

**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

Parties' Joint Final Pretrial Statement

The parties in the above-captioned suit submit the following Joint Pretrial Statement.

The Final Pretrial Conference is scheduled on 11/4/2015 at 3:30 p.m., pursuant to Rule 16 of the Federal Rules of Civil Procedure.

I. Appearances:

A. For Plaintiff(s):

1. Bruce Spiva - Lead Trial Attorney
2. Donald McTigue
3. Joshua Kaul
4. Rhett Martin
5. Amanda Callais

B. For Defendant(s):

1. Steven T. Voigt – Lead Trial Attorney
2. Sarah E. Pierce

3. Tiffany L. Carwile
4. Defendants reserve the right to supplement this list.

II. Nature of Action and Jurisdiction:

- A. This is an action for injunctive and declaratory relief.
- B. The jurisdiction of the Court is invoked under Title 28, United States Code, sections 1331, 1343(a)(3), and 1357; Title 42, United State Code, section 1983 and 1988; and Title 28, United States Code, sections 2201 and 2202.
- C. The jurisdiction of the Court is disputed. Defendants dispute some or all of Plaintiffs standing to institute this case.

III. Trial Information:

- A. According to the Court's July 9, 2015 Order, trial is expected to last less than one (1) week.

Plaintiffs: Due to the number of issues and claims involved in this suit as well as the number of witnesses each side intends to call, the Plaintiffs request eight (8) days for trial.

Defendants: Pursuant to this Court's Order (Doc. 23) anticipating a trial "less than one (1) week, Defendants request four (4) days for the trial.

- B. Bench Trial is set for 11/16/2015 at 10 a.m.

IV. Statements and Lists:

A. General Nature of the Claims of the Parties

1. **Plaintiffs' Claims:** The following is a brief summary of Plaintiffs' claims:
 - a. **S.B. 238 – Elimination of Golden Week:** Plaintiffs challenge S.B. 238's elimination of the "Golden Week" period for same-day registration and early voting on the grounds that it, alone and in conjunction with the other laws challenged in this suit, violates equal protection under the First and Fourteenth Amendments; constitutes intentional racial discrimination under the Fourteenth and Fifteenth Amendments; constitutes intentional partisan discrimination under the First and Fourteenth Amendments; and violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.
 - b. **One Early-Voting Location Per County:** Plaintiffs challenge Ohio Rev. Code § 3501.10(C)'s limitation of one early-voting location per county on the grounds that it, alone and conjunction with the other laws challenged in this suit, violates equal protection under the First and Fourteenth Amendments; constitutes intentional racial discrimination under the Fourteenth and Fifteenth

Amendments; constitutes intentional partisan discrimination under the First and Fourteenth Amendments; and violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

c. S.B. 200's and Secretary of State Directive 2014-26's Reductions in the Number of Direct Recording Electronic ("DRE") Voting Machines: Plaintiffs challenge S.B. 200 and Secretary of State Directive 2014-26's reductions in the number of DRE voting machines on the grounds that they, alone and conjunction with the other laws challenged in this suit, violate equal protection under the First and Fourteenth Amendments; constitute intentional racial discrimination under the Fourteenth and Fifteenth Amendments; constitute intentional partisan discrimination under the First and Fourteenth Amendments; and violate Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

d. S.B. 205's Restrictions on Absentee Ballots: Plaintiffs challenge S.B. 205's requirements that voters fill out their date of birth and address on the absentee ballot identification envelope in order to have their ballots counted on the grounds that this provision, alone and conjunction with the other laws challenged in this suit, violates equal protection under the First and Fourteenth Amendments; constitutes intentional racial discrimination under the Fourteenth and Fifteenth Amendments; constitutes intentional partisan discrimination under the First and Fourteenth Amendments; violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301; and violates Section 1971 of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B).

e. S.B. 216's Restrictions on Provisional Ballots: Plaintiffs challenge S.B. 216's requirement that voters casting provisional ballots fill out their date of birth and address on the provisional ballot affirmation form and S.B. 216's shortening of the period to cure the failure to provide proper identification from 10 to seven days on the grounds that these provisions, alone and conjunction with the other laws challenged in this suit, violate equal protection under the First and Fourteenth Amendments; constitute intentional racial discrimination under the Fourteenth and Fifteenth Amendments; constitute intentional partisan discrimination under the First and Fourteenth Amendments; violate Section 2 of the Voting Rights Act, 52 U.S.C. § 10301; and violate Section 1971 of the Civil Rights Act of 1964, 52 U.S.C.A. § 10101(a)(2)(B).

