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

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

PLAINTIFFS' TRIAL BRIEF

I. INTRODUCTION

The 2004 election in Ohio was "[t]he worst ever." Anthony Dep. Tr. 68:10-13, Oct. 27, 2015. Wait times to vote exceeded 10 hours in parts of the state. Allen Dep. Tr. 62:6-21, Nov. 9, 2015. In Franklin County, lines were as long as seven hours in predominantly African-American precincts. *Id.* at 220:12-20. Thousands of voters were deterred from casting ballots. *Id.* at 65:12 - 66:8.

Bipartisan reforms followed, including the adoption of a 35-day no-fault early voting period. These reforms materially improved the quality of the elections process in Ohio, but problems remained. On the last day of early voting in 2008, for instance, voters in Franklin County had to wait six hours to cast a ballot. Anthony Dep. Tr. 65:8-14. In 2012, lines in Cuyahoga County during the last weekend of early voting were over an hour and a half long, extending outside of the building and into the street. Perlatti Dep. Tr. 48:2-17, Oct. 28, 2015; McDonald Dep. Tr. 71:10-11, 118:1-5, Oct. 28, 2015; McNair Dep. Tr. 23:8-24, Nov. 3, 2015.

Despite these ongoing election-administration challenges, state officials began to undertake efforts to limit access to the polls. Prior to the 2012 election, for instance, Secretary of State Jon Husted issued a directive that prohibited county boards of election ("CBOEs") from offering early voting on the three days prior to Election Day—the three most popular days of early voting. *See Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012). While that directive was overturned by litigation, *see id.* at 437, efforts to restrict access to the polls continued, culminating in the enactment in 2013 and 2014 of a series of laws that have made it more difficult to vote in Ohio and the issuance of directives that compound the effects of some of these laws.

The evidence in this case will establish that these restrictive measures (described in detail below), as well as Ohio's rule prohibiting counties from opening more than one early voting location, should be invalidated for the following reasons: *First*, these measures impose burdens on voting rights that outweigh their benefits to the State, and, under the *Anderson-Burdick* test, therefore violate the Equal Protection Clause. *Second*, these measures interact with the ongoing effects of the history of racial discrimination to impose disproportionate burdens on minority voters, in violation of Section 2 of the Voting Rights Act ("VRA"). *Third*, the measures at issue were intended, at least in part, to suppress the vote of minority voters, in violation of the Fourteenth and Fifteenth Amendments. *Fourth*, these restrictive measures were intended to suppress the vote of Democratic voters, in violation of the First and Fourteenth Amendments.

This Court does not write on a blank slate. Last year, the Sixth Circuit affirmed a decision by Judge Economus declaring that the reductions in EIP voting are unconstitutional and violate Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10302(a), and preliminarily enjoining those reductions for the 2014 general election. *See Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), *affirming* 43 F. Supp. 3d 808 (S.D. Ohio 2014). Although the Sixth Circuit subsequently vacated its decision and the preliminary injunction for reasons unrelated to the merits, those decisions at the very least retain strong persuasive force and provide a roadmap for resolving the issues presented here.[1]

[1] "[D]ecisions vacated for reasons unrelated to the merits may be considered for the persuasive [value] of their reasoning." *Rosenbloom v. Pyott*, 765 F.3d 1137, 1154 n.14 (9th Cir. 2014); *Friends of the Everglades v. S. Fla. Water Mgmt Dist.*, 570 F.3d 1210, 1218 (11th Cir. 2009). That is the case here. The Sixth Circuit vacated its decision and the preliminary injunction not because of any doubts about the merits, but because, as a result of the Supreme Court's Sept. 29, 2014 order staying the preliminary injunction "pending the timely filing and disposition of a petition for writ [of] certiorari," *Husted v. Ohio State Conference of the NAACP*, 135 S. Ct. 42, 42 (2014) (Mem.), the preliminary injunction itself--which applied only to the upcoming 2014 general election--"no longer has any effect." *Ohio State Conf. of the NAACP v. Husted*, No. 14-3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014). Plaintiffs believe that the findings and conclusions in *NAACP v. Husted* are not only highly persuasive, but should be given preclusive effect. *See* n. 2 *infra.*

II. FACTS

The following discussion summarizes the facts that plaintiffs are prepared to establish at trial and/or through materials of which the Court may take judicial notice (such as the legislative history of the challenged Senate Bills). In addition, plaintiffs believe this Court should give preclusive weight (*i.e.*, collateral estoppel effect) to the findings of fact in the *NAACP* litigation that are relevant to the overlapping (and often identical) issues in this case. Those findings were the product of intensive discovery, expert testimony, briefing, and a hearing, and were upheld on appeal by the Sixth Circuit. Many of those findings are directly on point here. Unless defendants have evidence of some material change in the factual circumstances over the past 12-18 months, there is no reason for this Court to reinvent the wheel with respect to relevant facts established in the *NAACP* litigation.[2]

A. HISTORY AND ONGOING EFFECTS OF DISCRIMINATION IN OHIO

Ohio has a long history of discrimination against African Americans and Latinos that has hindered, and the ongoing effects of which continue to hinder, their ability to participate in the

[2] Although the Sixth Circuit subsequently vacated its decision and the district court's preliminary injunction, the vacatur had nothing to do with the merits of these decisions, and the state defendants then settled the case to avoid a trial on the merits. *See* n.1 *supra.* It is appropriate in these circumstances to give preclusive effect to the findings of fact in the vacated decisions, especially those embraced by the Sixth Circuit in its decision affirming the preliminary injunction. *See, e.g., Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 220 - 22 (3d Cir. 2003) (giving "preclusive effect to the findings underlying [a] vacated judgment" where the vacatur "did not purport to expunge the findings of fact and conclusions of law," but "merely states that the 'judgment' is vacated"); *Chemetron Corp. v. Bus. Funds, Inc.*, 682 F.2d 1149, 1192 (5th Cir. 1982) (giving preclusive effect to factual findings in prior litigation that had been "withdrawn and set aside" by the trial judge when the case was dismissed as a result of settlement), *vacated on other grounds*, 460 U.S. 1007 (1983); 13C Charles Wright et al., Fed. Prac. & Proc. Jurisdiction § 3533.10.2 & n.31 (3d ed. updated Apr. 2015) (citing cases resting collateral estoppel on vacated judgments).

Moreover, it is appropriate to give preclusive effect to findings of fact made in the context of preliminary injunction proceedings where—as here—the findings were the product of contested discovery, briefing, and a hearing, and were affirmed on appeal. *See, e.g.*, Restatement (Second) of Judgments § 13 (1982) (collateral estoppel effect may be given to "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect," including in preliminary injunction proceedings); 18A Charles Wright et al., Fed. Prac. & Proc. Jurisdiction § 4434 (2d ed. updated Apr. 2015) ("Preliminary injunction findings affirmed on appeal may … support preclusion as to matters of fact or mixed law and fact."); *Commodity Futures Trading Comm'n v. Bd. of Trade*, 701 F.2d 653, 657-58 (7th Cir. 1983) (preliminary injunction findings should be given collateral estoppel effect "if the circumstances make it likely that the findings are accurate [and] reliable," such as where the district court "entered detailed findings of fact after full hearing and the findings were affirmed on appeal").

political process. Ohio's original 1802 constitution limited the right to vote to white males. *See* Ohio Const., art. IV, § 1 (1802). In 1804 and 1807, the Ohio legislature enacted "Black Codes" and "Black Laws" designed to limit the freedoms of freed slaves who migrated north. PX0109 (Expert Report of Dr. Jeffrey M. Timberlake, dated Sept. 18, 2015 ("Timberlake Rpt.") at 34). In 1868, Ohio enacted a law permitting election clerks and judges to reject the right to vote of any person with "a visible admixture of African blood." *Id.* at 35. This law permitted elections officials to question, under oath, the ancestry of anyone who appeared to be of African descent, the person's official racial classification, and whether the person associated with whites or "colored persons." Ohio's proscription on African-American voting survived until 1923—nearly 60 years after the end of the Civil War—when "white" and "male" were removed from the state's constitution as part of Ohio's ratification of the 19th Amendment to the U.S. Constitution. *Id.*

Non-proportional representation, particularly in urban areas with higher African-American populations, diluted the ability of minorities in Ohio to elect the representatives of their choice during the first two-thirds of the 20th century. Under this system, each county in Ohio was entitled to one representative in the state House of Representatives, no matter its population. Ohio Const., art. XI, § 2 (1964). Further, while Ohio's system for drawing legislative districts was ruled unconstitutional in 1964, *see Nolan v. Rhodes*, 378 U.S. 556 (1964), a three-judge panel found in 1991 that the state legislative districts in Mahoning County, which is home to Youngstown, a community with a large African-American population, had been drawn in such a way as to dilute the minority vote by splitting the black population into separate districts. After surveying the history of official discrimination in the County, including domination of Youngstown's government by the Ku Klux Klan in the 1920s, the court ruled that

the County's districts violated both Section 2 of the Voting Rights Act of 1965 and the Fifteenth Amendment to the United States Constitution. *See Armour v. Ohio*, 775 F. Supp. 1044, 1063 (N.D. Ohio 1991).

Moreover, election officials have very recently acknowledged that they were taking race into account in setting election policy. In 2012, Doug Preisse, the Chair of the Hamilton County Board of Elections, explained, in defense of his vote not to permit early voting on weekend and evening hours in Cincinnati prior to the 2012 election, that "I guess I really actually feel we shouldn't contort the voting process to accommodate the urban — read African-American — voter-turnout machine.'" PX0094 (Darrel Rowland, *Voting in Ohio: Fight over Poll Hours Isn't Just Political*, Aug. 19, 2012). While the Secretary of State's Office was aware of this quote, it took no remedial action and did not even ask Preisse about this statement.[3] First Damschroder Dep. Tr. 122:5 - 123:8, Oct. 20, 2015. Similarly, at a legislative hearing in 2014, State Representative Matt Huffman stated, "[t]here's that group of people who say, 'I'm only voting if someone drives me down after church on Sunday.' Really? Is that the person we need to cater to when we're making public policy about elections?" PX0109 (Timberlake Rpt. at 48).

Ohio has employed a number of voting practices that enhance the opportunity for discrimination against minority groups. For example, Ohio's permissive voter-challenge law has also resulted in minorities being subject to intimidation and harassment at the polls.[4] In 2004, the Republican Party planned to put 3,600 challengers inside precincts serving mostly black

[3] As evidenced by an email sent on behalf of Preisse to State Senator Seitz's legislative assistant, Preisse had long shared the goal of Senate Republicans to minimize weekend and evening early voting hours. PX 0098 (noting that the early voting schedule agreed to by the Franklin County BOE was a "significant departure from the position advocated by the Democrat (sic) Board Members" and that had the BOE deadlocked over the issue it would have been "thrown to the [then Democratic] Secretary of State who would then break the tie in favor of the Democrat (sic) Party position as she did in 2008.")).

[4] Ohio law provides that "[a]ny person offering to vote may be challenged at the polling place by any precinct election official." Ohio Rev.Code Ann. § 3505.20.

voters to challenge the eligibility of some 23,000 registered voters. PX0107 (Expert Report of Dr. Lorraine C. Minnite, dated Sept. 18, 2015 ("Minnite Rpt.") at 16–17).[5] During the 2012 presidential election, groups associated with *True the Vote* obtained permission to serve as poll watchers at various locations in Ohio, including precincts in Hamilton County, although they had been banned from other locations such as Columbus because of complaints that they had been harassing voters by taking their pictures and interfering with voters. PX0109 (Timberlake Rpt. at 36). These groups focused on student voters and voters from low-income and high-minority areas with the stated intent of preventing voter fraud. *Id.* However, of the 1,077 challenges they made, most were thrown out. *Id.* Also during the 2012 election, anonymous persons erected 30 billboards in African-American and Latino neighborhoods in Columbus and Cleveland, some within view of four large public housing communities, warning that "VOTER FRAUD IS A FELONY." Id. at 42–43. These tactics were rationalized on the basis of the need to prevent voter fraud, but after an extensive investigation into the 2012 election, Secretary of State Husted identified only 135 cases of potential fraud out of approximately 5.63 million votes cast, or .002397 percent. *Id.* at 42 n.93; PX0107 (Minnite Rpt. at 18-19). Federal courts have been required to intervene on many occasions in recent years to enjoin Ohio voting practices that discriminate against disadvantaged voters and minorities.[6]

[5] This plan was enjoined by two federal courts and did not go into effect. *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, No: 5:04CV2165, 2004 WL 5550698, at *1 (N.D. Ohio Oct. 31, 2004); *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 532, 538 (S.D. Ohio 2004).

[6] *See SEIU v. Husted*, Nos. 2:12-CV-562, 2:06-CV-896, 2012 WL 5497757, at *5 (S.D. Ohio, Nov. 13, 2012) (holding that Secretary Husted's directive violated consent decree intended to protect the votes of the indigent and homeless); *Harkless v. Husted*, No. 1:06-cv-02284, 2011 WL 2149179, at *3, *26 (N.D. Ohio Mar. 31, 2011) (holding that Ohio's failure to provide voter registration opportunities at public assistance agencies violated the National Voter Registration Act); *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825, 827 (N.D. Ohio 2006) (holding that statute permitting election judges "unbridled discretion to challenge any voter's citizenship without any guidelines" was unconstitutional, as it created a "very real possibility of 'profiling' voters . . . on the basis of appearance, name, looks, accent or manner"); *id.* at 827 ("It is shameful to imagine that this statute is an example of how the State of Ohio says 'thank you' to [naturalized citizens] who helped build this country."); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 609 (N.D. Ohio 2008) (finding that slotted at-large system in Euclid enhanced

The effects of Ohio's history of discrimination continue to manifest themselves to this day in ways that impact minorities' access to the polls:

- Employment: Thirty-five percent of whites in Ohio work in professional and managerial jobs, compared to only twenty-five percent of African Americans, Whites (35 percent) in Ohio enjoy a much greater share of professional and managerial jobs than African Americans (25 percent), and a greater percentage of African Americans (53 percent) work in service and sales occupations than whites (41 percent). PX0109 (Timberlake Rpt. at 12). Because of these disparities in employment and occupational pursuits, African Americans are more likely to have one or more hourly wage jobs that do not allow them the flexibility to go to the polls to vote on Election Day or during typical work hours during the week. PX0109 (Timberlake Rpt. at 4, 28, 32, 50, 55, and 61).

- Income and Transportation: Income for African Americans in Ohio is approximately 60% of income for whites in Ohio, and the poverty rate for African-American families is roughly three times that of white families (approximately 33 percent compared to 12 percent) in Ohio. PX0109 (Timberlake Rpt. at 22–23). Similarly, African Americans in Ohio are much more likely to live in poverty-ridden neighborhoods, with approximately 51 percent of African Americans living in neighborhoods where more than 20 percent of the residents are in poverty, compared to 19 percent of whites. *Id.* at 19. Voters living in poverty often have limited access to transportation and childcare. *Id.* at 23, 32. African Americans in Ohio have an average 1.2 vehicles per household, compared to 2.2 vehicles for white households, while African Americans are approximately four times more likely than whites to rely on public transportation or to walk to work, and four times less likely to own their own automobile. *Id.* at 23–24.

