

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

THE OHIO ORGANIZING )  
COLLABORATIVE, ET AL, )  
 )  
PLAINTIFFS, ) CASE NO. 2:15-CV-1802  
 )  
vs. )  
 )  
JON HUSTED, ET AL, )  
 )  
DEFENDANTS. )  
\_\_\_\_\_ )

TRANSCRIPT OF THE BENCH TRIAL PROCEEDINGS - VOLUME V  
BEFORE THE HONORABLE MICHAEL H. WATSON  
MONDAY, NOVEMBER 23, 2015; 9:00 A.M.  
COLUMBUS, OHIO

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Monday Morning Session

November 23, 2015

- - -

THE COURT: What's the deal we worked out with respect to Mr. Preisse?

MR. MCTIGUE: Your Honor, Mr. Preisse's attorney is having Mr. Preisse contact the newspaper to try and retrieve a copy of the e-mail that he sent. Short of that, we should still be able to reach a stipulation to the best of his memory.

THE COURT: Okay. Thank you.

Who's next?

MR. SPIVA: Your Honor, we are going to call our next witness and then we're going to, after our next witness, we're going to bring Dr. Timberlake back for his cross-examination and redirect. Our next witness will be Mr. Sandy McNair.

(Witness sworn.)

THE COURT: Sir, if you'd have a seat on the witness stand over there.

You may proceed.

- - -

EBEN MCNAIR

Called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

1 BY MR. MARTIN:

2 Q. Good morning. Would you please state your name for the  
3 record?

4 A. Eben Orlando McNair, IV.

5 Q. Could you spell that?

6 A. E-B-E-N, O-R-L-A-N-D-O, M-C-N-A-I-R.

7 Q. Good morning, Mr. McNair.

8 A. Good morning.

9 Q. Let's begin by talking a little bit about your  
10 background. What do you do for a living?

11 A. I'm a lawyer.

12 Q. And what kind of lawyer?

13 A. Generally I represent labor unions and their trust  
14 funds. I do some individual employment work.

15 Q. And you're also a member of the Cuyahoga Board of  
16 Elections; is that correct?

17 A. Yes.

18 Q. And when did you join the Cuyahoga Board of Elections?

19 A. 2007.

20 Q. Do you remember the month?

21 A. May.

22 Q. May of 2007?

23 A. Yes.

24 Q. Were you fired after the 2008 elections from the board  
25 of elections?

1 A. No. I served continuously on the board from May 2007 to  
2 date.

3 Q. Are you also active in politics?

4 A. Yes, I am.

5 Q. In what capacity?

6 A. I hold various positions with the Cuyahoga County  
7 Democratic Party.

8 Q. Can you describe those positions?

9 A. Yes. I'm a precinct committee person. So that means  
10 I'm on their central committee. I'm an executive committee  
11 person. I am the democratic city leader for my community which  
12 is the city of Brecksville. I'm counsel for the party,  
13 parliamentarian to the party. I chaired bylaws review  
14 committee and I serve on the chair's cabinet.

15 Q. How did you first learn about this lawsuit?

16 A. A friend of mine brought it to my attention when I was  
17 visiting him in Washington, D.C.

18 Q. Okay. And what friend was that?

19 A. Larry Gold.

20 Q. And is Mr. Gold also a lawyer?

21 A. Yes.

22 Q. What did he tell you about the lawsuit?

23 MS. COONTZ: Objection.

24 THE COURT: Rephrase.

25

1 BY MR. MARTIN:

2 Q. What did you learn about the lawsuit from Mr. Gold?

3 A. That -- he told me -- sorry. I learned that the lawsuit  
4 had been filed and was brought by the Clinton lawyers.

5 Q. And did you have some concerns about the lawsuit when  
6 you first learned about it?

7 A. Yes.

8 Q. Could you describe what those were?

9 A. Yes. I read the lawsuit in his law office and I was  
10 concerned about paragraphs 90 to 99 which were that count that  
11 dealt with early-voting centers. And as I read it, it would  
12 appear that the relief being requested was to have multiple  
13 early-voting centers proportionate to a county's population.

14 Q. And did you contact me about those concerns?

15 A. Eventually, yes. I first called Mr. McTigue who I knew  
16 and then that led to a conversation with you.

17 Q. And after those conversations were your concerns  
18 allayed?

19 A. Yes.

20 Q. Why?

21 A. Because it's my understanding that that claim, as the  
22 relief being requested as to that count is that counties should  
23 have the option, at the county's determination, to have more  
24 than one early-voting site.

25 Q. And do you have any problem with the counties having

1 that option?

2 A. No. I think counties generally should have as many  
3 tools in their tool box as they can to use those to effectuate  
4 good elections.

5 Q. Let's turn now to the elections in Ohio in 2004. What  
6 do you recall about those elections?

7 A. Well, in Cuyahoga County we had major problems. Very  
8 long lines. Chaos is the wrong word, but it was chaotic at  
9 many polling locations.

10 Q. It's after the 2004 elections that the state adopted  
11 no-excuse absentee voting, correct?

12 A. Yes.

13 MS. COONTZ: Objection, Your Honor. He's leading. In  
14 addition, we're talking about 2004 when Mr. McNair was not on  
15 the board of elections until 2007. And what happened in 2004  
16 is not relevant to this case.

17 MR. MARTIN: Your Honor, this goes to foundation and  
18 his knowledge since he's been a member of the board of  
19 elections.

20 THE COURT: He's been a member of the board since May  
21 of 2007. I don't think you've established his knowledge with  
22 respect to the 2004 election, necessarily. He's an attorney  
23 interested, he's a board of elections member, he's a member of  
24 several committees of the democratic party in Cuyahoga County.  
25 It's certainly reasonable to assume that he would have been

1 generally aware of those things but why don't we make sure the  
2 record says that.

3 BY MR. MARTIN:

4 Q. Can you describe what you personally observed during the  
5 2004 elections?

6 A. Yes. In the 2004 election I did what was called voter  
7 protection. So I was part of a group that monitored what was  
8 going on outside and then we had an arrangement that if there  
9 were problems, I would call one of the board members and advise  
10 that board member about what the problems were.

11 Q. What did you learn about the problems in the course of  
12 your voter-protection work in 2004?

13 A. There were very long lines and people were getting very  
14 frustrated with that.

15 Q. After the 2004 elections is when the -- is it your  
16 understanding is that when the state adopted no-excuse absentee  
17 voting?

18 A. 2006, yes.

19 Q. How many days of early voting were available then?

20 A. Thirty-five.

21 Q. Is that the same number that were available when you  
22 became a member of the Cuyahoga board of elections?

23 A. Yes.

24 Q. And did the Cuyahoga board of elections take any  
25 measures to respond to the problems that you observed in the

1 2004 election?

2 A. Yes. Before I got on the board, the prior board members  
3 started what I would call an aggressive vote-by-mail program.  
4 So they sent out unsolicited applications for vote by mail to  
5 voters. They also provided for the return postage so a voter  
6 didn't have to pay for the postage for that -- to return that  
7 application. And then if they put in an application and  
8 therefore we would send them a ballot, we would also pay for  
9 the return postage to return that vote-by-mail ballot.

10 Q. What effects did you observe this program having?

11 A. Over time there was an increasing shift away from voting  
12 on election day to voting by absentee and also in-person  
13 voting.

14 Q. Okay. And did you observe any impact on the lines in  
15 Cuyahoga County as a result of this program?

16 MS. COONTZ: Objection. Vague.

17 THE COURT: Rephrase your question.

18 BY MR. MARTIN:

19 Q. Did this program help reduce the lines in Cuyahoga  
20 County?

21 MS. COONTZ: Objection. Same objection.

22 THE COURT: Overruled. He can answer what he  
23 observed.

24 THE WITNESS: I'm sorry. Would you ask the question  
25 again?

1 BY MR. MARTIN:

2 Q. In your observation, did the expanded vote-by-mail  
3 program that the Cuyahoga County Board of Elections implemented  
4 help reduce the lines?

5 A. Yes. It was, I think, very -- it was one of the keys  
6 for us to be in bringing up the election administration in  
7 Cuyahoga County.

8 Q. And did you mail absentee-ballot requests for every  
9 election?

10 A. Yes. Yes.

11 Q. And how much postage did you include on those ballots?

12 A. Whatever the postage is that would be required.

13 Q. Did the amount of that postage vary?

14 A. Yes. It could vary from election to election and it  
15 could vary within the same election with respect to a  
16 particular community. So if a particular community had  
17 additional issues on the ballot, that might require an  
18 additional page of the ballot and, therefore, the postage for  
19 that community might be higher than the postage for another  
20 community.

21 Q. And how long did you continue this program?

22 A. We continued it until we were told to stop it, I believe  
23 in 2011 by Secretary of State directive.

24 Q. And has the Secretary of State mailed out unsolicited  
25 applications since then?

1 A. Yes. He did so for the 2012 general election.

2 Q. Okay. And but has he mailed ballots out for elections  
3 in odd-numbered years?

4 A. I'm not sure the answer to that question. He certainly  
5 doesn't mail them out for every election. I can only remember  
6 the 2012 election.