f. Secretary of State Directive 2014-15's Exclusion of Inactive/Active-Confirmation Voters from the Mailing of Unsolicited Absentee Ballot Applications: Plaintiffs challenge the exclusion of more than a million registered voters who are on inactive/active confirmation status from Secretary Husted's mailing of unsolicited absentee ballot applications on the grounds that this policy, alone and conjunction with the other laws challenged in this suit, violates equal protection under the First and Fourteenth Amendments; constitutes intentional racial discrimination under the Fourteenth and Fifteenth Amendments; constitutes intentional partisan discrimination under the First and

Fourteenth Amendments; and violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

g. Failure to Provide Notice and an Opportunity to Cure Mistakes on the Provisional Ballot Affirmation Form: Plaintiffs challenge the Secretary of State's failure provide voters who cast provisional ballots notice of deficiencies on the provisional ballot affirmation form or an opportunity to correct such deficiencies on the grounds that this, alone and conjunction with the other laws challenged in this suit, violates equal protection under the First and Fourteenth Amendments; constitutes intentional racial discrimination under the Fourteenth and Fifteenth Amendments; constitutes intentional partisan discrimination under the First and Fourteenth Amendments; violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301; and violates procedural due process under the Fourteenth Amendment.

h. S.B. 216 – Discretion to Consolidate Poll Books at Multi-Precinct Voting Locations: Plaintiffs challenge the system created by S.B. 216 under which county Board of Elections have discretion to consolidate poll books in multi-precinct polling locations, leaving voters in counties that do not consolidate their poll books open to the risk of disenfranchisement. Plaintiffs challenge this law on the grounds that it, alone and conjunction with the other laws challenged in this suit, violates equal protection under the First and Fourteenth Amendments; constitutes intentional racial discrimination under the Fourteenth and Fifteenth Amendments; constitutes intentional partisan discrimination under the First and Fourteenth Amendments; and violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

2. Defendants' Claims: Defendants do not assert any claims in this matter, but oppose all of Plaintiffs' claims and reassert the defenses asserted in their Answer to the Amended Complaint (Doc. 42).

B. Uncontroverted Facts

The parties intend to work in good faith to determine which factors are uncontroverted prior to trial.

C. Issues of Fact and Law

1. Contested Issues of Fact: Pursuant to the Court's October 16, 2015 Order, it is the parties' understanding that any contested issues of fact will be addressed in the pretrial briefs to be submitted on November 12, 2015.

2. Contested Issues of Law: Pursuant to the Court's October 16, 2015 Order, it is the parties' understanding that any contested issues of fact will be addressed in the pretrial briefs to be submitted on November 12, 2015.

D. Witnesses

1. Plaintiffs' Witnesses: Plaintiffs will call or will have available at trial the following witnesses. In addition to the witnesses identified on the following list, Plaintiffs reserve the right to call additional witnesses as may be necessary to authenticate evidence, establish the circumstances and content of public statements made by current or former elected officials, or otherwise address evidentiary issues, in the event that appropriate stipulations cannot be reached. In keeping with the Court's October 16, 2015 Order, Plaintiffs intend to submit an updated list of witnesses on or before November 12, 2015. Plaintiffs' current list of witnesses is:

a. Dr. David Canon: Dr. Canon will offer testimony rebutting Defendants' experts Professor M.V. "Trey" Hood III and Sean Trende and their use of a report Dr. Canon co-authored with three other individuals.

b. Dr. Lorraine C. Minnite: Dr. Minnite will testify as to the absence of voter fraud in Ohio and the use of allegations of fraud as a pretext for voter suppression.

c. Dr. Jeffrey M. Timberlake: Dr. Timberlake will testify as to the discriminatory and disproportionate impact the laws challenged in this suit will have on minorities.