- Residential Segregation: Ohio is home to three of the 22 most residentially segregated cities in the United States. Cleveland, Cincinnati, and Columbus rank 8th, 12th, and 22nd, respectively, on this score. *Id.* at 15–16. Further, white Ohioans are almost twice as likely as African-American Ohioans to own a home (72.9 percent compared to 38.5 percent). *Id.* at 17. These high levels of segregation are the direct result of a long history of official discrimination at the federal, state, local, and individual levels.[7] The effects of

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opportunity for discrimination); *see also United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 743 (N.D. Ohio 2009) ("minorities in Euclid have been systematically denied the opportunity to elect their preferred candidates to the Board"); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 699, 703-704 (N.D. Ohio 2006) (enjoining new voter registration laws which effectively shut down voter registration drives in "low- and moderate-income, minority, and other disenfranchised communities" and "have the discriminatory effect of imposing an undue burden primarily on poor and/or elderly voter registration workers"); *Mallory v. Eyrich*, 922 F.2d 1273, 1275-76 (6th Cir. 1991) (holding that judicial elections in Hamilton County Municipal Court violated Section 2 of the Voting Rights Act).

[7] During the 1930s, the federal government created the Home Owners Loan Corporation ("HOLC") and the Federal Housing Administration ("FHA") to encourage homeownership. *Id.* at 20–21. HOLC and FHA actuaries relied on so-called "residential security maps" to assess the creditworthiness of neighborhoods. *Id.* at 21. Neighborhoods containing high concentrations of blacks or that were undergoing demographic transition from white to black were outlined or shaded in red, giving the practice of "redlining" its name. *Id.* This policy resulted in African Americans being shut out of the opportunity to buy homes during the period of rapid suburbanization after World War II, with the result that African Americans were left behind in urban centers of cities such as Cleveland. *Id.*

these policies and other discriminatory housing policies continue to manifest themselves in high levels of racial segregation today. *Armour*, 775 F. Supp. at 1054-55 (noting that "Youngstown's [Mahoning County] housing pattern has remained intensely segregated" due to "the segregated white-black housing assignment policies maintained by the Youngstown Metropolitan Housing Authority," restrictive covenants, and private discrimination). Inequalities in employment and income also mean that African Americans, as compared to whites, experience much higher levels of residential instability and mobility. On average between 2008 and 2012, 22 percent of African Americans in Ohio moved in the previous year, compared to 13 percent of whites. PX0109 (Timberlake Rpt. at 17–18). As a consequence of this residential instability, African Americans are more likely to have out of date and inaccurate voter-registration information.

- Educational Disparities: Many public schools in Ohio are highly segregated as well. Cleveland, Youngstown, and Cincinnati have the 5th, 6th, and 8th most segregated school systems of the 100 largest metropolitan areas in the country. *Id.* at 25. As a result of the conjoined effects of school segregation and economic inequality, the average African-American child in Cleveland attends a school where 75 percent of the students live in poverty, compared to one-third of white students. *Id.* In Toledo, the average African American child attends a school where approximately 80 percent of the children are poor, compared to 40 percent of white children. *Id.* These inequalities manifest themselves in disparate rates of educational attainment of African Americans compared to whites. African-American children are five to 10 percent less likely to score proficient or better on the state's standardized Graduation Test. *Id.* at 26. The drop-out rate for African-American students in Ohio is seven percentage points higher than that of whites. *Id.* at 27. Fifteen percent of African Americans, versus 25 percent of whites, in Ohio have a college degree. *Id.* In counties where the population is 18 percent African American or higher, the gap is even wider, with approximately 33 percent of whites having a college degree compared to 14 percent of African Americans. These disparities disadvantage African Americans because education imparts the skills needed to navigate the bureaucratic process of voting and fosters an interest in and knowledge of the political process. *Id.* at 28. Inequalities in educational achievement further increase the burdens and costs of voting for African Americans by reducing employment options, job flexibility, residential stability, access to transportation, and other advantages that make it easier to find time to vote on Election Day or during early voting. *Id.* at 28–29.

- Health Disparities: Health statistics are also unbalanced. African Americans in Ohio are more likely than whites to be obese (36.8 percent compared to 28.6 percent), have high blood pressure (37.5 percent compared to 26.2 percent), be diagnosed with diabetes (12.3 percent compared to 9.2 percent), experience a stroke (3.4 percent compared to 2.1 percent), or suffer from a disability (19.3 percent compared to 15.6 percent). *Id.* at 29–30. As of 2012, 27.6 percent of African Americans in Ohio did not have health insurance, compared to 17 percent of whites. *Id.* at 30. African Americans have a shorter life expectancy (73.9 years) than whites (78.1 percent). *Id.* African-American children are twice as likely to be born with a low birth weight, and infant mortality rates for African Americans are 2.5 times those of whites. *Id.* Health-related disadvantages impose

unique time, resource, and mobility constraints on voting and, as a result, disproportionately burden African Americans' access to the polls. *Id.* at 31.[8]

- Racially Polarized Voting: Voting in Ohio is racially polarized. In 2004, 84 percent of Ohio's African Americans, as opposed to 44 percent of whites, voted for Democratic presidential candidate John Kerry. *Id.* at 39. In 2008, 97 percent of African Americans in Ohio voted for President Obama, compared to 46 percent of white voters. *Id.* And in 2012, 96 percent of African Americans, 82 percent of Latinos, and only 41 percent of whites in Ohio voted for President Obama. *Id.* Similarly, in the 2010 governor's race, eight percent of African Americans, compared to 58 percent of whites, voted for Republican Governor John Kasich. *Id.* at 40. In the U.S. Senate election that year, nine percent of African Americans voted for Republican Senator Rob Portman, compared to 67 percent of white voters. *Id.* at 41. In 2012, 95 percent of African Americans voted for Democratic U.S. Senator Sherrod Brown, compared to 43 percent of whites. *Id.*

- Racial Appeals: Moreover, elections in Ohio in recent years have featured racialized appeals. During the 2012 presidential election, some members of the electorate attended rallies for Mitt Romney in Ohio wearing t-shirts that read, "Put the White Back in the White House." *Id.* at 45; PX0093 (Photo). Similarly, "Joe the Plumber," who shot to fame during the 2008 election and was a Republican nominee for Congress in 2012, posted an article online entitled "America Needs a White Republican President" and stating, "Wanting a white Republican president doesn't make you racist, it just makes you American." PX0109 (Timberlake Rpt. at 45).

  These overt racial appeals were accompanied by more subtle messages that played on racial stereotypes. For example, during the 2012 presidential election, a group calling itself the "Tea Party Victory Fund" ran a commercial depicting an African-American woman in Cleveland claiming that President Obama gave her a phone and suggesting that he would cater to those on food stamps, disability, and other public benefits. *Id.* at 43-44. Appeals such as this invoke fears of crime and dissatisfaction with policies such as welfare and immigration by playing into prevalent stereotypes about African Americans and other minorities. *Id.* at 42–43.

B. OHIO'S STRAINED ELECTORAL SYSTEM AND EXPANSION OF ACCESS

In the 2004 presidential election, Ohio's electoral system effectively collapsed. Many Ohioans waited several hours to vote. In Franklin County, "some voters waited for more than 10 hours to cast their ballots," PX0113 (Expert Report of Dr. Muer Yang, dated Sept. 18, 2015

[8] Likewise, Ohio's Latino population suffers from persistent socio-economic disparities that increase the costs and burdens of voting. *Id.* at 47 (the poverty rate for "Ohio's small Hispanic population were 24.9% and 27.4%" in 1989 and 2013, respectively).

("Yang Rpt.") at 5), and the final votes were not cast until midnight. Anthony Dep. Tr. 72:14 - 20, Oct. 27, 2015. These long lines occurred due to a lack of sufficient machines, and one scholar found that "'the allocation of voting machines in Franklin County was clearly biased against voters in precincts with high proportions of African Americans.'" PX0113 (Yang Rpt. at 5 (quoting Mebane (2006))). Thousands of voters were deterred from voting. William Anthony, then the chair and now the director of the Franklin County Board of Elections, characterized the 2004 elections as "[t]he worst ever[,]" Anthony Dep. Tr. 68:13, explaining that there was no early voting, polling locations were located in "bad places," machines were old, and that overall, "there was just a lot of confusion." *Id.* at 68:14 - 72:13.

In the wake of this election, Ohio adopted a number of reforms to improve its electoral system. Some of these reforms, including the adoption of a 35-day no-excuse EIP voting period, were adopted voluntarily. *See* Ohio Rev. Code § 3509.01(B)(2)–(3). Others, such as a requirement that the State implement procedures for pre-election planning and post-election reporting and improve the training and recruitment of poll workers, were implemented under compulsion, as a result of *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008). In addition, some of Ohio's largest counties, such as Cuyahoga County, attempted to encourage absentee voting by mail by sending absentee ballot applications to registered votes and, in some cases, prepaid the postage for absentee ballot return envelopes. *See, e.g.*, Perlatti Dep. Tr. 57:13 - 58:5; *id.* at 9:17 - 10:6; McNair Dep. Tr. at 34:1 - 35:11.

These reforms mitigated some of the difficulties that Ohio has had in administering elections. Indeed, hundreds of thousands of voters have used early voting. During "Golden Week" in 2008—the period at the beginning of early voting when voters were able to register and to vote at the same time—67,408 voters cast their ballots and 12,842 voters either registered

for the first time or updated their registrations. In 2012, 89,224 voters voted during Golden Week, and 14,253 registered or updated their registrations. In 2008, "approximately 1.7 million Ohioans cast their ballots before election day, amounting to 20.7% of registered voters and 29.7% of the total votes cast." In Ohio's twelve largest counties, approximately 340,000 voters, or about 9% of the total votes cast in those counties, chose to vote early at a local board of elections office. In 2010, approximately 1 million Ohioans voted early, and 17.8% of them chose to cast their ballots in person." *Obama for Am. v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012)

These reforms were disproportionately used by members of historically disenfranchised groups. For example, African Americans used Golden Week to register or update their registrations and vote at much higher rates than other Ohioans. In 2008, the registration usage rate of Golden Week in high minority counties was 18 percent higher than in low minority/high poverty counties and 32 percent higher than in low minority/low poverty counties. PX0109 (Timberlake Rpt. at 51). In 2012, the rate of Golden Week registrations in high minority counties was 17 percent higher than in low minority/high poverty counties and 56 percent higher than in low minority/low poverty counties. *Id.* Similarly, in Cuyahoga, Hamilton, and Mahoning Counties, voters in homogenous African American census blocks used Golden Week at a rate 3.514 times greater than those in homogeneous white blocks in in 2008; in 2012, the ratio was even greater, at 5.186. PX0110 (Expert Rebuttal Report of Dr. Jeffrey M. Timberlake, dated Oct. 16, 2015 ("Timberlake Rebuttal Rpt.") at 6). In nearly homogeneous census blocks (i.e., those with 90 percent or more of the same race), the use of Golden Week was 4.100 times greater in 2008 and 5.584 times greater in 2012. *Id.*; *see also* Perlatti Dep. Tr. 49:6 - 9 (minority voters from Cleveland use early in-person voters in Cuyahoga County more than whites from the

suburbs); McNair Dep. Tr. 90:24 - 92:4 (African Americans disproportionately use early in-person voting in Cuyahoga County).

But significant problems remained. The wait to cast a ballot on the last day of early voting in Franklin County in 2008 was six hours long, and that election presented a "perfect storm" of problems. Anthony Dep. Tr. 60:15 - 63:3. In Cuyahoga County in 2008, wait times on the final Friday through Monday before Election Day ranged from two to two and a half hours, with lines extending out of the building and down the street. In 2012, they ranged from an hour to hour and a half. Perlatti Dep. Tr. 45:22 - 48:17. On Election Day in both 2008 and 2012, the precinct on campus at Ohio State had a long line to vote. Anthony Dep. Tr. 47:16 - 49:3; Walch Dep. Tr. 101:24 - 102:2, Oct. 30, 2015. In the 2008 primaries, some voters left the polls in Sandusky County due to long lines. Tuckerman Dep. Tr. 19:20 - 20:1, Oct. 28, 2015.

Long wait times to vote, like those Ohio has experienced, clearly disenfranchise voters. The 2008 *Survey of the Performance of American Elections* estimated that 2.6 million people across the country were disenfranchised in 2008 due to long lines. PX0113 (Yang Rpt. at 5). As the evidence will show, 30 minutes is the crucial threshold beyond which voters begin to leave the polls. According to a Marist poll, 27% of respondents said they would wait "30 minutes or less to vote" and another 17% said they would wait 31-60 minutes to vote. *Id.* at 6; *see also* Baldridge Dep. Tr. 28:14 - 28:22, Nov. 4, 2015 (half an hour would be "a real concern for some of our constituents" in Adams County).

C. RETRENCHMENT

In 2008, Barack Obama was elected president. Ohio, which had voted for Republican President George W. Bush in the two prior presidential elections, voted for President Obama, and African American turnout in Ohio reached historic levels.

After the 2008 election, Republican officials and staff on large county boards of elections, members of the General Assembly, and, after he became Secretary of State, Secretary Husted and his staff, schemed to make voting more difficult in a number of ways, including the following: (1) relentlessly seeking to cut back on evening and weekend voting during the early voting period, (2) eliminating Golden Week, (3) adding unnecessary informational requirements for provisional and absentee voting, and (4) preventing county BOEs from opening multiple early voting sites:

- Thus, on December 6, 2009, then-Franklin County BOE Deputy Director Matthew Damschroder wrote then-State Senator Jon Husted with a "summary of the items that are suggestion for enhancing Sub SB 8," a precursor bill to many of the Challenged Laws, that would have among other things: required additional information on provisional ballots in order to be validated, excluded from precinct size calculation voters who have voted by absentee voter ballot in the last two gubernatorial elections, and "require[d] a county board of elections to notify its county commissioners by 10/1 of the prior year before establishing multiple in person voting locations -- this would mean no multiple in person voting locations in 2010." PX0097. Damschroder sent the email from his personal email account to the personal accounts of all of the recipients.

- On August 11, 2010, Damscroder, on behalf of Franklin County BOE Member Doug Preisse, boasted in an email to State Senator Seitz, one of the sponsors of SB 238, that the Republican members of the BOE had managed to reach a "compromise" that reduced the number of evening and weekend early voting hours below what the "Democrat (sic) Board Members" had advocated in order to avoid the then-Democratic Secretary of State from breaking a tie "in favor of the Democrat Party position as she did in 2008." PX0098. Damschroder sent the email from his personal account.

- The Secretary of State's office produced a document entitled "Items Senate Would Like to Address Prior to 2012," which includes, among other things, "Elimination of Golden Week (*22 days*) (emphasis in original)"; "5 Fields on Absentee Ballots"; "Observer Language"; "*End Voting Saturday Before Election Day*"(emphasis in original); "Uniform Application for Absentee Application Postage." PX0099.

In addition, communications between Republican CBOEs and Secretary Husted's office make clear that these officials fully appreciated the significance of Golden Week to Democratic voters.

For instance, on October 9, 2012, Patrick McDonald, the Republican Cuyahoga County Director of Elections, emailed Secretary Husted and Mr. Damschroder about the turnout in Cuyahoga County during Golden Week in 2012: "3,748 people came in and voted today. This totals 9,050 for Golden Week which is a 26% increase over 2008 (without having a weekend) so much for the voter suppression that the Democrats tout." PX000056 (Email from M. Samschroder to M. Masterson, et al. regarding Golden Week voting in Cuyahoga County). Mr. Damschroder forwarded this email to numerous other members of the Secretary's staff.

