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

OHIO DEMOCRATIC PARTY; DEMOCRATIC PARTY OF CUYAHOGA COUNTY; MONTGOMERY COUNTY DEMOCRATIC PARTY; JORDAN ISERN; CAROL BIEHLE; and BRUCE BUTCHER, Plaintiffs, v. JON HUSTED, in his official capacity as Secretary of State of the State of Ohio; and MIKE DEWINE, in his official capacity as Attorney General of the State of Ohio, Defendants.	**Case No. 2:15 CV 1802** **JUDGE WATSON** **MAGISTRATE JUDGE KING**

PLAINTIFFS' EVIDENTIARY BRIEF

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INTRODUCTION

Pursuant to the Court's December 4, 2015 Order, ECF. No. 95, Plaintiffs submit this brief addressing the outstanding evidentiary issues before the Court. The brief addresses the admissibility of Plaintiffs' disputed exhibits and proffered deposition designations; the relevance and admissibility of certain evidence under the *Arlington Heights* factors; and the admissibility of Dr. Timberlake's proffered testimony. Further, it sets out Plaintiffs' objections to Defendants' exhibits, including the objections to the Bensen Declarations, DX 20A and DX 21, which were tendered by Defendants on the final day of trial.

It is Plaintiffs' understanding that Defendants have objected to the following exhibits tendered by Plaintiffs on either authenticity, hearsay, or relevance grounds: PX0001 - PX0018 (legislative videos and transcripts); PX0020, PX0067–69, PX0070–71, PX0085, PX0096, PX0121 (written statements and testimony submitted to the legislature); PX0049–53, PX0055–58, PX0060, PX0063, PX0065–66, PX0088-89, PX0095, PX0100, PX0103, PX0118, PX0124 (Secretary of State emails); PX0097–98 (Damschroder Franklin County emails); PX0104–105 (Hamilton Early Voting Reports); PX0126–127 (Rachel Roberts' Declarations); PX0094, PX0125 (Douglas Preisse's Declaration); and PX0128–132 (deposition designations).[1] Nevertheless, Defendants' objections fail.[2]

Plaintiffs submit to the Court that all of Plaintiffs' disputed exhibits are relevant to

[1] At the close of trial, it was Plaintiffs understanding that Defendants would circulate a list of their stated objections to Plaintiffs' exhibits. On December 11, 2015, Plaintiffs had not received such a list and requested it directly. To date, Plaintiffs have not received a list of the specific objections to Plaintiffs' exhibits. For this reason, Plaintiffs' following arguments are based on their best understanding of the objections that Defendants raised at trial.

[2] Plaintiffs no longer seek admission of the following exhibits: PX0072 - 84, PX0120 (double-voting letters); PX0061, PX0064, PX0087 (Secretary of State emails); PX0099 (Items Senate Would Like to Address); and PX0021 (Minnite Article).

Plaintiffs' claims, probative of the facts at issue, and admissible either as non-hearsay evidence, an exception to the hearsay rule, or for a non-hearsay purpose. Moreover, there is sufficient testimony in the record to authenticate these documents such that the Court can be satisfied that Plaintiffs' tendered exhibits are what they purport to be. Likewise, Plaintiffs' proffered deposition designations fit squarely within the confines of Federal Rule of Evidence 32, and Dr. Timberlake's proffered testimony is proper rebuttal testimony and appropriately before this Court. Accordingly, Plaintiffs respectfully request that the Court overrule Defendants' objections to Plaintiffs' disputed exhibits, deposition designations, and Dr. Timberlake's testimony, and admit these as substantive evidence in Plaintiffs' case. Further, Plaintiffs respectfully request that this Court sustain Plaintiffs' objections to Defendants' exhibits.

ARGUMENTS

I. ADMISSION OF PLAINTIFFS' DISPUTED EXHIBITS

A. Legislative Videos

Defendants' authenticity and relevance objections to the legislative videos tendered by Plaintiffs (PX0001, PX0003, PX0005, PX0007, PX0009, PX0011, PX0013, PX0015, and PX0017) fail because the legislative videos are self-authenticating and Plaintiffs have presented sufficient evidence for the Court to assure itself that the videos are what they purport to be—namely, videos of the floor debates surrounding the challenged provisions. Further, as discussed *infra* at 41-49, statements of legislators made at the time that a bill is passed provide evidence of intent and, indeed, are probative of the State's intent in this case.[3]

When determining the authenticity of a proffered exhibit, "[t]he key question under

[3] Plaintiffs are not aware of any other stated objections to the legislative videos. To the extent that Defendants might raise a hearsay argument in their briefing (although not stated during trial), Plaintiffs offer these videos solely as evidence of the legislature's knowledge and intent at the time that the challenged provisions were passed. The statements contained therein are not offered for the truth of the matter asserted.

Federal Rule of Evidence 901 is whether 'the matter in question is what its proponent claims.'" *United States v. Damrah*, 412 F.3d 618, 628 (6th Cir. 2005) (holding that videotapes were properly authenticated). For the following reasons, there can be no serious dispute as to the authenticity of the video recordings of the legislative sessions that Plaintiffs seek to introduce and Federal Rules of Evidence 901(b)(1), 901(b)(4), and 902(5) support their introduction.

1. The Videos Were Authenticated under Rules 901(b)(1) and 901(b)(4)

To authenticate evidence, the proponent need only present evidence "sufficient to support a finding that the matter in question is what its proponent claims." *United States v. Berringer*, 601 F. Supp. 2d 976, 978 (N.D. Ohio 2008) (quoting Fed. R. Evid. 901(a)). "To establish authenticity, the proponent need not rule out all possibilities inconsistent with authenticity, or . . . prove beyond any doubt that the evidence is what it purports to be." *Id*. (internal quotation marks omitted). "Rather, the standard for authentication, and hence for admissibility, is one of reasonable likelihood." *Id.* "This requirement is satisfied if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *Id.*

Pursuant to this standard, these videos are authenticated under Rules 901(b)(1) and 901(b)(4). Rule 901(b)(1) permits authentication by "[t]estimony that an item is what it is claimed to be." At trial former State Senator Nina Turner testified that she was familiar with the process by which these videos were made and posted on the Ohio Channel's website operated the Ohio Government Television Service ("OGTV"), which is charged by the state with recording the sessions of the General Assembly. 11/16/2015 Trial Tr. 85:10–86:3 (Turner). She also testified that she had watched some of the videos and they were complete recordings of the sessions at issue. 11/16/2015 Trial Tr. 86:21–87:16 (Turner). Similarly, Rachel Roberts, paralegal for Plaintiffs' counsel, submitted a declaration attesting that she oversaw the process of downloading these videos from the Ohio Channel and copying them onto the DVDs Plaintiffs

have submitted as evidence.[4] PX0126 (Roberts Decl. 1). Her declaration also sets forth the web addresses where they can be accessed, and the parties stipulated that the videos were obtained from this source. PX0126 (Roberts Decl. 1); 12/3/2015 Trial Tr. 4:6–11 (Kaul).

In addition to this testimonial evidence, the "distinctive characteristics" of the videos themselves also establish that these videos are what they purport to be. Fed. R. Evid. 901(b)(4). The Advisory Notes to Rule 901(b)(4) state: "The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety." *Damrah*, 412 F.3d at 628. The contents of the videos speak for themselves, and, combined with the testimonial evidence outlined above regarding their completeness and the means by which they were obtained, contain all the indicia of authenticity needed to establish a "reasonable likelihood" that they are what they purport to be. *United States v. Hamama*, No. 08-20314, 2010 WL 2649877, at *5 (E.D. Mich. June 30, 2010) ("Federal Rule of Evidence 901(b)(1) and (b)(4) specifically provide that a document's authenticity can be established by 'testimony of [a] witness with knowledge,' of the document's [a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.'"). Indeed, the Court recognized this fact at trial. 11/17/2015 Trial Tr. 192:2-192:7 ("As far as I'm concerned, that is sufficient given the fact that you go to the senate's website and click on the sessions and that's what pops up on the screen is all the stuff that's coming from the Ohio Channel. Looks pretty much like the official record of the senate absent some journal.").

Beyond this, no more evidence is required. *Damrah*, 412 F.3d at 628 ("Evidence of how the tapes were made and handled prior to their seizure is not required."); *Buziashvili v. Inman*, 106 F.3d 709, 717 (6th Cir.1997) ("[T]he W–2 forms were sufficiently authenticated in that

[4] The admissibility of this declaration as well as PX0127, the Second Declaration of Rachel Roberts, is discussed *infra* at 37-39.

they appeared to be what they purported to be, and defense counsel was not able to make any serious challenge to their authenticity."); *United States v. Kandiel,* 865 F.2d 967, 973–74 (8th Cir.1989) (tape recordings authenticated without evidence of origin, method, or time of recording). Defendants can make no serious claim that the videos are not what they purport to be, *i.e.*, recordings of sessions of the Ohio General Assembly.

2. The Videos Are Self-Authenticating under Rule 902(5)

The recordings of the proceedings of the Ohio General Assembly also constitute self-authenticating "publications" under Rule 902(5). *Williams v.* Long, 585 F.Supp.2d 679, 686-87 (D.Md. 2008) (noting that courts routinely "interpret Rule 902(5) to include the self-authentication of . . . legislative reports, published transcripts of hearings, . . . and other . . . publications from public authorities") (internal quotation marks omitted). It is well established that internet postings by government entities are self-authenticating "official publications" pursuant to Rule 902(5). Indeed, another judge from this Court authored the seminal case on this point. In *Sannes v. Jeff Wyler Chevrolet, Inc.*, the defendant sought to introduce printed press releases from the Federal Trade Commission's ("FTC") website. No. C-1-97-930, 1999 WL 33313134, at *3 (S.D. Ohio Mar. 31, 1999). Even though the press releases were not attached to any authenticating affidavit, the court ruled that because they had been printed from a "government [worldwide webpage]," they were therefore self-authenticating under Rule 902(5). *Id.* at *3 n.3. Numerous cases have confirmed that postings on "government websites" are inherently authentic. *See, e.g., Schaghticoke Tribal Nation v. Kempthorne*, 587 F.Supp.2d 389, 397 (D. Conn. 2008) (holding that government press release was self-authenticating where it included the web address for press releases thereby allowing the court to verify that the press release in the record was a copy of an official document issued by a public authority); *Shell Oil Co. v. Franco*, No. 03-8846, 2004 WL 5615656, at *5 n.7 (C.D. Cal. May 18, 2004) (holding

that "records from government websites are self-authenticating" and admitting internet reports from the U.S. State Department website) (citing *Hispanic Broad. Corp. v. Educ. Media Found.*, No. CV027134CAS, 2003 WL 22867633, at *5 n.5 (C.D. Cal. Oct.30, 2003) (noting that "exhibits which consist of records from government websites, such as the FCC website, are self-authenticating"); *EEOC v. E.I. DuPont de Nemours & Co.*, No. 03-1605, 2004 WL 2347559 at *2 (E.D. La. Oct.18, 2004) (holding that data obtained from the Census Bureau was self-authenticating where "[t]he exhibit contains the internet domain address from which the table was printed, and the date on which it was printed.").

Further, Defendants' contention that these videos are not "official publications" because they are recorded by OGTV instead of the legislature is without merit. OGTV is created by state statute to "provide the state government and affiliated organizations with multimedia support including audio, visual, and internet services, multimedia streaming, and hosting multimedia programs." Ohio Rev. Code § 3353.07(A). It receives its funding from public money. *Id*. (OGTV "shall be funded through grants to an educational television broadcasting station" and "shall receive grants from, or contract with, any of the three branches of Ohio government, and their affiliates, to provide additional services"). Its operations are governed by a "legislative programming committee" comprised of various state officials. *Id*. at § 3353.07(B). As such, it constitutes a "public authority" under Rule 902(5). *Williams*, 585 F. Supp. 2d at 686 (holding that "public authority" under Rule 902(5) includes "any State . . . or . . . political subdivision, department, officer, or agency of [a state]").

Likewise, Defendants' overly formalistic characterization of OGTV as a non-governmental entity is beside the point. "There is nothing in the rule that states the public authority publishing the information . . . must originate the information posted. Rather, the

publication must have actually been approved by the public authority, or, as some would say, 'made official.'" *Id.* at 688 n.4. The fact that the Ohio General Assembly hosts links to the videos recorded by OGTV on its House and Senate websites demonstrates that it "approved" of the recordings at issue here.[5] *Id.* at 689 ("[T]he public authority's selection of the posted information for publication on its website will act as the necessary 'seal of approval' needed to establish that the information came from a public authority for purposes of Rule 902(5)."). Together with the Declaration of Rachel Roberts (PX0126) and the parties' stipulation, these exhibits contain the web addresses where they were downloaded, the date and title of each legislative session, and the date the recordings were accessed. Nothing else is required to authenticate these recordings under Rule 902(5). *Weingartner Lumber & Supply Co. v. Kadant Composites, LLC*, No. 08-181, 2010 WL 996473, at *7, n.12 (E.D. Ky. Mar. 16, 2010) ("The documents presented do indicate assurances of authenticity. For example, each document downloaded bears the U.S. Securities and Exchange Commissions [sic] web address, the date and title of each document, and the date and time the document was accessed and downloaded.").

Finally, that the recordings of the Ohio General Assembly's floor sessions are self-authenticating flows from the "common sense" idea embodied in Rule 902(5) "that official publications seldom contain serious mistakes in the reproduction of official pronouncements" and "that official publications are likely to be readily identifiable by simple inspection, and that forgery or misrepresentation of such material is unlikely." *Williams*, 585 F. Supp. 2d at 686. Defendants cannot seriously contend that these videos have been forged or altered in some way. In sum, the video exhibits are "self-authenticating, and also to a degree corroborated by some of

[5] *See* Ohio House of Representatives and Senate Video Libraries, available at http://www.ohiohouse.gov/session/session-video-library and http://ohiosenate.gov/session/session-video-library.

the other things that counsel for the [Plaintiffs] referred to." *Damrah*, 412 F.3d at 628. Accordingly, they should be admitted by this Court.[6]

B. Transcripts

Defendants' opposition to the introduction of transcripts of these legislative sessions that were made by a court reporter (PX0002_A, PX0004_A, PX0006_A, PX0008_A, PX00010_A, PX00012_A, PX00014_A, PX00016_A, and PX00018_A) are also misplaced. For the reasons stated below, there is no serious dispute as to the accuracy of these transcripts; they have been properly authenticated based on Ms. Roberts' declaration (PX0127) and the court reporter's certification; and, as with the legislative videos, they are relevant to Plaintiffs' intent claims (and, moreover, serve as an aid to the court in reviewing the legislators' contemporary statements) and should therefore be admitted.

