a number of e-mails exchanged between employees of the Secretary of State's office. The following proffered exhibits fall into this category:

- PX0049-53, Halle Pelger e-mails
- PX0055, E-mail from Craig Forbes to Matt McClellan
- PX0056, E-mail from M. Damschroder forwarding Pat McDonald's e-mail
- PX0057, E-mail from H. Pelger to M. McClellan
- PX0058, E-mail from M. Damschroder to H. Pelger and others
- PX0088-89, Guest column by Secretary Husted and related e-mails
- PX0100, E-mail from H. Pelger to K. Huffman
- PX0103, E-mail from M. McClellan to S. Borgemenke
- PX0118, E-mail from H.Pelger to M. Ostrowski

As an initial matter, Defendants do not object to the admission of parts of the following exhibits: PX0050, PX0057, PX0058, PX0088, PX0089. For PX0050, Defendants do not object to the admission of the e-mail exchange dated August 29, 2012, or the exchange dated August 30, 2012 at 8:13 AM. Defendants do not object to the three reports attached to PX0057. With regard to PX0058, Defendants do not object to the following statements by Mr. Damschroder—"Talked w Pat McD via phone. I think he's comfortable with the directive thing." However, the rest of this exhibit contains Mr. Damschroder's recital of other people's statements, which are hearsay with no applicable exception. As to PX0088 and PX0089, Secretary Husted's guest column appearing at PX0088-2-3 and PX0089-2-3 is a publication of the Secretary's office, and the Defendants do not object to its admissibility.

The remaining portions of these documents and the other e-mail exchanges Plaintiffs seek to admit, however, are inadmissible. First, the statements do not fall within the hearsay exclusion found in Rule 801(d)(2). None of the statements were made by Secretary Husted or Attorney General DeWine, and Plaintiffs presented no evidence that either Secretary Husted or Attorney General DeWine adopted the statements or believed them to be true. Fed. R.

Evid. 801(d)(2)(A), (B). Plaintiffs also presented no evidence that Secretary Husted or Attorney General DeWine authorized any of the declarants to make the challenged statements. Fed. R. Evid. 801(d)(2)(C). As the Defendants' Rule 30(b)(6) witness, Mr. Damschroder could have testified to such authorization, if it existed, but Plaintiffs made no attempt to elicit such testimony.

With regard to whether the statements fall within Rule 801(d)(2)(D), Plaintiffs did not show that the particular e-mails constituted anything more than the individual personal views of the declarants; and thus, the e-mails do not qualify for the exclusion. There was no testimony offered by any Secretary of State employee to lay a proper foundation with respect to PX0049, PX0050, PX0051, and PX0118. Although Plaintiffs asked Mr. Damschroder a few questions about PX0053 and PX0057, they similarly failed to lay a foundation sufficient to attribute these statements to the Secretary of State as a party statement. Vol. X at 8:23-11:11; 16:23-19:9. The remaining portions of PX0088 and PX0089 are both irrelevant and contain hearsay. A discussion about sending a copy of a press release is wholly irrelevant to whether the challenged laws violate federal law, particularly when the discussion includes traditionally liberal and conservative groups. *See* PX0089-001. Furthermore, although there was testimony on the declarants' job titles, there was no testimony as to the scope of the declarants' employment and whether that scope included determining who receives a copy of a press release. *See* Vol. IX at 171:8-172:4. Thus, these e-mails cannot qualify as an exclusion under Rule 801(d)(2).