7 Q. Why did you mail the ballots out prior to 2011 for every  
8 election?

9 A. Because I think it's important that the voters have a  
10 consistency in terms of what occurs in terms of election  
11 administration. The voters are very busy doing very many  
12 things so I don't think they necessarily focus on, as we have  
13 now, an intermittent process. I don't think that's good for  
14 elections administration. I think it's important to keep  
15 consistency and people have certain expectations. Over time  
16 what you see is I think people's expectations change. Some  
17 people really like voting by mail for various reasons and some  
18 people still want to come to the polls. I think it's important  
19 to have that consistency.

20 Q. And have you observed the inconsistent mailing to have  
21 created any problems with voters in Cuyahoga County?

22 MS. COONTZ: Objection.

23 THE COURT: Sustained.

24 BY MR. MARTIN:

25 Q. Let's talk about early in-person voting in Cuyahoga

1 County. You were on the board of elections during the 2008  
2 elections, correct?

3 A. Yes.

4 Q. And what kind of machines did Cuyahoga County use in the  
5 2008 general election?

6 A. In the 2008 general election we used the ES&S. I think  
7 back then it was the DS100 optical scan system. So we had  
8 optical scan machines in the polling locations for the general.

9 Q. And what kind of machines did Cuyahoga County use when  
10 you first became a member of the board of elections?

11 A. We had the Diebold DRE machines.

12 Q. Those are direct recording electronic machines?

13 A. Yes. That's what DRE means, yes.

14 Q. Why did you change the machines from when you first came  
15 on board to the November 2008 elections?

16 A. The Diebold system, in my view, was an inherently  
17 unstable system. So I came on the board in May of 2007. We  
18 had a primary then. I think it was on May 7th or 8th. I came  
19 on the board really four or five days before then. Just within  
20 that time period when they were testing the central processing  
21 unit, the unit that would actually tabulate the votes on  
22 election night from the memory sticks, it failed. We had a  
23 backup CPU that then we tested and it failed. We then had  
24 to -- there was only one other unit in the state that was  
25 available and the Secretary of State had it. So we used that

1 one for the May 2007 primary and that one worked.

2 Then in 2007, with respect to the general, on election  
3 night, the main processer crashed on multiple occasions. The  
4 Diebold people knew we were having problems and they sent their  
5 top tech from California. I remember on election night I was  
6 standing right next to him when it crashed and he had this like  
7 deer in the headlights. So the main system, to me, was not  
8 stable. That was one problem.

9 The other problem was the VVPAT recorder which was added  
10 on to the machines that was supposed to be the official count  
11 whereby there was like a cash register roll and as people  
12 voted, they could look on the little window and see the paper  
13 recording of their ballot and that system, that VVPAT, often  
14 jammed and that was a problem.

15 Q. When you say it jammed, could you describe?

16 A. It's on a spool and it feeds through kind of like a cash  
17 register and so as the paper comes through, you could look at  
18 the window and see how you were voting. And so that would get  
19 jammed and if a voter was looking, they could tell us and we  
20 could fix it. But often the people weren't telling us because  
21 I think they were focused more on the screen. And the screen  
22 itself, on occasion, we had complaints that the fields were  
23 unstable so that if you press whatever you pressed for R it  
24 would show a D or vice versa. So that was a concern.

25 THE COURT: You're talking now about the DRE machines?

1 THE WITNESS: Yes, I am, Your Honor, when you touch  
2 them.

3 THE COURT: And the VVPAT recorder was an add-on to  
4 each unit?

5 THE WITNESS: Yes. My understanding is when they  
6 manufactured the DRE machine, it did not have this VVPAT on it  
7 and the legislature said, well, we want to have a written  
8 document recording showing how people voted and so in response  
9 to that requirement, they added, in my view, poor quality VVPAT  
10 verified voter -- I forget what it stands for -- audit trail.  
11 And that would jam a lot.

12 In one election that I can recall, we had an automatic  
13 recount because it was so close. We had to use the paper and  
14 my recollection is 30 percent of those things had jammed. We  
15 really could not use them. So that was a problem.

16 And the final problem that I recall is that we got  
17 complaints from our poll workers just in terms of the amount of  
18 time and energy and confusion setting up these machines.

19 So those were the concerns I had. I think all my board  
20 members, I don't want to speak for them, but we all agreed to  
21 move to a different system.

22 THE COURT: Thank you.

23 BY MR. MARTIN:

24 Q. And did you sue the manufacturers of those machines?

25 A. The county did. The county was the one that purchased

1 the equipment and so we worked with the county and we did sue  
2 them, yes.

3 THE COURT: How old was the equipment at the time it  
4 failed?

5 THE WITNESS: It was very new, Your Honor. It was  
6 purchased for, I think, \$20 million by the county in 2006. So  
7 now we're in 2007 and we switched out and went to optical scan  
8 for the 2000 --

9 THE COURT: '8 I think you said.

10 THE WITNESS: Let me just be clear. The 2008 primary.  
11 So for the 2008 primary we did not have optical scans at the  
12 polling locations. We had them -- so people used the paper  
13 ballot but then those ballots were taken down and we, what's  
14 called, centrally scanned them at our warehouse and we were  
15 sued over that because if you don't have precinct-based optical  
16 scan then you don't get a second chance to check your vote. So  
17 when you put your ballot in, if you overvoted at the precinct,  
18 the machine will tell you that and you have the opportunity to  
19 fix your ballot.

20 So when we did the March 2008 primary, I believe it was  
21 in March, we did not have that second-chance opportunity and we  
22 got sued over that. But we just couldn't make the change  
23 quickly enough for that primary. We were able to make it for  
24 the general 2008.

25 THE COURT: Thank you.

1 BY MR. MARTIN:

2 Q. Mr. McNair, let's turn to the 2008 general election. Am  
3 I correct that this was the first presidential election in Ohio  
4 with no-excuse absentee voting?

5 A. Yes.

6 Q. And what did you observe in Cuyahoga County about the  
7 use of these expanded opportunities for no-excuse absentee  
8 voting?

9 A. You talking about in-person voting or general absentee?

10 Q. Let's start with the vote-by-mail program first.

11 A. I think it was successful. The numbers really went up  
12 in 2008 in terms of people who voted by mail, and that was  
13 important to us for election administration. People vote three  
14 ways. They either vote by-mail absentee or they vote in person  
15 or they vote on election day. So from an election  
16 administration perspective, the more we could get people to use  
17 the nonelection-day avenues of voting, the better it was for us  
18 on election day, the greater likelihood of success on election  
19 day that we would have a good elections administration day that  
20 day.

21 Q. Okay. Let's talk about early in-person voting. What  
22 did you observe about the use of early in-person voting in  
23 Cuyahoga County?

24 A. Again, I think that was successful. People used it. We  
25 tracked it day by day, hour by hour and it was, I think, a

1 successful program. At the end we did have some long lines but  
2 it was still, I think, successful.

3 Q. And you described long lines toward the end. Do you  
4 recall which days or periods of the early-voting period?

5 A. It was on the weekends.

6 Q. Who did you observe in those lines?

7 A. They were primarily African-American voters.

8 Q. Is that on all of those weekends that you observed?

9 A. Yes. The observations I made during in-person early  
10 voting, this was primarily used by African-American voters.

11 Q. Golden week was in place in 2008, correct?

12 A. Yes.

13 Q. What is your understanding of the term golden week?

14 A. It's that week, I think 35 to 29, 28 days out where  
15 someone can both register to vote and vote. It's the overlap  
16 of those two opportunities.

17 Q. Did you observe anything about voters using golden week  
18 in the 2008 election?

19 A. Not specifically that I can recall, no.

20 Q. Do you know how many people voted early in person in the  
21 2008 election?

22 A. My recollection is around 54,000.

23 Q. And how many weekends were you open for early in-person  
24 voting in the 2008 election?

25 A. Every weekend. Every Saturday and every Sunday for, I

1 think, four hours each day.

2 Q. And you said 54,000?

3 A. It was between, I think, 54- and 55,000.

4 Q. Let's go to the 2012 general election. Were you able to  
5 conduct your vote-by-mail program as you had in the past during  
6 this election?

7 A. In 2012, no. That was the one that the Secretary of  
8 State did.

9 Q. And did that mailing include prepaid postage?

10 A. No.

11 Q. What did you observe about the impact of the change on  
12 voters in Cuyahoga County?

13 THE COURT: You're seeking -- you're assuming he  
14 observed all of the voters in Cuyahoga County by that question.

15 MR. MARTIN: No, Your Honor. Just if he observed  
16 anything, what those observations were.

17 THE COURT: Okay.

18 THE WITNESS: I don't know that I observed anything  
19 about the voters themselves. I had my own general observations  
20 about it but I'm not sure if that's responsive to your  
21 question.

22 BY MR. MARTIN:

23 Q. When did the Secretary of State mail out the  
24 applications in 2012?

25 A. I think there were two mailings. One was around Labor

1 Day or so and I guess my view was that was too early and it was  
2 a subsequent kind of follow-up mailing to catch intervening  
3 people, intervening registrants.

4 Q. When you say it was too early, why was that?

5 A. I don't think people focus on the election that early  
6 out so we would do it closer to the election.

7 Q. Were you working with the Cuyahoga democratic party at  
8 that time as well?

9 A. The answer would be generally yes because of the  
10 positions I held. Yes.

11 Q. Are you aware of whether the Cuyahoga democratic party  
12 in 2012 mailed out its own mailings?

13 A. Yes, they did. I think they were checking the returns,  
14 the responses, and they were concerned and so they sent out  
15 their own mailing. I think as a result of that then at the  
16 board we saw an uptick in vote-by-mail applications.