"The decision to admit tape transcripts is []within the sound discretion of the court." *United States v. West*, 948 F.2d 1042, 1044 (6th Cir. 1991). The Sixth Circuit has held that when

[6] Defendants also oppose the introduction of these videos into evidence on the dubious ground that such use is prohibited by Ohio Rev. Code § 3353.07(A), which provides that "[s]ervices provided by the Ohio government telecommunications service 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." *See* 11/17/2015 Trial Tr. 192:16–193:1 (Coontz). However, state laws governing privilege and the admissibility of evidence are "not controlling in federal question cases." *Freed v. Grand Court Lifestyles, Inc.*, 100 F.Supp.2d 610, 612 (S.D. Ohio 1998); *see also Hancock v. Dodson*, 958 F.2d 1367, 1372–1373 (6th Cir.1992) ("In federal court when dealing with a federal question [Fed. R. Evid.] 501 states that privilege 'shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.'"); *Baldwin v. Rice*, 144 F.R.D. 102, 106 (E.D. Cal.1992) ("There can be no doubt, however, that a state legislature cannot purport to make binding pronouncements of law concerning what evidence may be privileged or otherwise admissible in a federal court action involving claims based on federal law."); Fed. R. Evid. 501 (state privilege law binding only in actions where state law controls the merits of a claim or defense). Moreover, the notion that a state could limit the use of statements by its state legislators made in the course of conducting the people's business is patently inconsistent with the First Amendment of the U.S. Constitution, which of course applies to the states through the Fourteenth Amendment.

determining the accuracy of a transcript of a recording "[t]he preferred practice is to have both parties stipulate to the accuracy of the transcripts." *Id*. However, when a transcription is contested, "the transcriber should attest to the accuracy of the transcripts . . . and the court should make a determination of accuracy . . . . by reading the transcripts while listening to the tapes." *Id*. (citations omitted). Without any justification whatsoever, Defendants refused to stipulate to the accuracy of the transcripts Plaintiffs submitted in this case.[7] Nevertheless, the evidence submitted by Plaintiffs demonstrates the authenticity and accuracy of the transcripts and warrants their admission.

At trial, Plaintiffs submitted the declarations of Rachel Roberts, the paralegal for Plaintiffs' counsel who oversaw the downloading of the videos and the transcription process. PX0126, PX0127. As Ms. Roberts attested, the transcripts were prepared by certified court reporters and the name of the court reporter for each transcription appears on the first and last page of the transcripts. PX0127 (Roberts Decl. 2). Each transcript contains a certification of accuracy signed by the court reporter on the last page. PX0127 (Roberts Decl. 2); *see also* PX0002_A at 23, PX0004_A at 54, PX0006_A at 45, PX0008_A at 36, PX00010_A at 46, PX00012_A at 106, PX00014_A at 67, PX00016_A at 27, and PX00018_A at 26.

These certifications, combined with Ms. Roberts' declaration, are sufficient by themselves to demonstrate the authenticity and accuracy of the transcripts. *See United States v. Hughes*, 895 F.2d 1135, 1147 n.22 (6th Cir. 1990) (upholding district court's introduction of transcripts to jury based on the "testimony of the FBI agent who supervised the preparation of the transcripts"). This is particularly true where the Defendants have failed to point to *any*

[7] Given that Plaintiffs' counsel used a reputable court reporting service, Defendants' refusal to stipulate to the authenticity of the transcripts serves no purpose other than to drive up the costs of this litigation.

discrepancy between the transcripts and the video recordings, and instead raise only speculative concerns about accuracy. 11/16/2015 Trial Tr. 83:18–85:3 (stating that Defendants are not sure what inaccuracies are contained in the transcripts); 11/17/2015 Trial Tr. 192:12–193:1 (failing to answer the Court's question regarding their discrepancies with the transcripts); *see Goggin Truck Line Co. v. Admin. Review Bd.*, 172 F.3d 872 (6th Cir. 1999) (admitting transcript of audio recording where "[t]he tape recording at issue was transcribed by a court reporter and certified as accurate"); *Vaughan v. City of Shaker Heights*, No. 1:10-00609, 2015 WL 1650202, at *15 (N.D. Ohio Apr. 14, 2015) (holding that hearing transcripts were properly authenticated where they contained "certifications from the court reporter for each day of testimony" and there was a "lack of any evidence or argument the hearing transcripts [were] not what they purport to be"); *United States v. Sears*, No. 12-0141, 2012 WL 4820504, at *3 (S.D. Ala. Oct. 10, 2012) ("Certified transcripts of prior deposition or court testimony appear to fit comfortably within the categories of self-authenticating records identified in Rule 902, Fed.R.Evid., . . . the admissibility of those documents may not be challenged on grounds of authenticity for lack of a custodian of records or other witness testifying at trial that the transcripts are, in fact, what they purport to be."). Accordingly, the transcripts of the legislative videos should be admitted.

Finally, even if the transcripts are not formally admitted into evidence, they should be allowed as aids to the Court in interpreting the videos. Courts routinely allow transcripts of recordings to be used for this purpose. *See, e.g.*, *United States v. Elder*, 90 F.3d 1110, 1130 (6th Cir. 1996) ("The district court did not abuse its discretion in allowing transcripts to be used as aids to the jury when listening to tape recorded conversations in light of his limiting instructions. Once admitted, transcripts may be used by the jury during the playing of tape recordings at trial and during jury deliberations after the case has been submitted."); *West*, 948 F.2d at 1044 ("The

decision to admit tape transcripts is also within the sound discretion of the court.").

C. Secretary of State Staff Emails

1. Emails Sent By and Among Secretary of State Senior Staff Are Statements of Party Opponents

Defendants' hearsay objections to Plaintiffs' exhibits PX0049–53, PX0055, PX0057–58, PX0088–89, PX0103, and PX0118 are misplaced. These exhibits are all email exchanges between senior level employees in Defendant Husted's office; they concern matters within the scope of these individuals' employment relationship with Defendant Husted's office; and were made while these employees were still employed by the office. Accordingly, they constitute statements of party opponents and are plainly excluded from the hearsay rule.

Federal Rule of Evidence 801(d)(2)(D) provides that an out-of-court statement offered to prove the truth of the matter asserted is not hearsay if (1) it is offered against a party; (2) it was made by the party's employee; (3) on a matter within the scope of that employment relationship; (4) while the relationship existed. Fed. R. Evid. 801(d)(2)(D); *Robert R. Jones Associates, Inc. v. Nino Homes,* 858 F.2d 274, 276 (6th Cir. 1988). There is no requirement that the statement be against a party's interest. *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 761 (7th Cir. 2003) ("To qualify as an admission, no specific 'against interest' component is required."). The aforementioned exhibits are all offered against Defendant Husted. Likewise, the statements contained within them were made by Defendant Husted's senior employees during the scope of their employment and while they were serving in those roles. For example, Matthew Damschroder, the current Assistant Secretary of State and Defendant Husted's proffered Rule 30(b)(6) representative, testified that PX0089 concerns an email exchange between Secretary Husted's senior staff. 12/2/2015 Trial Tr. 171:8–13 (Damschroder). Specifically, sender/recipient Matthew McClellan was Secretary Husted's Press Secretary at the time the email was sent

(12/2/2015 Trial Tr. 171:14–17 (Damschroder)), sender/recipient Maggie Ostrowski was the Secretary's Director of Communications (*id.* at 171:21–24), and all of the additional senders and recipients, including Mr. Damschroder, were also senior staff at that time (*id.* at 171:25–172:2). *See also id.* at 174:21–175:1 (Joel Fleeman regional representative and Military Voting Coordinator); PX0128, 10/20/2015 Damschroder 30(b)(6) Dep. Tr. 118:8–119:4 (discussing PX0089, marked as deposition exhibit 4, and explaining that sender/recipient Craig Forbes served as Legislative Director; Halle Pelger served as Chief of Staff; Matt Masterson served as Deputy Chief of Staff and IT Director; and Joel Fleeman served as Military Voting Coordinator and maintained the office's contact lists). All of these senders/recipients are discussing the distribution of an official press release by Secretary Husted, which is plainly within the scope of their employment. *See* 12/2/2015 Trial Tr. 174:1–176:4 (Damschroder); PX0128, 10/20/2015 Damschroder 30(b)(6) Dep. Tr. 115:2–120:19. Accordingly, PX0089 constitutes a statement of a party opponent under Rule 801(d)(2)(D) should be admitted as it is not hearsay.[8]

The additional email exhibits proffered by Plaintiffs are no different. PX0088 merely constitutes another part of the same discussion contained in PX0089, and it is circulated between same Husted senior staff while they served in those positions. PX0049, PX0053, PX0118, PX0050, and PX0051 are also email exchanges between some of those same senior staff persons—Halle Pelger, Matt McClellan, Matt Masterson, and Maggie Ostrowski—discussing, respectively, official responses to a United States Supreme Court decision on the voting rights act and an editorial concerning Ohio elections as well as a draft statement for Secretary Husted

[8] Indeed, although the Court ultimately reserved on all of its rulings on the emails, *see* 12/3/2015 Trial Tr. 80:11-80:14, when this communication was initially presented the Court overruled Defendants' objections to the documents admission and allowed the exhibit to be admitted as a statement of the office. 12/2/2015 Trial Tr. 173:19–22.

concerning the mailing of absentee ballot request forms and a draft statement to the Canton Area Urban League, all actions within the scope of their work for Secretary Husted.[9] *See* 12/3/2015 Trial Tr. 16:23–17:4 (Damschroder) (discussing PX0053); 12/2/2015 Trial Tr. at 181: 14–23 (Damschroder) (discussing PX0051); PX0128, 10/20/2015 Damschroder 30(b)(6) Dep. Tr. 135:12–14, 138:3–6 (confirming that PX0051 was a discussion among Secretary of State employees). Moreover, the first email in the PX0050 email chain was actually drafted by Secretary Husted and, as such, constitutes a direct statement of a party opponent and is admissible under Rule 801(d)(2)(A) as well.[10]

Similarly, PX0058 is also a statement by Mr. Damschroder, sent during the course of his

[9] The Toledo Blade Featured Editorial included in the August 14, 2013 9:34 AM section of PX0053 and PX0118 is not being offered into evidence for the truth of the matter asserted therein. Rather, it is offered (1) to provide context for the ensuing discussion among Secretary Husted's senior staff as well as a basis for their drafting a response; and (2) to show that Secretary Husted had knowledge of allegations that minority voters disproportionately used early voting, prior to the passage of the challenged provisions. *See United States v. Talley*, 164 F.3d 989, 999 n. 4 (6th Cir. 1999) (finding that statements were non-hearsay where they "provided meaningful context to the conversation" and were not admitted for their truth); *United States v. Johnson*, 71 F.3d 539, 543 (6th Cir.1995) (statements offered to prove the listener's knowledge are not hearsay); *United States v. Martin*, 897 F.2d 1368, 1371 (6th Cir. 1990) (hearsay does not apply where statements are only offered to show their effect on the listener). Whether the statements contained in the article or true or not, that the Secretary was aware of them and then acted in a way that would diminish the ability of these voters to utilize early voting is probative of his and the State's intent and motive and, accordingly, the article can be admitted for that purpose.
In addition, his 30(b)(6) deposition, Mr. Damschroder also reviewed PX0118 and confirmed that the references in Ms. Pelger's August 21, 2013 8:32 AM email to statements made by "Mags" and "JAH" are references to Maggie Ostrowski and Secretary Husted, respectively, meaning that those statements would also be admitted under the statement of a party opponent exclusion to the hearsay rule. PX0128, 10/20/2015 Damschroder 30(b)(6) Dep. Tr. 127:5–128:2.

[10] The top email in PX0050, August 30, 2012 9:40 AM, is an email from Ms. Pelger to Scott Borgemenke. The email itself indicates that Mr. Borgemenke was a member of Secretary Husted's staff, as it contains the "@ohiosecretaryofstate.gov" notation. Further, in Mr. Damschroder's deposition, he also explained that Mr. Borgemenke was an employee of the Secretary of State's Office during the time period that this email was sent. PX0129, 10/29/2015 Damschroder Dep. Tr. 106:23–107:2.

employment on Secretary Husted's staff, which conveys information about the Cuyahoga County Board of Elections that he learned within the scope of his employment, and which concerns official business of the Secretary of State's office. 12/3/2015 Trial Tr. 23:12–25:18 (Damschroder).[11] Accordingly, it is a party statement and should be admitted.

Likewise, PX0052 is an email from Ms. Pelger to Senator Gardner during her employment at Secretary Husted's office. *See* 12/3/2015 Trial Tr.11:12–12:7 (Damschroder) (verifying that sending emails to outside legislators was in the scope Ms. Pelger's position at the Secretary of State's office). Thus, Ms. Pelger's statements in the email can be admitted for the truth of the matter asserted therein under Rule 801(d)(2)(D). Further, the Toledo Blade article that Ms. Pelger forwards to Senator Gardner, which is included in the email, can be admitted for the non-hearsay purpose of showing the knowledge of the Secretary of State and his office as well as the knowledge of Senator Gardner which, as demonstrated more fully in Plaintiffs proposed findings of fact and conclusions of law, is relevant to the questions of motive and intent in the case. *See* PFOF/COL at ¶¶133-135; *infra* at 22-24, 41-49; *Johnson,* 71 F.3d at 543 (statements offered to prove the listener's knowledge are not hearsay). PX0055 and PX0103 are admissible for the same reasons. PX0055 is a statement of Mr. Forbes (i.e., the pasting and forwarding of the link) and PX0103 is a statement by Mr. McClellan (i.e., "FYI" and the forwarding of the article) to other Secretary of State senior staff.[12] Further, the articles contained

[11] To the extent that Defendants' pose a double-hearsay argument regarding references to things that Pat McDonald said in PX0058, Mr. McDonald testified as to the substance of this email in his own, admissible deposition and such information is not hearsay. PX0132, McDonald Dep. Tr. 104:8–107:3. Further, as discussed *infra*, as director and/or deputy director of the Cuyahoga County Board of Elections ("CBOE") Mr. McDonald is a managing agent of the Secretary of State's Office and, therefore, his statements fall directly within Rule 801(d)(2)(D)'s exclusion from hearsay and may be entered for the truth of the matter asserted.