Furthermore, none of the e-mail exchanges sets forth the Secretary's activities, a matter observed while under a legal duty to report, or an authorized investigation. *See* Fed. R. Evid. 803(8). Thus, the exception for public records in Rule 803(8) does not apply. Moreover, the exception for records of a regularly conducted activity likewise does not apply. *See*

id. 803(6). First, PX0049, PX0051, and PX0118 all contain draft documents, and drafts are properly excluded as hearsay because they do not represent the final "act, event, condition, [or] opinion" of the office and are not yet endorsed by the office. *Id.*; *see also Figures v. Bd. of Pub. Utils. Of City of Kansas*, 967 F.2d 357, 360 (10th Cir. 1992). Second, PX0050 and PX0057 were not made at or near the time of the act being described, so they do not meet the criteria of the exception. Fed. R. Evid. 803(6)(A). Third, as to PX0088 and PX0089, there was no testimony that distribution lists were a record kept in the regular course of business. *Id.* 803(6)(B). Lastly, as to PX0100, this Court already sustained Defendants' hearsay objection. Vol. IX at 152:2-23. The same objection still applies and the exhibit should not be admitted.

PX0052, PX0053, PX0055, PX0103 all contain newspaper articles for which no exception applies. *See* Fed. R. Evid. 803. Likewise, PX0056 contains the statements of a third party not associated with the Secretary of State or Attorney General DeWine; thus, such statements cannot fall within Rule 801(d)(2) or Rule 803(6) and (8).

As to all of the documents, Plaintiffs wholly failed to demonstrate that any of the declarants were unavailable such that Rule 804 might apply. Without a showing of unavailability, the hearsay exception in Rule 804 is inapplicable and cannot exempt any of the hearsay statements. Moreover, to the extent that Plaintiffs allege that they are offering any of these statements just to show notice rather than the truth of the matter asserted, Plaintiffs failed to elicit testimony from Mr. Damschroder that the Secretary saw any of these statements or that any of these statements informed his actions or the actions of his staff.

Because the challenged e-mails contain hearsay for which no exception or exclusion applies and because some are irrelevant to this case, the e-mails should be excluded as inadmissible.

D. Documents produced in response to third-party subpoenas.

Plaintiffs also seek improperly to introduce certain documents produced by non-parties in response to Plaintiffs' counsel's subpoenas in this case. Specifically, Plaintiffs moved to admit a series of documents produced by the Franklin County Board of Elections referring to cases of attempted double-voting in Franklin County (PX0072-PX0082, PX0083, PX0094, PX0120) and two e-mails Matthew Damschroder sent to General Assembly staff when he was a member of the Franklin County Board of Elections that the General Assembly produced in response to a subpoena (PX0097-PX0098). All of these exhibits are inadmissible.

1. Franklin County Board of Elections documents regarding double- voting (PX0072-0082, PX0083, PX0084, PX0120).

The vast majority of Franklin County documents Plaintiffs proffer appear to be correspondence from Franklin County voters responding to a letter from the Franklin County Board of Elections informing them that they voted absentee and then voted provisionally on Election Day (PX0072-PX0082, PX0084, PX0120). Some of the letters are handwritten, and document 72 is barely legible as produced by Plaintiffs. These letters are all out-of-court statements that constitute hearsay not subject to any exception. Moreover, Plaintiffs did nothing to authenticate or lay a foundation for these documents. *See* Fed. R. Evid. 901. Plaintiffs presented no evidence to confirm that the documents are what they purport to be. None of the authors were called to testify at trial. None of the authors indicated, through testimony, declaration, or otherwise, that the documents are a true and correct copy of correspondence he or she authored and sent to the Franklin County Board of Elections. *Id.*

Plaintiffs' Exhibit 84 appears to be an interview of a voter suspected to have voted twice that was taken before the Franklin County Board of Elections. Though this document does not

suffer from the same authenticity and reliability concerns that plague the letters from voters, it is nonetheless inadmissible as hearsay.

Plaintiffs made no attempt to demonstrate at trial that any of the Franklin County documents discussed in this section qualify for an exclusion or exception to the hearsay rule. Defendants anticipate that Plaintiffs may try to invoke the exception for former testimony set forth in Rule 804(b)(1). But this rule does not apply. As with all of the exceptions in Rule 804, the exception for former testimony applies only after a threshold showing that the witness is unavailable to testify at a trial. Plaintiffs did not attempt to and cannot satisfy any of the criteria for unavailability listed in Rule 804(a). They made no attempt to secure the presence of the declarant at trial. And even if they could overcome the threshold unavailability requirement, Plaintiffs fail to demonstrate that the Franklin County interview was testimony by a "witness at a trial, hearing, or lawful deposition" or that the Franklin County staff who conducted the interview, apparently in an effort to determine whether criminal activity occurred, was a "predecessor in interest" to the Defendants here with an "opportunity and similar motive to develop" the statement.