17 Q. Was it your observation that fewer people were  
18 responding in 2012 to the Secretary of State's mailing?

19 A. You looked at the numbers and I think one thing that  
20 helped us in 2012 was the fact -- it's correlation, it's not  
21 causation. So when you see that the party sent them out and  
22 then there's an uptick and many of those that came in, and I  
23 don't have the numbers, were in response to the democratic  
24 party sending them out because, unlike what the Secretary of  
25 State sent out which was barcoded, the ones from the Cuyahoga

1 County Democratic Party were not barcoded.

2 Q. Let's talk about early in-person voting in the 2012  
3 election. Did you witness any lines during the early in-person  
4 voting period?

5 A. Yes.

6 Q. And when were they?

7 A. Principally the last two weekends before the election.

8 Q. Did Cuyahoga County allow for early in-person voting on  
9 the same weekends that it did in the 2008 election in 2012?

10 A. No. We were restricted, my recollection that there was  
11 litigation over that and pursuant to the litigation -- let me  
12 step back. Typically boards of election set their own hours  
13 and in 2008 we attempted to -- we the board, the four board  
14 members, attempted to agree on a schedule of extended hours.  
15 We were not successful in reaching agreement among ourselves  
16 and so that went to the Secretary of State to make that  
17 decision.

18 The same thing happened in 2012. The board members had  
19 different views as to what the hours should be or even if there  
20 should be any hours in terms of my republican colleagues and so  
21 that we deadlocked as well on that and pursuant to state law,  
22 the Secretary of State broke that tie and determined that there  
23 would be no extended hours for in-person early voting. And  
24 then I believe that that was trumped effectively by federal  
25 court litigation.

1           What we had in 2012 was less than what we had in 2008.

2           Q.    How many people used early in-person voting in Cuyahoga  
3           in 2012?

4           A.    My recollection is about 45,000.

5           Q.    Do you know how many people use the golden-week period  
6           in 2012?

7           A.    I think it was around 9,000.

8           Q.    And those are voters?

9           A.    Voters, yes.

10          Q.    Do you know how many used the same-day registration  
11          opportunity in 2012?

12          A.    It was a little over 2,000.

13          Q.    What did you observe about the opportunity to have  
14          golden week on your ability to administer elections in Cuyahoga  
15          County?

16          A.    From an elections administration perspective, in  
17          addition to whatever the benefit is to those voters who can do  
18          both those things at once, it allows us to start our early  
19          vote-by-mail program a week earlier. And I think that then  
20          helps relieve us -- it relieves the pressure on the back end,  
21          that is to say as we get closer to election day in terms of  
22          everything that occurs.

23          Q.    So walk me through how that works. Voters can request  
24          an absentee ballot before the early voting starts?

25          A.    Yes.

1 Q. Right?

2 A. Yes.

3 Q. And when can they start requesting them?

4 A. I think the law is on January 1st or 90 days before the  
5 election, whichever is closer.

6 Q. So there's a 90-day period where people are requesting  
7 ballots that you cannot send out until early voting starts?

8 A. Yes. I would defer to the statute obviously but that's  
9 my recollection. So people can ask certainly substantially  
10 earlier than we can mail them out. So we get this backlog that  
11 we're then kind of ready to go as soon as we can start the  
12 early-voting period.

13 Q. Am I correct that you testified that having an extended  
14 early-voting period helps deal with that backlog?

15 A. Yes. So what it means is then we can get all of those,  
16 that backlog we get out a week earlier which means then they're  
17 getting, in theory, processed a week early coming back to us.  
18 So now they want to -- now we're sending them the ballot and so  
19 we're getting the ballots back earlier and then we open those  
20 and we do not tabulate them but then they get scanned and just  
21 it's an earlier time that we can get that done.

22 Anything we can get done earlier than later is very  
23 helpful to us. Our folks work very, very hard all month. They  
24 work hard all the time but it's a really burdensome task,  
25 especially when you're doing a presidential election.

1 Q. Let's talk about the voters who use the -- in previous  
2 elections used same-day registration during golden week. Can  
3 you walk me through the process of verifying those  
4 registrations and how the board treated the absentee ballots  
5 that they cast?

6 A. So those ballots are segregated. We then send a  
7 nonforwardable acknowledgment communication card to them and  
8 then if that does not come back then the process is concluded.  
9 If it comes back as nondeliverable then we send a confirmation  
10 card which is forwardable to the new address in case they've  
11 moved. Then we need to get that acknowledgment back. And if  
12 we don't get it back then we don't count that ballot.

13 Q. That was the case when golden week was in place,  
14 correct?

15 A. For 2000 -- yes.

16 Q. Has that verification process changed since golden week  
17 has been eliminated?

18 A. No.

19 Q. So what's the difference in terms of how you treat these  
20 ballots now that golden week has been eliminated, if any?

21 A. The process remains the same. That doesn't change.

22 Q. So a voter can still register during the same time frame  
23 as they could in the 2012 election, correct, 30 days before the  
24 election?

25 A. The time frame for registration is the same, yes.

1 Q. And the only difference is the time frame for casting  
2 the early ballot, correct?

3 A. Correct. So if they did the same thing, if they did --  
4 during golden week, if they did both activities on the same day  
5 in one visit and now that that's changed and it requires two  
6 visits to register and then come back and vote, the way that  
7 ballot is handled is no different in those two scenarios.

8 Q. When golden week still existed, did you observe any  
9 difficulties in administering the verification process?

10 A. No.

11 Q. Are you aware of any instances of someone using golden  
12 week to commit fraud in Cuyahoga County?

13 A. No.

14 Q. The board of elections investigates possible cases of  
15 fraud; is that correct?

16 A. Yes.

17 Q. You did conduct such investigation after the 2012  
18 election; is that correct?

19 A. Yes. We made -- we had initial concerns that that may  
20 have occurred and then we made a referral over to the  
21 prosecutor's office for investigation or further investigation.

22 Q. What was the result of the prosecutor's office -- what  
23 was the result in the investigation conducted by the  
24 prosecutor's office after your referral?

25 A. He issued us a letter and advised us that --

1 MS. COONTZ: Objection.

2 THE COURT: Sustained.

3 MS. COONTZ: Thank you.

4 BY MR. MARTIN:

5 Q. Are you aware of whether any of those referrals resulted  
6 in charges?

7 A. I'm aware that there were no charges filed.

8 Q. How large or what is the budget for administering  
9 elections in this past election in 2015 in Cuyahoga County?

10 A. I don't remember the specific numbers. I think we  
11 average, I don't know, something north of \$14 million. It can  
12 vary from election to election depending on how many  
13 county-wide elections we have.

14 Q. Do you know how much it cost to administer golden week  
15 specifically in previous elections?

16 A. It was around 40-, 41,000.

17 Q. Would the 14- to \$15 million figure for this past  
18 election be roughly what it was in 2014 or 2012?

19 A. Well, that's an average. During the presidentials, it's  
20 higher. So it would probably be north of that next year.

21 Q. Let's turn now to the new requirements for casting  
22 absentee ballots. Are you familiar with those new  
23 requirements?

24 A. Yes.

25 Q. What are they, from your understanding?

1 A. My understanding is that they've added now two fields in  
2 terms of birthdate and address that were not required before.

3 Q. When did these new requirements go into place?

4 A. Well, they're in place now. The legislature passed them  
5 in 2014. I'm not sure which specific election between when  
6 they were passed and the election we just had but they've been  
7 in place in that time frame.

8 Q. Before the legislature required date of birth and  
9 address on the absentee-ballot identification envelope, did you  
10 have any difficulty identifying absentee voters?

11 A. If somebody had a common name it might take a little bit  
12 more time but we were able to do it, certainly.

13 Q. And absent that particular instance, did you have any  
14 difficulty identifying voters before those new requirements?

15 A. Sometimes you have difficulty but they didn't relate to  
16 these requirements.

17 Q. Is it your understanding that similar requirements have  
18 been in place for provisional ballots?

19 A. Yes.

20 Q. Does that mean that the provisional-ballot affirmation  
21 form now requires date of birth and address as well?

22 A. Yes.

23 Q. With that information, is it your understanding that the  
24 affirmation form for provisional ballots can be used as the  
25 equivalent of a registration form?

1 MS. COONTZ: Objection. He's leading, Your Honor.

2 THE COURT: Rephrase.

3 BY MR. MARTIN:

4 Q. What is your understanding of how the provisional-ballot  
5 form can be used to update a registration?

6 A. Before the 2008 -- the 2014 changes, the  
7 provisional-ballot envelope had two sections and the bottom  
8 section could be used to update voter registration. It would  
9 require those fields. The top part of it did not.

10 The new form does not have two sections and so can be  
11 used for that purpose but now the date of birth and address,  
12 which were not required before when there were two separate  
13 pieces were not required in the top part of the form which  
14 really is what you needed to get your vote counted, is now  
15 included in the one. Now it's just all one section. There  
16 aren't just two sections anymore.

17 So with that information then it can be used for that  
18 purpose whereas before you'd have to fill out the bottom to  
19 update your registration. That's my understanding.