[12] PX0055 is a forward from Mr. Forbes' personal email account to the personal email accounts

in the email demonstrate the knowledge of and information before the Secretary of State's Office with respect to the various criticisms contained therein, whether such criticisms are true or not. With respect to PX0103 specifically, it demonstrates that at least as of the date of that email Secretary Husted had knowledge of Doug Preisse's statement regarding "urban" voters and yet, as testimony demonstrates, despite that knowledge failed to take any action to address the statement. *See* 12/2/2015 Trial Tr. 165:5–166:12 (Damschroder) (confirming in a separate discussion that the Secretary of State's Office had knowledge of the Preisse statement referenced in PX0103); PX0128, 10/20/2015 Damschroder 30(b)(6) Dep. Tr. 120:22–123:8 (same); PX0129, 10/29/2015 Damschroder Dep. Tr. 125:13–126:3 (same).

Lastly, PX057 is also an email exchange between these same Secretary of State senior staff—Pelger, Masterson, Damschroder, and McClellan—and Kevin DeWine, former Chairman of the Ohio Republican Party, while they worked for the Secretary of State's office and in their role as senior staff. 12/3/2015 Trial Tr. 8:23–11:11 (Damschroder) (discussing role of persons included on emails and affirming that as part of their jobs they communicated via email with legislators, board members, etc.); PX0129, 10/29/2015 Damschroder Dep. Tr. 126:8–15 (confirming DeWine's identity). Thus, the portions of the email chain containing statements from these staff members are party statements admissible for the truth of the matters asserted.[13]

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of other Secretary of State senior staff. In his trial testimony, Mr. Damschroder confirmed that sometimes official business of the Secretary of State's office was transmitted through emails to personal accounts. 12/2/2015 Trial Tr. 169:12–22 (Damschroder); 12/3/2015 Trial Tr. 25:12–18 (Damschroder); *see also* PX0129, 10/29/2015 Damschroder Dep. Tr. 106:12–107:13, 128:13–129:4. Additionally, he confirmed that Jack Christopher, one of the recipients, was the Secretary of State's General Counsel. 12/3/2015 Trial Tr. at 23:24–24:1 (Damschroder).

[13] Plaintiffs have separately argued that these emails also constitute business records and, therefore, even outside of just the statements by the Secretary of State's staff they can be admitted for the truth of the matter asserted therein, which would include the statement of Kevin DeWine. However, if the Court were to find that Mr. DeWine's statement was not admissible,

Further, the attachments to the email, authenticated by Mr. Damschroder at trial and included as part of the exhibit, can also be admitted for the truth of what of they say as statements of the Secretary of State's office, and reports maintained by the Secretary of State's office in the ordinary course of business and circulated by the staff. 12/3/2015 Trial Tr. 9:14–11:4 (Damschroder).

2. Emails Sent By and Between Secretary of State Senior Staff and County Board of Elections Members, Directors, and Deputy Directors Also Constitute Statements of Party Opponents

Defendants' hearsay objections to PX0056, PX0063, PX0066, PX0095, and PX0100, also fail. These exhibits are all communications between senior level employees in Defendant Husted's office and his agents at the county boards of elections; they concern matters within the scope of the agents' relationships with the Secretary of State's office; and the statements were made while these individuals were still agents of the office. Accordingly, they also constitute statements of party opponents and are plainly excluded from the hearsay rule.

The Secretary of State appoints members of the boards of elections, has the power to remove them, and issues directives that control boards' operations. *See Hunter v. Hamilton County Bd. Of Elections*, 850 F.Supp.2d 795, 801 (S.D. Ohio 2012) (holding that the County Board of elections in Ohio functioned as an arm of the state because "[t]he Board is created by statute. Ohio Rev. Code ("O.R.C.") § 3501.05[,] [i]ts membership is appointed by the Ohio Secretary of State" and it manages elections "under the guidance of the Secretary of State"); *see also* 11/23/2015 Trial Tr. 182:11–183:14 (Burke) (testifying that he has been threatened with removal for opposing the position of the secretary of state). Likewise, they serve as the secretary's representatives and, while they do have broad discretion in carrying out the

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Plaintiffs would offer his email for the non-hearsay purpose of merely providing context for the ensuing discussion between the Secretary of State's staff i.e., an email from Mr. DeWine prompted the discussion between the staff. *See Talley*, 164 F.3d at 999.

operations of the board, can be expected to act in the Secretary's interests. *See* Ohio Rev. Code § 3501.06 (members are "appointed by the secretary of state, as the secretary's representatives"); 11/23/2015 Trial Tr. 35:4–14 (McNair). The Secretary's relationship with the board also extends to county directors and deputy directors, who, like board members, play a significant role in carrying out the operations of the board as well as implementing and complying with the Secretary's directives. *See* Attorney General Opinion 84-009 (stating that "[t]he director of the board of elections implements the policies determined by the board and, in general, is in charge of the daily operations of the board office . . . [t]hus, the director's role is as significant as that of the four-member board to a balanced governmental process.") (citation omitted). The directors and deputy directors of the county boards of elections are also subject to the Secretary's removal power. Ohio Revised Code § 3501.16. As the Sixth Circuit has held, a defendant's authority to hire, fire, and direct the operations of the declarant is sufficient to establish an agency relationship under Rule 801(d)(2)(D). *See Nino Homes*, 858 F.2d at 276 (statement not hearsay where declarant was hired by defendant); *United States v. Rioux*, 97 F.3d 648, 660 (2d Cir. 1996) (holding that "the fact that [declarants'] were answerable and directly responsible to [Defendant], who directed the [declarants'] operations, [wa]s enough to satisfy the first element of the test under 801(d)(2)(D)"). Accordingly, like the statements of Secretary Husted's senior staff, the statements of county boards of elections members, directors, and deputy directors are not hearsay.

PX0063 is an email from Cuyahoga County Board of Elections Director Pat McDonald to Mr. Damschroder, then Director of Elections for Secretary Husted. *See* PX0132, McDonald Dep. 7:19–8:13 (confirming role as Cuyahoga CBOE Director). It was sent while Mr. McDonald was serving in his role as Director; concerns a matter within the scope of that role—an upcoming

Cuyahoga County Board meeting; and it is being offered against Secretary Husted. PX0132, McDonald Dep. Tr. 97:6–103:17 (authenticating and discussing email); 12/3/2015 Trial Tr. 25:19–27:1 (Damschroder) (confirming that email sent to him due to his role at the Secretary's office). Accordingly, PX0063 constitutes a statement of a party opponent under Rule 801(d)(2)(D) and should be admitted as it is not hearsay. The additional email exchanges are no different. PX0056, like PX0063, is an email from Mr. McDonald, then Deputy Director of Cuyhoga County's BOE, to Secretary Husted and Mr. Damschroder regarding the number of voters voting during Golden Week in 2012, which was part and parcel of the official business of the Secretary of State's Office and within the scope of their professional relationship.[14] 12/2/2015 Trial Tr. 169:7–19 (Damschroder); PX0132, McDonald Dep. 7:19 - 8:13 (confirming position as deputy director).[15] Likewise, PX0095 is an email sent by Mr. McDonald while he was the Director of Cuyahoga's CBOE, communicating Cuyahoga's official early voting numbers to Mr. Damschroder at the Secretary's office, a purpose plainly within the scope of Mr. McDonald's work as Director and his relationship with the Secretary of State.[16] *See* PX0132,

[14] To the extent that the Court does not recognize Mr. McDonald's statements in PX0056 as statement of a party opponent, Plaintiffs submit that PX0056 is also admissible for a non-hearsay purpose: to show that at least as of the time of that email, both Secretary Husted and Mr. Damschroder had knowledge of (whether true or not) a reported increase in the usage of Golden Week in Cuyahoga County from 2008 to 2012. *See* 12/2/2015 Trial Tr. 169:9–22 (Damschroder); *Johnson*, 71 F.3d at 543.

[15] To the extent the State seeks to argue that these emails were sent in a personal capacity because they were sent via personal email addresses, it should be noted that the content is strictly about matters within the official duties of the Secretary's and Director's offices. Mr. McDonald acknowledged at his deposition that he could not distinguish between his sending these emails in his "official" role and "another role." PX0132, McDonald Dep. Tr. 94:13 - 94:19. Moreover, it would be a perversion of justice if these public officials were permitted to shield from scrutiny these communications about matters within their public duties by sending them through their personal email accounts.

[16] To the extent that the Court does not recognize Mr. McDonald's statements in PX0095 as

McDonald Dep. Tr. 83:19–85:22 (authenticating and explaining email).

Further, PX066 and PX0100 should be admitted for the same reasons. PX0066 is an email exchange between the Director of the Licking County Board of Elections and an attorney for the Secretary of State's Office, Matthew Walsh, in which the Director poses questions about the proper hours for early voting so that she can run an election in compliance with Secretary Husted's directives.[17] *See* Decl. of Matthew Walsh, ECF No. 26-1 (identifying Mr. Walsh as Legislative Counsel for the Secretary of State's Office). Mr. Walsh, in his role as a legal advisor at the Secretary's office, provides an interpretation of the rules for the Director. Accordingly, both the Director's emails and Mr. Walsh's responses constitute statements of party opponents.

Lastly, PX0100 is an email from Inajo Davis Chapell, a member of the Cuyahoga CBOE, to members of her board and senior staff at the Secretary of State's Office. 12/2/2015 Trial Tr. 150:21–151:18 (Damschroder); PX0129, 10/29/2015 Damschroder Dep. Tr. 93:16–95:6, 99:13–100:10 (verifying Ms. Chappell's role as well as the role of various recipients). The email directly concerns an issue within the scope of Ms. Chappell's role as a Cuyahoga CBOE member as well as her relationship with the Secretary of State, specifically, a tie vote on early voting hours. Accordingly, both Ms. Chappell's statements as well as the statements of the Secretary of State staff included on the later emails should be admitted as party statements.[18]

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statement of a party opponent, Plaintiffs submit that PX0095 is also admissible for a non-hearsay purpose: to show that at least as of the time of that email the Secretary of State's Office had knowledge of (whether true or not) increasing usage of Golden Week in Cuyahoga County from 2008 to 2012. *Johnson*, 71 F.3d at 543.

[17] To the extent that the Court does not recognize Ms. Penick's statements in PX0066 as party statements, Plaintiffs also offer them for a non-hearsay purpose, namely to demonstrate that as of the time of Ms. Penick's emails the Secretary of State was on notice and/or had knowledge that confusion remained around early voting hours. *Johnson*, 71 F.3d at 543.

[18] Even if the Court were to find that Ms. Chappell's statements could not be admitted for the

3. Business Records

Defendants' hearsay objections to Plaintiffs' exhibits PX0049–53, PX0055–58, PX0060, PX0063, PX0065-66, PX0088–89, PX0095, PX0100, PX0103, PX0118, PX0124_A also fail because these emails qualify as business records under the business records exception to the hearsay rule. Rule 803(6) provides that "[b]usiness records are properly admitted under the business records exception to the hearsay rule if they satisfy four requirements: (1) they must have been made in the course of regularly conducted business activities; (2) they must have been kept in the regular course of business; (3) the regular practice of that business must have been to have made the memorandum; and (4) the memorandum must have been made by a person with knowledge of the transaction or from information transmitted by a person with knowledge." *Auto Indus. Supplier Employee Stock Ownership Plan v. Ford Motor Co.*, 435 F. App'x 430, 447 (6th Cir. 2011) (citing *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 588 (6th Cir. 2009)). Information about business records can be presented through a custodian or other qualified witness. *United States v. Moon*, 513 F.3d 527, 544 n. 2 (6th Cir.2008). "To be an 'other qualified witness,' it is not necessary that the person laying the foundation for the introduction of the business record have personal knowledge of their preparation." *Dyno Construction Co. v. McWane, Inc.*, 198 F.3d 567, 575–76 (6th Cir.1999).

Mr. Damschroder, the Assistant Secretary of State and the Secretary's 30(b)(6) witness, manages the "day-to-day operations of the office, business services, campaign finance, and elections administration" on Secretary Husted's behalf. 12/2/2015 Trial Tr. at 49:5–10

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truth of what they assert, Plaintiffs also offer them for a non-hearsay purpose. Ms. Chappell's email demonstrates that at least as of July 13, 2012, the Secretary of State had knowledge of/was on notice that Democratic members of the Cuyahoga CBOE felt that they were not being heard and at least one of them was concerned that limiting early in person voting hours would have a disparate impact on African-American voters (whether or not it would actually have that effect). *Johnson*, 71 F.3d at 543.

(Damschroder). His management of the operations of the office gives Mr. Damschroder knowledge both of the manner in which the secretary of state's staff conducts its business as well as knowledge of how it retains its records. Indeed, Mr. Damschroder testified that the work of the secretary of state's office, particularly work with the boards, is conducted through emails. 12/3/2015 Trial Tr. 9:5–13; 51:12–52:1 (Damschroder) (unlikely that the emails sent by and between the secretary of state's staff would have been sent but for working at the secretary of state's office). Further, he also testified that the work of the secretary of state's office may also be conducted by senior staff through use of their personal emails. 12/3/2015 Trial Tr. 25:13–18 (Damschroder) (conveying official information on personal emails). Plaintiffs' exhibits PX0049–53, PX0055–58, PX0060, PX0063, PX0065-66, PX0088–89, PX0095, PX0100, PX0103, PX0118, PX0124_A are all exactly the types of business emails that Mr. Damschroder testified about. They were maintained by the Secretary of State's office and subsequently produced by his office to Plaintiffs.[19] Accordingly, Plaintiffs submit that these emails constitute business records and should be admitted under this exception to the hearsay rule.[20] Further, to the extent that there

[19] That these were produced by the Secretary of State's office is shown by the "SEC" prefix to the Bates numbering on each. *See* PX0127 (Roberts Declaration).