In short, the Franklin County documents regarding double-voting that Plaintiffs seek to admit are inadmissible and must be excluded.

2. E-mails Matthew Damschroder sent while he was employed by the Franklin County Board of Elections (PX0097-PX0098).

Plaintiffs also seek improperly to introduce select e-mails that Matthew Damschroder authored while employed by the Franklin County Board of Elections. Vol. IX at 141:17-148:3. These e-mails appear to have been produced by the General Assembly in response to Plaintiffs' subpoena.

Mr. Damschroder testified at length about statements he made in both exhibits. *Id.* at 141:17-148:3. His testimony is admissible. But Mr. Damschroder's out-of-court statements are not. As already explained, prior statements by a testifying witness can be admitted only in narrow circumstances, none of which are present here. *See* Fed. R. Evid. 801(d)(1). Furthermore, as Mr. Damschroder was not working for Secretary Husted at the time, the e-mails cannot be statements of a party opponent. *See id.* 801(d)(2). In addition, these are the personal statements of Mr. Damschroder and do not represent the activities of the Franklin County Board of Elections or an act, event, condition, or opinion of the Board. *Id.* 803(6), (8). This is particularly true as there was no testimony that Mr. Damschroder's statements constitute a record that was kept in the course of a regularly conducted activity of the Board. *Id.* 803(6). Thus, none of the exemptions in Rule 803 apply. Finally, Plaintiffs failed to demonstrate why e-mails Mr. Damschroder sent when he worked for a Board that is not a party to this case, which relate to a bill (Sub. SB 8) that did not pass and is not challenged here, are relevant.

E. Dr. Jeffrey Timberlake's proffered sur-rebuttal opinion and analyses violates a previous order in this case and should be excluded.

Before trial, Magistrate Judge King rejected Plaintiffs' request to allow their expert, Dr. Jeffrey Timberlake, to submit a report (a sur-rebuttal) rebutting Dr. Nolan McCarty's report. *See* Doc. 56, Order of October 26, 2015. In spite of this Order, Plaintiffs sought to elicit a new (oral) sur-rebuttal opinion from Dr. Timberlake from the witness stand not reflected in his expert report. The Defendants objected and Plaintiffs proffered Dr. Timberlake's new opinion. They argued that it should be permitted because raw data that a non-testifying expert, Clark Bensen, obtained for the *NAACP v. Husted* case ("raw data") from the years 2008 and 2012 was not provided by the Defendants to Dr. Timberlake before he submitted his rebuttal report in this case. But that fact is a red herring because Dr. McCarty (whose rebuttal report Dr. Timberlake is

attempting to sur-rebut) also did not have or rely upon the raw data. Rather, the undisputed testimony is that he relied upon data that had been geocoded by Mr. Bensen. Vol. III at 56:13-15 (McCarty).

The raw data on which Plaintiffs are relying to create this conflict was gathered by Mr. Bensen, an expert retained in the *NAACP v. Husted* case, from the local county boards of elections. It was not turned over to the Defendants or to Dr. Timberlake and was not relied upon by anyone in this case. Nonetheless, at Plaintiffs request, in the October 26, 2015 Order, Judge King ordered Defendants to turn over data obtained "from relevant county boards of elections and agencies." Doc. 56 at 1. The Defendants did so. At trial, this Court upheld Magistrate Judge King's Order and prohibited Dr. Timberlake from offering a new opinion not reflected in either of his expert reports. Vol. II at 140:20-21.