20 Q. So before when it was split into two, if the voter  
21 filled out the date of birth and address, it could be used to  
22 update registration, is that my understanding of your  
23 testimony?

24 MS. COONTZ: Objection.

25 THE COURT: I think that's what he testified to.

1 THE WITNESS: Hopefully, Your Honor.

2 THE COURT: I think that's what I heard.

3 BY MR. MARTIN:

4 Q. Would the failure to include that information -- would  
5 that have resulted in the ballot being rejected?

6 A. No. Not before the changes because they were two  
7 separate sections and they had two separate purposes. Now  
8 there's just one form and you have to fill it all out.

9 Q. And the same legislation that added these new  
10 requirements to provisional ballots also made some other  
11 changes to the laws governing provisional ballots, correct?

12 A. There were other changes to the law. There was the  
13 reduction from having ten days to seven days.

14 Q. At that moment could have you a look at Plaintiffs'  
15 Exhibit Number 70. They're in the black binders.

16 MR. MARTIN: Your Honor, may I approach?

17 THE COURT: You may.

18 BY MR. MARTIN:

19 Q. Have you seen this document before, Mr. McNair?

20 A. Yes. I'm the author of this document.

21 Q. Can you describe what it is?

22 A. Yes. It's the written testimony I gave with respect to  
23 Senate Bill 216.

24 Q. Is this a true and accurate copy of your testimony?

25 A. Yes.

1 MS. COONTZ: Your Honor, I'm going to object.

2 THE COURT: Okay.

3 MS. COONTZ: He can testify as to what he testified to  
4 but at this point he hasn't indicated that he doesn't remember  
5 such that his recollection needs refreshed by this document.  
6 This document is hearsay. The witness is here. He can testify  
7 as to what he said.

8 MR. MARTIN: Your Honor, I'm not trying to refresh his  
9 recollection. This is going to the information that was before  
10 the legislature, the legislature's purported knowledge, intent  
11 and justifications for these laws. I'm not introducing it for  
12 the truth of the matter asserted herein and for that reason  
13 it's not hearsay.

14 MS. COONTZ: Your Honor, unless the witness -- even if  
15 the witness can testify that every single member of the General  
16 Assembly read this document such that they can be found to have  
17 knowledge of what it says, it's still being used for the truth  
18 of the matter asserted as to the intent of the General  
19 Assembly. The intent of the General Assembly is evidenced by  
20 the statutes themselves and once again, the journal of the Ohio  
21 General Assembly which Plaintiffs have yet to introduce. This  
22 testimony is not evidence of the General Assembly's intent.

23 MR. MARTIN: Your Honor, I disagree with respect to  
24 what evidence is relevant to show the General Assembly's  
25 intention --

1 THE COURT: Why don't you let me determine that. I'm  
2 going to sustain the objection.

3 BY MR. MARTIN:

4 Q. Mr. McNair, can you recall the subject matter of your  
5 testimony regarding the reduction from ten to seven days of the  
6 cure period of provisional ballots?

7 A. Yes. I think Senator Seitz had proposed it and some  
8 concern about it would ease election administration burden and  
9 that made no sense to me. The number of people we have  
10 correct -- making these corrections for days eight, nine and  
11 ten are very small, and we're the largest county. So I had no  
12 idea what the basis was for that assertion. So I was putting  
13 testimony to urge that they keep the ten days.

14 Q. Do you recall how many people have utilized the days  
15 that were eliminated in the 2012 election?

16 A. I don't know that.

17 Q. Or in any previous election in Cuyahoga County?

18 A. All I know is that -- no, other than to say that it's  
19 not many people.

20 Q. But some people had utilized those days in the past?

21 A. Yes.

22 THE COURT: I think he said at the outset it was  
23 relatively small.

24 BY MR. MARTIN:

25 Q. You also submitted testimony regarding the new

1 informational requirements for provisional ballots, correct?

2 A. Yes.

3 Q. And do you recall the subject matter of your testimony?

4 A. Again, my concern was that by putting additional  
5 requirements that were not necessary, people would be -- voters  
6 would be unnecessarily disenfranchised, and that was my  
7 concern. And I think I pointed out that when the legislators  
8 themselves run as candidates, their petitions must be, I forget  
9 the phrase, but substantially correct. And yet I felt that  
10 with respect to voters it was like we would say strict  
11 liability.

12 Somebody could make a small mistake, an inadvertent  
13 error and we would not count that ballot when everybody,  
14 democrat, republican, whoever would say, no, we should count  
15 that ballot. We know that that's that voter based upon the  
16 information on that provisional envelope. And the fact that  
17 they may have forgotten to put in their birthdate, even though  
18 every single other aspect of it is correct and their signature  
19 matches exactly with the signature we have on file, we can't  
20 count that ballot. And that seemed wrong to me.

21 Q. There was just an election in Cuyahoga County, correct?

22 A. Yes.

23 Q. Did you observe anything about the impact of these new  
24 requirements on voters in this past, this most recent election?

25 A. Yes.

1 Q. And what was that observation?

2 A. Based upon the reports, 75 individuals were  
3 disenfranchised by these new requirements.

4 Q. And what was the turnout in this past election?

5 A. I don't remember.

6 Q. Do you remember how it compares to the 2012  
7 presidential?

8 A. It's much smaller.

9 MR. MARTIN: That's all at this time, Your Honor.

10 THE COURT: Thank you, Mr. Martin.

11 Ms. Coontz, you may cross.

12 Before you start, let me ask one question. Mr. McNair,  
13 the 75 individuals whose votes were not counted in this past  
14 election.

15 THE WITNESS: Yes.

16 THE COURT: It was for one of the additional two, the  
17 date of birth or the address?

18 THE WITNESS: Yes.

19 THE COURT: It was for lacking the ability to verify  
20 that or it was missing?

21 THE WITNESS: We did not count those, correct.

22 THE COURT: And in all of those circumstances either  
23 the address or the date of birth was not properly filled out;  
24 is that correct?

25 THE WITNESS: Correct. We get a report with respect

1 to absentees and with respect to provisionals that give us the  
2 categories of why they were challenged and not voted. And so  
3 the numbers I'm giving you are the numbers -- the total numbers  
4 off of the report.

5 THE COURT: Thank you. Go ahead.

6 - - -

7 CROSS-EXAMINATION

8 BY MS. COONTZ:

9 Q. Good morning, Mr. McNair.

10 A. Good morning.

11 Q. Mr. McNair, you became aware of this lawsuit around  
12 June 17th of 2015, correct?

13 A. No.

14 Q. When did you become aware?

15 A. Well, I gave you that piece of paper in my deposition.  
16 I think it was in May of sometime.

17 Q. May of 2015, correct?

18 A. Yes.

19 Q. And you became aware from your friend Larry Gold,  
20 correct?

21 A. Yes.

22 Q. And you became aware that it was Hillary Clinton's  
23 lawyers who filed the suit, correct?

24 A. No. That's not what he said to me.

25 Q. I believe on your direct you mentioned Clinton's

1 lawyers?

2 A. He said to me this was filed by Clinton's lawyers.

3 Q. And upon becoming aware of it, you read the complaint,  
4 correct?

5 A. Yes.

6 Q. And you called Don McTigue upon reading the complaint?

7 A. Yes.

8 Q. Because you were concerned about paragraphs 90 through  
9 99?

10 A. Yes.

11 Q. Because in those paragraphs it appeared to you that the  
12 plaintiffs were seeking to require multiple early-vote centers  
13 on a proportional basis to voter population, correct?

14 A. Yes.

15 Q. And you were concerned about an order mandating the  
16 Secretary of State to direct each county board of elections to  
17 provide an early in-person center on a reasonably equitable  
18 population-per-county basis would be harmful to the Cuyahoga  
19 County Board of Elections?

20 A. I don't know if I would use the word harmful but it  
21 would be, in my view, adverse to good election administration  
22 in Cuyahoga County. That's how I would put it.

23 Q. Okay. And as a member of the board of elections, under  
24 Ohio law you are a representative of the Secretary of State; is  
25 that correct?

1 A. I'm not sure what you're referring to. I have to follow  
2 what the Secretary of State tells me to do by directive or  
3 advisory or whatever.

4 Q. So are you familiar with Ohio Revised Code 3501.06 which  
5 provides that county board of elections members are appointed  
6 by the Secretary of State as their representative for a  
7 four-year term?

8 A. I'm aware that I'm appointed by the Secretary of State,  
9 yes.

10 Q. And you're aware that that statute also says as his  
11 representative?

12 A. If you want to show it to me then I can be aware of it.  
13 Sitting here, I don't know. I don't know that that word's in  
14 the statute. If it is, I accept that it is.

15 Q. But when you became aware of this lawsuit you did not  
16 call the Secretary of State to flag for the Secretary of  
17 State's Office that the plaintiffs were seeking relief that  
18 would be adverse to Cuyahoga County?

19 A. Correct. Because he was a party in the case.

20 Q. But you're appointed by the Secretary of State, correct?

21 A. Yes.

22 Q. And you didn't think it was important to call the  
23 Secretary of State to inform him that Cuyahoga County would not  
24 be able to effectuate the relief that the plaintiffs were  
25 seeking?