d. Dr. Muer Yang: Dr. Yang will testify as to the impact the laws challenged in this suit will have on wait times at the polls.

e. William Anthony: Mr. Anthony is the Director of the Franklin County Board of Elections. He will testify as to the negative impact the provisions challenged in this suit will have on Franklin County's election administration and voters in that county, as well as the history of election administration in Franklin County.

f. Greg Beswick: Mr. Beswick is the Executive Director of the Ohio Democratic Party. He will testify as to the impact the provisions challenged in this suit have had and will have on Plaintiff Ohio Democratic Party's operations and its members' ability to vote and participate in the political process.

g. Carol Biehle: Mrs. Biehle is a poll worker in Clermont County at a multi-precinct voting location. She will testify as to the problem of "right church, wrong pew" ballots at multi-precinct voting locations.

h. Rachel Bowman: Ms. Bowman was an organizer for the Obama for America campaign at Bowling Green University and will testify about long lines at the polls and the importance of Golden Week for students at Bowling Green University.

i. Timothy Burke: Mr. Burke is the Chairman of the Hamilton County Board of Elections. He will testify about the impact the provisions challenged in this suit have had and will have on the Hamilton County

Board of Elections' election administration and voters in Hamilton County, Ohio.

j. Bruce Butcher: Reverend Butcher is a pastor at the St. Paul African Methodist Episcopal Church in Akron. He will testify about the impact the provisions challenged in this suit have had and will have on the "get out to vote" and registration efforts within the African-American community.

k. Matthew Caffrey: Mr. Caffrey is a former student at The Ohio State University who will testify about long lines at the polls and the importance of Golden Week to students at The Ohio State University. Mr. Caffrey will also testify about the benefits of having more than one early-voting location in a county.

l. Phyllis Cleveland: Mrs. Cleveland is a member of the Cleveland City Council. She will testify about incidents of voter suppression in Ohio and the difficulty members of her community have in accessing their early-voting location.

m. Brad Cromes: Mr. Cromes is the Portage County Treasurer and a former member of the Portage County Board of Elections. He will testify about long lines at the polls and the benefits of having more than one early-voting location in a county.

n. Matthew Damschroder: Mr. Damschroder will testify about the intent, rationales, costs, benefits, and/or burdens imposed by the provisions challenged in this suit and the communications, actions, and positions of the Secretary of State with respect to the provisions at issue.

o. Monica DeTota: Ms. DeTota is the Finance Associate for the Ohio Democratic Party and a former student at The Ohio State University. She will testify about long lines at the polls at Ohio elections.

p. Jordan Isern: Ms. Isern is an organizer at The Ohio State University and will testify about the impact of the provisions challenged in this suit on students' ability to register, vote, and engage in "get out the vote" efforts.

q. Andrew Kohn: Mr. Kohn is a former Obama for American staffer and he will testify about the importance of Golden Week for Ohio's voters.

r. Joey Longley: Mr. Longley was an organizer in 2012 and he will testify about long lines at the polls in Ohio elections and the importance of Golden Week for Ohio's voters.

s. Nick Martin: Mr. Martin is the Executive Director of the Democratic Party of Cuyahoga County. He will testify about the impact the provisions challenged in this suit have had and will have on the operations of Plaintiff Democratic Party of Cuyahoga County.

t. Eben (“Sandy”) McNair: Mr. McNair is a member of the Cuyahoga County Board of Elections. He will testify about the impact of the provisions challenged in this suit on the Cuyahoga County Board of Elections’ election administration and the burdens these provisions impose on voters in Cuyahoga County.

u. Mark Owens: Mr. Owens is the Chair of the Montgomery County Democratic Party. He will testify about the impact the provisions challenged in this suit will have on the operations of Plaintiff Democratic Party of Montgomery County.

v. Halle Pelger: Ms. Pelger will testify about the intent of, rationales for, costs and benefits of, and/or burdens imposed by the provisions challenged in this suit and the communications, actions, and positions of the Secretary of State with respect to the provisions at issue.

w. Anthony Perlatti: Mr. Perlatti is the Deputy Director of the Cuyahoga County Board of Elections. He will testify about the impact of the provisions challenged in this suit on the Cuyahoga County Board of Elections’ election administration.