[20] Mr. Damschroder specifically provided foundational testimony about a number of these emails in both his trial and deposition testimony. *See* PX128, 10/20/2015 Damschroder 30(b)(6) Dep. Tr. 115:4–119:10 (PX0089); *id.* at 127:5–128:2 (PX0118); *id.* at 131:5–135:9 (PX0065); *id.* at 135:10–14 (PX0051); PX0129, 10/29/2015 Damschroder Dep. Tr. at 89:18–91:8, 93:16–95:6 (PX0100); *id.* at 114:9–116:18 (PX0056); *id.* at 117:5–118:8 (PX0103); *id.* at 126:8–128:12 (PX0057); *id.* at 128:16–129:4 (PX0058); *id.* at 134:24–135:16 (PX0055); *id.* at 143:24–150:4 (PX0063); 12/2/2015 Trial Tr. 150:21–151:18 (PX0100); *id.* at 166:13–22, 169:7–14 (PX0056); *id.* at 169:23–170:14 (PX0060); *id.* at 171:8–176:21 (PX0089); *id.* at 181:14–23 (PX0051); 12/3/2015 Trial Tr. 8:23–12:21 (PX0057); *id.* at 11:12–12:13 (PX0052); *id.* at 16:23–18:9 (PX0053); *id.* at 23:12–27:1 (PX0058); *id.* at 25:19–27:1 (PX0063); *id.* at 46:15–48:3 (PX0060). To the extent that Mr. Damschroder did not testify about a limited number of emails, specifically, PX0049, 50, 66, and 88, Plaintiffs submit that they are substantially similar to the emails about which Mr. Damschroder testified and that there is sufficient evidence in the record regarding these types of email to support the Court's finding that these documents are also

are any statements by individuals who do not work at the Secretary of State's office, these statements are discussed in Plaintiffs' other hearsay arguments and are covered by other exceptions or exclusions to the hearsay rule.

4. Knowledge

Defendants' hearsay objections with respect to PX0060, 65 and 124_A also fail because Plaintiffs do not seek admission of these exhibits to prove the truth of the matter asserted. Rather, Plaintiffs offer these exhibits for the non-hearsay purpose of demonstrating the Secretary of State's knowledge and the subsequent effect of these documents on the Secretary and his staff.

"Statements offered to prove the listener's knowledge are not hearsay." *United States v. Boyd*, 640 F.3d 657, 664 (6th Cir. 2011) (citing *Johnson*, 71 F.3d at 543); *United States v. Churn*, 800 F.3d 768, 776 (6th Cir. 2015), *reh'g denied* (Oct. 23, 2015) ("Such a statement may be admitted to show why the listener acted as she did."); *United States v. Pugh*, 273 F. App'x 449, 456 (6th Cir. 2008) ("[B]ecause the statement was not offered to prove the truth of the matter asserted, but instead to demonstrate the affect [sic] on Calhoun and to explain his steps in the investigation, the statement was not hearsay, and the district court did not err in admitting it."); *United States v. Mays*, 69 F.3d 116, 121 (6th Cir. 1995) ("[T]he proffered testimony was probative of defendants' knowledge of the wrongfulness of their actions. The evidence, therefore, was relevant and non-hearsay."); *United States v. Cantu*, 876 F.2d 1134, 1137 (5th Cir.1989) (explaining that if a statement is offered for its effect on the listener, to explain the listener's conduct, it is not hearsay as defined by the Federal Rules of Evidence).

For example, PX0060 is an email from Sonia Gill to Mr. Damschroder regarding a study on early voting patterns in Cuyahoga County and PX0124 is the attachment thereto, *see* PX0127 (Roberts Decl. 2). These exhibits are not offered for the truth of what they assert but, rather, to

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business records.

show that as of October 2012, the date of the email, the Secretary was aware of reports of disproportionate usage of early voting and Golden Week by African-Americans, regardless of the veracity of such reports. (PX0060 also provides crucial context for PX0124, demonstrating how and when such reports arrived at the Secretary's office).[21]

Likewise, PX0065 is an email from a reporter to Mr. McClellan forwarding a press release on voter suppression. Both the email and the press release are offered into evidence to show that the Secretary's office had knowledge of the purported impact of the loss of Golden Week on minority voters as well as SB 205's purported impact on voters. The email and attached letter are not offered for the truth of what they assert. Rather, they are offered to show their effect on the listener, namely, the Secretary of State. *See also* discussion *supra* of PX0053, PX0118 (n.9), PX0056 (n.14), PX0095 (n.16), PX0066 (n.17), PX0100 (n.18), PX0052 (pp. 16-17), and PX0055, PX0103 (p.17), which Plaintiffs also seek to introduce to demonstrate knowledge. These, combined with other evidence in the record, establish that both the General Assembly and Defendant Husted undertook these measures with knowledge of their disparate impact on minorities (whether true or not). *See Hispanic Taco Vendors of Washington v. City of Pasco*, 994 F.2d 676, 680 (9th Cir.1993) ("The discriminatory impact of a governmental act may be evidence of discriminatory intent."); *See* 12/02/2015 Trial Tr. 139:24 - 150:5 (Damschroder) (discussing repeated efforts to eliminate Golden Week and reduce early voting period on the part of Defendant Husted and General Assembly since 2009); *see also infra* at 41-49; And, further, provide evidence of the State's motive in enacting the challenged provisions, which is relevant to and probative of intent. *See infra* at 41-49. Accordingly, all of these exhibits are directly relevant

[21] As attested in Ms. Roberts' declaration (PX0127), PX0124_A was produced in the Bates range immediately following Sonia Gill's email to Matthew Damschroder (PX0060), which, together with the contents of that email, demonstrates that PX0124_A was an attachment to that email.

to the issues in this case should be admitted as non-hearsay evidence.[22]

D. Deposition Designations

Defendants' objections to Plaintiffs' deposition designations PX0128–132 also fail. The depositions Plaintiffs have moved to admit fit squarely within the contours of Federal Rule of Civil Procedure 32 and should be admitted because they are either (1) depositions of a party and/or a party's officer, director, managing agent, or designee; or (2) the deponent was unavailable for trial.

1. Mr. Damschroder's, McDonald's, and Weber's Depositions Are Admissible As Depositions of a Party's Officer, Director, Managing Agent, or Rule 30(b)(6) Designee

Under Rule 32(a)(3), a party may use all or part of a deposition against another party for "any purpose," where the deposition is of an adverse party or a "party's officer, director, managing agent, or designee under Rule 30(b)(6)." The deposition of a managing agent, officer, or 30(b)(6) designee may be used regardless of whether the deponent was present in court to testify. *Pingatore v. Montgomery Ward & Co.*, 419 F.2d 1138, 1142 (6th Cir. 1969) ("The ruling of the District Judge in limiting [the witnesses'] deposition to impeachment purposes was erroneous. [Rule 32(a)(3)] permits the deposition of a party to a suit to be used by an adverse party for any purpose at the trial, even though the party was present at the trial and testified orally."); *see also Black v. United Parcel Serv.*, 797 F.2d 290, 293 (6th Cir. 1986) (finding no error in using a managing agents deposition testimony where he was present in the courtroom during trial). In the Sixth Circuit, a managing agent is defined as someone who (1) "Acts with superior authority and is invested with general powers to exercise his judgment and discretion in

[22] Although offered to show the knowledge of the legislature and/or at least some legislators rather than the Secretary of State, PX0020, PX0067–71, PX0085, PX0096, and PX0121, also overcome Defendants' hearsay objections based on the grounds discussed in this section and *infra* at 41-49. Namely, they are not offered for the truth of the matter asserted therein but, rather, are offered only for the purpose of showing the knowledge of the listener.

dealing with his principal's affairs"; (2) "[c]an be depended upon to carry out his principal's directions to give testimony at the demand of a party engaged in litigation with his principals;" and "(3) [c]an be expected to identify himself with the interests of his principal rather than those of the other party. *Brandon v. Art Ctr. Hosp. (Osteopathic*), 366 F.2d 369, 372 (6th Cir. 1966).[23] When determining whether an actor is a managing agent, courts are instructed to "not be too technical or literal in their approach" and to "liberally apply the Rule to reach the demands of justice in each case." *Melton v. O.F. Shearer & Sons, Inc.*, 436 F.2d 22, 27 (6th Cir. 1970).

As an initial matter, under the plain language of Rule 32 and the supporting Sixth Circuit case law, it is clear that Mr. Damschroder's 30(b)(6) deposition may be admitted by Plaintiffs as substantive evidence, regardless of whether Mr. Damschroder was present to testify. Further, Mr. Damschroder currently serves as the Assistant Secretary of State and Chief of Staff of the Secretary of State's office. 12/2/2015 Trial Tr. 48:13–22 (Damschroder). In this role he manages the "day-to-day operations of the office, business services, campaign finance, and elections administration" on Secretary Husted's behalf. *Id.* at 49:5–10. As his trial testimony demonstrates, he is vested with authority to exercise is his discretion in dealing with the Secretary's affairs and managing the Secretary's office; he carries out the Secretary's directions; and also identifies with the Secretary's interests. *See generally id. at* 48:11–185:3; 12/3/2015 Trial Tr. 8:21–71:8

[23] In *Brandon v. Art Centre Hospital* the Sixth Circuit specifically applied this definition in the context of Rule 43. However, other case law in the Sixth Circuit has found that this definition should also apply to the term "managing agent" under Rule 32. *See In re Air Crash at Lexington, Kentucky, Aug. 27, 2006*, No. CIV.A. 5:06CV316-KSF, 2008 WL 2954971, at *4 (E.D. Ky. July 30, 2008) (using the criteria set out in *Brandon v. Art Centre Hospital* to determine what constitutes a managing agent under Rule 32(a)). Further, cases in other circuits have noted the similarity between the use of the term "managing agents" in these two rules and have also advocated adopting the same definition for each rule. *Newark Ins. Co. v. Sartain*, 20 F.R.D. 583, 585–86 (N.D. Cal. 1957) (providing a comprehensive discussion of the various definitions for the term managing agent and explaining why Rule 32 and Rule 43's definitions should be interpreted the same).

(Damschroder); *Brandon*, 366 F.2d at 372 (setting out the test for a managing agent: (1) superior authority and discretion; (2) carrying out of principal's directions; (3) alignment of interests). Accordingly, his October 29, 2015 deposition testimony is also admissible as the deposition testimony of a managing agent of the Secretary's office.[24]

Further, both of these depositions are necessary to support Plaintiffs' claims in this case, and the selected designations highlight issues and facts that were not solicited at trial. In particular, in his depositions Mr. Damschroder provides extensive testimony on a number of email exhibits that Plaintiffs attempted to introduce at trial but, at times, were prevented from eliciting both foundational and substantive testimony. As the Court has reserved its evidentiary rulings on many of these exhibits, discussed *supra* at 14 n.8, such testimony will assist the Court with its rulings and also provide the substantive evidence Plaintiffs were unable to elicit. Further, Mr. Damschroder's depositions also make helpful admissions that support Plaintiffs' case-in-chief. *See* PFOF/COL at ¶¶60, 61, 81, 90, 126. Thus, both of Mr. Damschroder's depositions in this case should be admitted by this Court pursuant to Rule 32(a)(3).

Further, Mr. Weber, as a member of the Fulton County Board of Elections, and Mr. McDonald, as the Director of Cuyahoga County's Board of Elections, also qualify as managing agents under Rule 32(a)(3), and their deposition testimony should also be admitted.[25] First, electoral board members, directors, and deputy directors all act with superior authority and are

[24] Although Defendants now purport to oppose the admission of these deposition designations, Plaintiffs note that in their previous briefing before this Court Defendants stated that "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." Defs. Tr. Br. at 69 (ECF No. 71).

[25] Plaintiffs also note that Mr. Damschroder's, Mr. McDonald's, and Mr. Weber's depositions would also be admissible under Federal Rule of Evidence 801(d)(2) as statements of party opponents. *See* discussion *supra* at 11-16.

granted with the discretion to deal with the secretary of state's affairs. Board members are appointed by the secretary of state; they are vested with "broad powers to manage the conduct of elections" on the Secretary's behalf; and they exercise discretion as they carry out those duties. *See Hunter*, 850 F.Supp.2d at 801. Likewise, directors and deputy directors also are granted similar authority, *see* Ohio Rev. Code. § 3501.13, and carry out their duties by exercising comparable discretionary power. *See* 1984 Op. Atty. Gen. No. 84-009 ("[t]he director of the board of elections implements the policies determined by the board and, in general, is in charge of the daily operations of the board office . . . [t]hus, the director's role is as significant as that of the four-member board to a balanced governmental process.").

Second, board members as well as directors and deputy directors can be depended upon to carry out the Secretary of State's directions and give testimony on his behalf. In particular, Ohio Revised Code § 3501.16 specifically explains that all of these positions may be "summarily remove[d] or suspend[ed]" by the secretary of state where they have, among other things, failed to comply with his directives. *See also* 11/23/2015 Trial Tr. 182:11–183:15 (Burke) (testifying that he has been threatened with removal for opposing the position of the secretary of state); 1993 Op. Atty. Gen. No. 2-237 (explaining that a director of a board of elections is a public official who serves the board and the secretary of state as his master). Further, with respect to members of the board, they are specifically "appointed by the secretary of state, as the secretary's representatives." Ohio Rev. Code § 3501.06; 11/23/2015 Trial Tr. 35:4–14 (McNair).

Lastly, for the reasons already noted above, as well as their mutual interest in running successful elections in Ohio, board members, directors, and deputy directors can also generally be expected to identify with the interests of the Secretary of State. Even if the Court were to find that not all board members, directors, and deputy directors' interests identify with the interests of

the Secretary of State, the Sixth Circuit has explained that the courts "should view each case on an ad hoc basis and liberally apply the Rule to reach the demands of justice in each case." *Melton*, 436 F.2d at 27. Thus, this Court could still find that in *this* case, Mr. Weber and Mr. McDonald, are managing agents of Secretary Husted. In addition to the factors discussed above, all three *actually* submitted declarations on behalf of Secretary Husted in support of his position. *See, e.g.*, DX 14 (Trende Rpt. at 6) (stating reliance Declarations of J. Weber (DX 14_R) and D. Troy (DX 14_Q); *id.* at 7 (stating reliance on Declaration of P. McDonald (DX 14_KK); DX 15 (Hood Rpt. at 8) (citing Declaration of J. Weber (DX 14_R)); *id.* at 15 (citing Declaration of P. McDonald (DX 14_KK) and D. Troy (DX 14_Q)). Further, with respect to Mr. McDonald, there are numerous emails (discussed above) that demonstrate both his loyalty to and support of Secretary Husted's position. Accordingly, both Mr. Weber and Mr. McDonald qualify as managing agents under Rule 32(a)(3), and their deposition designations should be admitted as substantive evidence.[26]

2. Mr. McDonald, Mr. Weber, and Daniel Troy's Depositions are Also Admissible Because They Were Unavailable

Rule 32(a)(4)(B) provides that a party may use a witness deposition "for any purpose," "if the court finds: that the witness is more than 100 miles from the place of hearing or trial." There is no requirement that a party make any other showing of unavailability outside of demonstrating that a witness is more than 100 miles from the court. *See, e.g., Kasuri v. St. Elizabeth Hosp. Med. Ctr.*, 897 F.2d 845, 853 (6th Cir. 1990) (finding that admission of a deposition into evidence was in compliance with the federal rules where the witness was more than 100 miles from the place of trial); *Delgado v. Pawtucket Police Dep't*, 668 F.3d 42, 49 (1st

[26] Plaintiffs also note that Mr. Damschroder's, Mr. McDonald's, and Mr. Weber's depositions would also be admissible under Federal Rule of Evidence 801(d)(2) as statements of party opponents. *See* discussion *supra* at 11-16.