1 A. Correct.

2 Q. Instead, you called Plaintiffs' counsel?

3 A. Correct.

4 Q. And you called Mr. McTigue to ask the plaintiffs not to  
5 seek that type of relief, correct?

6 A. Yes.

7 Q. And I believe in your deposition you testified, because  
8 you don't want to be told by anyone how to run elections?

9 A. Well, if I said that, I would say it's imprecise. I  
10 think that counties should be given discretion to use various  
11 tools to effectuate elections and I am concerned about the  
12 press for this going on in the state with respect to uniformity  
13 because it restricts our ability locally to make adjustments  
14 that I think are proper at the local level.

15 Q. So you're concerned about the counties not having  
16 discretion. Is that a fair statement?

17 A. Yes. County boards, yes.

18 Q. Are you aware that the Cuyahoga County Democratic Party  
19 is seeking to eliminate counties' discretion with respect to  
20 consolidated poll books?

21 A. I'm not aware -- well, I know that that issue is in the  
22 case but I don't know, frankly, what the relief is that's being  
23 requested as to that issue.

24 Q. So you didn't know that the Cuyahoga County Democratic  
25 Party is actually seeking relief such that the board would be

1 required to consolidate its poll books?

2 A. I don't think I was aware of that.

3 Q. The Cuyahoga County Democratic Party is also not  
4 challenging the uniform hours for early voting that currently  
5 exists, correct?

6 A. Look, I don't know what they're doing or not doing in  
7 this litigation. It does get a little confusing because I have  
8 a lot of different hats but my participation in this litigation  
9 has been out of my concern for election administration in  
10 Cuyahoga County with my board of elections hat on.

11 Q. And with your board of elections hat on, you want  
12 discretion, correct?

13 A. Yes.

14 Q. Do you feel the discretion is necessary with respect to  
15 days and hours of voting?

16 A. Yes.

17 Q. But the Cuyahoga County Democratic Party, for whom  
18 you're an executive committee member, is not seeking to force  
19 that discretion, correct?

20 A. Again, I'm not sure what the party is seeking. If your  
21 question to me is -- I won't -- I'm sorry. I'll answer your  
22 questions.

23 Q. Now, after your initial call with Mr. McTigue,  
24 Mr. McTigue arranged a call between you, Mr. Kaul and  
25 Mr. Martin, correct?

1       A.    I think that's -- I'm hesitating because of the issue of  
2   Mr. Kaul, but I think you're right.  I didn't know that -- I  
3   didn't have a specific recollection it was Mr. Kaul but I think  
4   you are correct in that regard.

5       Q.    And during that call with Mr. Kaul and Mr. Martin, you  
6   informed them that you did not want Cuyahoga County to be  
7   forced to have multiple early-voting centers; is that correct?

8       A.    Yes.

9       Q.    And when you had this call with Mr. Kaul and Mr. Martin,  
10   you told them that Cuyahoga County was in the process of trying  
11   to find even one additional early-voting center, correct?

12      A.    No.  I would phrase it differently, if I might.  I think  
13   we were looking for an alternative early-voting center to the  
14   one that we had.  The one that we have is at the board of  
15   elections and there are, for example, parking problems with  
16   respect to that.  So we were looking for, I don't really think  
17   a second one but really an alternative one to the one we  
18   currently have and have always had.

19      Q.    So you were trying to replace the existing early-vote  
20   center?

21      A.    We were looking into that, correct.

22      Q.    And before you had this call with Mr. Kaul and  
23   Mr. Martin, you asked Mr. Perlatti to outline the problems that  
24   you were having trying to find an alternative early-vote  
25   center, correct?

1 A. Yes.

2 Q. And you asked Mr. Perlatti to outline those problems  
3 because he's more familiar with the problems that the board is  
4 having, correct?

5 A. With the specific issues in terms of staffing and  
6 equipment, yes.

7 Q. But you conveyed those problems to Mr. Kaul and  
8 Mr. Martin, correct?

9 A. Yes.

10 Q. You did not tell Pat McDonald that you had the call with  
11 Mr. McTigue, Mr. Martin and Mr. Kaul, correct?

12 A. Yes.

13 Q. You did not tell them?

14 A. I did not. That's correct.

15 Q. And Mr. McDonald is the republican member of the  
16 Cuyahoga County Board of Elections?

17 A. No.

18 Q. I'm sorry. What's his position?

19 A. He's the director.

20 Q. He's the director. So you did not tell the director of  
21 the Cuyahoga County Board of Elections that you were having  
22 these calls with Mr. Martin, Mr. McTigue and Mr. Kaul?

23 A. Yes. Correct.

24 Q. You had another call with Mr. Martin about the third  
25 week in August, August 21st; is that correct?

1 A. I had a number of calls. The dates, you have all my  
2 notes from these calls. I'm hesitating because I don't know  
3 that it was that particular date, but I had a number of calls  
4 with him, yes.

5 Q. And did you ask Mr. McDonald to join that call on or  
6 about August 21st of 2015?

7 A. Again, I don't want to assume the date, but the answer  
8 is no, I did not ask him to join in that call.

9 Q. Roughly a week later, on August 28th, you had another  
10 call with Mr. Martin, correct?

11 A. Again, I had a series of calls. I don't remember the  
12 specific dates.

13 Q. Okay. So let's just talk broadly. In all the calls  
14 that you had with Mr. Martin, did you ever ask the director of  
15 the Cuyahoga County Board of Elections to join on the call?

16 A. No.

17 Q. And during these calls you were talking about the impact  
18 of these laws on election administration, correct?

19 A. Yes.

20 Q. And Mr. McDonald is the director of the board of  
21 elections who administers elections in Cuyahoga County,  
22 correct?

23 A. Yes.

24 Q. At one point you asked Mr. Perlatti to join a call with  
25 you and with Mr. Martin, correct?

1 A. My recollection is twice.

2 Q. So on two occasions you had Mr. Perlatti talk to  
3 Plaintiffs' counsel?

4 A. Yes.

5 Q. And what's Mr. Perlatti's position?

6 A. He's the deputy director.

7 Q. You didn't ask the director to join on either one of  
8 these calls with Mr. Perlatti and Plaintiffs' counsel, did you?

9 A. Correct.

10 Q. And you asked Mr. Perlatti to join these calls because  
11 he's much more familiar with the unsolicited absentee-mail  
12 application process than you are, correct?

13 A. He's certainly more familiar. I don't know about much  
14 more familiar but he's more familiar, yes.

15 Q. Did you ask Mr. McDonald for any of his expertise to be  
16 able to convey that to Plaintiffs' counsel?

17 A. No.

18 Q. You had a subsequent conversation on October 1st, 2015  
19 where Mr. Martin informed you that he would be subpoenaing you  
20 as a fact witness in this case; is that correct?

21 A. I'm not sure of the date but the substance of what you  
22 say is correct.

23 Q. Did you ever suggest to Plaintiffs that they should  
24 subpoena the director of the Cuyahoga County Board of  
25 Elections, Pat McDonald, in this case?

1 A. I never made any suggestions to them about who they  
2 should subpoena, including me.

3 Q. But you volunteered Mr. Perlatti to Plaintiffs' counsel  
4 to provide background information on the administration of  
5 elections in Cuyahoga County, correct?

6 A. Yes. Because he knows that, I think, better than  
7 anybody.

8 Q. When you first took a look at this complaint, in your  
9 opinion, the entire opinion didn't implicate or didn't affect  
10 Cuyahoga County, did it?

11 A. The entire --

12 Q. Every claim in the complaint?

13 A. Did not, correct.

14 Q. And in fact, you noted that the counts related to  
15 absentee and provisional balloting didn't impact Cuyahoga  
16 County because those were going to be dealt with in the NEOCH  
17 case, isn't that correct?

18 A. Well, I think you're referring to the exhibit that I  
19 gave you from my deposition which was my summary of the  
20 proposed amended complaint that the Court denied, as I recall.

21 Q. But the question is --

22 A. Yes.

23 Q. Your understanding was that the claims related to  
24 absentee and provisional balloting were going to be eliminated  
25 from this case and handled through the NEOCH case; is that

1 correct?

2 A. That's what I understood Plaintiffs' request to this  
3 Court was.

4 Q. You talked about the lines in 2004 in Cuyahoga County.  
5 You came to the board in 2007, correct?

6 A. Yes.

7 Q. And that was after the Secretary of State replaced all  
8 four members of the Cuyahoga County Board of Elections; is that  
9 right, in 2007?

10 A. So I'm a little concerned about the word replaced. She  
11 wanted them all to resign and to start fresh with a new board.  
12 My recollection is that she asked them all to resign and the  
13 two democrats did.

14 Q. And what happened with the two republicans?

15 A. So that was a two-step process. Ms. Florkiewicz did  
16 then resign but Mr. Bennett I think resisted for a longer  
17 period of time and I think there was some litigation that was  
18 going to occur and then in response to that, Mr. Bennett then  
19 did resign.

20 Q. So when you came on the board, it was an entirely new  
21 board of elections in Cuyahoga County as a result of what we've  
22 just discussed?

23 A. Yes.

24 Q. And the Secretary of State kept the board on election  
25 oversight for a period of time, correct?

1 A. Yes.

2 Q. And is it your understanding that this was because of  
3 the problems that the Cuyahoga County Board of Elections had  
4 had administering elections?