In 2010, Republican candidates were elected Governor and Secretary of State of Ohio, and Republicans gained control of the State House and retained control of the State Senate. Shortly after, the Republican majority introduced H.B. 194, which would have enacted sweeping changes to Ohio's election laws similar to those challenged in this suit. Among many other restrictions, H.B. 194 would have 1) eliminated the provision permitting voters who did not provide identification to provide that information within ten days after the election; 2) shortened the period for mail-in absentee voting from 35 to 21 days before an election and the period for EIP voting from 35 to 17 days before an election; 3) prohibited county BOEs from mailing unsolicited absentee ballot applications; 4) prohibited a BOE from prepaying the return postage on absentee ballot applications; and 5) permitted election officials to challenge an absentee voter's right to vote if the absentee ballot identification envelope was incomplete. Am. Sub. H.B.194, 129th Gen. Assemb., Reg. Session (Ohio 2011) (repealed Aug. 15, 2012). However, after voting rights groups succeeded in putting a referendum on the 2012 ballot to repeal the law, the Ohio General Assembly repealed H.B. 194 pre-emptively. Am. Sub. S.B. 295, 129th Gen. Assemb., Reg. Session (Ohio 2012)

However, the repeal of HB 194 left in place some inconsistent deadlines for early voting on the final weekend before Election Day that were the result of a related law, HB 224, that the General Assembly had passed but that had not been repealed along with HB 194. *OFA I*, 697 F.3d at 427. As a result, Ohio voters were left with inconsistent deadlines. Nonmilitary voters could cast ballots in-person until 6:00 p.m. on the Friday before the election. But military and overseas voters had two deadlines: Friday at 6:00 p.m., and the close of the polls on election day. *Id*. Secretary Husted took the opportunity offered by this confusion to interpret the law so as to allow military voters to vote early during the final weekend and Monday before the election, but prohibited local boards of election from providing early in-person voting to non-military voters during this period. *Id*.

Various Democratic groups sued to compel Secretary Husted to give non-military voters the same opportunities he had decided to afford to military voters. *Id*. In upholding the injunction against Secretary Husted's attempt to shut down early voting for non-military voters on the final weekend and Monday before Election Day, the Sixth Circuit noted that the evidence showed that "approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and that these voters are disproportionately women, older, and of lower income and education attainment." *Id*. at 431 (quotation omitted). The court rejected the State's argument that that "the burden on non-military voters [was] slight because they have 'ample' other means to cast their ballots, including by requesting and mailing an absentee ballot, voting in person prior to the final weekend before Election Day, or on Election Day itself." As the court explained, "because early voters have disproportionately lower incomes and less education than election day voters, and because all evening and weekend voting hours prior to the final weekend were eliminated by Directive 2012–35, thousands of voters who would have

voted during those three days will not be able to exercise their right to cast a vote in person." *Id.* (quotation omitted).

Following the 2012 election, the Republican majority renewed its effort to make voting in Ohio more difficult. As a result, the General Assembly, on largely party-line votes, enacted SB 200, SB 205, SB 216, and SB 238—a series of bills that restrict voting in many of the same ways that HB 194 would have. After these bills were enacted, moreover, Secretary Husted issued a number of directives that compounded the restrictive effect of these bills. In addition to the directives described below, Secretary Husted issued directives that eliminated the discretion that counties previously had to provide EIP voting on weekends and evenings (Directives 2014-06, 2014-17, and 2014-30). Those directives were challenged in *Ohio State Conference of NAACP. v. Husted*, 2:14-CV-404 (S.D. Ohio). Following discovery and a hearing, Judge Economus issued a comprehensive decision declaring the reductions in the EIP voting period and in EIP evening and Sunday voting hours were unconstitutional and violated Section 2 of the Voting Rights Act of 1965, and issuing detailed preliminary injunctive relief. *NAACP*, 43 F. Supp. 2d at 852-53. Judge Economous made extensive findings of fact, many based on undisputed evidence, and reached many conclusions of law that carry over directly to this case. Those findings and conclusions include, among many others:

- A reduction in the total time available for EIP voting disproportionately burdens African American voters. *Id.* at 841.
- Elimination of Golden Week burdens the voting rights of lower income and homeless individuals. *Id.* at 841-43.
- The presence of vote by mail "cannot completely eliminate or lessen" the burdens imposed by the elimination of Golden Week (and evening/Sunday voting) "to the extent that they become less than significant." *Id.* at 843.
- Neither fraud prevention nor cost savings justify the elimination of Golden Week and the reduction in EIP voting. *Id.* at 843-47.

- SB 238 and the reduction in EIP voting opportunities "interact with the historical and social conditions facing African Americans in Ohio to reduce the opportunity to participate in the political process relative to other groups of voters." *Id.* at 849-50.

- The elimination of Golden Week's same-day registration will disproportionately impact African Americans. *Id.* at 850.

- The burdens created by SB 238 "arise largely from the lower socio-economic standing of African-Americans in Ohio, which … can be seen as resulting from past and current discrimination." *Id.* at 850.

- Defendants' justifications for SB 238 are "relatively weak" and "tenuous at best." *Id.* at 850-51.

The Sixth Circuit engaged in its own searching examination of the record evidence, upheld the district court's findings and conclusions across the board, and affirmed the preliminary injunction without qualification. *NAACP*, 768 F.3d at 533-60. As discussed above, the Sixth Circuit subsequently vacated its decision and the underlying preliminary injunction for reasons wholly unrelated to the merits. *See* p. 2 & n.1 *supra.*

Rather than proceeding to trial, the parties settled the litigation in April 2015. Pursuant to their settlement agreement, every Ohio county will provide EIP voting on the final two Saturdays and Sundays before the presidential general election in November 2016, and evening EIP voting hours until 7 p.m. during the final week before the election. *See* Settlement Agreement, *Ohio State Conf. of NAACP*, No. 2:14-cv-404 (S.D. Ohio Apr. 17, 2015), Dkt. No. 111-1.

D. CHALLENGED PROVISIONS

In this case, Plaintiffs are challenging the following provisions (the "challenged provisions"):

- **Elimination of Golden Week**: SB 238 eliminated the same-day registration period (known as "Golden Week") that had previously been in place in Ohio.

- **One EIP Location**: Under Ohio law, no county can have more than one early in-person ("EIP") voting location. See Ohio Rev. Code § 3501.10(C).

- **Reduction in DREs**: SB 200 changed the law regarding the minimum number of direct recording electronic voting machines ("DREs") that a county must have if it uses DREs as its primary voting device (hereinafter a "DRE county"). Under the law in place prior to SB 200, DRE counties were required to have a minimum of one DRE for every 175 "registered voters" in the county, with the number of registered voters being the higher of (1) the total number of registered voters as of the October deadline for voter registration for the last presidential election or (2) the average of the total number of registered voters in the county as of the October deadline for the last two presidential elections. As a result of SB 200, the total number of absentee ballots cast and counted in the last presidential election are subtracted from the number of "registered voters," meaning that counties will be permitted to have fewer DREs than they were previously required to have.

- **Reduction in DREs**: Directive 2014-26 permits CBOEs to reduce the number of "registered voters" used for the DRE calculation described above by subtracting voters who failed within 30 days to respond to a confirmation-of-residence notice sent out pursuant to the statewide voter records maintenance program, as well as the number who had requested an absentee ballot for the upcoming election. The effect will be a further reduction in the minimum number of DREs that counties must have.

- **Restrictions on Absentee Ballot Mailings**: SB 205 prohibits any public office, including CBOEs, county Boards of Commissioners, and individual town and city governments, from mailing unsolicited absentee ballot applications; prohibits officials from including pre-paid postage for returning absentee ballots; and prohibits the Secretary from mailing unsolicited absentee ballot applications absent specific authorization from the General Assembly.

- **Exclusion of Certain Voters from Absentee Ballot Application Mailings**: Despite SB 205's general prohibition on mailing unsolicited absentee ballot applications, Secretary Husted was given authority to mail such applications ahead of the November 2014 election. Pursuant to Directive 2014-15, however, Secretary Husted excluded from that mailing "inactive" or "active-confirmation" voters—who are fully eligible to cast a ballot—if they did not vote in either the 2010 or 2012 elections. As a result of this decision, more than a million registered voters were excluded from this mailing.

- **Unnecessary Informational Requirements**: SB 205 and SB 216 added categories of information that must be provided on absentee and provisional ballots, respectively. In particular, SB 205 requires that absentee identification envelopes include five categories of information, including address and date of birth. Similarly, SB 216 adds to the type of information that voters casting provisional ballots must include on their provisional ballot affirmation form by requiring such voters to provide their current address and date of birth.

- **Other Provisional Ballot Restrictions**: SB 216 reduces from 10 to seven days the period of time that voters have to cure a failure to provide proof of identity on Election Day. It also bars election officials (with limited exceptions) from completing on a voter's behalf the information required on the provisional ballot affirmation form.

- **Continuation of "Right Church, Wrong Pew"**: Under SB 216, CBOEs have discretion—but are not required—to consolidate poll books and multi-precinct polling locations.

E. LEGISLATIVE HISTORY OF THE CHALLENGED PROVISIONS

The challenged statutory provisions (aside from the limitation on early voting locations) were debated and enacted in late 2013 and/or early 2014. Speaking in favor of SB 200's reductions in DRE minimums, Rep. Ruhl, who acknowledged that there were insufficient machines, causing people to vote at 1 a.m. six years earlier, said that the problem of long lines had been resolved with early voting and that, absent the change in the DRE minimum, Knox County would have to purchase 42 additional voting machines. PX0016 (House Tr. 12/11/13 at 24) (Rep. Ruhl). Representative Fedor, who noted that long lines were "the reason why we had the [DRE minimum] language in the first place," *id.* at 12 (Rep. Fedor), offered an amendment that "would have exempted smaller counties who did not experience the long lines that were the reason the minimum requirement was adopted in the first place." *Id.* at 10 (Rep. Clyde); *see also id.* at 13 (Rep. Fedor). It was rejected. *Id.* at 18-19.

With respect to SB 205, Rep. Dovilla asserted that the bill was consistent with an agreement struck between Secretary Husted and a Democratic county executive "whereby every registered voter in Ohio, not just those residing in one urban county, received an application." PX0012 (2/19/14 House Tr. at 5) (Rep. Dovilla). One supporter said, "[I]f you are allowing one local board of elections and it happens to be in an urban county to be able to send out absentee ballot request forms with prepaid postage when most of the rural counties can't afford it, you are definitely disenfranchising the voters in the rural counties because that isn't equal," and that "[h]aving taxpayers pay to target specific individuals in specific counties to try to drive up vote totals, as my colleague also said, that does create a difference in how you treat equal access and equal votes." *Id.* at 70-71, 73. The supporter said he had "some studies from the University of

Akron" that showed that the percent of absentee ballots counted "in most of the rural counties . . . was almost 100 percent" and that "only really the urban counties . . . had the problems. . . . So from that standpoint they're counting all the votes or as many votes as they can in the rural counties. Seems like the urban counties are having the problem." *Id.* at 72.

In support of SB 216's reduction from ten to seven days of the cure period for provisional ballots cast due to a lack of ID, Rep. Dovilla said, "As many of us know, Ohio was the subject of considerable criticism during the 2012 election for its ten-day rule regarding provisional ballots. Specifically, if that presidential election had come down to counting Ohio's provisional ballots, current law would have required boards of elections to wait ten days before counting provisional ballots." PX0014 (2/26/14 House Tr. at 5) (Rep. Dovilla). He then acknowledged, however, that "[t]he change proposed in this bill will retain the requirement that the actual count begin on the tenth day, but requires the provisional voter to produce ID by the end of the seventh day." *Id.*

Rep. Lundy introduced an amendment that "would not require that missing or imperfect information would . . . cause that ballot to be thrown out. If enough information is provided to determine the identity of the eligible voter, that vote should be counted." *Id.* at 19; *see also* PX0008 (11/20/13 Sen. Tr. at 31) (Sen. Turner) ("We should be encouraging provisional voters to provide as much information as possible but we should not require it. If the Board of Elections has enough information to determine who a voter is then we should count their ballot."). The amendment was defeated. PX0014 (2/26/14 House Tr. at 21).

SB 238, which eliminated Golden Week, was justified on the grounds that eliminating same-day registration ("SDR") would provide CBOEs with adequate time to verify registrations, whereas keeping SDR would "perpetuate[] an election system that is susceptible to voter fraud while also undermining citizen's confidence in our electoral system." PX0012 (2/19/14 House

Tr. at 78-79) (Rep. Dovilla); *accord* PX0010 (11/20/13 Sen. Tr. at 5) (Sen. LaRose); *see also* PX0012 (2/29/14 House Tr. at 99) (Rep. Brenner) ("I've got a concern that there could be voter fraud. And just because you don't see it doesn't mean it isn't happening."). Sen. Turner pointed out, however, that ballots cast during Golden Week were not counted immediately. PX0010 (11/20/13 Sen. Tr. at 14) (Sen. Turner). Sen. Skindell noted that he had "heard no evidence that Golden Week undermines the confidence of our citizens. In fact, I have heard from many citizens that they appreciated that opportunity." *Id.* at 22-23 (Sen. Skindell). And Senator Tavares quoted opponents of the elimination of Golden Week, including a representative from the League of Women Voters who said that voters' perceptions that the system is working improve when they are able to cast their ballots at variety of times, without long waits. *Id.* at 31-32 (Sen. Tavares).

Opponents of these bills emphasized that the bills would make voting more difficult, particularly for minorities. *See* PX0012 (2/19/14 House Tr. at 40-41) (Rep. Reece) (citing editorials from the *Cleveland Plain-Dealer*, Ohio.com, and the *Toledo Blade* weighing in against SB 205 because it would make voting more difficult); *id.* at 55 (Rep. Ramos) (SB 205 "disenfranchises those amongst us who have historically been disenfranchised the most."); PX0006 (11/6/13 Sen. Tr. at 7) (Sen. Turner) ("This legislation is unnecessary and it makes voting harder for folks."); *id.* at 26 (Sen. Tavares) (noting that minority voters are disproportionately burdened by the changes being made to election laws); PX0014 (2/26/14 House Tr. at 11) (Rep. Clyde) (SB 216 "makes it harder to count people's votes and therefore is more voter suppression."); PX0008 (11/20/13 Sen. Tr. at 27) (Sen. Tavares) (discussing SB 216, Senator Tavares quoted an individual from the Ohio Alliance for Retired Americans Educational Fund who said that seniors, young people, and people of color would be disproportionately

disenfranchised); PX0018 (2/19/14 Sen. Tr. at 9-10) (Sen. Turner) (SB 205 "does nothing to advance the cause of expanding and protecting the right to vote in the great state of Ohio. It does everything, everything, to put up more road blocks and barriers to protecting the right to vote."). *See generally* PX0016 (12/11/13 House Tr. at 21-22) (Rep. Reece) (stating that "[w]e are changing rules very quickly," that there previously had been a bipartisan bill when Secretary Husted was the speaker, and that "they passed that bill and they said wait a minute, the wrong people are voting, now we gotta come up with a way to stop those folks, and we're gonna change the -- change the rules.").