x. Doug Preisse: Mr. Preisse is the chairman of the Franklin County Board of Elections. He will testify about the actions of the Hamilton County Board of Elections and the Secretary of State with respect to Ohio’s election laws and the provisions challenged in this suit, as well as Mr. Preisse’s statement that “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban — read African-American — voter-turnout machine.”

y. Rep. Michael Stinziano: Rep. Stinziano will testify about the legislative intent behind the provisions challenged in this suit and the impact these provisions will have on Ohio’s voters.

z. Terri Taylor: Ms. Taylor is an African-American voter and an active Democratic volunteer. She will testify about long lines at the polls and the importance of Golden Week for Ohio’s voters.

aa. Sen. Nina Turner: Sen. Turner will testify about the legislative intent behind the provisions challenged in this suit, the impact these provisions will have on Ohio’s voters, and discrimination and voter suppression.

In addition, Plaintiffs' submit that they *may* also call the following witnesses:

a. Mandy Chen: Ms. Chen is a student at The Ohio State University and a former Obama for American volunteer. She is an organizer who can testify to the existence of long lines during early voting as well as the importance of Golden Week for voters.

b. Rep. Teresa Fedor: Rep. Fedor will testify about the legislative intent behind the provisions challenged in this suit and the impact these provisions will have on Ohio's voters.

c. Juliana Wishne: Ms. Wishne is a young voter and organizer who can testify to the existence of long lines during early voting as well as the importance of Golden Week for voters.

2. Defendants' Witnesses: Defendants will call or will have available at trial the following witnesses. Pursuant to the Court's October 16, 2015 Order, Defendants intend to submit an updated list on or before November 12, 2015 and reserve the right to supplement the list below. Defendants' current list of witnesses is:

a. Sean P. Trende will testify about his analysis of Ohio's voting opportunities as well as Ohio's voting opportunities in the context of voting opportunities nationwide. He examined Ohio's early voting period. He conducted analyses about the location of Ohio's early voting centers with respect to minorities and individuals having a particular political affiliation. He assessed recent trends in turnout and influences on voter trends. He conducted analyses about Ohio's DRE machines, provisional, and absentee ballot procedures, both within Ohio and also placing Ohio in a national context.

b. M.V. (Trey) Hood, III will provide testimony regarding the use of early in-person voting in Ohio, including the previous use of Golden Week; the determination that the challenged election law changes did not diminish the usage of early in-person voting, did not negatively affect African American early voting turnout, and are supported by important state interests; the election law changes effects on the rate of provisional ballots rejected and rejection because of voter error; and the administrative justifications supporting the additional election law changes challenged by plaintiffs.

c. Theodore T. Allen will testify about the effects increased early voting centers would have on average wait times and the impact on wait times based on the change in formula to calculate the minimum number of DRE machines.

d. Nolan McCarty, Ph.D. will offer testimony rebutting Plaintiffs' expert Jeffrey M. Timberlake and Plaintiffs' other experts and will offer testimony regarding whether African-American turnout was

affected by recent changes to Ohio election laws and procedures. In particular, in addition to other calculations, Professor McCarty compared data in 2014 (after the Challenged Laws were in effect) with 2010.

e. Matthew Damschroder will offer testimony regarding the methods of voting in Ohio, the use of DRE machines, mailing absentee ballot applications, provisional ballots, absentee voting, election preparation, voting patterns, and election procedures generally.

f. To the extent Defendants add additional witness to their witness list that will be filed on November 12, 2015, it is likely that such additions will consist only of two or three election officials that Plaintiffs depose. Defendants are not certain at this time whether that additional testimony will be needed for their case. Defendants, however, reserve the right to list additional witnesses pursuant to the Court's Order.

3. The parties reserve the right to call rebuttal witnesses whose testimony could not reasonably be anticipated without prior notice to opposing counsel.

4. In the event other witnesses are to be called at trial, a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least one day prior to trial.

E. Expert Witnesses

1. Plaintiffs' Expert Witnesses: Plaintiffs' counsel prepared a resume of each expert's qualifications in accordance with Appendix A herein.

2. Defendants' Expert Witnesses: Defendants' intend to call four (4) expert witnesses, and Defendants' counsel prepared a resume of each expert's qualifications in accordance with Appendix A herein.