It is undisputable that this raw data, which Plaintiffs claim not to have had access, was publicly available to them from the boards of elections at any time before or after they filed this lawsuit. They simply did not ask. But Plaintiffs' failure to secure evidence before trial does not give them the right to offer new expert opinions from the witness stand. This is especially true here, where neither expert (Dr. Timberlake or Dr. McCarty) had access to the raw data before offering their written reports in this case.

There is a fundamental issue of fairness at stake here. Both sides produced the data and materials underlying expert reports *after* producing the respective expert reports. Plaintiffs did not produce the data and materials on which *their* experts relied before Plaintiffs produced their expert reports. For Plaintiffs to argue that Defendants are held to some other obligation that does not apply to Plaintiffs is without merit. Dr. McCarty not only relied on the geocoded data and not the raw data, but he also did not even rely on the years 2008 and 2012. As he testified at

trial, he relied on mid-term years (2010 and 2014) because presidential elections involve diluting factors that make those elections less reliable to understand the impact of election law changes. Vol. III at 50:2-51:4; *see also* Ex. 20 at p.3 (McCarty report).

Plaintiffs began sending public records requests related to their claims back in December 2014 (see letters attached as Ex. A-B), and they had ample time to gather whatever data they wanted to gather from the boards for Dr. Timberlake or other experts to do their work. Dr. Timberlake never drafted a report for his purported sur-rebuttal. There was no deposition testing this sur-rebuttal before trial. His sur-rebuttal (orally provided at trial) was far beyond the deadline for expert reports. The ability of only one side to file sur-rebuttals raises the obvious issue of prejudice. There must be an end to the process. The schedule clearly set froth concurrent initial and rebuttal reports. There is no dispute that Dr. McCarty's rebuttal report called into question Dr. Timberlake's "aggregate" methodology by instead looking at individual-level data. Plaintiffs might not like that Dr. McCarty critiqued Dr. Timberlake, but that is the purpose of a rebuttal report.

To the extent Plaintiffs argue that they requested this data in their document requests, this is false. Plaintiffs requested all documents *produced* in *NAACP*. Defendants produced those documents to Plaintiffs. Mr. Bensen's raw data from 2008 and 2012 was not produced in *NAACP*, used in *NAACP*, or even in Defendants' possession. In fact, that case settled before additional expert reports, subsequent to the expedited preliminary injunction discovery period, were filed, and Dr. McCarty did not produce any affirmative expert report during that time. His reports during the injunction discovery period were rebuttal reports responding to Dr. Daniel Smith and completed without the individual-level data that Mr. Bensen would later gather.

To the extent Plaintiffs claim that the Attorney General's office collected the data that Mr. Bensen used, this is also incorrect. One sentence in Mr. Bensen's original declaration was not worded as well as it could have been, and to clear up confusion, Mr. Bensen submitted a second declaration making it clear that he collected the data. Ex. 21 (supplemental Bensen declaration). Plaintiffs' counsel was notified that this was the purpose of the supplemental declaration.

Even if this Court permits Plaintiffs to offer a sur-rebuttal opinion, however, Dr. Timberlake's proffered opinion is not sufficiently reliable and must be excluded. Vol. II at 154:2-159:9. For an expert opinion to be admissible, the testimony must be based on sufficient facts or data, it must be the product of reliable principles and methods, and the expert must have reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. As to reliability, the Supreme Court in *Daubert* identified several factors that might bear on the reliability of *scientific testimony*: testing, peer review and publication, known or potential rate of error, and general acceptance. *United States v. Jones*, 107 F.3d 1147, 1156 (6th Cir. 1997). If an expert's factual basis, data, principles, methods, or application is called into question, the district court is to consider "whether the testimony has a reliable basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137, 149 (1999) (quotation omitted) (alteration in original). Under Fed. R. Evid. 702, the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). However, those conclusions should have a basis in established fact and cannot be premised on mere suppositions, and when the conclusions are based on assumed facts, there should be some support for those assumptions in the record. *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 800-01 (6th Cir.2000).