With respect to the elimination of Golden Week, Senator Turner said, "We should not be rolling back the progress that we have achieved in the aftermath of the disastrous 2004 election cycle in Ohio. Ohio in 2004 looked a lot like Florida in 2000. People forced to stand in long lines for hours and some voters giving up altogether." PX0010 (11/20/13 Sen. Tr. at 16). She explained that eliminating Golden Week was "going to have a disproportionate impact on the African American community in this state." PX0018 (2/19/14 Sen. Tr. at 19) (Sen. Turner). In support, she noted the "abundance of data indicating that African American voters rely heavily on early voting and that any cutbacks will fall disproportionately on them. . . . For example, two studies by the Northeast Ohio Voter Advocates, including one looking at five counties -- Cuyahoga, Franklin, Hamilton, Summit, Montgomery -- determined that African American voters disproportionately utilize early in-person voting." *Id.* at 20 (Sen. Turner). She continued, "A report published online by the Lawyers Committee for Civil Rights explaining early voting in Cuyahoga County during the 2008 general election and a more recent analysis by the ACLU examined the 2012 election . . . found that in both elections black voters accounted for over 75 percent of all early in-person votes and that black voters were almost 20 times more likely to use

early in-person voting than were white voters." *Id.* In addition, Senator Turner noted that Golden Week was being eliminated, with knowledge that it would have "a disproportionate impact on the African American community," "during Black History Month." *Id.* at 20-21 (Sen. Turner).

Rep. Reece stated that she represents constituents who are "angry when they walk outside their house and there is a voter intimidation billboard up," adding, "And any of you had had it in front of your house, please see me after this, because I don't think you have seen it in front of your house, I have." PX0012 (2/19/14 House Tr. at 41). In another session, Rep. Ramos pointed out, "If this isn't voter suppression, then you probably wouldn't have to say that[.]" PX0014 (2/26/14 House Tr. at 47).

Opponents also explained that SB 205's and SB 216's additional information requirements for absentee and provisional ballot envelopes were inconsistent with federal civil rights law. *See* PX0012 (2/19/14 House Tr. at 35-36) (Rep. Reece) (SB 205 is inconsistent with the Civil Rights Act of 1964's prohibition against denying the right to vote because of an error or omission on any record or paper relating to any act requisite to voting); 11/6/13 Sen. Tr. at 15 (Sen. Smith) (SB 205 "likely violates federal law which states that no voter shall be disenfranchised due to omission or error if it's not material"); *id.* at 30 (Sen. Turner) ("The provision in [SB 205] that allows for boards of elections to throw out ballots because the envelope is not filled out completely, to me, violates on my reading of the 1964 Civil Rights Act."); PX0014 (2/26/14 House Tr. at 11, 13) (Rep. Clyde) (SB 216 "makes it harder to vote by requiring voters to provide more unnecessary information on their provisional ballot envelope" and "violates the Civil Rights Act by throwing out people's votes because of insignificant paperwork issues. Senate Bill 216 functions as a literacy test.").

Even some supporters of these bills effectively acknowledged that they would make voting more difficult. In advocating for SB 205, Representative Dovilla, who presented the bill, said, "Reasonable people recognize that voting in our representative republic is not something to be considered a mere convenience to be undertaken only if made easy by government." PX0012 (2/19/14 House Tr. at 3) (Rep. Dovilla). He also said that, "[w]hen enacted, [SB 205] will no longer allow some counties to push unsolicited absentee voting applications and offer pre-paid postage on such applications and ballots," and that SB 205 "does change the level of convenience associated with force-feeding applications and ballots to voters, but unlike some, I believe the residents of this state don't need to be spoon-fed everything from government." *Id.* at 4, 10 (Rep. Dovilla). Regarding SB 216, Rep. Brenner said, "I believe that it defies, to me, common sense that a voter will just suddenly forget . . . what their address was or forget to sign it. Now, it is possible that it happens, but to say that this is going to go on on a mass scale and that all of a sudden thousands or hundreds of thousands or tens of thousands of voters are going to suddenly forget to do these things and this is somehow voter suppression, to me, is an absurd argument." PX0014 (2/26/14 House Tr. at 17). As noted above, moreover, at least one of the restrictions (SB 205) targeted efforts to facilitate voting in an "urban" county. Rep. Ramos, an opponent of that bill, noted the obvious implication of restricting methods of voting that "urban" areas had relied upon: "[T]he largest communities of African Americans live in the largest communities in our state, live in the cities. The largest communities of Hispanics, my people, live in the cities. So when you are disenfranchising city voters, you are in fact disenfranchising African American and Hispanic voters." PX0012 (2/19/14 House Tr. at 53) (Rep. Ramos).

Golden Week was eliminated through unusual fast-track procedures. SB 238 was introduced "just eight days" before the Senate voted on it and "[t]here were only two hearings

held within" the 24 hours before the vote, even though the elimination of Golden Week was "an incredibly important topic." PX0010 (11/20/13 Sen. Tr. at 9) (Sen. Gentile). Moreover, Rep. Heard explained that, during the debate on SB 238 in the House, "as the testimony was given and our member stood to respond, we were gaveled down," which she noted was "disrespectful to [her] as a leader of the Democratic caucus" and "insulting to [her]16 members also called out by name to be gaveled down [to] have this House adjourned again with no opportunity for legislative response." PX0014 (2/26/14 House Tr. at 59); *see also* PX0018 (2/19/14 Sen. Tr. at 9) (Sen. Turner) ("I saw what happened in the House in terms of discussion being cut off.").

All four bills—SB 200, SB 205, SB 216, and SB 238—passed largely or strictly on party lines. PX0033, PX0034, PX0035, PX0036, PX0037, PX0038, PX0119 (Ohio Senate Journals). And no minority members voted for any bill.

F. PLAINTIFFS

The Ohio Democratic Party ("ODP") is a political organization dedicated to electing candidates of the Democratic Party to public office throughout the State of Ohio. ODP has thousands of members from across Ohio who regularly support and vote for Democratic candidates. ODP has been, and will continue to be, extensively involved in voter registration drives and GOTV activities. Additionally, many of ODP's members are likely to cast absentee ballots, either by EIP or by mail.

The laws challenged in this case harm ODP by disproportionately reducing the turnout of Democratic voters and decreasing the likelihood that ODP will be successful in its efforts to elect Democrats to office. S.B. 238's elimination of Golden Week and the limitation of one EIP location per county burdens ODP's efforts to register voters and get them to the polls, particularly poor, minority, and student voters who utilize EIP at high rates. The reductions in

the number of DRE machines resulting from S.B. 200 and Directive 2014-26 will likewise burden ODP's efforts to turn out the vote in counties that use those machines. And, the long lines that will result from these provisions will cause ODP to divert resources that otherwise would have been put to other productive uses. As a result of S.B. 205, ODP will be forced to divert its resources to educate voters about absentee voting. ODP's efforts to persuade its members to vote early, including poor and minority voters, have also been burdened by the exclusion of those registered voters who have received but not responded to a confirmation-of-residence notice from the Secretary of State's mailing of unsolicited absentee ballot applications.

The Democratic Party of Cuyahoga County ("DPCC") is a political organization dedicated to electing candidates of the Democratic Party to public office in Ohio. Cuyahoga County has a racially diverse population. Approximately 30 percent of its inhabitants are African American, compared to the 12.5 percent for all of Ohio. DPCC has thousands of members who regularly support and vote for Democratic candidates. CCDP has also been, and will continue to be, extensively involved in voter registration drives and GOTV activities. Many of DPCC's members are likely to cast absentee ballots, either by EIP or by mail.

The laws challenged in this case harm DPCC by disproportionately reducing the turnout of Democratic voters and decreasing the likelihood that DPCC will be successful in its efforts to elect Democrats to office. The elimination of Golden Week and the limitation of one EIP location per county burdens DPCC's voter-registration and GOTV efforts, particularly among the poor, minority, and student voters who utilize EIP at high rates. Its efforts to persuade its members to vote early, including poor and minority voters, have also been burdened by the exclusion of those voters who have received but not responded to a confirmation-of-residence notice from the Secretary of State's mailing of unsolicited absentee ballot applications. Likewise,

as a result of S.B. 205, DPCC will be forced to divert its resources to educate voters about absentee voting.

The Montgomery County Democratic Party ("MCDP") is a political organization dedicated to electing candidates of the Democratic Party to public office in Ohio. Montgomery County has a racially diverse population as approximately 21 percent of its inhabitants are African American. Montgomery County uses DRE machines as its primary voting device. MCDP has thousands of members who regularly support and vote for Democratic candidates. Many of MCDP's members are likely to cast absentee ballots, either by EIP or by mail. MCDP has also been, and will continue to be, extensively involved in voter registration drives and GOTV activities.

The laws challenged in this case harm MCDP by disproportionately reducing the turnout of Democratic voters and decreasing the likelihood that MCDP will be successful in its efforts to elect Democrats to office. The elimination of Golden Week and the limitation of one EIP location per county burdens MCDP's voter-registration and GOTV efforts, particularly among the poor, minority, and student voters who utilize EIP at high rates. The long lines that will result from S.B. 200 and Directive 2014-26's reductions in the number of DRE machines will force MCDP to divert resources that otherwise would have been put to other productive uses. Its efforts to persuade its members to vote early, including poor and minority voters, have also been burdened by the exclusion from the Secretary of State's mailing of unsolicited absentee ballot applications of those voters who have received but not responded to a confirmation-of-residence notice. Similarly, S.B. 205 burdens MCDP's efforts by forcing it to divert its resources to educate voters about absentee voting.

Jordan Isern is a resident of Columbus, which is in Franklin County, Ohio's second-most-populous county. Isern is a student at The Ohio State University and has been involved in GOTV and voter registration initiatives on campus since 2012. In that role she has mobilized other students to vote, both early and on Election Day.

Isern is registered to vote in Ohio. In 2012, she voted early in person during the evening and waited between 30 and 45 minutes to vote. Without the enhanced early in person voting opportunities provided by Franklin County, which were necessary to meet the demands of its approximately 800,000 registered voters, she would have found it very difficult, if not impossible, to vote in the 2012 presidential elections because her midterms fell on Election Day and the wait time at the Ohio State on-campus voting location was approximately two hours. Because turnout in the 2016 presidential election is also expected to be high, she will likely face similar obstacles to voting on Election Day and will be burdened by the inequitable distribution of EIP voting opportunities resulting from the one-EIP-location-per-county rule. The reductions in the opportunities for EIP voting will also hinder her efforts to mobilize students to vote early.

As a student, Isern moves frequently and thus incurs increased burdens in maintaining up-to-date voter registration information. Isern's frequent moves make it more likely that she will be sent a confirmation notice pursuant to Ohio's voter registration maintenance program to which she will not respond, with the result that she is more likely to be excluded from the statewide mailing of absentee ballot applications. Isern is originally from California and has a California driver's license which makes her more likely than the population as a whole to be forced to cast a provisional ballot. Due to her frequent changes in residence, she is less likely to possess an alternative form of proof of identification, such as an utility bill, which also increases the likelihood she will have to vote provisionally. And, due to the heightened identification

requirements put in place by S.B. 216, she is at a greater risk that her provisional ballot will not be counted.

Carol Biehle is a resident of Loveland, Ohio. She is registered to vote in Ohio as a Democrat. For the past 20 years she has voted and served as a poll worker at a multi-precinct voting location in Clermont County. Clermont County did not consolidate its poll books at multi-precinct voting locations in 2014. The inconsistent voting system created by S.B. 216's grant to each county BOE the discretion not to consolidate the poll books at multi-precinct locations deprives Biehle of the right to have her vote counted according to uniform statewide standards.

Reverend Bruce Butcher is an African-American pastor at the St. Paul African Methodist Episcopal Church in Akron, Ohio. He is registered to vote in Akron as a Democrat. Akron, which is in Summit County, is Ohio's fourth most-populous county. Summit County has approximately 370,000 registered voters, a vastly greater number than most of Ohio's 88 counties. Reverend Butcher has participated in voter-registration and GOTV drives in numerous elections in Ohio, including the 2008 and 2012 presidential elections and the 2010 and 2014 midterms. Through these efforts, he has encouraged and helped many people to register and vote early on the same day during "Golden Week" and to vote early on weekends as part of "Souls to the Polls" drives. The elimination of "Golden Week" hinders his ability to register voters in his community and to mobilize them to vote early. Similarly, the inequitable distribution of EIP voting locations has discriminatorily burdened, and will continue to discriminatorily burden, his efforts to mobilize members of his community to vote early.

III. ARGUMENT

A. BURDICK

The First and Fourteenth Amendments safeguard the fundamental right to vote from undue burdens. Where challenges are brought to restrictions on the right to vote, such challenges "cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (citation omitted). Rather, courts must "weigh 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting Anderson, 460 U.S. at 789).

This framework—the *Anderson-Burdick* framework—applies a "flexible" sliding scale, in which "the rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [voting rights]." *Id.* While strict scrutiny is applied to severe restrictions on the right to vote and rational-basis review applies to laws that impose incidental burdens or no burdens at all, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling opinion); *NAACP*, 768 F.3d at 538 , the majority of the cases fall in between these extremes and are "subject to ad hoc balancing." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995); see also id. at 1221 n.6 (rejecting proposition that "election laws that impose less substantial burdens need pass only rational basis review"); *see, e.g., NAACP*, 768 F.3d at 545, 548 ("more piercing scrutiny" than mere rational basis review is required if the elimination of early voting opportunities imposes "significant" burdens). Further, the Supreme Court has made clear that,

"[h]owever slight [a] burden [on voting] may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Crawford*, 553 U.S. at 191 (controlling opinion) (citation and quotation marks omitted); *see also McLaughlin*, 65 F.3d at 1221 n.6 ("[A] regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational.").

In weighing competing interests, courts applying the *Anderson-Burdick* test must look skeptically upon vague or speculative state interests. A state must identify its "precise interests" in a challenged provision. *Burdick*, 504 U.S. at 434. Moreover, a state must provide evidence to demonstrate a link between the challenged provisions and the state's purported interest. *See NAACP*, 768 F.3d at 547-48 (explaining that valid state interest is insufficient if the challenged practice is "not logically linked to" it and that, while "scattered historical examples of voter fraud" may be sufficient to justify a restriction under rational basis review, such evidence was insufficient under "more searching review" required for a significant burden); *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (restriction unconstitutional where state provided "no evidence" to support its "vague" justifications).

In determining how severely a measure burdens the right to vote, the pertinent question is not the extent to which the measure burdens all citizens or voters generally but rather the extent to which it burdens individuals who are impacted by it. *See Crawford*, 553 U.S. at 198, 201 (controlling opinion) (relevant burdens "are those imposed on persons who are eligible to vote but do not possess a current photo identification" and assessing burdens on "indigent voters"); *see also id.* at 186, 191 (controlling opinion) (explaining that a voting restriction could be found unconstitutional based on burdens it opposes "on a political party, an individual voter, or a

discrete class of voters" and noting that poll taxes violate the Fourteenth Amendment, even if they are not generally burdensome, because of the burdens they impose on poor voters); *NAACP*, 768 F.3d at 543-44 (assessing burdens on "African American, lower-income, and homeless voters"). Courts have thus held unconstitutional laws that burden only a small percentage of voters. *See Anderson*, 460 U.S. at 784 (invalidating law that affected the approximately 6% of the electorate who supported Anderson); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012) ("NEOCH") (law that affected 0.248% of total ballots cast likely unconstitutional). *See generally League of Women Voters of N.C. v. North Carolina*, 769 F.3d 244, 244 (4th Cir. 2014) ("[E]ven one disenfranchised voter—let alone several thousand—is too many."). As set forth below, the burdens imposed by the challenged provisions—both individually and in combination with each other—outweigh the State's interest in these provisions.