Cir. 2012) ("so long as this distance criterion is satisfied, the admissibility of deposition testimony under the aegis of Rule 32(a)(4)(B) is not contingent upon a showing that the witness is otherwise unavailable. Critically, however, Rule 32(a)(4)(B) does not contain the requirement that the court find that the witness cannot attend or testify because of distance. (internal citations and quotation marks omitted)); *In re Biron, Inc.*, 28 B.R. 340, 342–43 (Bankr. S.D. Ohio 1983) (finding that deponent's residence more than 100 miles from an adversary proceeding was sufficient for deponent's deposition testimony to be admitted, notwithstanding the fact that he could have been present for trial).

Mr. Weber, Mr. McDonald, and Mr. Troy, by both Plaintiffs' *and Defendants'* calculations are located "more than 100 miles from the place of [] trial." Rule 32(a)(4)(B). In particular, DX 71A calculated the following distances for these witnesses: Mr. Weber, located 124.548 miles from this Court; Mr. Troy, located 152.807 miles from this Court; and Mr. McDonald, located 127.453 miles from this Court. Plaintiffs represent to the Court that these calculations by Defendants are consistent with Plaintiffs' own "crow flies" calculations and, in most cases, are even shorter than the actual travel distance calculated by Plaintiffs for each of these witnesses. *See McDaniel v. BSN Med., Inc.*, No. 07-36, 2010 WL 2464970, at *2-3 (W.D. Ky. June 15, 2010) (adopting straight line calculation). Therefore, these witnesses are unavailable under Rule 32(a)(4)(B), and Plaintiffs' deposition designations for them should be admitted.[27]

Moreover, Defendants' arguments that they will be prejudiced if the Court admits these

[27] Although Defendants now purport to oppose the admission of these witnesses, Plaintiffs note that in Defendants prior briefing they only explicitly opposed the admission of six depositions as being inside of 100 miles, none of which included the three individuals at issue here. Defs.' Tr. Br. at 69.

designations because Defendants failed to conduct extensive cross examinations of these witnesses is insufficient to overcome Rule 32(a)(4)(B). In all of these depositions not only was Defense counsel able to conduct an examination of these witnesses if they wanted to, but they actually *did* conduct such examinations. *See* PX0132, McDonald Dep. Tr. 119:9–132:22; PX0131 Troy Dep Tr. 103:3–118:7; PX0130, Weber Dep. Tr. 71:10–72:3. Further, Plaintiffs have stated on the record that they are not opposed to allowing Defendants to provide counter designations, which would cure any perceived prejudice. 11/30/2015 Trial Tr. 10:3–5 (Spiva). Accordingly, Plaintiffs proffered deposition designations for Mr. Weber, Mr. McDonald, and Mr. Troy should be admitted.[28]

E. Declaration and Statement of Doug Preisse

Defendants also object to the admission into evidence of Doug Preisse's Declaration attesting to the veracity of his statement, published in the Columbus Dispatch on August 19, 2012, that "I guess I really actually feel we shouldn't contort the voting process to accommodate the urban – read African-American – voter-turnout machine . . . Let's be fair and reasonable," as well as the introduction of the statement itself. PX0125 (Preisse Decl.); PX0094 (Columbus Dispatch Article).[29] Plaintiffs tried repeatedly to subpoena Mr. Preisse to testify about this

[28] Defendants reliance on *Allegier v. United States*, 909 F.2d 869, 876 (6th Cir. 1990) is misplaced. *Allegier* concerned the question of whether a party had made a sufficient showing of "exceptional circumstances" under Rule 32(a)(3)(E). It did not consider unavailability under Rule 32(a)(4)(D) and, therefore, is inapplicable. Further, to the extent that Defendants argue that *Allegier* supports their prejudice argument because it found no prejudice where a party was allowed to cross-examine a deponent, Plaintiffs reiterate that nothing prevented Defendants from cross examining any of the deponents in question and, in fact, Defendants did so. Thus, *Allegier* actually supports Plaintiffs' position.

[29] Plaintiffs submit that they are not offering PX0094 for any hearsay purpose and, therefore, that the Court should allow the article as a whole to come into evidence. Rather, Plaintiffs are offering PX0094 simply to provide necessary context for the statement, i.e., where it was made; that it was circulated; etc. *See Talley*, 164 F.3d at 999 n. 4 (6th Cir. 1999) (finding that

statement to no avail. However, Mr. Preisse ultimately submitted a declaration acknowledging that he made this statement while a member of the Franklin County Board of Elections. PX0125. For the following reasons, Defendants' objections to the admission of the Declaration of Doug Preisse (PX0125) and the underlying statement to which the declaration attests fail.

1. Mr. Preisse's Declaration is Admissible Under the Residual Exception to the Hearsay Rule

First, it is unclear to Plaintiffs whether Defendants object to the introduction of Mr. Preisse's declaration in lieu of his live testimony. As the Court is aware, Plaintiffs attempted repeatedly to subpoena Mr. Preisse to appear at trial, but those attempts failed. 11/20/2015 Trial Tr. 87:6–88:16. Mr. Preisse's attorney called the court about the subpoena and moved to quash it, and in lieu of his testimony offered to submit a declaration. Defendants indicated that they might agree to the admissibility of the declaration while reserving their objections to the admissibility of Mr. Preisse's statement itself. 11/30/2015 Trial Tr. 7:21–23.

However, in the event that Defendants do object to the admission of Mr. Preisse's declaration, Plaintiffs respond that the declaration is not inadmissible hearsay under the residual exception of Rule 807. *See* Fed. R. Evid. 807. "Rule 807 allows the admission of a hearsay statement that does not fall under the exceptions to hearsay found in Rules 803 and 804 if the statement meets four criteria: (1) the statement has equivalent circumstantial guarantees of trustworthiness, (2) the statement is offered as evidence of a material fact, (3) the statement is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts, and (4) admitting the statement will best serve the purposes of the Rules of Evidence and the interests of justice." *Brumley v. Albert E. Brumley & Sons, Inc.*, 727 F.3d 574, 578 (6th Cir. 2013). All of these factors are met here.

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statements were non-hearsay where they "provided meaningful context to the conversation" and were not admitted for their truth).

First, this declaration has the requisite "circumstantial guarantees of trustworthiness." Mr. Preisse's declaration, signed under penalty of perjury, attests that the statement quoted in the article accurately reflected what he said. Given the embarrassing nature of the statement, he would have had little incentive to swear under penalty of perjury that he made it if in fact he did not. He could simply have denied it. Furthermore, he prepared this declaration with the assistance of his attorney, a fact suggesting that he gave its contents careful consideration. In these circumstances, there can be little doubt as to the trustworthiness of the declaration. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1552 (9th Cir. 1989) (admitting corporation registrations prepared for the Securities and Exchange Commission because "[t]he standard of due diligence applied by securities lawyers with regard to Registration Statements is sufficient to guarantee the requisite circumstantial trustworthiness of the facts contained in the Registration Statement to allow the district court to admit the evidence[.]").

Second, the declaration is probative of a material fact in this case—that the reductions in the early voting period would disproportionately impact African Americans and that the Secretary of State's office failed to take any action against Mr. Preisse in response to his racially charged comments, a fact which goes to Defendants' motivation and purpose. Third, given the fact that Plaintiffs were unable to compel Mr. Preisse to testify at trial despite repeated efforts to do so, this declaration was the most probative evidence available that he did, in fact, make these statements. Finally, the ends of justice would best be served by admitting this declaration because it obviated the need to litigate the subpoena to Mr. Preisse, which he moved to quash, and the need to delay the trial proceedings with Mr. Preisse's testimony about a fact that he does not deny and that is not really in dispute—i.e, that he made the statement at issue. *See Brumley*, 727 F.3d at 578 (admitting transcript of recording of conversation that occurred in 1977 under

Rule 807).

2. Mr. Preisse's Statement is Admissible as Non-Hearsay

Defendants also object directly to the introduction of Mr. Preisse's statement (outside of their objections to the declaration) on hearsay grounds. This argument fails.

First, this statement is not hearsay for the simple reason that it is not being offered for the truth of the matter asserted. That is, Plaintiffs are not offering the statement to show that there is, in fact, no need to "contort the voting process to accommodate the urban – read African-American – voter-turnout machine." To the contrary, Plaintiffs introduce this statement to show its effect on the listener, principally, that the Secretary of State and his staff did not investigate the comment and failed to take any remedial action against Mr. Preisse. 12/2/2015 Tr. 163:8–163:13; *id.* at 165:5–166:12 (Damschroder). As shown in Plaintiffs' PFOF/COL, this evidence is probative of Defendants' knowledge and intent with respect to the impact reducing the early voting period would have on African Americans. PFOF/COL at ¶¶17, 126, 133-135.

Second, this statement is not hearsay because members of the county boards of election in Ohio, as discussed *supra* at 11-16, are agents of the State of Ohio and the Secretary of State's office. As such, statements by members of the county boards of election are statements of an opposing party that do not fall within the definition of hearsay. *See Nino Homes*, 858 F.2d at 276; *Rioux*, 97 F.3d at 660; Fed. R. Evid. 801(d)(2)(D) (hearsay does not include statements "made by the party's agent or employee on a matter within the scope of that relationship and while it existed"). Specifically, Mr. Preisse made this statement "within the scope of that relationship and while it existed." He made this statement in the context of explaining his vote not to permit early voting on weekend and evening hours in Cincinnati prior to the 2012 election and Defendant Husted's policy of establishing a uniform early-voting schedule throughout the

state. PX0094. Given that these comments were made as a member of the Franklin County Board of Elections concerning a policy advocated by Defendant Husted, they were contained within the scope of the agency relationship between himself and the Secretary of State. *See Nino Homes*, 858 F.2d at 276.

3. Even if Hearsay, Mr. Preisse's Statement Were Hearsay, They Are Admissible As Statements Against Interest Under FRE 804(b)(3)

Even if Mr. Preisse's statement were hearsay, it would nevertheless be admissible as the statement against interest of an unavailable declarant. *See* Fed. R. Evid. 804(b)(3) (exempting from hearsay exclusion "[a] statement that: (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability[.]").[30]

First, as explained above and as the Court is aware, Plaintiffs tried repeatedly to subpoena Mr. Preisse to testify at trial without success. For this reason, Mr. Preisse was unavailable within the meaning of Rule 804. *See* Fed. R. Evid. 804(5) (a declarant is unavailable where he is (1) "absent from the hearing and (2) the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."); *see also* Fed. R. Evid. 804(a)(5) advisory committee's note ("Reasonable efforts include service of a subpoena on the declarant to testify at the hearing, attempts to depose the declarant, or some other showing of a

[30] Note that the second prong of this exception does not apply because this is not a criminal case. *See* Fed. R. Evid. 804(b)(3)(B) (providing that the exception applies if (A) is shown "and (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, *if it is offered in a criminal case as one that tends to expose the declarant to criminal liability* (emphasis added)); *Canter v. Hardy*, 188 F. Supp. 2d 773, 786 (E.D. Mich. 2002) ("Rule 804(b)(3) currently only requires corroboration when a statement against interest is offered to exculpate an accused in a criminal case.").

good faith effort to secure the declarant's attendance, such as witnesses explaining why the declarant is unavailable to testify."); *Allen v. Morris*, 845 F.2d 610, 613 (6th Cir.1988) (Rule 804 requires counsel to serve subpoena to satisfy unavailability burden).

Second, this statement was against Mr. Preisse's interest because the controversial nature of his comments could have resulted in him losing his job with the Franklin County BOE. *Cf. Smith v. Updegrafo*, 744 F.2d 1354, 1366 (8th Cir. 1984) (statements made at the time declarant was subject to a civil law suit determined to be against declarant's pecuniary interest). Because the nature of this statement exposed Mr. Preisse to the risk of losing his position and to public ridicule, it is admissible under Rule 804(b)(3). Fed. R. Evid. 804(b)(3), advisory committee's note (statement-against-interest exception "allow[s] statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake").

F. Declarations of Rachel Roberts

Paralegal for Plaintiffs' counsel submitted two declarations in this case, PX0126 and PX0127. As discussed previously, PX0126 attests to the fact that Ms. Roberts supervised the downloading of the legislative videos Plaintiffs seek to introduce. PX0127 attests to the fact that Ms. Roberts oversaw the transcribing of those videos. PX0127 also attests that three of Plaintiffs' exhibits, PX0020_A, PX0068_A, and PX0069, were received by Plaintiffs pursuant to public records requests to the State. Finally, this declaration also attests that PX0124_A was produced during discovery as an email attachment to Sonia Gill's email to Matthew Damschroder (PX0060).

Plaintiffs are uncertain whether Defendants object to the introduction of the declarations themselves in lieu of Ms. Roberts's testimony at trial, or whether they merely object to the authentication of the videos, transcripts, and discovery and public-record documents that are

discussed in those declarations. However, to the extent that Defendants object to the introduction of the declarations themselves, this argument would have no merit.

As the Court is aware, Plaintiffs made Ms. Roberts available during trial to testify as to the process whereby the legislative videos were downloaded and transcribed and the documents she received pursuant to Plaintiffs' public-records and discovery requests. It is Plaintiffs' understanding that the Court accepted her declarations in lieu of live testimony, and that this foreclosed any hearsay objection to the admissibility of the declarations themselves. 12/3/2015 Tr. 77:18–77:24 ("MR. KAUL: Your Honor, just briefly. We're happy to litigate the sufficiency of the declaration in the papers that we're filing. We're going to be doing that. This is just, for today's purposes I think all we need to resolve is can we submit a declaration that we can rely on from Ms. Roberts or do we need to call her as a live witness. THE COURT: Why don't you submit the declarations.").