Dr. Timberlake's "new" opinion fails to meet the standard for admissibility under Rule 702. Dr. Timberlake testified that he "us[ed] the techniques that Dr. McCarty used and the data that Dr. McCarty used" to form his new opinion. Vol. II at 154:5-6. He testified that he did this "using the data that [he] had at [his] disposal." *Id.* at 155:19-20. But Plaintiffs did not elicit testimony as to what data Dr. Timberlake was referring. That is, Dr. McCarty relied upon data that was geocoded by Clark Bensen, Vol. III at 56:13-15 (McCarty), and was produced to Plaintiffs on October 20, 2015. The data that was produced to Plaintiffs, pursuant to Judge King's October 26, 2015 order, was produced on October 28, 2015, and was *raw* data that Clark Bensen collected from the boards of elections for the *NAACP* case. Dr. McCarty did not use (or even have) this raw data to form his opinions.

Thus, one of two things is true with respect to the proffered opinion. The first option is that, when Dr. Timberlake testified that he used "his data in 2010" (referring to Dr. McCarty), Vol. II at 155:5, he is referring to the geocoded data that was produced and for which they sought to file a sur-rebuttal, which was denied by Judge King. Thus, any such oral sur-rebuttal is inadmissible.

The other option is that Dr. Timberlake applied the "same strategy" as Dr. McCarty, *id.* at 154:22-23, to *different* (raw) data. Specifically, Dr. Timberlake testified that he had access to all of Dr. McCarty's data and that he had access to his computer programs, and "just ran his program." *Id.* 157:11-13. But if he did so using raw data, he offered no evidence that it is sound methodology to run Dr. McCarty's program using raw data. Plaintiffs are obligated to prove that it is. The only evidence in the record is that Dr. McCarty's racial imputation methodology using geocoded data is peer-reviewed and generally accepted in the field of political science, but there is no evidence that using Dr. McCarty's methodology on raw, non-geocoded data is sound

methodology or generally accepted in the field. Vol. III at 56:25-57:15 (McCarty). Plaintiffs' failure to offer similar testimony regarding Dr. Timberlake's *new* opinion is fatal to its admissibility.

F. Plaintiffs fail to establish the prerequisites for admitting deposition transcripts in this case.

There are cases in which deposition transcripts are admissible, but this is not one of them. The depositions of Timothy Weber, Daniel Troy, Pat McDonald, and the individual and 30(b)(6) depositions of Matthew Damschroder are inadmissible, and Plaintiffs cannot prove otherwise. Matthew Damschroder testified at trial for roughly eight hours over a two-day period. His deposition testimony is cumulative and should not be admitted in this case. *See* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: . . . needlessly presenting cumulative evidence.").

Turning to the remaining three depositions, there is an established distinction between a trial deposition to preserve testimony and a discovery deposition. "Courts in this circuit generally recognize the need to treat *de bene esse* [(trial)] depositions differently in certain respects than those of discovery depositions." *Marmelshtein v. City of Southfield*, No. 07-CV-15063, 2010 WL 4226667, at *2 (E.D.Mich. Oct. 21, 2010). For example, in *Burkett v. Hymen Lippett, P.C., Inc.*, Nos. 05-72110, 05-72171, 05-72221, 2008 WL 1741875 (E.D.Mich. Apr. 11, 2008), the court ruled that an order setting a discovery cutoff date did not bar a party from conducting a trial deposition after discovery closed. Further, in *Rayco Mfg. Inc. v. Deutz Corp.*, No. 5:08-CV-00074, 2010 WL 183866, at *4 (N.D. Ohio Jan. 14, 2010), the court stated in dictum that "[t]rial depositions (also known as 'preservation depositions' or '*de bene esse* depositions') are not treated as part of the discovery process to which the Rule 30(a)(2)(A)(i)

ten-per-side deposition limit applies." When Plaintiffs requested, and were granted, leave to exceed the ten-per side discovery deposition limit in order to conduct Mr. Weber, Mr. Troy and Mr. McDonald's depositions, they conceded that these were discovery, not trial preparation depositions. Doc. 43, October 6, 2015 Order, Page ID # 542. Nonetheless, they now want to admit the transcripts, claiming that the witnesses are more than 100 miles from the courthouse and are therefore "unavailable" under Fed. R. Civ. P. 32(a)(4)(B).