1. Elimination of Golden Week

The elimination of Golden Week will severely burden the right to vote. Moreover, Dr. Canon has explained that, based on his nationwide study of the impact of same-day registration and early voting on turnout, the expected increase in turnout that would result from five days of same-day registration—the length of Golden Week—would be tens of thousands of votes. PX0106 (Expert Report of David Canon, dated Oct. 16, 2015 ("Canon Rpt.") at 8-9); Canon Dep. Tr. 46:9 - 48:11, Nov 5, 2015.

Further, because the elimination of Golden Week resulted in the elimination of several days of early voting, this change will increase wait times to vote at the polls. Approximately 67,408 voters cast ballots during Golden Week in 2008, and about 89,224 voters cast ballots during Golden Week in 2012. PX0109 (Timberlake Rpt. at 51). While some of the presumably

similar number of voters who would have voted during Golden Week in 2016 likely will not be able to cast a ballot at all (meaning that the elimination of Golden Week has caused them not to vote), most of these voters will instead cast their ballots during other parts of early voting or on Election Day, causing further strain on the administration of the 2016 election and producing longer lines. *See* PX0113 (Yang Rpt. at 12) ("S.B. 238, which eliminates the 'Golden Week', will make voters who would have voted during the Golden Week . . . vote either in the rest of the early voting period, or on Election Day, or not . . . at all."); *id.* ("Queueing theory has concluded that more arrivals cause longer wait time[s]."); *id.* at 16 ("Because of the elimination of 'Golden Week,' some of the 'Golden Week' voters will likely vote during the remaining early voting period. . . . According to queuing theory, the increased voter turnout will cause longer wait times.").

In contrast, the benefits to the State from the elimination of Golden Week are minor. While the State will likely assert that the elimination of Golden Week saves money, numerous election administrators have explained that the costs of Golden Week are relatively minor. *See, e.g.*, Perlatti Dep. Tr. 35:11-25 (Golden Week costs about $40,000 out of $15 million budget); Breckel Dep. Tr. 31:4-7, Nov. 6, 2015 ("not a great impact"); Munroe Dep. Tr. 61:7-13, Oct. 22, 2015 (only 7% of average monthly budget). Moreover, such administrative cost savings cannot justify a significant burden on voting rights, much less the severe burden at issue here. *See Ohio NAACP II*, 768 F.3d at 549 (cost-saving rationale insufficient without evidence that defendants would "struggle" with costs of maintaining status quo).

Nor is the elimination of Golden Week justified by concerns about voter fraud. And the facts developed in this case will reaffirm that conclusion. *See, e.g.*, First Damschroder Dep. Tr. 53:3-4, 53:13 - 55:1 (acknowledging that voter fraud is rare and refusing to provide a yes or no

answer to the question whether Golden Week caused a heightened risk of fraud); Perlatti Dep. Tr. 38:23 - 39:11; Terry Dep. Tr. 65:19-66:1, Oct. 21, 2015; PX0107 (Minnite Rpt. at 19 (noting that event potential voter fraud "is a miniscule faction of the more than 5.6 million votes case in Ohio in 2012)); *id.* at 20 (concluding that risk of reducing voter access by challenged reforms not justified by empirical record that voter fraud in Ohio is rare). Accordingly, the burdens imposed by the elimination of Golden Week far outweigh the benefits of that change in the law, and it thus cannot survive scrutiny under the Equal Protection Clause.

2. One EIP Location Per County

The portion of the early voting law that limits counties to one early voting location, irrespective of a county's size, also imposes severe burdens on the right to vote. One burden is plain from the face of the law: many voters must travel far greater distances to vote early than they would have to travel if additional early voting locations were open. *See, e.g.*, PX0114 (Expert Rebuttal Report of Dr. Muer Yang, dated Oct. 16, 2015 ("Yang Rebuttal Rpt.") at 4-5 (explaining that, with one early voting location, "[s]ome voters may need to travel a significant amount of time to go to the polling station" and that, even if Franklin County's early voting location were in the geographic center of the county, voters in Hillard, Ohio, would have a round trip of over 40 minutes to vote (with a car and no traffic))); Munroe Dep. Tr. 44:14-45:18. This burden is plainly most onerous on the portion of the population that lacks access to means of transportation with which they can conveniently access their county's sole early voting location.

Unsurprisingly, "[e]xtensive literature has concluded that polling station location can impact voter turnout." PX0114 (Yang Rebuttal Rpt. at 5.) Indeed, one study found that "the longer the road distance, the lower [the] likelihood of voting, and conclude[d] that 'small differences in distance from the polls can have a significant impact on voter turnout.'" *Id.*

(quoting Haspel and Knotts (2008)). Another study "used official statistics from the Ohio Secretary of State and survey data from the Akron Buckeye Poll and found that 'convenience was the most common reason that voters cast a ballot early' and [that] early voting 'is closely tied to the logistics of getting to the polls.'" *Id.* (quoting Kaltenthaler et al. (2010)).

Experience in Ohio further demonstrates the inadequacy of a single early voting location in large counties. As explained above, early voting locations in Ohio's largest counties have had inordinately long lines. This severe burden on voting rights is wholly unjustified. While individual counties may have reasons not to open additional early voting locations, there is no reason for them to be barred from making that judgment—as they are under current law. The evidence will show that there is no justifiable reason for counties not to have *the discretion* to open additional early voting locations. *See, e.g.*, First Damschroder Dep. Tr. 111:24 - 113:10; Perlatti Dep. Tr. 54:6-10; McNair Dep. Tr. 99:12 - 20; Troy Dep. Tr. 88:23-89:8, 90:5 - 91:25, 113:10-20; Kelly Dep. Tr. 70:8 - 11, Oct. 27, 2015; Baldridge Dep. Tr. 31:24 - 32:3, 33:12-17 Nov. 4, 2015; Breckel Dep. Tr. 57:2-16; Kendall Dep. Tr. 114:25-5, Nov. 6, 2015. Absent any justification at all, this law cannot survive. *See generally Crawford*, 553 U.S. at 191 (controlling opinion) ("However slight [a] burden [on voting] may appear, . . . it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation.").

3. Reductions in DREs

The reductions in the number of DREs that DRE counties are required to have will likewise severely burden the right to vote. There is no dispute that SB 200 and Directive 2014-26 will have the effect of reducing the number of DREs required in DRE counties. PX0113 (Yang Rpt. at 8-12).

To the extent that counties' DRE supply falls under the number required under the law previously in place, the effect of this change in the law will be longer wait times to vote. As Dr. Yang's expert report demonstrates, counties that reduce their DRE stock in line with the change to the new minimum requirements will see significant increases in wait times, with a number of voters who would have waited approximately half an hour under the old rule now waiting for approximately an hour and other voters who would have waited for less than 10 minutes now waiting for over half an hour. *See* PX0113 (Yang Rpt. at 10, Tbl. 2).

Moreover, this does not account for the fact that DREs are aging technology and liable to fail. *See, e.g.*, Kendall Dep. Tr. 27:6 - 12; Munroe Dep. Tr. 26:13 - 27:3; Troy Dep. Tr. 53:14 - 55:4. As the testimony in this case will show, Cuyahoga County was told by the State that it could no longer use DRE machines precisely because they were crashing, Perlatti Dep. Tr. 30:7-13, and Franklin County has also had to use its own budget to purchase an additional three to four hundred machines. Anthony Dep. Tr. 44:19 - 46:16. Thus, there is a real possibility that counties that hew to the DRE minimums could see even worse outcomes than Dr. Yang's analysis suggests.

The state interest in this is purely financial: counties will not have to acquire new DREs or repair as many old ones if they are permitted to have fewer functioning DREs. But the State has made no effort to quantify these costs, and any interest is therefore speculative. And, again, such administrative costs cannot outweigh the severe burden on voters—both in terms of the costs of their time and the decrease in turnout that will result from longer lines at the polls—that will result where counties see a reduction in their DRE stock.

Further, it is no answer that some counties will exceed the statutory minimums for DREs. To the extent that this is the case, the changes to the DRE formula serve no purpose and

therefore cannot be justified. Thus, the relevant question is how the changes to the DRE formula will impact voters where it is having an effect. Because, as set forth above, the burdens on voting from those changes outweigh the benefits to the State, they must be struck down under the Equal Protection Clause.

4. Restrictions on Absentee Ballot Mailings

As noted above, SB 205 prohibits local and county governments from sending out unsolicited absentee ballot applications; prohibits all officials from including pre-paid postage for returning absentee ballots; and prohibits the Secretary from mailing unsolicited absentee ballot applications absent specific authorization from the General Assembly. The burdens that these provisions impose on voting are plain: Unsolicited absentee ballot mailings had made voting absentee by mail easier than it otherwise would have been, *see* Poland Dep. Tr. 67:14-68:15, Oct. 29, 2015, and prepaid postage ensured that the cost and inconvenience of obtaining a stamp and determining how much postage was required did not prevent voters from submitting absentee ballots. McDonald Dep. Tr. 65:8-66:7, Oct. 28, 2015 (explaining that Cuyahoga previously sent absentee ballots with prepaid postage); Perlatti Dep. Tr. 116:13-117:1 (same); Tuckerman Dep. Tr. 73:17-74:21 (discussing how elderly individuals may not have stamps) . Because these provisions make it more difficult for many voters to cast absentee ballots, they will in turn have the effect of causing some voters to vote in person, either during early voting or on Election Day, resulting in increased wait times to vote. *See* PX0113 (Yang Rpt. at 20-21). *See generally* Allen Dep. at 208:16-209:13 (acknowledging that adding voters to the system is likely to result in longer wait times).

To be sure, the Secretary anticipates sending unsolicited absentee ballot applications to voters for the 2016 election, First Damschroder Dep. Tr. at 81:11 - 13, but, for several reasons,

this fact mitigates SB 205's burden only to a limited extent. *First*, this mailing is pertinent only to one election and the statute is not time-limited, meaning that SB 205 will likely result in the end of the mailing of unsolicited absentee ballots. *Second*, even the Secretary is not permitted to send absentee ballots with prepaid postage. SB 205 § 3509.03(I). *Third*, the evidence will show that unsolicited absentee ballot mailings from the Secretary are less likely to be effective than are such mailings from CBOEs, which have had the opportunity to study their local electorates and to determine when such mailings are most likely to be effective. *See* Perlatti Dep. Tr. 41:23 - 43:22, 57:13 - 66:12 (discussing Cuyahoga's robust unsolicited mail program prior to SB 205). *Fourth*, the Secretary has not and will not mail unsolicited absentee ballot applications to fully eligible voters in "inactive" or "active-confirmation" status who did not vote in 2012 or 2014, Directive 2014-15; First Damschroder Dep. Tr. 80:7 - 81:21, the result of which will be that over a million eligible voters will not receive unsolicited absentee ballot applications and that CBOEs are unable to step in and send unsolicited absentee ballots applications to such eligible voters.

The benefits to the State from these restrictions on absentee voting are limited. While defendants will presumably argue that this measure promotes uniformity, whatever merit that rationale has in the context of preventing mailings by local and county governments, moreover, it plainly does not apply to statewide mailings from the Secretary of State, nor would it apply to a decision by the Secretary to supply funding for prepaid postage for absentee ballots. S*ee, e.g.*, *NAACP*, 768 F.3d at 549 (state's interest in "uniformity, standing alone, is not an interest important enough to significantly burden Plaintiffs' ability to vote" (internal quotation marks omitted)).

Further, to the extent that the State is concerned about spending money, it should *encourage*, not prohibit, mailings by CBOEs. In any event, it is not clear what interest the State

had in preventing counties from spending money *that the counties would like to spend*. Finally, the lack of any sound footing for the Secretary's decision to send absentee ballots to eligible voters because they are inactive or in inactive-confirmation status and did not vote in the two prior general elections is demonstrated by Matthew Damschroder's statement, when asked why the State excluded some but not all inactive voters from the unsolicited absentee ballot mailing, that, "[t]hat's the choice we've made." First Damschroder Dep. Tr. 95:18 - 96:3. In short, the benefits from SB 205's and Directive 2014-15's restrictions on absentee ballot mailings are limited, and they are outweighed by the burdens that these provisions impose on voting.

5. Unnecessary Informational Requirements for Absentee and Provisional Ballots

SB 205 and SB 216 added address and date of birth to the list of information (which previously included only name, signature, and form of ID) that absentee and provisional voters, respectively, are required to include on their absentee and provisional ballot envelopes. For those voters who fail to supply this information, the consequences are severe. In the case of absentee ballots that do not contain the requisite information, voters must either cure their failure to include this information or their vote will not count. Provisional voters who fail to supply the newly required information are disenfranchised. Given the very large numbers of Ohioans who cast absentee ballots by mail and who must cast provisional ballots, a number of voters are likely to be disenfranchised as a result of these changes to the law.

With respect to absentee ballots, this law serves almost no purpose. Numerous elections officials have explained that they were able to identify voters with the information they received under prior law and that the new requirements are unnecessary. *See, e.g.*, Perlatti Dep. Tr. 73:8 - 74:1; Kelly Dep. Tr. 98:15 - 100:13; Kendall Dep. Tr. 83:7 - 10; Munroe Dep. Tr. 68:10-70:10; Walch Dep. Tr. 43:12-44:4. In the extraordinarily unlikely event that elections officials were

unable to determine which voter had cast a ballot even though they had the voter's name, signature, and a form of ID, minimal follow-up would likely resolve the uncertainty. Further, the evidence will show that the remedy of disenfranchisement is particularly unwarranted given that most voters supplied this information even before they were required to do so.

With respect to provisional ballots, to be sure, an address can help administrators determine an individual's correct precinct. Again, however, it is not clear why the remedy for a failure to provide such information should be disenfranchisement where the identity of the voter is not in question. Nor is it clear why voters must provide *both* address and date of birth information. *See, e.g.*, Kelly Dep. Tr. 98:15 - 100:13. As such, the benefits to the State from the new informational requirements for absentee and provisional ballots are clearly outweighed by the burdens those requirements impose on voting rights.

6. Other Provisional Ballot Restrictions

SB 216 burdens the right to vote in other ways as well.[9] In particular, SB 216 reduces the cure period for voters who fail to provide proof of identity on Election Day from 10 to seven days. The burden from this change is straight-forward: votes affected by this change will have a shorter period of time in which to ensure that their ballots are counted and some number of these voters will surely present to cure their ballots too late. In addition, SB 216 prohibits election

[9] Ohio's failure to provide notice and an opportunity to cure mistakes on the provisional ballot affirmation form also violates procedural due process. To determine what process is due, a court must balance three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). First, there is no question that the right to vote is a fundamental liberty. *See Yick Wo*, 118 U.S. at 370. Thus, the private interest at stake is paramount. Second, the risk of erroneous deprivation is significant. A number of provisional ballots are rejected for errors such as a perceived mismatch between signatures on the affirmation form and those in the database that, by their very nature, entail a significant risk of pollworker error that could be corrected if voters were given the opportunity to cure before their ballots were rejected. Third, the Defendants have not demonstrated that the costs of providing this opportunity would be so great as to overwhelm the interest in protecting the right to vote. *See Zessar v. Helander*, 2006 WL 642646, at *7 (N.D. Ill. Mar. 13, 2006) (holding that absentee voters had a procedural due process right to notice and a pre-deprivation hearing).

officials from completing the information required on the provisional ballot affirmation form on behalf of any voter other than illiterate and disabled voters. While this change presumably provides little burden for most voters other than a requirement that they pay attention to detail, for voters with low literacy or limited English proficiency, the lack of ability to obtain assistance from election workers—who will typically be far more familiar with the provisional ballot form than voters encountering it for the first time—will, in at least some cases, likely mean the difference between having their votes counted and being disenfranchised.