5 A. Yes.

6 Q. You briefly testified about the issues with the Diebold  
7 machines. Those were back in 2007, right?

8 A. Yes.

9 Q. And since then, Cuyahoga County has switched vendors to  
10 ES&S?

11 A. Yes.

12 Q. The machines that you currently use are optical-scan  
13 machines?

14 A. Yes. I think except for disabled voters.

15 Q. And it's the DS200 machine?

16 A. That I believe is the current model that we have  
17 deployed at polling locations.

18 Q. And the DS200 machines sometimes jam, correct?

19 A. Yes.

20 Q. And they sometimes become inoperable?

21 A. Inoperable, I'm not aware of that. They've given an  
22 error code. We have replaced them so I guess in that sense.  
23 We've had trouble -- we've had occasional trouble with them,  
24 that's true, but nothing like we had with the DRE system.

25 Q. But you have had problems with the optical-scan system?

1 A. I would say minor problems.

2 Q. But they have, on occasion, become inoperable?

3 A. Yes. In the sense that on election day on occasion we  
4 have to switch out machines. So in that sense, yes.

5 Q. Is there any limit to the number of optical-scan  
6 machines that a county can have?

7 A. I'm not aware of that. You're asking as a legal matter?

8 Q. I'm asking as a board of elections official are you  
9 aware of anything limiting the number of optical-scan machines  
10 that you have?

11 A. I think, no. As a practical matter we have one out  
12 there for every precinct.

13 Q. So there's just one machine for every precinct?

14 A. Yes.

15 Q. So optical scans are apportioned not by the number of  
16 voters; is that correct?

17 A. No. Precincts -- to step back. Precincts are allocated  
18 by the number of voters within a range, so within that range  
19 there's one scanner for each precinct.

20 THE COURT: So how do they cast their ballot?

21 THE WITNESS: So what they do is they come and they  
22 register and then they get a ballot. They fill it out and then  
23 after they fill it out, they go to the machine and they simply  
24 put it into the machine. The machine takes it and reads it.

25 THE COURT: Scans it, reads it, records it?

1 THE WITNESS: Yes. On a flash drive and then an  
2 internal memory. So then we have really three records of that  
3 one ballot. We have the paper ballot, we have the flash drive  
4 that -- the memory stick that will be taken out at the end of  
5 the night, transported down to the board of elections and read  
6 and that's into the tabulator. And then there's a hard drive  
7 in that machine as well.

8 THE COURT: Thank you.

9 BY MS. COONTZ:

10 Q. Mr. McNair, do you know what voters the Secretary of  
11 State is going to mail unsolicited absentee applications to in  
12 2016?

13 A. I do not.

14 Q. And I believe you testified in was it --

15 A. I'm sorry. Could I go back to this inoperable issue  
16 that you raised?

17 Q. Sure.

18 A. So I guess the one point, just so the Court has a fuller  
19 understanding, is if the machine is inoperable or doesn't work  
20 or somehow isn't being scanned then the voter takes that ballot  
21 and puts it into an emergency slot at the bottom of the  
22 machine. Unlike the DS200 -- unlike the DRE machine, if that  
23 became inoperable, there was no way to kind of keep going. But  
24 with the optical scan you can keep going.

25 It's harder from an election administration point of

1 view to tabulate those but in terms of lines, you can keep  
2 people coming in and voting. In theory, they all could not be  
3 operating. You just keep putting your ballots in the emergency  
4 slot. It's not what we prefer but we have that. That's an  
5 additional capability with the optical scans that is important  
6 to me as an elections official.

7 THE COURT: So there's a printing cost for those  
8 ballots, right?

9 THE WITNESS: Yes.

10 THE COURT: So in addition to the machines, you're  
11 paying the additional printing cost of the paper ballot?

12 THE WITNESS: Yes.

13 THE COURT: All right. Go ahead.

14 BY MS. COONTZ:

15 Q. Mr. McNair, are you aware that many DRE counties,  
16 including Franklin County, have backup optical-scan options?

17 A. I'm really not aware of other -- of what other counties  
18 have. I do recall that the Secretary of State Brunner required  
19 if you're going to continue using a DRE that you have that but,  
20 frankly, I lost focus of that issue when we moved away from DRE  
21 machines.

22 Q. So counties with the DRE machines, if those would become  
23 inoperable, are required to default to the optical-scan system  
24 that Cuyahoga County uses?

25 A. I don't have any reason to question your representation,

1 counsel. I just don't know.

2 Q. Okay. You mentioned that the Cuyahoga County Democratic  
3 Party mailed out unsolicited absentee-ballot applications to  
4 supplement what the Secretary of State had done?

5 A. Yes.

6 Q. Is there any reason why the Cuyahoga County Democratic  
7 Party can't do that in 2016?

8 A. No.

9 Q. And that actually created an uptick, you testified, to  
10 usage of vote by mail?

11 A. Yes. Well, again, I don't know if causation is  
12 correlation. But it did have an uptick -- the board had an  
13 uptick after those were sent out, correct. But, again, I would  
14 say from an elections administration point of view, we'd rather  
15 get one in from the Secretary of State that has the barcode  
16 because that's a lot easier, which is how we did it when we  
17 kind of controlled that process.

18 Q. Is there anything to prevent the Cuyahoga County  
19 Democratic Party from implementing a barcode system?

20 A. What I'm told is that that's virtually impossible to do.

21 Q. But you don't know for sure?

22 A. Correct.

23 Q. This kind of dovetails into what we talked about with  
24 respect to golden week. You are concerned that the elimination  
25 of golden week will delay Cuyahoga County's being able to begin

1 its vote-by-mail process; is that correct?

2 A. That's one of the concerns, yes.

3 Q. You testified that starting your vote-by-mail program  
4 earlier will alleviate some of the administrative burdens on  
5 the board, correct?

6 A. Yes.

7 Q. But you also testified that you were concerned about the  
8 Secretary of State mailing its unsolicited absentee ballots too  
9 early because people aren't engaged long before the election;  
10 is that correct?

11 A. Yes.

12 Q. So Cuyahoga County wants to start early but you think  
13 the Secretary of State started too early by starting roughly at  
14 the same time?

15 MR. MARTIN: Objection, Your Honor. That  
16 mischaracterizes the prior testimony.

17 THE WITNESS: I would agree it mischaracterizes my  
18 testimony.

19 MS. COONTZ: I can rephrase.

20 THE COURT: That would be good.

21 BY MS. COONTZ:

22 Q. You're concerned that the Secretary of State did his  
23 mailing too early?

24 A. Yes.

25 Q. But you're aware that he did the mailing in two ways?

1 A. Yes. There was a big mailing and then there was a  
2 supplemental.

3 Q. The supplemental mailing was to catch the individuals  
4 who had not responded to the first wave, correct?

5 A. No.

6 Q. What was that?

7 A. My understanding is that because he sent it out before  
8 the close of registration, the second wave picked up those  
9 people between the time that whatever his cutoff date was and  
10 the close of registration, that group of people he then sent it  
11 out to. So he could say, correctly I think, that he sent them  
12 to the voters that met his targeted categories because he had  
13 to make up for the fact that he sent it out, that first major  
14 wave, early.

15 Q. And when you say early, you say before registration  
16 closed?

17 A. I think it was around Labor Day.

18 Q. And that's when Cuyahoga County wants to be able to  
19 begin its vote-by-mail process, correct?

20 A. We want to extend it -- we want to start it -- that was  
21 the advantage to starting it at the 35th day which is, I think,  
22 different than Labor Day. I'd have to look at a calendar.

23 MS. COONTZ: If I can have just a minute.

24 Thank you. I have nothing further at this time.

25 THE COURT: Thank you.

1 Mr. Martin?

2 MR. MARTIN: I have nothing further, Your Honor.

3 THE COURT: Thank you for coming down, Mr. McNair.

4 THE WITNESS: Thank you, Your Honor.

5 MR. KAUL: Your Honor, before we bring up the next  
6 witness, could I just raise an evidentiary point?

7 THE COURT: Sure.

8 MR. KAUL: Your Honor, on this issue about written  
9 testimony before the legislature, we have a few other exhibits  
10 that we intend to offer which are along the same lines and I  
11 think we would ask the Court, and we can handle this however  
12 the Court thinks best, but to the extent that we have any  
13 posttrial briefing, we'd ask that we be permitted to address  
14 sort of the question of what evidence that relates to the  
15 legislature's intent should be considered as part of the  
16 inquiry into the intent. And in that event that, if the Court  
17 thinks it's appropriate, that the Court either reserve or  
18 revisit on the question of whether that evidence should be  
19 considered as part of the intent inquiry.

20 THE COURT: You're speaking specifically about 70 at  
21 this point?

22 MR. KAUL: Yes, Your Honor. There will be a few other  
23 exhibits that are similar in nature. It's our opinion that any  
24 testimony before the legislature, written or oral, is evidence  
25 of its intent and knowledge, specifically.

1 THE COURT: Certainly evidence of the speaker's  
2 intent, isn't it?

3 MR. KAUL: Well, that is --

4 THE COURT: Not the Speaker of the House but the  
5 speaker who offers the testimony.

6 MR. KAUL: That is definitely true, Your Honor. But  
7 again, in the Arlington Heights case where the Supreme Court  
8 talks about inquiring into intent, it's a broad-based inquiry  
9 that look at all the information that the legislature had  
10 before it.