Importantly, had these depositions been designated as "trial depositions," Defendants would have conducted the depositions in an entirely different manner and elicited much more testimony on cross-examination. It is patently unfair for Plaintiffs to prejudice Defendants by first calling these depositions discovery depositions and then only later switch the label to "trial testimony"—after the opportunity to fully examine each witness as Defendants would in a trial-context has passed.

Although it is certainly within this Court's discretion to admit deposition testimony pursuant to the "100-mile rule," the circumstances of this case weigh against doing so. Throughout trial, Plaintiffs did not have any trouble securing the appearance of witnesses from out-of-town. Of the twenty-one witnesses that they called, only two of them (Bill Anthony and Greg Beswick) were from Franklin County. Six witnesses (Dr. Lorraine Minnite, Dr. Muer Yang, Dr. David Cannon, Joey Longley, Rachel Bowman, and Matthew Caffrey) were from out-of-state.

The distance that Mr. Weber, Mr. Troy, and Mr. McDonald would have had traveled to appear in court is similar, if not less than or identical to that traveled by Plaintiffs' other witnesses. *See* Ex. 71A, Conover Declaration. Att. A to compare Weber, Troy and McDonald with Perlatti, McNair and Munroe. Mark Munroe appeared from Mahoning County. Brad

Cromes appeared from Portage County. Sandy McNair, Anthony Perlatti, Nina Turner, Phyllis Cleveland, and Terri Taylor all appeared from Cuyahoga County. Plaintiffs offer no explanation as to why Mr. Weber, Mr. Troy, and Mr. McDonald were so "unavailable" so that they were unable to do the same. Given Plaintiffs' ability to secure the appearance of seventeen other out-of-town witnesses, the explanation is simple: Plaintiffs did not try. At the very least, they failed to present any evidence that they did.

Plaintiffs cite no authority for the proposition that the discretionary "100-mile exception" is meant to apply under these circumstances. The parties conducted the depositions as discovery depositions. Plaintiffs should not be permitted to benefit from that mutually understood course of conduct by selectively deciding *which* witnesses for whom 100 miles was too far to travel.

In the event that this Court admits any or all of the deposition transcripts, Defendants' submit the following objections to the specific designations within those deposition transcripts.

DEPOSITION	**PAGE AND LINE**	**OBJECTION**
Matthew Damschroder - 30(b)(6)	35:10-36:2	Calls for Speculation
Matthew Damschroder - 30(b)(6)	49:20-50:6	Calls for Speculation
Matthew Damschroder - 30(b)(6)	72:20-73:3	Calls for Speculation
Matthew Damschroder - 30(b)(6)	78:11-16	Calls for Speculation
Matthew Damschroder - 30(b)(6)	117:7-118:2	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder - 30(b)(6)	118:3-7	Calls for Speculation
Matthew Damschroder - 30(b)(6)	119:8-120:12	Hearsay; Not a Statement of a Party Opponent

Matthew Damschroder - 30(b)(6)	120:13-16	Calls for Speculation
Matthew Damschroder - 30(b)(6)	121:23-122:11	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder - 30(b)(6)	123:12-24	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder - 30(b)(6)	126:5-20	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder - 30(b)(6)	128:3-18	Calls for Speculation
Matthew Damschroder - 30(b)(6)	129:4-130:20	Not Relevant
Matthew Damschroder - 30(b)(6)	131:4-9	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder - 30(b)(6)	131:13-24	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder - 30(b)(6)	134:19-135:2	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder - 30(b)(6)	137:3-138:13	Not Relevant
Daniel Troy	53:23-55:4	Hearsay
Daniel Troy	55:16-56:19	Hearsay
Daniel Troy	72:6-73:24	Not Relevant
Daniel Troy	87:25-89:8	Calls for Speculation
Matthew Damschroder	17:4-18:1	Calls for Speculation
Matthew Damschroder	91:10-92:6	Not Relevant
Matthew Damschroder	94:7-95:6	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder	97:8-20	Not Relevant