Neither of these provisions serves any material state interest. *See* PX0010 (11/20/2013 Sen. Session Tr. at 21:20 - 26:5) (Sen. Skindell); *id.* at 26:9 - 28:15 (Sen. Tavares); *id.* at 28:19 - 31:14 (Sen. Turner); *see also* McNair Dep. Tr. 53:1 - 54:5, 54:18 - 55:10. Moreover, we expect that election officials in Ohio's largest county will explain at trial that counting these ballots is not burdensome in any real sense. McNair Dep. Tr. 53:1 - 54:5, 54:18 - 55:10. Indeed, it stands to reason that turning away voters who attempt to cure their ballots eight, nine, or ten days after an election will prove far more challenging to elections officials than simply counting the ballots of such voters. Similarly, it is not clear what interest the State has in prohibiting its election officials from assisting voters in filling out their provisional ballot forms. To the extent the State asserts that this will result in greater accuracy in the information included on provisional ballot forms, that claim is highly implausible. Voters who request assistance in filling out their provisional ballot forms are obviously the very voters (e.g., low-literacy and limited-English-proficiency voters) who need help filling out those forms, and poll workers trained to ensure that all required information is provided on the provisional ballot form are unquestionably more likely to comply with these requirements than voters encountering the requirements for the first time. Thus, these provisions of SB 216 appear not to serve any state interest and, even if they

do, that interest is limited and outweighed by the burdens these provisions impose on voting rights.

7. Continuation of "Right Church, Wrong Pew"

SB 216 further burdens the right to vote by failing to require CBOEs to consolidate their poll books. As a result of *SEIU v. Husted*, voters who present to vote at the correct polling location but are directed by a poll worker to the wrong precinct—essentially, the wrong line—within that location are entitled to have their votes counted. However, a voter whose situation is precisely the same, except that he or she went to the wrong line of his or her own volition (or cannot establish that he or she did so at the direction of a poll worker), is disenfranchised. The consolidation of poll books cures this issue, as it ensures that all voters who show up at the correct location sign the same (and thus the correct) poll book. But SB 216 make poll book consolidation optional, meaning that voters will continue to be disenfranchised for getting into the wrong line.

There is no state interest at all in having poll books that are not consolidated. Indeed, the Secretary of State's Office "has recommended that Boards of Elections consolidate their pollbooks in a multi-precinct location." *See* First Damschroder Dep. Tr. 113:17 - 19. Accordingly, counties should be required to consolidate their poll books in multi-precinct locations to prevent any more voters from being disenfranchised for cast "right church, wrong pew" ballots.

B. VRA

Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizens of the United States

to vote on account of race or color," and that a violation "is established if, based on the totality of the circumstances, it is shown that the political processes . . . in the State . . . are not equally open to participation by members of" a particular racial group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301.

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of rid[ding] the country of racial discrimination in voting," and "the Act should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citations and internal quotation marks omitted). Indeed, "Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Instead, a plaintiff need show only that the challenged action or requirement has a discriminatory effect on members of a protected group[.]" *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002); *cf. Tex. Dept. of Housing and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2522 17-18 (2015) ("Recognition of disparate impact liability . . . plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.").

The Supreme Court has explained that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Consistent with this language, the Fourth Circuit has held that a Section 2 claim in this context has two elements: First, "the challenged standard, practice, or procedure must impose a discriminatory burden on members of

a protected class, meaning that members of the protected class must have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *League of Women Voters*, 769 F.3d at 240 (citation and internal quotation marks omitted). The assessment of whether "the political processes are equally open depends upon a searching practical evaluation of the past and present reality," *Gingles*, 478 U.S. at 75 (citations and internal quotation marks omitted), and "require[s] an intensely local appraisal of the design and impact of the challenged electoral practice," *Stewart v. Blackwell*, 444 F.3d 843, 878 (6th Cir. 2006) (citation and internal quotation marks omitted). Second, the burden on members of a protected class "must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *League of Women Voters*, 769 F.3d at 240 (citation and quotation marks omitted).

In addition, the Supreme Court has pointed to nine factors (originally identified in the Senate Judiciary Committee majority report accompanying the 1982 amendments to Section 2) that are relevant to Section 2 claims. These so-called "Senate Factors" are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the

> political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction;
>
> 8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> 9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 478 U.S. at 44-45. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other," *id.* at 45 (citation and quotation marks omitted), and this list is "neither exclusive nor controlling," *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986). However, these factors "may shed light on whether the two elements of a Section 2 claim are met." *League of Women Voters*, 769 F.3d at 240; *see also Gonzalez v. Arizon*a, 677 F.3d 383, 40506 (9th Cir.2012) (en banc) (considering the Senate factors in evaluating a Section 2 challenge to Arizona's voter ID law), *aff'd on other grounds sub nom. Ariz. v. Inter Tribal Council of Ariz., Inc.*, —— U.S. ——, 133 S.Ct. 2247 (2013); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (explaining that, in a vote denial claim, "courts consider a non-exclusive list of objective factors (the 'Senate factors') detailed in a Senate Report accompanying the 1982 amendments" as part of evaluating whether, under the "totality of the circumstances," "the political processes . . . are not equally open to participation by [members of a protected class]") (alterations in original); *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir.1997) ("[T]he 'totality of the circumstances' test established in § 2(b) was initially applied only in 'vote denial' claims such as this.").

Courts have identified several principles for Section 2 cases that are significant here. *First*, "Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting." *NAACP*, 768 F.3d at 552; *accord League of Women Voters*, 769 F.3d at 243 ("[N]othing in Section 2 requires a showing that voters cannot register or vote under any circumstance."). This is clear from the text of the statute, which refers not only to the "denial" but also the "abridgement" of the right to vote. 52 U.S.C. § 10301(a); *see also abridge, Black's Law Dictionary 7* (9th ed. 2009) (defined as "[t]o reduce or diminish"); *Gray v. Johnson*, 234 F. Supp. 743, 746 (S.D. Miss. 1964) ("When the word [abridge] is used in connection with . . . the word deny, it means to circumscribe or burden.") (15th Amendment case); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (prohibition on "abridgement" of the right to vote reaches any "onerous procedural requirements which effectively handicap exercise of the franchise by [voters of color]") (15th Amendment case).

Second, a state's previous voting practices are "centrally relevant" and "a critical piece of the totality-of-the-circumstances analysis Section 2 requires." *League of Women Voters*, 769 F.3d at 242. The Supreme Court has explained that Section 2 requires a "searching practical evaluation of the 'past and present reality,'" with a "'functional' view of the political process." *Gingles*, 478 U.S. at 45 (citations omitted). This "searching practical evaluation" requires an examination of past practices, including whether the new law "eliminates a voting opportunity that used to exist under prior law that African Americans disproportionately used." *League of Women Voters*, 769 F.3d at 241-42 (citation and quotation marks omitted). And, "'[t]he fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is . . . relevant to an assessment of whether, under the current

system, African Americans have an equal opportunity to participate in the political process as compared to other voters.'" *Id.* at 241-42 (quoting *NAACP*, 768 F.3d at 558).[10]

Third, the practices of other states are not relevant. Rather, "[t]he focus is on the internal processes of a single State or political subdivision and the opportunities enjoyed by that particular electorate. The text of Section 2 does not direct courts to compare opportunities across States." *NAACP*, 768 F.3d at 559; *accord League of Women Voters*, 769 F.3d at 243 (Section 2, "on its face, is local in nature," and a conclusion "as to North Carolina" would not "somehow throw other states' election laws into turmoil"). *See generally Gingles*, 478 U.S. at 46 ("[E]lectoral devices, such as at-large elections, may not be considered *per se* violative of § 2," because liability depends on the "totality of the circumstances," which may vary in different jurisdictions.) (citation omitted); *id.* at 78-79 (liability under Section 2 is "peculiarly dependent upon the facts of each case") (citations and quotation marks omitted).

Fourth, facially neutral laws can violate Section 2. As Justice Scalia has written, "[i]f, for example, a county permitted voter registration for only three hours one day a week, and that

[10] In addition to the fact that Section 2 and Section 5 of the VRA place the burden of proof on different parties, these sections differ in that "[Section] 5 prevents nothing but backsliding," while Section 2 prohibits "discrimination more generally." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 321-35. Put differently, the retrogression analysis required by Section 5 looked at "the position of racial minorities with respect to *their* effective exercise of the electoral franchise," *Beer v. United States*, 425 U.S. 130, 141 (1976) (emphasis added), whereas Section 2 requires consideration of whether, "based on the totality of circumstances," the challenged provisions result in minority voters having "less opportunity than *other* members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added).

Nevertheless, Section 2 and Section 5 both apply to changes in election laws that make voting or registration more difficult. As the *Bossier Parish* Court explained, Section 5 applies "*only* to retrogression;" Section 2 challenges "involve *not only* changes but (much more commonly) the status quo itself." 528 U.S. at 333-34 (emphasis added). *See generally Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (explaining that "some parts of the Section 2 analysis may overlap with the Section 5 inquiry"). The relevant statutory language shows that this must be the case. Section 5's retrogression analysis derives from the reference in Section 5 to "abridging the right to vote on account of race or color," *Bossier Parish*, 528 U.S. at 333-34, language that is effectively indistinguishable from Section 2's proscription of the "abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Thus, the Supreme Court's statement in the Section 5 context that the term "abridge" "necessarily entails a comparison" and that "[i]t makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice," *Bossier Parish*, 528 U.S. at 334, applies with equal force in the Section 2 context.

made it more difficult for blacks to register than whites, . . . Section 2 would . . . be violated," even though the law on its face treated all races equally. *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). Consistent with this principle, courts have found that several facially neutral voting practices violate or could violate Section 2. *Stewart*, 444 F.3d at 877-79 (use of old voting technology in predominantly minority communities); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (per curiam) (same); *Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987) (restrictions on registration), *aff'd*, *Operation Push v. Mabus*, 932 F. 2d 400 (5th Cir. 1991); *Brooks v. Gant*, No. CIV. 12-5003-KES, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (limits on early voting); *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (polling place closures); *Brown v. Dean*, 555 F. Supp. 502, 504-05 (D.R.I. 1982) (relocation of polling place).

1. Elimination of Golden Week

Prior to S.B. 238, voters in Ohio could register or update their registration and vote early on the same day during the five-day period known as Golden Week beginning on the 35th day before and ending on the 30th day before an election. S.B. 238's elimination of Golden Week imposes disproportionate burdens on African Americans by restricting the early-voting period and eliminating the opportunity for same-day registration. These disproportionate burdens arise from the interaction between S.B. 238 and the ongoing social and historical effects of racial discrimination in Ohio, with the result that S.B. 238 "results in a denial or abridgment of the right of [African Americans] to vote on account of race" in violation of Section of the Voting Rights Act.

First, as Judge Economus and the Sixth Circuit have already found, "SB 238's reduction of the early-voting period will burden the voting rights of African Americans because they use

EIP voting at higher rates than other groups of voters." *NAACP*, 43 F. Supp. 3d at 850; *NAACP*, 768 F.3d at 555 ("[T]he disproportionate burdens SB 238 . . . place[s] on African Americans, combined with their lower-socioeconomic status in Ohio, operate[s] to give African American voters 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" (quoting Section 2); *cf. Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 906 (S.D. Ohio 2012) *aff'd*, 697 F.3d 423 (6th Cir. 2012) ("[M]inority and working class voters will be disproportionately affected by the restrictions on in-person early voting.").

These findings are entitled to preclusive effect. *See* n. 2 *supra.* The expert and lay testimony in this case will further confirm these findings. First, African Americans use EIP voting in Ohio at much greater rates than other segments of the population. In 2008, 19.9 percent of Ohio's African American voters made use of EIP voting, compared to only 6.2 percent of whites. In 2012, 19.6 percent of blacks used EIP voting versus 8.9 percent of whites. PX0109 (Timberlake Rpt. at 54–55). *See also NAACP*, 768 F.3d at 541–42 (noting "ample evidence that African American, lower-income, and homeless voters disproportionately have used in past elections the EIP voting times that Directive 2014–17 and SB 238 eliminated"); Obama *for Am.*, 697 F.3d at 426 ("Early voters were more likely than election-day voters to be women, older, and of lower income and education attainment.").

Furthermore, the greater the percentage of the African-American voting-age population in a particular census block, the greater was the rate of EIP voting during Golden Week. In Cuyahoga, Hamilton, and Mahoning Counties, voters in homogenous African American census blocks used Golden Week at a rate 3.514 times greater than those in homogeneous white blocks in in 2008; in 2012, the ratio was even greater, at 5.186. PX0110 (Timberlake Rebuttal Rpt. at

6). In nearly homogeneous census blocks (i.e., those with 90 percent or more of the same race), the use of Golden Week was 4.100 times greater in 2008 and 5.584 times greater in 2012. *Id.*; *see also* Perlatti Dep. Tr. 49:6–9 (minority voters from Cleveland use early in-person voting in Cuyahoga County more than whites from the suburbs); McNair Dep. Tr. 90:24–92:4 (African Americans disproportionately use early in-person voting in Cuyahoga County); PX0106 (Canon Rpt. at 6 ("[R]ecent research on restrictions on early voting in Florida finds that it deterred participation of black voters.")).

Lower levels of educational attainment make the complexities of the vote-by-mail process—which requires filling out a detailed absentee application, paying postage, filling out more information again when the ballot is received, and paying additional postage—even more difficult to navigate. As a consequence, mail-in absentee voting is not a workable option for many African Americans. McDonald Dep. Tr. 66:15-67:5; *NAACP*, 43 F. Supp. 3d at 843 ("The associated costs and more complex mechanics of voting by mail, coupled with other information in the record concerning the enumerated groups including homelessness, lower educational attainment, more limited financial resources, reliance on public transportation, and transience, indicate to the Court that voting by mail may not be a suitable alternative for many voters.").

Judge Economus and the Sixth Circuit have also found that the elimination of same-day registration disproportionately burdens the voting rights of African Americans. *NAACP*, 43 F. Supp. 3d at 850 ("The elimination of Golden Week's same-day registration will also impact African Americans as . . . they tend to disproportionately make up the groups that benefit the most from same-day registration: the poor and the homeless."); *NAACP*, 768 F.3d at 555 ("Lower-income individuals face difficulties in voting during the day because they are more likely to work in hourly-wage jobs with little flexibility. Lower-income individuals, often

because they are more likely to move and/or have difficulty accessing transportation, also most need same-day registration.") (citation omitted).

The evidence will confirm these findings as well. First, rates of Golden Week registrations, both first time and updated registrations, were significantly greater in counties with higher percentages of African Americans. In counties with high minority populations, the rate of registration during Golden Week was 18 percent higher than in low minority/high poverty counties and 32 percent higher than in low minority/low poverty counties in 2008. PX0109 (Timberlake Rpt. at 51). In 2012, the rate was 17 percent higher than in low minority/high poverty counties and 56 percent higher than in low minority/low poverty counties. *Id*. Thus, even when controlling for income levels, the data show that African Americans used Golden Week registrations than other segments of the populations.