However, in an abundance of caution, Plaintiffs submit that these declarations are admissible under residual exception to hearsay discussed above. *See* Fed. R. Evid. 807. First, the fact Ms. Roberts signed these declarations under penalty of perjury and was prepared to testify about their contents in court demonstrate their trustworthiness. Second, they are offered to prove material facts—that a number of Plaintiffs' key exhibits are what they purport to be. Third, these declarations are more probative than any other evidence that could have been submitted for the simple reason that the Court directed Plaintiffs to submit the declarations in lieu of live testimony. Finally, justice will be served because these declarations obviated the need to delay the trial proceedings with Ms. Roberts's live testimony and because it would be manifestly unfair to exclude them from evidence when Plaintiffs offered her testimony but were told to submit them instead. For these reasons, any hearsay objections to the admission of these declarations

should be rejected.

G. Documents Obtained from Public Records Requests

Defendants object to the admission of three exhibits that were obtained by Plaintiffs through public records requests on authenticity and hearsay grounds. *See* PX0020; PX0068; PX0069. These objections are without merit.

First, these exhibits have been properly authenticated. PX0020 is a copy of written testimony submitted to the Ohio House of Representatives regarding SB 238 titled "Written testimony submitted to the Ohio House of Representatives December 2013—Opposition to SB 238 and the attempt to limit early voting and eliminate 'Golden Week'" by Brian Davis, Director of Community Organizing for the Northeast Ohio Coalition for the Homeless. Plaintiffs obtained PX0020 from the docket in the *NAACP v. Husted* litigation, and Defendants objected to its authenticity. However, as attested by Ms. Roberts's declaration (PX0127), Plaintiffs also received this same document from the Ohio House of Representatives in response to a public records request. PX0127 at ¶4. Plaintiffs have submitted the copy obtained from the Ohio House of Representatives as PX0020_A.

Plaintiffs' Exhibit PX0068 is written testimony submitted to the Ohio House of Representatives regarding SB 216 titled "Testimony on Ohio SB 216 (February 18, 2014) Jon Sherman, Staff Attorney, Fair Elections Legal Network." Plaintiffs received PX0068 from the Ohio House of Representatives in response to a public records request. PX0127 at ¶3. Plaintiffs also received a copy of this document from Ohio Legislative Service Commission ("OLSC") in response to a public records request, which Plaintiffs have submitted as PX0068_A. *Id*. Plaintiffs also received PX0069 from the OLSC, which is a report titled "Saving Votes: An Easy Fix to the Problem of Wasting Provisional Ballots Cast Out of Precinct" that was attached to the written testimony reflected in PX0068 that was submitted to the Ohio House of Representatives. *Id*.

Defendants contend that Ms. Roberts's declaration cannot authenticate PX0020, PX0068/68_A, or PX0069 because another attorney at Perkins Coie made the public records requests, not Ms. Roberts, and her testimony on this point is therefore hearsay. This contention is without merit. Ms. Roberts's declaration states that she was responsible for receiving, filing and maintaining these responses to Plaintiffs' public-records requests as part of her regular duties. PX0127. As a consequence, the fact that Plaintiffs' counsel received these documents in response to public-records requests is directly within her personal knowledge and she is competent to authenticate this evidence. *See Sprinkle v. Lowe's Home Centers, Inc.*, No. 04-4116, 2006 WL 2038580, at *2–3 (S.D. Ill. July 19, 2006) (holding that documents were properly authenticated based on affidavit signed by lawyer's paralegal that she received them through discovery).

Furthermore, the "distinctive characteristics" of these exhibits also establish that they are what they purport to be, i.e. evidence submitted to the legislature. Fed. R. Evid. 901(b)(4). "The Advisory Notes to Rule 901(b)(4) state: 'The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety." *Damrah*, 412 F.3d at 628; *see also Hamama*, , 2010 WL 2649877, at *5 ("Federal Rule of Evidence . . .[901](b)(4) specifically provide[s] that a document's authenticity can be established by . . . the document's [a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.'"). The fact that these exhibits were submitted to the legislature is demonstrated by their contents, which state that they are "testimony" submitted to the House of Representatives and contain analyses of the bills that can only be understood as such. The dates in the documents correspond to when the bills were being considered, and it is thus highly unlikely that they were manufactured for some purpose other

than for what they claim to be. *California Ass'n of Bioanalysts v. Rank*, 577 F. Supp. 1342, 1356 n.23 (C.D. Cal. 1983) (holding that reports prepared by a third-party and submitted to DHS were authentic under Rule 901(b)(4) where "the content of the reports, when considered with the circumstances surrounding their receipt by DHS, is of such a nature that it is unlikely that the reports were prepared by an individual or entity other than [the third-party agency]"); *Alexander Dawson, Inc. v. National Labor Relations Board*, 586 F.2d 1300, 1302 (9th Cir.1978) ("The content of a document, when considered with the circumstances surrounding its discovery, is an adequate basis for a ruling admitting it into evidence."). Furthermore, Judge Economus cited and relied upon PX0020/20_A in his opinion granting a preliminary injunction against SB 238 in the *NAACP v. Husted* litigation. *See Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808, 819 (S.D. Ohio 2014). A review of that document (which is docket number 18-31) and PX0020 shows that they are the same, and the fact that Judge Economus accepted it as testimony submitted to the legislature and relied on its contents provides further corroboration that the document is what it purports to be. All of these circumstances, when taken together, establish the authenticity of these documents under Rule 901(b)(4).

Defendants' objections to these exhibits on hearsay grounds are equally without merit. These documents are not offered for the truth of the matter asserted, but as evidence of the information that was before the General Assembly when they were considering these laws. *Boyd*, 640 F.3d at 664 ("Statements offered to prove the listener's knowledge are not hearsay."). Each of these documents sets forth the details of the impact these laws would have on Ohio's voters in general and African Americans in particular. For the reasons set forth more fully below, *see infra* at 41-49, they are therefore directly relevant to the legislature's knowledge and intent. *See also* PFOF/COL at ¶¶17, 126, 133-135.

H. Miscellaneous Exhibits

Defendants hearsay objections to PX0097, PX0098, PX0104, and PX0105 as well as Defendants' authenticity objection to PX0124 are without merit. PX0097 and PX0098 are, respectively, emails sent by Mr. Damschroder to Defendant Husted and to Erika Cybulskis, Senator Seitz's assistant, while Mr. Damschroder was serving as Deputy Director of the Franklin CBOE. 12/2/2015 Trial Tr. 141:17–150:9 (Damschroder). The emails address suggestions to precursor bills to the challenged provisions in this case (PX0097) and discuss partisan disputes on early voting hours (PX0098). Plaintiffs do not offer these emails for the truth of the matter asserted therein—i.e., that the Democrats would have sought additional hours or that Secretary of State Bruner would have broken the tie. Rather, they are offered to show the intent and motive of the State in this case. *See* discussion *infra* at 41-49. Specifically, these emails demonstrate that Mr. Damschroder and Mr. Preisse were working with Defendant Husted even before he became Secretary of State to restrict early in-person ("EIP") voting, restrictions that have been shown to harm voters and, in particular, African American and Democratic voters. These actions put in context their later advocacy for and decisions to cut back on EIP once Defendant Husted become Secretary of State, namely that they knew that Democratic constituencies relied upon EIP voting, particularly during evening and weekend times, and that they wanted to minimize the availability of EIP during those periods. Moreover, these emails are also clearly business records of the Franklin County Board of Elections.

Further, PX0104 and PX0105, Hamilton County early voting reports, are also admissible as business records under Rule 803(6). Sherry Poland, the Director of Hamilton County's Board of Elections, who is responsible for running the day-to-day operations of the Hamilton County Board of Elections, 12/2/2015 Trial Tr. 9:8–21 (Poland), testified that she recognized both of these documents and that they are maintained by Hamilton County's Board of Elections in the

ordinary course of business. *Id.* at 32:12–34:11 (Poland). As director, Ms. Poland clearly has knowledge of, and is ultimately responsible for, the record keeping practices of her office. Accordingly, PX0104 and PX0105 are business records of the Hamilton County Board of Elections and can be admitted as an exception to the hearsay rule.

Lastly, Plaintiffs' Exhibit PX0124 is a document titled "Early Voting Patterns by Race in Cuyahoga County, Ohio: A Statistical Analysis of the 2008 General Election." Plaintiffs' counsel obtained this document from the docket in the *NAACP v. Husted* litigation. As attested in Ms. Roberts's declaration (PX0127 at ¶5), Defendants produced an identical copy of the same document in response to Plaintiffs' discovery requests, which Plaintiffs have submitted as PX0124_A.[31] Production of a document by a party constitutes an implicit authentication of that document. *United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir.1982); *see also South Cent. Bank v. Citicorp Credit Ser.*, 863 F.Supp. 635, 645 (N.D.Ill.1994) (applying the above standard in the summary judgment context). "Thus, [Defendants'] challenge is without merit because [Plaintiffs'] obtained the documents from [Defendants'] themselves and they were implicitly authenticated when received." *In re Greenwood Air Crash*, 924 F.Supp. 1511, 1514 (S.D. Ind. 1995).[32]

II. INTENT/ARLINGTON HEIGHTS

Plaintiffs have sought to introduce video recordings and transcripts of the sessions of the Ohio General Assembly during which the challenged laws were debated, *see* discussion *supra* at 2-11, and discussed as well as evidence of written testimony submitted to the legislature

[31] As explained *supra* at 22-23, this document was an attachment to an email sent by Sonia Gill of the Lawyers' Committee on Civil Rights to Matthew Damschroder (PX0060). PX0127 at ¶5.

[32] For the reasons discussed *supra* at 22-24, Defendants' hearsay objections to PX0124 are also without merit. This exhibit is not being offered to assert the truth of the matter contained therein, but as evidence of Defendants' knowledge and intent.

regarding the challenged provisions (PX0020, PX0067–71, PX0085, PX0096, PX0121). Similarly, Plaintiffs have introduced other exhibits that show that Secretary Husted has been trying for years, both as a member of the General Assembly and as Secretary of State, to roll back a number of the reforms that have directly contributed to increasing levels of minority political participation in Ohio. *See*, *e.g.*, PX0064, PX0065, PX0097, PX0098, and PX0124/A; 12/02/2015 Trial Tr. 139:24 - 150:5 (Damschroder) (discussing repeated efforts to eliminate Golden Week and reduce early voting period on the part of Defendant Husted and General Assembly since 2009). For the reasons explained below, this evidence is probative of Plaintiffs' claims that the challenged laws were enacted with discriminatory purpose in violation of the 14th and 15th Amendments to the United States Constitution as well as Plaintiffs' claims under Section of the Voting Rights Act of 1965. As a consequence, evidence of the legislative history of these laws, as well as the testimony that the General Assembly had before it, is relevant and should be admitted into evidence.

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 265 (1977). "When racial classifications are explicit, no inquiry into legislative purpose is necessary." *Hunt v. Cromartie*, 526 U.S. 541, 546 (U.S. 1999). However, as the Supreme Court has repeatedly held, the Constitution also prohibits facially neutral laws "motivated by a racial purpose or object, or if [they are] unexplainable on grounds other than race." *Id.* (citations and internal quotation marks omitted); *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute[.]"). "The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to

perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hunt*, 516 U.S. at 546 (quoting *Arlington Heights*, 429 U.S. at 266).

In *Arlington Heights*, the Supreme Court articulated a number of facts that are relevant to this "sensitive inquiry" into circumstantial and direct evidence of intent. First, "[t]he impact of the official action whether it bears more heavily on one race than another, may provide an important starting point." 429 U.S. at 266 (citation omitted). Second, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. Third, the "sequence of events leading up [to] the challenged decision also may shed some light on the decisionmaker's purposes." *Id.* Fourth, "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Id.* Fifth, departures from established "substantive" standards "may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor" a different course of action than the one selected. *Id.* Finally, and of particular importance to the admissibility of the recordings and transcripts of the General Assembly sessions at issue here, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 268.

Since *Arlington Heights*, it has become commonplace to consider legislative history when conducting the "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" regarding the discriminatory purpose underlying a facially neutral law. For example, in *Hunter v. Underwood*, the Supreme Court unanimously struck down a 1901 provision of the Alabama constitution that disenfranchised individuals convicted of crimes involving moral turpitude. 471 U.S. 222 (1985). The provision was facially neutral because it applied to persons

of all races. *Id.* at 227. However, the record contained evidence that African Americans voters were convicted of such crimes at a far higher rate than white voters. Acknowledging that "[p]roving the motivation behind official action is often a problematic undertaking," the Court nevertheless struck down the law under *Arlington Heights* on the basis of "[t]he evidence of legislative intent . . . consisting of the proceedings of the convention, several historical studies, and the testimony of two expert historians" that showed racial animus in enacting the law. *Id*. at 228–29.

As *Hunter* shows, evidence relating to the legislative history of a law is not only relevant, but essential to a claimant's ability to enforce the constitutional right to be free from racial discrimination. Indeed, as the Sixth Circuit has explained, it is precisely "[b]ecause discriminatory intent is so difficult to prove by direct evidence, [that] it is incumbent on a sensitive decision maker to analyze all of the surrounding facts and circumstances to see if discriminatory intent can be reasonably inferred." *Grano v. Dep't of Dev. of City of Columbus*, 637 F.2d 1073, 1081 n.7 (6th Cir. 1980) (citing *Arlington Heights*, 429 U.S. 252)). Thus, "a finding of intent cannot be limited to instances where decision-makers articulate overtly bigoted opinions." *United States v. City of Parma,* Ohio, 494 F. Supp. 1049, 1054 (N.D. Ohio 1980). "Such would reward subtlety and camouflage at the expense of uncovering the underlying motivation." *Id*. "Even though the overt public expression of bigotry has become unfashionable, racial intent still can be shown by a series of decisions all of which have had a segregative effect and result in a cumulation of disadvantage inexplicable on grounds other than an invidious but unstated basis." *Id*. Furthermore, this does not require a showing of "racial animus," but rather a showing that Defendants and the General Assembly enacted these measures with knowledge that they would disproportionately impact African American voters. *See* PFOF/COL at ¶¶133-135.