Matthew Damschroder	98:19-99:12	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder	103:2-24	Hearsay; Not a Statement of a Party Opponent; Not Relevant
Matthew Damschroder	106:12-107:13	Not Relevant
Matthew Damschroder	111:16-113:10	Not Relevant
Matthew Damschroder	114:18-115:19	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder	116:15-18	Not Relevant
Matthew Damschroder	117:2-118:8	Not Relevant
Matthew Damschroder	121:4-20	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder	125:13-126:3	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder	128:21-129:4	Not Relevant
Matthew Damschroder	133:24-134:20	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder	140:14-141:14	Hearsay; Not a Statement of a Party Opponent
Matthew Damschroder	158:10-23	Calls for Speculation
Pat McDonald	49:1-18	Calls for Speculation
Pat McDonald	52:16-19	Hearsay
Pat McDonald	52:2053:18	Calls for Speculation
Pat McDonald	53:19-22	Hearsay
Pat McDonald	53:23-54:2	Calls for Speculation
Pat McDonald	55:17-57:17	Not Relevant

Pat McDonald	59:9-20	Not Relevant
Pat McDonald	66:15-67:5	Calls for an Expert Opinion; Calls for Speculation
Pat McDonald	87:12-88:17	Hearsay
Pat McDonald	94:20-97:2	Not Relevant
Pat McDonald	97:6-103:17	Not Relevant
Pat McDonald	104:8-106:7	Hearsay; Calls for Speculation: No Foundation
Pat McDonald	106:8-16	Not Relevant
Pat McDonald	111:3-113:8	Not Relevant

Furthermore, if this Court admits Plaintiffs' deposition designations, then Defendants respectfully ask this Court to admit Defendants' deposition designations, which are attached as Exhibits C-G, and the underlying declarations, which are Defendants' Trial Exhibits 14-Q, 14-R, and 14-Z. With regard to the depositions, if this Court admits the depositions of Mr. Troy, Mr. Weber, and Mr. McDonald based on the "100-mile rule," then this exception would apply equally to Defendants. As to the individual and 30(b)(6) depositions of Mr. Damschroder, Defendants' designations are limited to presenting an entire answer where Plaintiffs' designations are incomplete. Thus, these should be admitted also to ensure that Plaintiffs' designations are not misleading.

With regard to the declarations, these should be admitted as the only reason given by Plaintiffs for seeking the depositions was that Defendants attached these declarations to Sean Trende's expert report, and Plaintiffs used the declarations as an exhibit during the depositions.

Therefore, in order for the record to be complete and accurate, Defendants ask that the declarations also be admitted if this Court admits Plaintiffs' deposition designations.

G. Miscellaneous prejudicial and irrelevant hearsay statements should be excluded.

Finally, some remaining exhibits do not fit neatly into a specific category but are also inadmissible, irrelevant, and prejudicial. Specifically, PX0094, an article from the Columbus Dispatch is hearsay. So too is PX0021, a report unrelated to this case authored by Dr. Minnite. Dr. Minnite testified and, to the extent that it was within the scope of her opinions offered in this case, could rely on and testify about the report. But the report itself is still her out-of-court statement being offered for the truth of the matter asserted and is inadmissible.

PX0092, the much-discussed photo of a voter fraud billboard, is hearsay. To the extent that it is being offered for anything other than the truth of the matter it asserted, the evidence in this case is that it was erected by someone from Wisconsin, not by the Defendants. Vol. VII at 91:7-17 (Cleveland). Further, there is no evidence that the General Assembly, the Secretary of State, or the Attorney General knew that the billboard existed or that it impacted any of their respective decisions. Quite simply, Plaintiffs failed to establish how the billboard was relevant to or impacted any of the challenged laws or directives. They therefore failed to establish its probative value, much less one that is substantially outweighed by its prejudicial effect on this case.