Eliminating same-day registration burdens lower-income voters, who tend disproportionately to be African American in Ohio. Lower-income individuals are much more likely to have inflexible work schedules and time and resource constraints make it difficult to make two separate trips to register and vote. *Id.* at 50; Poland Dep. Tr. 54:12-22. These voters are more likely to move frequently due to higher rates of residential instability and therefore more likely to need to update their registrations. PX0109 (Timberlake Rpt. at 15–19, 32). Lower-income individuals are more likely to lack access to transportation necessary to travel to the voting location, especially as the distance increases. *Id.* at 23–24. They also possess lower levels of educational attainment, with the result that they are more likely to need to register in person and less likely to do so through other means such as registration by mail. *Id.* at 29; *see also City of Euclid*, 580 F. Supp. 2d at 609 ("[S]ocial science literature on voter participation makes clear that educational achievement is strongly and directly correlated with voter

registration and turnout."). For these reasons, the evidence in this case will confirm the previous finding in *NAACP* that "the opportunity to register and vote at the same time during Golden Week is more than a mere convenience to poorer individuals and the homeless, it can make the difference between being able to exercise the fundamental right to vote and not being able to do so." *NAACP*, 43 F. Supp. 3d at 841.

Second, S.B. 238 interacts with the social and historical inequalities facing African Americans in Ohio to reduce the opportunity to participate in the political process relative to other groups of voters. Per Senate factor five, as explained above, African Americans in Ohio face persistent inequalities in key socio-economic indicators such as employment, job flexibility, income, access to transportation and childcare, education, housing, poverty rates, and health. Each of these disparities imposes time and resource constraints on African Americans' ability to vote on a particular day and to register or update their registration. PX0109 (Timberlake Rpt. at 31–33). By reducing the opportunities for early voting and eliminating same-day registration, S.B. 238 interacts with these inequalities to impose a disproportionate burden on African Americans.

A number of the other factors relevant to the "totality of the circumstances" further demonstrate the disproportionate barriers to voting S.B. 238 imposes on African Americans in Ohio. In particular, appeals to racial bias (Senate factor six) have been specifically linked with calls for reductions to early voting. Doug Preisse, the Republican Party Chairman of Franklin County explained his vote to eliminate Sunday early voting by stating, "'I guess I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter turnout machine.'" *Id.* at 48. Similarly, at a legislative hearing in 2014, in a transparent reference to the "Souls to the Polls" program organized by many African American

churches, State Representative Matt Huffman stated, "'[t]here's that group of people who say, 'I'm only voting if someone drives me down after church on Sunday.' Really? Is that the person we need to cater to when we're making public policy about elections?'" *Id.*

Relevant to Senate factors one and three, Ohio officials have frequently targeted Golden Week voters with fraud investigations to no avail. For example, in 2008 the Hamilton County prosecutor, who was also a regional chair of John McCain's presidential campaign, investigated each of the 600 Golden Week voters in that year's presidential election, and had a grand jury to subpoena the records of 200 of those voters. Triantafilou Dep. Tr. 85:1-86:25, Oct. 28, 2015. This investigation, like similar efforts, found no evidence of voter fraud during Golden Week. *See also* McNair Dep. Tr. 66:6-66:8 ("So far as I am aware we have never had any finding of fraud during Golden Week in Cuyahoga County."). In 2012, the Hamilton County Board of Elections investigated six people suspected of fraud during Golden Week. It referred two of these people to the county prosecutor, one of whom was an 80-year old woman from Tennessee staying with her daughter for six months in Ohio who had registered and requested an absentee ballot. Triantafilou Dep. Tr. 64:12-65:5. In the opinion of one member of the Hamilton County Board of Elections, this elderly woman remains a "fugitive from justice." *Id*. at 73:24. The inevitable effect of these criminal investigations and threats of prosecution for committing voter fraud is to deter voters from voting. PX0107 (Minnite Rpt. at 20); Triantafilou Dep. Tr. 87:15-19 ("I suppose you could make that argument that people would be scared off.").

Likewise, various groups have used Ohio's permissive voter-challenge law to target the eligibility of low-income and high-minority areas after a surge of voter registrations in those areas.[11] PX0107 (Minnite Rpt. at 16–17 (describing 2004 plan by Republican Party plan to put

[11] Ohio law provides that "[a]ny person offering to vote may be challenged at the polling place by any challenger, any elector then lawfully in the polling place, or by any judge or clerk of elections." Ohio Rev.Code Ann. § 3505.20.

3,600 challengers inside precincts serving mostly black voters to challenge the eligibility of some 23,000 registered voters)); PX0109 (Timberlake Rpt. at 36 (2012 groups affiliated with *True the Vote* targeted polling locations around in and around Cincinnati with high populations of students, low-income, and high-minority voters)).

Ohio has also been unresponsive to the needs of minorities as well (Senate factor eight), as demonstrated by the process surrounding the enactment of S.B. 238. As State Senator Bill Seitz, one of the sponsors of S.B. 238, said, "the state overreacted after 2004, "and we've been trying to ratchet that back ever since." PX0109 (Timberlake Rpt. at 48). Before its enactment, the legislature was presented with significant evidence that repealing Golden Week would disproportionately harm African Americans. *See, e.g.*, PX0018 (2/19/14 Sen. Tr. at 19) (Sen. Turner: explaining that eliminating Golden Week was "going to have a disproportionate impact on the African American community in this state."); *id.* at 20 (Sen. Turner: noting evidence "abundance of data indicating that African American voters rely heavily on early voting and that any cutbacks will fall disproportionately on them. . . ."); *see also* discussion *supra.* An amendment that would have required the Secretary of State to assess the racial impact of S.B. 238 was not even allowed to come up for debate. *See* PX00119 (Ohio House of Representatives Journal at 2-3, 5-6 (Feb. 24, 2014)). Thus, despite the significant gains Golden Week and early voting had played in remedying the disaster of the 2004 presidential election and in encouraging minority political participation, the state repeatedly attempted to cut back on these reforms before finally succeeding with S.B. 238. PX0109 (Timberlake Rpt. at 48). *League of Women Voters*, 769 F.3d at 241-42 ("[t]he fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is . . . relevant to an assessment of whether, under the current system, African Americans have an equal opportunity

to participate in the political process as compared to other voters." *League of Women Voters*, 769 F.3d at 241-42 at 241-42 (quoting *NAACP*, 768 F.3d at 558).

The State's likely justifications for eliminating Golden Week are also tenuous (Senate factor nine). As Judge Economus and the Sixth Circuit found in the *NAACP* suit, *NAACP*, 768 F.3d at 548 ("Defendants' asserted interest in reducing costs does not adequately justify the burdens SB 238 and Directive 2014–17 place on voters."); *NAACP*, 43 F. Supp. 3d at 846 ("The facts that EIP voting during Golden Week would take place during times when Boards are already open for business and that only a few Boards have operated separate locations for EIP voting, undermine the Defendants' attempt to justify SB 238 on the basis of cost."). As explained above, the evidence here will confirm these findings that "Ohio has used cost as if it were a silver bullet[,] [but] [t]he mere fact that there is some cost involved does not make that factor compelling." *NAACP*, 43 F. Supp. 3d at 845 (quoting *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir.2006)); *see also* discussion *supra.*

Moreover, the allegations of voter fraud during Golden Week are equally without foundation. Judge Economus and the Sixth Circuit have already rejected the identical argument Defendants make here. "Defendants did not provide more than a handful of actual examples of voter fraud, and their general testimony regarding the difficulties of verifying voter registration before counting ballots did not clearly pertain to problems with Golden Week specifically." *NAACP*, 768 F.3d at 547. "[T]he specific concern Defendants expressed regarding voter fraud—that the vote of an EIP voter would be counted before his or her registration could be verified—was not logically linked to concerns with voting and registering on the same day, but rather 'has more to do with the registration process and verification of absentee ballots' generally." *Id.* (citation omitted). "[S]ince Ohio law requires that officials segregate absentee ballots and not

count them until registration is verified, there is no reason to think that the registration of voters who registered and voted on the same day during Golden Week would be any harder to verify than an individual who registered on the last permissible day and then voted the next day, or for that matter than someone who voted very close to the election." *Id.* "Defendants did not explain why it is harder to segregate and count later the absentee ballots of individuals who vote and register on the same day as opposed to segregating absentee ballots that are returned a different way, particularly given that officials would have at least 30 days to verify the registration of those who register and vote during Golden Week." *Id.* The facts developed in this case reaffirm this conclusion. *See, e.g.*, First Damschroder Dep. 53:3-4, 53:13-55:1 (acknowledging that voter fraud is rare and refusing to provide a yes or no answer to the question whether Golden Week caused a heightened risk of fraud); Ward Dep. Tr. 16:16–22, Oct. 26, 2015 ("Q. I see. But specifically there is -- you know of no particular instance where Golden Week was used to commit voter fraud? A. No, not in Madison County. Q. Do you know of particular instances in other counties? A. No."); PX0107 (Minnite Rpt. at 19-20). (noting that Secretary of State Husted has launched several statewide fraud investigation but concedes that fraud is "rare").

2. One EIP Location Per County

By statute, Ohio limits each county to a single early voting location, regardless of that county's size and population. As a result of the uniform statewide early voting schedule put in place by the settlement agreement in *NAACP v. Husted*,[12] counties cannot modify their early voting schedules to accommodate the needs of their particular districts. Under this uniform statewide schedule, the total number of hours available for EIP voting in each county is 225 (45 in each of weeks one and two of the early voting period, 62 in week 3, 67 in week 4, and 6 on the Monday before election day). PX0109 (Timberlake Rpt. at 53). Given the wide disparity in

[12] *See* Settlement Agreement, *NAACP*, No. 2:14-cv-00404 (S.D. Ohio Apr. 17, 2015) (Dkt. No. 111-1).

voting-age populations ("VAP") (ranging from just over 10,000 in Vinton to nearly a million in Cuyahoga), larger counties will have many more voters per EIP voting hour than will small counties, with the resulting consequences of more crowding and longer lines.

The single-EIP-location-per-county rule imposes disproportionate burdens on the voting rights of African Americans in several respects. African Americans are overwhelmingly concentrated in densely-populated urban areas, with 73 percent living in seven of the 10-most populated counties in Ohio: Cuyahoga, Hamilton, Franklin, Lucas, Montgomery, Mahoning, and Summit counties. PX0109 (Timberlake Rpt. at 53). Because of the concentration of African Americans in Ohio's most densely populated counties, they enjoy disproportionately fewer early voting resources per person than other segments of the population. Now that the uniform early voting schedule has been put in place, there is one hour of EIP voting time for every 2,362 African Americans of voting age in Ohio, compared to one EIP voting hour for every 1,500 whites. *Id.* at 54. The strained EIP resources resulting from limiting each county to a single EIP voting location will, now that counties no longer have the discretion to set their own early-voting schedules, aggravated the problem of long lines that has plagued the early voting centers in Ohio's larger counties. Kendall Dep. Tr. 52:2-6, Nov. 6, 2015; McDonald Dep. Tr. 71:10-11; 118:1-5; McNair Dep. Tr. 23:8-24, 116:8-14.

These disparities are compounded by the fact that African Americans in Ohio use EIP voting at much greater rates than whites (19.9 percent compared to only 6.2 percent in 2008 and 19.6 percent compared to 8.9 percent in 2012). PX0109 (Timberlake at 54). Similarly, in Cuyahoga, Hamilton, and Mahoning Counties, the average EIP voting rate in homogeneous African American census blocks was 4.316 times higher than in homogeneous white blocks in 2008, 1.390 times higher in 2010, 4.476 times higher in 2012, and 2.330 times higher in 2014.

PX0110 (Timberlake Rebuttal Rpt. at 10). The rates of EIP voting in nearly homogeneous African American census blocks were similarly much higher than in nearly homogeneous white blocks: 4.423 times higher in 2008, 1.772 times higher in 2010, 4.661 times higher in 2012, and 2.519 times higher in 2014. *Id.*

These disparities are the result of the ongoing effects of the social and historical conditions of discrimination. As explained above, the heavier African American reliance on EIP voting is due to persistent inequalities in areas such as employment, job flexibility, income, access to transportation and childcare, education, housing, poverty rates, and health. Each of these disadvantages make it more difficult for African Americans to vote on Election Day, and they therefore benefit more from the opportunity to vote early than other groups of voters. *Id*. at 31–32. Furthermore, the concentration of African Americans in densely populated urban areas is a direct result of official discrimination. *Id*. at 21; *Armour*, 775 F. Supp. at 1054-55 (noting that "Youngstown's [Mahoning County] housing pattern has remained intensely segregated" due to "the segregated white-black housing assignment policies maintained by the Youngstown Metropolitan Housing Authority").

Furthermore, the state's justification for this policy is tenuous, as the evidence will show. *See, e.g.*, First Damschroder Dep. Tr. 111:24 - 113:10; Perlatti Dep. Tr. 54:6-10; Troy Dep. Tr. 88:23-89:8, 113:10-20; Kelly Dep. Tr. 70:8 - 11, Oct. 27, 2015; Baldridge Dep. Tr. 31:24 - 32:3, 33:12-17 Nov. 4, 2015; Breckel Dep. Tr. 57:2-16; Kendall Dep. Tr. 114:25-5. For these reasons, the limitation of one EIP voting location per county violates Section 2 of the Voting Rights Act.

3. Reductions in DREs

As explained above, there is no dispute that SB 200 and Directive 2014-26 will have the effect of reducing the number of DREs required in DRE counties. *See* discussion *supra.* As Dr.

Yang's reports shows, counties that supply only the minimum number of machines required by the new law will see substantial increases in wait times. *See* PX0113 (Yang Rpt. at 10, Tbl. 2). These problems could turn out to be even worse as DRE machines are susceptible to malfunctions and in many counties are old and in need of replacement. Welch Dep. Tr. 16:10-16, Oct. 26, 2015 ("[W]e're constantly fixing paper jams on the machine. It takes our poll workers away from what they should be doing. It causes lines to back up because they have to fix the paper jams. We also have some machines that go down, and we've had power outages, and it's just easier if you do things the easiest way possible, which would be paper."); McNair Dep. Tr. 16:5-6 ("[T]he DRE machine was a disaster in Cuyahoga County); Kendall Dep. Tr. 27:6 - 12; Munroe Dep. Tr. 26:13 - 27:3; Troy Dep. Tr. 53:14 -55:4.

The reductions in the number of DRE machines disproportionately burden the voting rights of African Americans. The rates of absentee ballot use are significantly higher in counties with greater populations of African Americans. PX0110 (Timberlake Rebuttal Rpt. at 14). Because SB 200 and Directive 2014-26 permit counties to subtract the number of people who voted absentee in the previous election from the number of "registered" voters used to allocate the machines, these reductions, if implemented by the counties, will disproportionately occur in the counties with the highest African American populations. The evidence will show that three high-minority counties that use DRE machines would experience a reduction of 140 DRE machines per 100,000 voters, compared to just 127 per 100,000 in the other DRE counties, if they implemented SB 200 and Directive 2014-26. PX0109 (Timberlake Rpt. at 60); PX0110 (Timberlake Rebuttal Rpt. at 15). For this reason, the long lines that will result from these reductions will occur disproportionately in those areas with the highest African American populations.

Second, SB 200 and Directive 2014-26 interact with the social and historical inequalities facing African Americans in Ohio to reduce the opportunity to participate in the political process relative to other groups of voters. Absentee voting is particularly important to African Americans in Ohio due to deep inequalities in employment, job flexibility, income, access to transportation and childcare, education, housing, poverty rates, and health. This explains in part why rates of absentee voting are higher in Ohio's high-minority counties. Likewise, long lines at the polls disproportionately burden African Americans in Ohio due to limited job flexibility, limited access to childcare and transportation, and other time and resource constraints that increase the barriers to voting and make them less able to remain in line to vote on Election Day. PX0109 (Timberlake Rpt. at 31-33, 59).