For these reasons, and as the Supreme Court, Sixth Circuit, and other courts have repeatedly recognized, the use of legislative history to establish legislative purposes is routine. *Spurlock v. Fox*, 716 F.3d 383, 397 (6th Cir. 2013) (analyzing evidence about a school board's deliberations in enacting a rezoning plan challenged under *Arlington Heights*); *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 371 (6th Cir. 2013) (noting that to determine discriminatory purposes "[o]ur review not only includes the statute itself, but also the legislative history and legislative intent to determine whether the statute achieved its legislative purpose"); *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 70 F.3d 1272, *5 (6th Cir. 1995) (noting that under *Arlington Heights* "[e]videntiary sources might include . . . legislative or administrative history, and contemporary statements by decisionmakers"); *United States v. City of Birmingham, Mich.*, 538 F. Supp. 819, 829 (E.D. Mich. 1982) *aff'd as modified*, 727 F.2d 560 (6th Cir. 1984) (finding discriminatory purpose in enactment of city zoning ordinance after surveying enactment's history and finding that "[r]acial concerns were a motivating factor behind the opposition of at least two of the four members of the majority faction. That fact alone may be sufficient to attribute a racially discriminatory intent to the City."); *Cox v. City of Dallas*, 2004 WL 370242, at *10 (N.D. Tex. Feb. 24, 2004) (finding that "specific sequence of events leading up to the challenged decision" established *prima facie* case intentional discrimination underlying city's failure to stop illegal dumping in a predominantly African American neighborhood). Indeed, Plaintiffs' counsel have found no instance in which legislative history was excluded from evidence in a case involving a claim of intentional discrimination under the 14th or 15th Amendments. *Cf. Cent. Alabama Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1187 n. 17 (M.D. Ala. 2011) *vacated on other grounds sub nom. Cent. Alabama Fair Hous. Ctr. v. Comm'r, Alabama Dep't of Revenue*, 2013 WL 2372302 (11th Cir. May 17, 2013) (denying motion *in*

limine seeking to exclude statements by legislators because *Arlington Heights* requires an inquiry into legislators' motives).

Thus, *Arlington Heights* and the subsequent case law not only permit, but require, the admission of the legislative videos and transcripts Plaintiffs seek to introduce. These videos demonstrate that the General Assembly was presented with evidence the Challenged Laws would disproportionately impact African Americans in Ohio. *See, e.g.*, PX0012_A (2/19/14 House Tr. at 35–36, 53); PX006_A 11/6/13 Sen. Tr. at 15, 30; PX0014_A (2/26/14 House Tr. at 11, 13). Similarly, this evidence shows that the legislators openly discussed the impact these laws would have on "urban" voters. *See, e.g.*, PX0012_A (2/19/14 House Tr. at 4, 5, 10, and 71-72); *see also* PFOF/COL at ¶¶17, 24-27, 133-135. Like the videos, the written testimony submitted to the General Assembly is also directly relevant under the *Arlington Heights* analysis because it shows the evidence that was before the legislature that these laws would disproportionately burden African American voters. *See* PX0020, PX0020_A, PX0067–68A, PX0069, PX0070–71, PX0085, PX0096, PX0121. Numerous courts have held that such evidence is probative of unconstitutional intent. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 487 (1997) ("[T]he impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions."); *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 232 (4th Cir. 2014) (examining procedural history of election law and noting that "[s]everal Senators characterized the bill as voter suppression of minorities" in context of challenge under Section 2 of Voting Rights Act (quotation omitted)); *City of Pasco*, 994 F.2d at 680 ("The discriminatory impact of a governmental act may be evidence of discriminatory intent."); *Page v. Virginia State Bd. of Elections*, 2015 WL 3604029, at *7 (E.D. Va. June 5, 2015) (considering "direct evidence of legislative intent, including

statements by the legislation's sole sponsor, in conjunction with the circumstantial evidence supporting whether the 2012 Plan complies with traditional redistricting principles"); *Faith Action for Cmty. Equity v. Hawaii*, 2015 WL 751134, at *6 (D. Haw. Feb. 23, 2015) ("Foreseeable knowledge of disparate impact can provide some basis for inferring discriminatory intent.").

Similarly, the legislative videos will show departures from the typical procedures and substantive principles that govern the General Assembly's deliberative process. For example, they show that the Assembly rejected several amendments that would have ameliorated the negative impacts of these laws and that the purported justifications for enacting these laws were not supported by evidence in the legislative record. PX0014_A (2/26/14 House Tr. at 19, 21); PX0008_A (11/20/13 Sen. Tr. at 31). They similarly show that the legislature achieved passage of these laws by abandoning the appropriate procedures and denying the laws' opponents the opportunity to respond fully. *See, e.g.* PX0010_A (11/20/13 Sen. Tr. at 9); PX0014_A (2/26/14 House Tr. at 59); PX0018_A (2/19/14 Sen. Tr. at 9); 11/16/2015 Trial Tr. 88:4-88:9 (Turner) ("The process [for SB 238] went very quickly, I will tell you that. The General Assembly, or certainly the senate, we did not deliberate on that bill for a particularly long period of time given the weight and the import of that bill. We did not have a lot of -- long debate either in committee or on the floor. It happened very quickly").

Notwithstanding the fact that *Arlington Heights*, *Underwood*, and their progeny clearly mandate that courts consider evidence of legislative intent beyond plain text of the law as enacted, Defendants object to the introduction of the videos of the sessions of the Ohio General Assembly on the ground that legislative history cannot be used to establish discriminatory purpose and that that inquiry must be limited to the language of the statute itself. This approach

would eviscerate the enforcement of the 14th and 15th Amendments by insulating from constitutional challenge facially neutral laws that intentionally discriminate on the basis of race. The Constitution demands more.

According to the Defendants' theory, "Plaintiffs in anti-discrimination suits would be unable to demonstrate the discriminatory intent of a defendant that openly admitted its intent to discriminate, so long as the defendant . . . relie[d] on a facially neutral law or policy[.]" *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013). "Such a rule presents the grotesque scenario where a [ ] [defendant] can effectively immunize itself from suit" by enacting a facially neutral law even if the proponents of the law expressly stated an intent to discriminate on the floor of the General Assembly. *Id*. (quotation omitted). However, "[t]this 'grotesque scenario' is not the law."

As the Supreme Court has explained in the related context of claims of discrimination under the Free Exercise Clause of the First Amendment, "[w]e reject the contention . . . that our inquiry must end with the text of the laws at issue." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). "Facial neutrality is not determinative." *Id.* The Constitution "forbids subtle departures from neutrality" and "protects against governmental hostility which is masked, as well as overt." *Id*. Indeed, it was precisely to guard against the scenario that Defendants urge here that the *Arlington Heights* frame work was adopted. *See, e.g.*, *Laramore v. Illinois Sports Facilities*, 1996 WL 153672, at *9 (N.D. Ill. Apr. 1, 1996) ("The first inquiry under *Arlington Heights* is whether the decision, while race neutral on its face, is an obvious pretext for discrimination.").

Thus, the issue here should not be confused with situations in which courts have refused to consider legislative history when interpreting the text of a statute. This is not a case of

statutory interpretation where the text of a statute might be the best (and in some instances only) evidence of its meaning. That rule of *statutory construction* is inapplicable to equal protection cases like this one where the very nature of the legal inquiry is whether an action taken by the legislature was motivated by animus. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 n. 6 (1991) (making this point and citing *Arlington Heights*); *City of Hialeah*, 508 U.S. at 535 (subjecting to heightened scrutiny a law whose "object" was to discriminate on the basis of religion). Accordingly, the legislative videos, transcripts, and written testimony that was submitted to the legislature should be admitted as evidence of the legislature's knowledge and intent.

III. TIMBERLAKE'S PROFFER

On October 16, 2015, the deadline for submitting rebuttal reports, Defendants produced the expert rebuttal report of Dr. Nolan McCarty. Dr. McCarty did not prepare an initial report, and Plaintiffs therefore did not have an opportunity to prepare a written response to his report before trial. In his report, Dr. McCarty stated that he was asked, in part, to respond to Dr. Timberlake's conclusion that "the elimination of Golden Week disproportionately affects African American voters." DX 20 at 2. To do this, he compared data regarding the early voters in 83 of the 88 Ohio counties from the 2010 and 2014 elections. *Id*. at 3.

Dr. McCarty relied on data obtained from Clark H. Bensen, who submitted a declaration attached to Dr. McCarty's rebuttal report. *Id*. Mr. Bensen, a data analyst with the firm Polidata LLC, had collected Ohio's registration files and merged them with Ohio's list of absentee voters to determine the addresses of those who had voted early. *Id*. at 4. He then "geocoded" this data and matched it with census data to determine the racial composition of the census tract in which the voters lived. *Id*. Mr. Bensen had collected data for the 2008 and 2012 elections, but only provided an analysis of the 2010 and 2014 data to Dr. McCarty. *Id*.; 11/17/2015 Trial Tr. 144:5 -

144:11 (Voigt) (description of data Bensen collected). Bensen stated in his declaration that "[t]his information was obtained through the assistance of the offices of the Ohio Attorney General and the Ohio Secretary of State and two vendors retained by them: TRIAD Governmental Systems of Xenia, Ohio and Skyline Consulting of Albany, New York." DX 20A at 1. Bensen had collected this data before this litigation began in connection with the earlier *NAACP v. Husted* suit, and Defendants provided it to Dr. McCarty in March and April of this year. 11/17/2015 Trial Tr. 147:2–10; 11/19/2015 Tr. 81:12–82:13 (McCarty).

In his rebuttal report, Dr. McCarty used the data provided by Bensen to analyze the turnout rates of African Americans during the early voting period in the 2010 and 2014 elections. DX 20 at 10–14. Based on his assertion that African-American turnout during the early voting period did not decrease in the 2014 election compared with 2010, Dr. McCarty disagreed with Dr. Timberlake's conclusion that the elimination of Golden Week disproportionately impacted minorities in Ohio. *Id*. Dr. McCarty did not compare the rates of usage of Golden Week between African Americans and whites, however, and limited his analysis to the turnout rates among African Americans. 11/17/2015 Trial Tr. 158:6–23 (Timberlake).

After producing Dr. McCarty's report and after the deadline for rebuttal reports had expired, Defendants produced the data upon which Dr. McCarty had relied and also provided the statistical software that Dr. McCarty used to analyze this data Defendants did not, however, produce the data collected and analyzed by Mr. Bensen for the 2008 and 2012 elections. Because this data was highly relevant and responsive to Plaintiffs' discovery requests, Plaintiffs requested that the Court compel production of the 2008 and 2012 data collected by Mr. Bensen and permit Dr. Timberlake to prepare a supplemental report analyzing that data. At a telephonic hearing on October 26th, Magistrate Judge King agreed with Plaintiffs and ordered Defendants to produce

all of the data Mr. Bensen had collected, not just the data he had provided to Dr. McCarty. 10/26/2015 Order (Dkt. No. 56). Judge King did not permit Plaintiffs to submit a supplemental report from Dr. Timberlake based upon the 2008 and 2012 data, however. *Id*. The parties did not raise the issue of whether Dr. Timberlake could rebut the analysis Dr. McCarty conducted in his report, and Judge King's ruling did not address that issue.[33]

At trial, Dr. Timberlake testified that he disagreed with Dr. McCarty's approach to analyzing the impact of the elimination of Golden Week by simply comparing turnout rates for early voting among African Americans in 2010 and 2014. 11/17/2015 Trial Tr. 136:20–138:9 (Timberlake). He explained that, because a number of other variables can affect turnout and because a comparison of African-American turnout rates does not address whether African Africans disproportionately use early voting compared to other races, Dr. McCarty's analysis did not support the conclusion that the elimination of Golden Week did not adversely impact minorities. *Id*. at 137:7–138:9. To the contrary, Dr. Timberlake testified that Dr. McCarty's own data and methodology revealed that African Americans disproportionately used Golden Week and early in-person voting compared to white voters, a fact rebutting Dr. McCarty's conclusions.

To demonstrate this, Dr. Timberlake used Dr. McCarty's computer program to analyze the 2010 data and test Dr. McCarty's conclusions. 11/17/2015 Trial Tr. 157:7–25 (Timberlake). According to the results generated by Dr. McCarty's program, African Americans used Golden Week at a 33 percent higher rate than whites in 2010. *Id*. at 157:23–5. Similarly, African Americans used early in-person voting at a 50 percent higher rate than whites in 2010 according

[33] For this reason, Defendants' contention that Plaintiffs should have objected to Magistrate King's ruling within 14 days of this hearing is without merit. *See* 11/19/2015 Trial Tr. 5:15 - 5:25 (Voigt). Magistrate King only ruled on whether Dr. Timberlake could *supplement* his report with the 2008 and 2012 Bensen data, and her ruling had no bearing on Dr. Timberlake's right to respond to Dr. McCarty's criticisms of his report at trial.

to the same computer analysis. *Id*. at 163:20–164:4 (Timberlake). Thus, Dr. Timberlake was able to show that Dr. McCarty's own data and software contradicted his conclusion that the elimination of Golden Week did not disparately impact African Americans.

1. Dr. Timberlake's Analysis Was Proper Rebuttal Testimony That Need Not, and Could Not Have Been, Disclosed Earlier

Dr. Timberlake's analysis of the 2010 early voting data on which Dr. McCarty relied in his preparing his report was proper rebuttal testimony. Plaintiffs are entitled to present rebuttal testimony "to rebut new evidence or new theories proffered in the defendant's" case. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 345 (6th Cir. 2002). "Evidence or theories offered by the defendant are 'new' for rebuttal purposes if, under all the facts and circumstances, . . . the evidence was not fairly and adequately presented to the trier of fact before the defendant's case-in-chief." *Id.* (internal quotation marks omitted). "[W]here . . . the evidence is real rebuttal evidence, the fact that it might have been offered in chief does not preclude its admission in rebuttal." *Id.* "Furthermore, with respect to 'real rebuttal evidence,' the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief." *Id.*. As the case law demonstrates, Dr. Timberlake's proffered testimony regarding Dr. McCarty's report was proper rebuttal testimony and should be admitted.

As explained above, Dr. McCarty used a comparison of the African-American turnout rates during early voting in 2010 and 2014 to analyze the impact of the elimination of Golden Week on minority voters. Dr. McCarty's analysis asserted a new defense theory relying upon previously undisclosed data that Dr. Timberlake did not have an opportunity to rebut in the form of a written response. When a defense expert presents a new theory, courts routinely permit plaintiffs to introduce rebuttal expert testimony analyzing the methods and data used by that expert.