The declaration from Doug Preisse is also inadmissible hearsay. Although he first appeared on their witness list on November 2, 2015 (Doc. 58 at 7, Page ID # 583), Plaintiffs made no attempt to secure Mr. Preisse's appearance at trial until November 16, 2015, when trial already had started. As commonly happens when a party waits until the last minute to serve a subpoena, Plaintiffs were unable to perfect service. Simply put, it is not that Mr. Preisse was

unavailable; it is that Plaintiffs did not try to ensure his availability in a timely manner. They should not be permitted to benefit from their failure. Mr. Preisse's declaration is hearsay, and it should not be admitted against the Defendants simply because Plaintiffs did not try hard enough to secure their own evidence.

In any event, Plaintiffs failed to lay a foundation for why Mr. Preisse's statement is relevant to this case. Back in 2012, when he made the statement at issue, Mr. Preisse was a member of the Franklin County Board of Elections. Vol. IX at 165:5-8 (Damschroder). He was not a member of the General Assembly responsible for passing any of the challenged laws. He also was not an employee of the Secretary of State's office responsible for crafting the directives at issue in this case. There is no evidence that Mr. Preisse's statement reflected the "official" position of the Franklin County Board of Elections at the time. Further, Plaintiffs failed to present any evidence that the General Assembly, the Secretary of State, or the Attorney General relied upon Mr. Preisse's statement for any purpose whatsoever. In spite of this complete lack of evidence regarding its relevance, Plaintiffs want to admit Mr. Preisse's statement.

Moreover, Plaintiffs appear to present Mr. Preisse's statement precisely because it is inflammatory. But it is this inflammatory nature that requires excluding the exhibit. Fed. R. Evid. 403. Plaintiffs failed to prove that the statement has any probative value, much less any probative value that is outweighed by its prejudicial effect. Mr. Preisse's declaration is hearsay, irrelevant, and should not be admitted for any purpose.

PX0099, a document purporting to show "Items Senate Would Like To Address Prior to 2012" is also inadmissible. Plaintiffs asked Mr. Damschroder about the document, Vol. IX at 148:44-150:18, but Mr. Damschroder did not author the document and testified that he did not recognize it. The document is inadmissible hearsay; and moreover, Plaintiffs' wholly failed to

lay any foundation. It is unclear who created the document and who, if anyone, reviewed the document. Plaintiffs made no attempt to explain how this document is relevant to any issue in this case. PX0099 should not be admitted.

Finally, this Court should reject Plaintiffs' attempt to cure evidentiary defects through an equally defective declaration from Plaintiffs' counsels' paralegal. On the last day of trial, Plaintiffs offered the second declaration from Perkins Coie paralegal Rachel Roberts in an apparent attempt to authenticate exhibits obtained in response to public record requests submitted by other firm employees (specifically, PX0068, PX0069, PX0020, PX0124). Vol. X at 74:14-16. But the declaration is insufficient to authenticate these records. Ms. Roberts neither submitted the public records requests, nor received the documents as an original matter.

And Ms. Roberts cannot be considered a custodian of the records, as Ms. Roberts is not "'familiar with the record keeping system.'" *United States v. Collins*, 799 F.3d 554, 584 (6th Cir. 2015) (quoting *United States v. Laster*, 258 F.3d 525, 529 (6th Cir. 2001) (holding that, in a drug prosecution, a detective who was not familiar with chemical company's record-keeping system was not qualified to lay a foundation for admission of company invoices under hearsay exception for business records)); *see also* Roberts Declaration, November 30, 2015, ¶¶ 3-5.

In short, Ms. Roberts' testimony, whether through declaration or in person, cannot demonstrate that the documents referred to in the declaration constitute "business records" under Rule 803(6).

III. CONCLUSION

For the reasons explained above, Defendants' objections to Plaintiffs' evidence should be sustained, and all of the evidence challenged in this brief should be excluded.

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 December 22, 2015, and served upon all parties of record via the Court's electronic filing system.

/s/ Tiffany L. Carwile
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