11 THE COURT: I've read the case and, yes, you'll have  
12 an opportunity.

13 MR. KAUL: Thank you.

14 THE COURT: Let's take a break. Dr. Timberlake on  
15 cross?

16 MR. VOIGT: Yes, Your Honor.

17 THE COURT: When we come back.

18 (A recess was taken at 10:23 a.m. until 10:42 a.m.)

19 THE COURT: Doctor, thank you for coming back. You  
20 may resume the stand. You are still under oath, sir.

21 Mr. Voigt, you may begin your cross-examination.

22 MR. VOIGT: Thank you, Your Honor.

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JEFFREY TIMBERLAKE, PH.D.

resuming the stand for cross-examination, having been previously duly sworn, continued his testimony as follows:

CROSS-EXAMINATION

BY MR. VOIGT:

Q. Professor, do you recall that I took your deposition a few weeks ago?

A. Yes.

Q. And today I'm going to go over some of the same topics that we discussed at the deposition.

A. Okay.

Q. Today I'm going to be referring, in particular, to your initial report which is Plaintiffs' Exhibit 109 and your rebuttal report which is Plaintiffs' Exhibit 110. So if you could look at those.

A. Sure.

Q. Do you want me to clear some of those other things?

A. If I can just put them on the floor.

I'm sorry, you said 109 and 110?

Q. Yes.

A. I'm at 109.

Q. Okay. You wrote two reports for the plaintiffs in this case?

A. Correct.

1 Q. And one was an initial report and a second was a  
2 rebuttal report?

3 A. Correct.

4 Q. Have you ever taught any courses related to election  
5 administration?

6 A. No, I have not.

7 Q. Have you ever published a paper related to election  
8 administration?

9 A. No.

10 Q. Have you ever done any professional research related to  
11 election administration?

12 A. No.

13 Q. Have you ever taught any courses related to election  
14 laws?

15 A. No.

16 Q. Have you ever published any paper analyzing election  
17 laws?

18 A. No.

19 Q. In your opinion, what does, generally, legislative  
20 intent mean?

21 MR. SPIVA: Objection, Your Honor. This is outside  
22 the scope of either of his reports and calls for a legal  
23 conclusion.

24 THE COURT: Sustained.

25

1 BY MR. VOIGT:

2 Q. Have you ever taught any courses related to legislative  
3 intent?

4 A. No.

5 Q. Have you ever published a paper regarding legislative  
6 intent?

7 A. No.

8 Q. Dr. Timberlake, do you consider yourself an expert on  
9 election administration?

10 A. I do not.

11 Q. Do you consider yourself an expert on Ohio's election  
12 laws?

13 A. No, I do not.

14 Q. Do you consider yourself an expert on legislative  
15 intent?

16 A. No.

17 Q. And I believe during your direct you mentioned that this  
18 is the first time you testified as an expert. So the next  
19 question is going to be pretty self-explanatory.

20 Have you ever been deemed by a court to be an expert on  
21 the Voting Rights Act?

22 A. No, because this is my first testimony, I've never been  
23 deemed as an expert in anything by any court except what came  
24 up during my -- assuming I was deemed an expert in my direct  
25 examination.

1 Q. In this case?

2 A. Correct.

3 Q. And you teach at the University of Cincinnati now?

4 A. Yes.

5 Q. Have you ever taught any courses that focus on the  
6 Voting Rights Act?

7 A. No.

8 Q. And you do not have a degree in law?

9 A. No.

10 Q. During Mr. Spiva's questions, he asked you about the  
11 senate factors. Very briefly, what are the senate factors?

12 A. The way that I understand the senate factors, the way in  
13 which I approached that part of my report was that they're a  
14 set of social and political conditions that may or may not  
15 exist in any jurisdiction and that courts can use those factors  
16 or dimensions or conditions to assess -- to help assess whether  
17 a violation of the Voting Rights Act has occurred. A violation  
18 in terms of policy or practice.

19 Q. Have you ever written any scholarly papers on the senate  
20 factors?

21 A. No.

22 Q. Have you ever written any scholarly papers on the Voting  
23 Rights Act?

24 A. No.

25 Q. And simply because we had a little bit of a delay

1 between your direct and cross, could you briefly tell the Court  
2 what the term calculus of voting means?

3 A. The term calculus of voting refers to a theoretical  
4 approach principally used by political scientists to try to  
5 understand why people may or may not vote. So it's a  
6 theoretical model that proposes that individuals calculate the  
7 costs and benefits of voting. And if the benefits exceed the  
8 costs, they vote, and if the costs exceed the benefits, they  
9 don't vote. Very briefly.

10 Q. Have you ever authored any professional papers related  
11 to the calculus of voting?

12 A. No, I have not.

13 Q. Have you ever taught any courses related to the calculus  
14 of voting?

15 A. No.

16 Q. Prior to writing your reports in this case had you ever  
17 conducted an analysis of the calculus of voting?

18 A. No.

19 Q. In the calculus of voting, what is the cost of voting?

20 A. Well, there are a whole variety of costs discussed in  
21 the framework.

22 Q. I'm sorry to interrupt you. I'm not asking for all of  
23 the costs but just generally if you could define the term cost  
24 of voting within the context of calculus of voting?

25 A. Well, as I understand it, there are -- the costs of

1 voting are the time and sometimes money and energy,  
2 expenditures that people have to exert in order to register to  
3 vote, go to the polls, learn about candidates. So there are a  
4 variety of behaviors individuals, according to this framework,  
5 have to engage in in order to be prepared to vote.

6 MR. VOIGT: Could we bring up slide 2, please?

7 BY MR. VOIGT:

8 Q. We've put on the screen page 4 of your initial report  
9 and there's a portion of your report on page 4 that is brought  
10 out. Is that where you, in your report, define the calculus of  
11 voting and reference the costs associated with voting?

12 A. That is certainly one place I do it. I'm not sure if  
13 it's the only place or not. But it is certainly a place.

14 Q. That's on page 4. And the sentence starts with, the  
15 primary theoretical basis for my conclusion and point 1 above  
16 is the calculus of voting. I'm not going to read the whole  
17 thing but I just wanted to frame for the record where that was.

18 Is the opportunities a person has to vote relevant to  
19 the calculus of voting?

20 A. I think I discussed in my deposition that I think that  
21 in general -- because the calculus of voting is a fairly  
22 general framework and the costs are a fairly general framework  
23 then people -- you could define various kinds of costs in a lot  
24 of ways and I think that I would agree that relative to a  
25 situation in which there were very few opportunities to vote, a

1 situation in which there were many opportunities to vote would  
2 entail lower costs.

3 Q. Right. And in fact, in the definition on page 4 of the  
4 costs of voting, you actually refer to opportunities to vote.  
5 Just let me read the sentence.

6 Such costs entail garnering information about  
7 candidates, registering, and how and where to vote. Did I read  
8 that correctly?

9 A. Yes, you did. So those would be information costs,  
10 essentially. Gathering information in an economic or political  
11 science framework could be considered costly because it  
12 requires an effort to learn things. So that would be a cost,  
13 yes.

14 Q. So the opportunities that a person has to vote are  
15 relevant to the calculus of voting framework?

16 A. Yes.

17 Q. When there are more opportunities to vote, does the cost  
18 to vote go down?

19 A. Relative to a situation in which there are fewer  
20 opportunities to vote, yes.

21 Q. Let's take a situation where a state has early  
22 in-person -- strike that.

23 Let's take a situation where a state has an early  
24 in-person voting period that includes evenings and weekends.  
25 Under this scenario, would that decrease the cost of voting?

1       A.    If you're saying implicitly relative to a state in which  
2 those opportunities were not -- did not exist then the state  
3 with those opportunities would have, overall other things  
4 equal, lower costs than a state that did not have those  
5 opportunities.

6       Q.    And if a state has evening voting hours on multiple  
7 days, this also would decrease the cost of voting; is that  
8 correct?

9       A.    Again, relative to a state that did not have those  
10 opportunities, yes.

11       Q.    And if a state has weekend voting hours before election  
12 day, does this decrease the cost of voting?

13       A.    Again, relative to a state that did not. I would say  
14 that in all of these, the simple comparison of whether a state  
15 had or did not have these opportunities is not the only thing  
16 somebody would be interested in in trying to figure out, for  
17 example, try to predict turnout or something like that. But  
18 other things left completely the same, if you just compare the  
19 two states on those dimensions then, yes, the state with more  
20 opportunities would have a lower average cost than the state  
21 with fewer opportunities. That would be the logic of the cost  
22 of voting framework.

23       Q.    Compared with a voting system with only in-person  
24 voting, does the opportunity to vote by mail also decrease the  
25 burden to vote?

1 A. Again, other things equal, comparing, let's say, a state  
2 that did not have vote by mail with a state that did, other  
3 things equal, the state that did have vote by mail would have  
4 lower average costs because there would be more opportunities.

5 Q. Let's consider two states. State A has one day of  
6 voting and state B has ten days of voting. Is it correct under  
7 the calculus of voting framework that in state B it is easier  
8 to vote?

9 A. Stated that way and using the calculus of voting as a  
10 theoretical framework, yes, the state that has ten days would  
11 have a lower average cost than a state with one.

12 Q. And the follow-up to that, under the calculus of voting  
13 framework it would be harder to vote in state A; is that  
14 correct?