For example, in *Benedict v. United States*, the plaintiffs claimed that they contracted a serious disease as a result of a swine-flu vaccination administered by the government. 822 F.2d 1426, 1428 (6th Cir.1987). The plaintiffs presented an expert who relied principally on clinical observation to prove causation. *Id.* The government presented experts who testified that a causal relationship could only be established through epidemiological data, not clinical observation, and that the epidemiological data refuted plaintiffs' theory of causation. *Id.* at 1428–29. The plaintiffs sought to introduce expert testimony on rebuttal to show that the epidemiological data cited by the defense experts was inaccurate and actually supported the plaintiffs' theory. *Id*. at 1429. The district court excluded this testimony on the grounds that the plaintiffs had known about the epidemiological data long before trial and that the rebuttal expert's analysis showing that the data supported the plaintiffs' claim should have been part of the plaintiffs' affirmative case. *Id*.

The Sixth Circuit reversed the district court's exclusion of plaintiffs' rebuttal expert and remanded for a new trial. As the court explained, "[a]lthough the epidemiological evidence was not 'new' since the parties knew of its existence prior to trial, it was new for rebuttal purposes." *Id*. "Under the law in this Circuit the [plaintiffs] had no duty to anticipate the government's defense[,]" and for that reason the government's "argument that the data had been available and known during the pretrial period [was] irrelevant." *Id.* Because "the government sought to disprove the [plaintiffs'] theory of causation by introducing contradictory data and methodology[,] the [plaintiffs] had a right to counteract the opposing expert's testimony by putting on their own expert to controvert the accuracy and reliability of his methodology and data." *Id.*

In *Toth v. Grand Trunk Railroad*, the plaintiff sued a railroad over injuries he suffered as a result of alleged defects in a railcar coupling device. 306 F.3d at 339-40. The defense presented

testimony that the railroad's inspection program would have detected any such defects if they had been present. *Id*. at 346. The plaintiff then sought to present rebuttal testimony attesting to deficiencies in the railroad's inspection program. *Id*. The district court excluded this evidence on the ground that it would have been relevant to proving the existence of a defect and therefore should have been included in plaintiff's affirmative case. *Id*.

The Sixth Circuit held that the district court had abused its discretion in excluding plaintiff's rebuttal testimony. "Although evidence concerning deficiencies in the railroad's inspection practices would have been relevant to prove the existence of a defect, it was not necessary for the plaintiff to pursue this theory in his case-in-chief." *Id*. Thus, the fact the proffered rebuttal testimony supported the plaintiff's claim and could have been offered as part of the plaintiff's affirmative case was "irrelevant" because it was offered "to refute new evidence offered in defendant's case-in-chief." *Id*. at 347.

Similarly, in *United States v. Posey*, the government's expert witness used a particular chemical test to confirm that the substance in issue was cocaine. 647 F.2d 1048, 1052 (10th Cir. 1981). In response, the defense presented expert testimony that the government's test was unreliable and less accurate than another method, the polarimeter test. The government on rebuttal was allowed to reintroduce its expert who used the polarimeter test suggested by the defense, and reported results consistent with her previous findings. *Id.* at 1050.

Numerous other cases confirm that Dr. Timberlake was entitled to respond to Dr. McCarty's new and previously undisclosed defense theory and the data on which he relied. *See, e.g.*, *Martin v. Weaver*, 666 F.2d 1013, 1020 (6th Cir.1981) (holding that district court abused discretion in excluding rebuttal witness to refute affirmative defense of official immunity and defendant officer's version of the facts); *Peabody v. Perry Twp.*, Ohio, No. 10-01078, 2013 WL

164504, at *3 (S.D. Ohio Jan. 15, 2013) ("Defendants' expert has presented his opinion as to how and why the Taser malfunctioned, and plaintiffs are entitled to present expert testimony rebutting that testimony."); *Duff v. Duff*, No. 04-345, 2005 WL 6011250, at *4 (E.D. Ky. Nov. 14, 2005) (rebuttal evidence is permitted when "directed to rebutting new matter or new theories presented by the [defense]."); *Poly-America, Inc. v. Serrot Intern., Inc.*, No. 00-1457, 2002 WL 1996561, at *15 (N.D. Tex. 2002) (finding that it is "sufficient if the evidence disclosed under the rebuttal rubric is intended solely to contradict or rebut evidence on the same subject matter that another party has identified in its expert disclosure").[34]

As these cases demonstrate, Dr. Timberlake was entitled to testify about his analysis of the data and methods used by Dr. McCarty. First, Dr. Timberlake's analysis did not constitute a new expert opinion, as Defendants' counsel suggested. *See* 11/17/2015 Tr. 149:9–11. Like any expert witness whose opinions are criticized by an opposing expert, Dr. Timberlake testified as to his opinions regarding Dr. McCarty's report. And, like any such witness, he formed those opinions by analyzing the data on which Dr. McCarty relied. To do this, he simply ran Dr. McCarty's computer program against Dr. McCarty's data to determine whether Dr. McCarty's conclusions were sound. This analysis demonstrated that, according to Dr. McCarty's own software and data, African Americans used Golden Week and early in-person voting at higher rates than whites, a fact which directly contradicted Dr. McCarty's contention that the elimination of Golden Week did not disproportionately impact African Americans.

[34] As the Court is aware, the parties in this case did not present their evidence in the typical sequence of 1) plaintiffs' affirmative case, 2) defense response, and 3) rebuttal. However, the fact that some witnesses were offered out of their usual order and that there was not a formal "rebuttal" stage of evidence does not alter the fact that, under the case law discussed above, Dr. Timberlake was entitled to respond to Dr. McCarty's critiques of the opinions he offered in this case.

Furthermore, the fact that Dr. Timberlake pointed out that Dr. McCarty's data and analysis actually supported Plaintiffs' disparate impact argument does not make this a new opinion that should have been disclosed in Dr. Timberlake's prior reports. Dr. McCarty's opinion that a comparison of African-American turnout rates in 2010 and 2014 was the proper way to determine whether the elimination of Golden Week disproportionately impacted minorities was a new defense theory. As such, Plaintiffs were under no obligation to anticipate this argument in their expert reports and were entitled to refute that conclusion with Dr. Timberlake's analysis of Dr. McCarty's data. *Toth*, 306 F.3d at 345 (holding that the fact that evidence "might have been offered in chief does not preclude its admission in rebuttal" and that "the plaintiff has no duty to anticipate or to negate a defense theory in plaintiff's case-in-chief"); *Benedict*, 822 F.2d at 1429 (same).

Second, Dr. Timberlake could not have included in his reports an analysis of the data Dr. McCarty used for the simple reason that Defendants failed to turn over this data until after the period for submitting expert reports had ended. This data was directly responsive to Plaintiffs' discovery requests. Plaintiffs' Request for Production No. 8 asked Defendants to:

> Provide all data documents, records, reports, studies, and/or analyses regarding voting and same day registration during Golden Week. This request includes but is not limited to:
> a. the number of those who voted and the number of those who voted and registered on the same day during Golden Week, broken out by individual county and polling location and including all records that contain, or that would assist a reasonable person in deciphering, a breakdown of such data by municipality, age, race, ethnicity, gender, and/or partisan affiliation.

Plaintiffs' Request No. 4 asked for similar information for early in-person ballots. Plaintiffs' Request No. 17 also asked for "all document previously produced in Case No. 2:14-cv-00404, Ohio State Conference of the NAACP, et al. v. Husted, et al." While Defendants' counsel claim that they were not obligated to produce this data because they did not produce it in the *NAACP*

litigation, they omit the fact that it was directly responsive to Request Nos. 4 and 8. *See* 11/17/2015 Tr. 147:14–16 (Coontz). Consequently, Defendants should have produced the data collected by Mr. Bensen and provided to Dr. McCarty months before they did. Furthermore, contrary to defense counsel's representations at trial, this data was in Defendants' possession, custody, and control at the beginning of this litigation. Defendants obtained this data in conjunction with the *NAACP v. Husted* litigation before this suit was even filed and provided it to Dr. McCarty in March and April of 2015. 11/19/2015 Trial Tr. 81:12–82:13 (McCarty).

However, instead of producing this information when they were obligated to do so, Defendants waited until after Dr. McCarty's rebuttal report had been submitted and days before the close of discovery to produce it. At that point, Dr. Timberlake had no means of responding before his trial testimony. Now, having withheld this data until the last possible moment, Defendants seek to exclude from evidence Dr. Timberlake's response to Dr. McCarty on the grounds he should have analyzed the data earlier. Defendants thus seek to insulate Dr. McCarty's opinions from any meaningful response on the basis of a delay that they manufactured. For this reason, Defendants cannot now be heard to complain that they would be prejudiced by Dr. Timberlake's analysis of Dr. McCarty's methodology and data.

Defendants also contended that Magistrate Judge King had precluded Dr. Timberlake from responding to Dr. McCarty's report at the October 26th discovery conference. 11/17/2015 Tr. 139:25–140:2 (Voigt). This contention was untrue. At that conference, Plaintiffs were seeking the 2008 and 2012 data that Defendants had obtained from Mr. Bensen of Polidata during the *NAACP v. Husted* litigation, data which Defendants chose not to have Dr. McCarty analyze. While Judge King ordered Defendants to produce the 2008 and 2012 data, she did not permit Plaintiffs to prepare a supplemental report from Dr. Timberlake analyzing that data.

At no point, however, did Judge King suggest that Plaintiffs could not respond to the analysis Dr. McCarty conducted in his report by having Dr. Timberlake analyze the data upon which McCarty relied. That issue was not even raised during October 26th conference. Judge King's ruling that Plaintiffs could not submit an additional report based upon the 2008 and 2012 Bensen data, data which, again, Defendants chose not to have Dr. McCarty analyze, has no bearing on the testimony Dr. Timberlake provided with respect the data and analysis Dr. McCarty actually included in his rebuttal report.

The fact that Dr. Timberlake's testimony regarding Dr. McCarty's methods and data should be admitted is further demonstrated by the fact that defense counsel elicited, over Plaintiffs' objections, testimony from their expert Sean Trende regarding Dr. Timberlake's errata that he submitted on November 11, 2015. PX0112; 12/1/2015 Trial Tr. 101:11–103:8 (Trende). Mr. Trende's testimony addressed whether Dr. Timberlake's errata adequately addressed, in his opinion, the errors Mr. Trende had identified in his rebuttal. This subject was not, and could not have been, discussed in Mr. Trende's rebuttal report and his testimony on this point had not been previously disclosed by Defendants. Plaintiffs thus had no opportunity to probe this testimony before cross-examination at trial. Thus, Mr. Trende's testimony on this point was in the identical posture as Dr. Timberlake's testimony regarding Dr. McCarty's rebuttal. Nevertheless, this Court allowed Mr. Trende's testimony into the record, explaining that cross examination would allow Plaintiffs to undermine it. *Id.*

While Plaintiffs agree that Mr. Trende's testimony regarding his analysis of Dr. Timberlake's errata was proper, they respectfully submit that the same principal should apply to Dr. Timberlake's proffered testimony.

IV. PLAINTIFFS' OBJECTIONS TO DEFENDANTS' EXHIBITS

A. The Declarations of Clark Bensen

Plaintiffs object to DX 20A and DX 21, the Declaration and Supplemental Declaration of Clark Bensen on hearsay grounds. Mr. Bensen's declarations are out of court statements offered by Defendants for the truth of the matter asserted therein. They are not subject to any exception or exclusion under the Federal Rules of Evidence. Accordingly, there is no basis for their admission.

Further, if Mr. Bensen's declarations were to be admitted, they would be highly prejudicial to Plaintiffs. Mr. Bensen is the data analyst who performed the underlying matching analysis for Dr. McCarty's expert report. Mr. Bensen accomplished this through the use of specialized skill and methodology and Defendants have stated that he is an expert. 12/3/2015 Trial Tr. 89:13–17 (Voigt). If Defendants wanted Mr. Bensen to attest to his methodology, like all of Defendants' other experts, Mr. Bensen should have appeared in Court and offered testimony subject to cross-examination. As it is, Plaintiffs have no way to probe Mr. Bensen's analysis, methodology, or the statements made in his declarations and, therefore, DX 20A and DX 21 should be excluded.

B. Dr. McCarty's *NAACP v. Husted* Expert Reports

Plaintiffs object to the admission of DX 23 and DX 25 as hearsay. Further, these reports are outside the scope of Dr. McCarty's expert report in this case. Dr. McCarty's reports in another case are, by definition, statements made out of court that are offered for the truth of the matter asserted therein and, accordingly, are inadmissible. To the extent that Defendants have argued that these are offered as rebuttals to Dr. Timberlake's citations in his report to Dr. Smith's report in the *NAACP v. Husted* case, Defendants had the opportunity to rebut those citations

through Dr. McCarty's rebuttal report in this case. However, Dr. McCarty's rebuttal in this case is the only relevant opinion that can be introduced, and the reports he submitted in the *NAACP v. Husted* litigation are therefore not only hearsay, but beyond the scope of the testimony and evidence that may be elicited from him here. For these reasons, these reports and their hearsay content are outside the scope of Dr. McCarty's report and testimony in this case and should not be admitted.

C. Sean Trende and Dr. Hood's Expert Reports and Their Supporting Declarations

Plaintiffs note that they maintain their *Daubert* objections to Sean Trende and Dr. Hood's expert reports in this case as well as to their testimony. Further, Plaintiffs also object to the admission of any of their supporting factual declarations (DX14Q-14Z, 14EE, 14FF, 14KK, 14LL, 14PP, 14QQ, 18A–18D). While Plaintiffs recognize that Defendants have not formally moved for their admission, Defendants have argued that to the extent that any of Plaintiffs proffered deposition designations are admitted, the declarations of those deponents should also be admitted. These declarations are hearsay and are not subject to any exclusion or exception. Accordingly, even where Plaintiffs deposition designations are admitted, these declarations remain inadmissible.

CONCLUSION

Accordingly, Plaintiffs respectfully request that the Court overrule Defendants' objections to Plaintiffs' disputed exhibits, deposition designations, and Dr. Timberlake's testimony, and admit these as substantive evidence in the Plaintiffs' case. Plaintiffs also respectfully request that this Court sustain Plaintiffs' objections to Defendants' exhibits.

Dated: December 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the United States 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/ *Bruce V. Spiva*