4. Restrictions on Absentee Ballot Mailings

As noted above, SB 205 prohibits local and county governments from sending out unsolicited absentee ballot applications; prohibits all officials from including pre-paid postage for returning absentee ballots; and prohibits the Secretary from mailing unsolicited absentee ballot applications absent specific authorization from the General Assembly. The Secretary obtained authorization from the Legislature to mail unsolicited absentee applications in 2014, and intends to do so again in 2016, but pursuant to Directive 2014-15 he excluded those listed as "inactive" or "active-confirmation" on the State's voter registration database.

These restrictions pose disproportionate burdens on the voting rights of African Americans. The mailing of unsolicited absentee ballot mailings and the inclusion of prepaid postage had been important tool in some of Ohio's larger counties that have large African-American populations, such as Cuyahoga, for encouraging voters to vote early and alleviating the stress on polling locations. Perlatti Dep. Tr. 116:13-117:1; McNair Dep. Tr. 38:9-23;

Tuckerman Dep. Tr. 73:17-74:21. The mailing of absentee applications encouraged voter participation, and including prepaid postage made it easier for lower-income voters, who tend disproportionately to be African American in Ohio, to cast a ballot. PX0109 (Timberlake Rpt. at 55). Without these incentives to vote early, more people will vote in person, either early or on Election Day, resulting in increased wait times to vote. *See* PX0113 (Yang Rpt. at 20-21); Allen Dep. at 208:16-209:13.

Excluding inactive voters from the statewide mailing of absentee applications also disproportionately burdens the rights of African American voters. Due to disproportionately high rates of residential instability, African Americans in Ohio are more likely changes addresses and need to update their registrations. PX0109 (Timberlake Rpt. at 15-18). They are consequently more likely to be identified as an inactive voter by the state's voter registration maintenance program, and therefore more likely to be excluded from the mailing of unsolicited applications.

These burdens arise from the unique constraints placed on African American voters by the ongoing effects of Ohio's legacy of racial discrimination. As a result of this discrimination, African Americans face higher barriers to voting and therefore benefit more from programs such as the mailing of unsolicited absentee applications and the inclusion of prepaid postage. Imposing a uniform statewide rule that prohibits counties from taking into account the particular needs of their voters disproportionately burdens voters in those counties. McNair Dep. Tr. 39:2-40:1 (stating that "uniformity is detrimental to successful outcomes in counties" and agreeing with statement that "SB 205 imposes rules for the sake of uniformity, but the consequences . . . of these rules in counties with very different . . . household income imposes an unequal . . . burden, in effect diminishing successful voting."). Similarly, higher rates of residential instability

among African Americans are a direct result of Ohio's legacy of racial discrimination, with the consequence that excluding inactive voters from the mailing of unsolicited applications disproportionately burdens their right to vote. For these reasons, SB 205's restrictions on the mailing of absentee ballots impose disproportionate burdens on African Americans that are the product of the ongoing social and historical effects of racial discrimination in Ohio, with the result that S.B. 205 "results in a denial or abridgment of the right of [African Americans] to vote on account of race" in violation of Section of the Voting Rights Act.

5. Unnecessary Informational Requirements for Absentee and Provisional Ballots

As explained previously, SB 205 and SB 216 added address and date of birth to the categories of information that absentee and provisional voters, respectively, are required to include on their absentee identification envelopes and provisional ballot affirmation forms. These additional informational requirements impose disproportionate burdens on the voting rights of African Americans.

Increasing the complexity of voting by requiring additional categories of information imposes disproportionate burdens on voters with lower levels of income and educational attainment, which tend disproportionately to be African Americans in Ohio. PX0109 (Timberlake Rpt. at 22-28). Likewise, African Americans are more likely to be forced to cast provisional ballots because, for example, they suffer from higher levels of residential instability and are therefore more likely to have out-of-date registrations. *Id*. at 15-18. The data in this case will attest to these disparities.

With regard to absentee ballots, the rejection rates are uniformly higher in high-minority counties relative to other counties in Ohio. In 2008, absentee ballots in high-minority counties were about twice as likely to be rejected as those in other counties. *Id.* at 55. In 2012, absentee

ballots were about 60 percent more likely to be rejected in high-minority counties. *Id*. In 2014, the voters in higher-minority counties were 73 percent more likely to have their absentee ballots rejected than those in low-minority/high-poverty counties, and 32 percent more likely than those in low-minority/high poverty counties. *Id*. at 56.

With regard to provisional ballots, African Americans are significantly more likely to be forced to cast provisional ballots than other segments of the population in Ohio because, for example, their registration is out of date, they lack one of the required forms of identification, or an election official challenges their eligibility. In 2008 and 2012, voters in high-minority counties were between approximately 30 and 50 percent more likely to have to cast a provisional ballot than those in low-minority/high-poverty and low-minority/low-poverty counties. *Id*. at 58. Rejection rates were also significantly higher in high-minority counties. In 2008, 20.6 percent of provisional ballots cast were rejected in high-minority counties, compared to 17.3 percent for low-minority/high-poverty counties and 17.9 percent for low-minority/low-poverty counties. In 2012, the equivalent figures were 19.4 percent, 15.8 percent, and 15.1 percent, respectively. *Id*. at 57. These data all demonstrate that each additional hurdle placed on a voter's ability to cast an absentee or provisional ballot will fall disproportionately on African Americans in Ohio.

The State's justifications for imposing the burdens are also tenuous (Senate factor nine). As explained above, there is little evidence that election officials were unable to identify voters before SB 205's and SB 216's requirements were put in place. Perlatti Dep. Tr. 73:8-74:1; Kelly Dep. Tr. 98:15 - 100:13. Similarly, the State will be unable to justify why the consequence of the failure to provide all of this information should be disenfranchisement when the voter's identity is not truly in question. For these reasons, SB 205's and SB 216's enhanced informational requirements impose disproportionate burdens on African Americans arising from

the ongoing social and historical effects of racial discrimination in Ohio, with the result that S.B. 205 and 216 "result[] in a denial or abridgment of the right of [African Americans] to vote on account of race" in violation of Section of the Voting Rights Act.

6. Other Provisional Ballot Restrictions

SB 216 also burdens the right to vote of African Americans in other ways. It reduces the cure period for voters who fail to provide proof of identity on Election Day from 10 to seven days. Because African Americans make up a disproportionate number of provisional voters in Ohio, this change disproportionately burdens their rights by shortening the period of time in which to cure identification deficiencies. In addition, SB 216 prohibits election officials from completing the information required on the provisional ballot affirmation form on behalf of any voter other than illiterate and disabled voters. This change disproportionately burdens voters with lower levels of educational attainment, who tend disproportionately to be African Americans in Ohio, who are more likely to need assistance from election workers. PX0109 (Timberlake Rpt. at 24-28).

The state's justification for these restrictions is also tenuous for the reasons explained previously. *See* discussion *supra*; McNair Dep. Tr. 53:22-54:5 ("[N]obody that I talked to on our staff could have any idea for what the possible basis for" reducing the cure period. "[I]t just struck me as being outrageous that even though it's a relatively few number of people that . . . there was not justification for this as far as I was concerned."). Because provisional voters tend disproportionately to be African Americans in Ohio as a result of the ongoing effects of racial discrimination, under a totality of the circumstances SB 216's additional restrictions on provisional ballots result "in a denial or abridgment of the right of [African Americans] to vote on account of race" in violation of Section of the Voting Rights Act.

C. INTENTIONAL RACE DISCRIMINATION

Legislation enacted with the intent to discriminate on the basis of race in the voting context violates the Fourteenth and Fifteenth Amendments. *City of Mobile v. Bolden*, 446 U.S. 55, 62, 66 (1980) (plurality opinion); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977). To establish that an action violated these amendments, Plaintiffs are not required "to prove that the challenged action rested *solely* on racially discriminatory purposes." *Id.* at 429 U.S. at 265 (emphasis added). "Rather, Plaintiffs need only establish that racial animus was one of several factors that, taken together, moved [the decision-maker] to act as he did." *Orgain v. City of Salisbury*, 305 F. App'x 90, 98 (4th Cir. 2008) (citation ommitted).13

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights*, 429 U.S. at 266; *see also Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("[D]iscriminatory intent need not be proved by direct evidence."). *See generally Lane*, 307 U.S. at 275 (The Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."). The Supreme Court has explained that "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes," and that "[t]he specific sequence of events leading up the challenged decision also

[13]The Court noted in *Village of Arlington Heights* that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one," and that "it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." 429 U.S. at 265. "But," the Court wrote, "racial discrimination is not just another competing consideration," and judicial deference is not justified "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision." *Id.* at 265-66.

may shed some light on the decisionmaker's purposes." *Vill. of Arlington Heights*, 429 U.S. at 267 (citation omitted). "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Id.* In addition, "[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. And "the fact, if it is true, that the law bears more heavily on one race than another" is relevant to determination whether there was an "invidious discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 242 (1976); *see also Bossier Parish Sch. Bd.*, 520 U.S. at 487 (disproportionate impact of legislation "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions"). Moreover, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." *Washington*, 426 U.S. at 242.

The trial record will establish that the challenged provisions were adopted, at least in part, in order to suppress the vote of minorities in Ohio. The historical background and sequence of events leading to the adoption of the challenged provisions, described in detail above, include the disastrous 2004 election, in which voters in predominantly minority precincts were forced to wait in excessively long lines to vote; an expansion of access to the polls and an increase in African-American turnout, resulting in Democratic successes in 2008 and providing a clear motive (due to Democrats' overwhelming success among African Americans and Latinos) for Republicans to suppress the vote of minorities; and subsequent efforts to curb access to the polls (notwithstanding continued difficulties) both prior to and in the wake of the 2012 election, resulting in the adoption of the challenged measures. *See also* PX0107 (Minnite Rpt. at 20

("Drawing on my prior research, I . . . conclude that American political parties compete as much by demobilizing voters as by mobilizing them, and that it is black Americans who are usually singled out as the targets of demobilization.")).

The General Assembly also departed from its usual procedural practices in eliminating Golden Week. SB 238 was introduced only eight days before it passed the Senate; only two hearings were held, in the day before the vote; and discussion on the bill was cut off in the House. *See* 11/20/13 Sen. Tr. at 9 (Sen. Gentile); 2/26/14 House Tr. at 59 (Rep. Heard). The rationales for many of the challenges provisions were tenuous. *See* discussion *supra*; *see also* PX0107 (Minnite Rpt. at 20 ("While proponents of electoral policies that reduce voter access to the ballot purportedly believe that such policies are justified as fraud prevention measures, in the absence of evidence of a problem with voter fraud, I conclude, given historical patterns and evidence and the context for party competition, that such policies actually serve as a form of voter suppression."). Additionally, there was significant evidence before the General Assembly—confirmed by the evidence in this case—that the challenged provisions would disproportionately burden minority voters. *See* discussion of legislative history *supra*.

Further, supporters of SB 205 expressly emphasized that the counties they were trying to rein in—from making voting too easy—are "urban." *See* 2/19/14 House Tr. at 5 (Rep. Dovilla) (noting agreement "whereby every registered voter in Ohio, not just those residing in one urban county, received an application"); *id.* at 70-71 (statement of another supporter that, "if you are allowing one local board of elections and it happens to be in an urban county to be able to send out absentee ballot request forms with prepaid postage when most of the rural counties can't afford it, you are definitely disenfranchising the voters in the rural counties because that isn't equal"); *see also id.* at 72 ("[S]ome studies from the University of Akron" showed that the

percent of absentee ballots counted "in most of the rural counties . . . was almost 100 percent" and "only really the urban counties . . . had the problems. . . . So from that standpoint they're counting all the votes or as many votes as they can in the rural counties. Seems like the urban counties are having the problem."). The language that Rep. Dovilla used in advocating for SB 205 is particularly striking. He explained that, "[w]hen enacted, [SB 205] will no longer allow some counties to *push* unsolicited absentee voting applications and offer pre-paid postage on such applications and ballots," and that SB 205 "does change the level of convenience associated with *force-feeding* applications and ballots to voters, but unlike some, I believe the residents of this state don't need to be *spoon-fed* everything from government." 2/19/14 House Tr. at 4, 10 (emphases added). Taken together with the facts above, these statements provide strong evidence that the challenged provisions were enacted, at least in part, to suppress minority voting.

D. PARTISAN FENCING

The First and Fourteenth Amendments also prohibit discrimination on the basis for partisan affiliation or viewpoint. In *Carrington v. Rash*, 380 U.S. 89, 93 (1965), the Supreme Court held that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." The Court reasoned that a right as fundamental as the right to vote "cannot constitutionally be obliterated because of a fear of the political views of a particular group." *Id.* Similarly, in *Anderson*, 460 U.S. at 792-93, the Court explained that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." And, Justice Kennedy has written that "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of

voters or their party to disfavored treatment by reason of their views," and that a State may not "burden[] or penalize[e] citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring); *accord Obama for Am.*, 697 F.3d at 435 ("Equally worrisome would be the result if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges. Partisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents."); *see also Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (discussing "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively").

In this case, the evidence that the challenged provisions were intended to suppress the vote of Democratic voters mirrors the evidence that those provisions were intended to suppress the vote of minority voters. As explained above, the electoral environment in Ohio is highly competitive, giving Republicans who enacted the challenged measures a strong motive for suppressing the vote of Democratic voters. This can be seen in the communications cited above, *see supra.* "Retrenchment," among Republican officials at every level of state government evidencing their intent to cut back on voting methods that Democratic voters favor. *See, e.g.*, PX0097, 0098, 0099. Moreover, the justifications for the challenged provisions are weak, the General Assembly knew that the challenged provisions would disproportionately burden groups of voters who tend to vote for Democrats, and one of the challenged provisions was directly aimed at practices designed to help voters in "urban"—and thus Democratic—counties.

E. CIVIL RIGHTS ACT

The new, superfluous requirements for casting absentee and provisional ballots under SB 205 and 216 are inconsistent with the plain language of the Civil Rights Act of 1964. It provides in relevant part that:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. § 10101(a)(2)(B). As explained above, the new informational requirements for absentee and provisional ballots will cause voters whose identity is known and qualification to vote is unquestioned to be disenfranchised. These requirements therefore directly violate § 10101(a)(2)(B).

The Sixth Circuit held in *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), however, that there is no private right of action under § 10101(a)(2)(B). Plaintiffs believe *McKay* should be reversed and note both that the *McKay* court reached its conclusion without any express analysis and that, subsequent to *McKay*, the Eleventh Circuit held based on the history of § 10101(a)(2)(B) and analogous Supreme Court precedent that there is a private right of action under the statute. *See Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003). Nevertheless, Plaintiffs acknowledge that this Court is bound by *McKay* and must find that Plaintiffs have no private right to challenge the new absentee and provisional ballot informational requirements under § 10101(a)(2)(B).

CONCLUSION

Plaintiffs will show at trial that Defendants have violated the United States Constitution and Voting Rights Act and the Court should enjoin the Challenged Laws.

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Respectfully submitted,

/s/ *Bruce V. Spiva*

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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 12th day of November, 2015.

By: /s/ *Bruce V. Spiva*