F. Exhibits

1. Plaintiffs' Exhibits: Plaintiffs' Preliminary Good Faith, Non-Binding Exhibit List is attached hereto as Appendix C. In keeping with the Court's October 16, 2015 Order, Plaintiffs intend to submit an updated list on or before November 12, 2015. Further, Plaintiffs and Defendants jointly submit to the court that they have listed all of their objections to the current exhibit lists and are making every effort to resolve, in good faith, the stated objections prior to the November 4, 2015 pretrial conference.

2. Defendants' Exhibits: Defendants' Preliminary Good Faith, Non-Binding Exhibit List is attached hereto as Appendix D. Pursuant to the Court's October 16, 2015 Order, Defendants intend to submit an updated list on or before November 12, 2015. Further, Plaintiffs and Defendants jointly submit to the court that they have listed all of their objections to the current exhibit lists and are making every effort to resolve, in good faith, the stated objections prior to the November 4, 2015 pretrial conference.

G. Depositions:

Plaintiffs: The parties are continuing to take depositions, and are unable to make deposition designations at this time. Plaintiffs submit that the parties should be allowed to designate the depositions that each intends to move into evidence on November 12, 2015.

Defendants: The Defendants object to the use of depositions or deposition designations by non-testifying witnesses as affirmative evidence.

H. Discovery: The parties are continuing to take depositions of some of their fact and expert witnesses. The parties expect these depositions to be finished by November 12, 2015.

I. Pending Motions: There are no pending motions at this time.

Plaintiffs' Position: Plaintiffs intend to file a motion in limine regarding the testimony of two defense experts by November 12, 2015.

Defendants' Position: Defendants respectfully request that the Court consider four issues at the pre-trial conference on November 4, 2015:

- (1) Experts. With regard to motions related to experts, Defendants propose that any motions to exclude expert testimony be made at trial after the testimony of the relevant witness. Defendants will likely move to exclude portions of the report of one of Plaintiffs' experts, based on Fed.Evid.R. 702, but request that such motion (and the corresponding motions cited by Plaintiffs above) be made orally at trial, so that the context of the motions can be more fully developed.
- (2) Deposition Transcripts. During a teleconference today, Plaintiffs stated that Plaintiffs plan to seek to introduce deposition testimony of non-testifying witnesses as affirmative evidence (*i.e.* not for purposes of impeaching testifying witnesses). Defendants oppose the introduction of such testimony under Fed. R. Civ. P. 32 (a) and (b) (governing the use of deposition transcripts) and as hearsay pursuant to Fed.Evid.R. 802. The parties did not agree to designate these depositions as trial depositions and Plaintiffs' proposed use of the transcripts falls outside of Rule 32 and is otherwise objectionable under Rule of Evidence 802.
- (3) Witnesses. Defendants object to three of the witnesses that Plaintiffs designated because the witnesses were disclosed less than one hour before the close of discovery or otherwise after discovery closed: (1) Senator Nina Turner (disclosed the day after the close of discovery – November 1, 2015 at 11:36 pm); (2) Rep. Michael Stinziano (disclosed at 11:05 pm on the last day of discovery); (3) Douglass J. Preisse (disclosed at 11:05 pm on the last day of discovery).

(4) Exhibits. Defendants object to Plaintiffs' exhibit designations of documents and videos that Plaintiffs' did not produce during discovery (see Appendix C).

V. Modification: The Final Pretrial Order may be modified at trial, or prior thereto, to prevent manifest injustice. Such modification may be made by application of counsel or on motion of the Court.

VI. Trial Briefs: Pursuant to the Court's October 16, 2015 Order, the parties will submit their 70-page trial briefs on November 12, 2015.

VII. Settlement Efforts: The parties have not undertaken any settlement efforts, and they do not believe that settlement negotiations would be fruitful.

Dated: November 2, 2015

Respectfully submitted,

/s/ Bruce V. Spiva

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Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing by transmitting a copy to all counsel with an e-mail address of record, who have appeared and consent to electronic service in this action and any consolidated actions.

This the 2nd day of November, 2015.

By: /s/ Bruce V. Spiva