15 A. Correct. And the reason would be that it would require  
16 people to -- it would require that people are only able to vote  
17 on a certain day and so if their schedules overlapped or they  
18 couldn't get child care or something like that, that, in  
19 theory, would make it harder to vote in the state with just one  
20 day of voting.

21 Q. Let's take a look at Ohio. I think you know that Ohio  
22 has early in-person voting, voting on election day and mail-in  
23 voting; is that right?

24 A. Yes. That's my understanding.

25 Q. So in Ohio, with early in-person voting, voting on

1 election day and mail-in voting, more responsive to the needs  
2 of a voters than a state that only has voting on election day?

3 A. Depending on what the word responsive means there, if  
4 you compared Ohio to other states, it's both reasonable to  
5 conclude that Ohio has more opportunities to vote than other  
6 states than some other states. The only thing I really know  
7 about this is -- about these state-by-state comparisons is from  
8 some of the expert reports that I've been reading in this case.

9 And so if it's the case that the evaluation of the  
10 challenged provisions is based on a state-by-state comparison  
11 then that certainly would be relevant. If the legal decisions  
12 are being made based on the changes within the state of Ohio  
13 then I'm not sure how relevant the state-by-state comparisons  
14 are. But that's a question I simply don't know the answer to.  
15 That's not my area of expertise.

16 Q. What I was asking about in the question is how  
17 responsive the state is to the needs of the voters. I can  
18 actually bring up your deposition testimony if that would be  
19 helpful to you.

20 A. Yeah. Well, sure. Let's see.

21 Q. Let's pull up page 102, lines 25 to 103, line 16. Here  
22 I asked your question at your deposition. I said, in Ohio,  
23 with 220 hours of early in-person voting, which actually is  
24 incorrect. I think there's 207. 220 overall and 207 early.

25 In Ohio, with 220 hours of early in-person voting and

1 the opportunity to vote by mail, is Ohio --

2 Is Ohio, with 220 hours of early in-person voting and  
3 the opportunity to vote by mail, more or less responsive to the  
4 needs of voters than a state that has only voting on election  
5 day, no early in-person voting, and does not have the  
6 opportunity to vote early by mail?

7 Then there's an objection by Mr. Spiva.

8 And your answer was, compared to that kind of state it  
9 would be -- it would be more -- there would be more  
10 opportunities to vote. I guess in the narrow sense of the term  
11 responsive, I'm not sure. I guess I don't -- yes -- I guess,  
12 yes, I'd be willing to accept that compared to such a state, it  
13 would be more responsive.

14 Sitting here today, do you have any reason to believe  
15 that your testimony at your deposition related to that question  
16 is incorrect?

17 A. No. I would say that we could tell from your verbatim  
18 reading of what I said, I was tripping over the term  
19 responsive. I frankly don't know if that's a particularly  
20 legal -- has a particularly legal definition that I'm not aware  
21 of. So the reason that I was sort of hesitating there is I  
22 suppose if we use a kind of colloquial common-sense definition  
23 of responsive then perhaps, yes, I'd be willing to accept that  
24 state B, or whatever, Ohio is more responsive than a state that  
25 didn't have those opportunities.

1           If the term responsive means something -- has a more  
2     legal definition that I'm not aware of then I guess that was  
3     where my hesitation was. But in sort of common-sense terms,  
4     whether or not we use the term responsive I would say that  
5     compared to a state that had very few voting opportunities, if  
6     a state had lots of voting opportunities, that state -- it  
7     would be easier to vote, on average, in the state that had lots  
8     of opportunities.

9           Q. Is it correct that your initial report does not include  
10    an analysis of whether Ohio's mail-in-voting option decreases  
11    the cost of voting?

12          A. I don't recall whether it mentions that at all. I don't  
13    think that it does. In terms of an empirical analysis of  
14    whether it actually reduces the cost of voting, this is where  
15    things get a little tricky. Because the calculus of voting  
16    framework is really just a theoretical model. Empirical tests  
17    of it vary in sort of what the inputs are to the model. So I'm  
18    not actually sure how you would test whether mail -- vote by  
19    mail empirically reduced the cost of voting. It certainly  
20    theoretically would reduce the cost of voting relative to,  
21    let's say, a state that did not have those opportunities.

22           So that's a long-winded way of saying I don't think I  
23    directly tested the calculus of voting framework really in any  
24    of the report, including mail-in voting.

25          Q. Let me ask you this. You would agree that voting

1 opportunities are part of the calculus of voting; is that  
2 right?

3 A. Correct.

4 Q. And so in your initial report and in your rebuttal  
5 report you do not include an analysis of the effect of mail-in  
6 voting on the calculus of voting framework; is that right?

7 A. That's correct. Yes. I'm not sure that it's correct  
8 even to say that you could assess the effect of a particular  
9 kind of voting on the calculus of voting framework if that's  
10 what your question was. It would really be -- what you would  
11 really have to do is assess, for example, you might -- what  
12 you'd really like to have is, within a given state and a given  
13 year have a set of voters assigned to a condition in which they  
14 could vote by mail and a set of voters assigned to a condition  
15 which they couldn't randomly assigned and then you could  
16 compare the rates of voting. That would really be the only way  
17 to directly test that idea. But, yes, I did not test that idea  
18 in my report in that way.

19 Q. Is it correct that in your initial report you do not  
20 include an analysis of whether Ohio's evening and weekend hours  
21 during Ohio's early-voting period decreased the cost of voting?

22 A. Again, the only way to ask that question would be if  
23 changes in the hours affected either some measure of the burden  
24 on voters or some measure of turnout. In other words, it's  
25 not -- the idea of cost is really more a logical way of

1 thinking about what people have to do to go vote. So I'm not  
2 sure you could actually test whether a particular set of hours  
3 affected the costs. Again, compared to a state that had fewer  
4 early-voting hours to states that had more early-voting hours  
5 would be expected to, on average, have lower costs. But it's  
6 not something you can directly test, I don't think. At least  
7 in a given state at a given time I guess is what I'm saying.

8 Q. You just testified that you agree that voting  
9 opportunities are part of the calculus of voting, right?

10 A. Yes. Theoretically, yes.

11 Q. And in your initial report you did not measure the  
12 burdens on voting against the totality of opportunities to vote  
13 in Ohio; is that correct?

14 A. Stated that way, no. I'm not sure how one could. But,  
15 yes, I did not do that, what you just said.

16 Q. And in fact, in your report you did not even discuss the  
17 totality of opportunities to vote in Ohio within the context of  
18 the calculus of voting; is that correct?

19 A. That sounds right. In other words, I would say that,  
20 again, the way to -- one way to go about doing this would be  
21 sort of as you're suggesting, I think. Lay out all the  
22 different possible opportunities to vote in Ohio and compare  
23 those, let's say, with another state or a set of states. Yes,  
24 I did not do that in the report.

25 Q. So neither of your reports in this case include an

1 analysis of all of the opportunities to vote in Ohio, fair to  
2 say?

3 A. Certainly not collectively as you suggested in your  
4 earlier question. I think I talk about a lot of different  
5 kinds of ways of voting, but I guess I'm not exactly sure what  
6 the question is.

7 Q. I'm wondering within the context of the cost of voting  
8 or even the calculus of voting I'm just trying to summarize  
9 what we've been talking about here. Your reports in this case  
10 do not include an analysis within that framework of all of the  
11 opportunities to vote in Ohio, fair to say?

12 MR. SPIVA: Objection to form, Your Honor.

13 THE COURT: I'm going to overrule that.

14 THE WITNESS: So I would say that the report discusses  
15 a number of the ways a person can vote, but whether it examines  
16 all of them, again, I'm not exactly sure what that would even  
17 mean to say that you examined all of them in terms of the costs  
18 of voting. I mean because in a given moment, the costs are  
19 partly determined by what the opportunities are but they're  
20 determined by a lot of other things, too. There are a couple  
21 of ways it seems like you could assess whether the costs were  
22 greater or less at a given time compared to another time within  
23 a state or in a given state at a certain time compared to other  
24 states.

25 And so I think that mostly what I did is tried to

1 assess -- I tried to assess the likelihood that there would be  
2 burdens placed on Ohio's voters, generally, by the changes in  
3 the law, that is by the challenged provisions, and whether  
4 there might be evidence of racial disparities in that burden.  
5 That was the main point of the report.

6 BY MR. VOIGT:

7 Q. I think we're talking past each other a little bit here.  
8 So could I bring up page 71, lines 11 to 22?

9 MR. SPIVA: I object, Your Honor. This isn't proper  
10 impeachment. Bringing up the deposition?

11 MR. VOIGT: I'm citing to a page of his -- I'm going  
12 to show him a page of his deposition to set the foundation for  
13 the next question.

14 THE COURT: Do I have it?

15 MR. VOIGT: We can provide it. May I approach the  
16 bench?

17 THE COURT: You may. You're citing page 71?

18 MR. VOIGT: Yes, Your Honor. Lines 11 to 22.

19 THE COURT: So you're going to ask him a question?

20 MR. VOIGT: Yes, Your Honor. It's a pretty simple  
21 point that I'm trying to make here.

22 THE COURT: Go ahead.

23 BY MR. VOIGT:

24 Q. This is page 71 of your deposition and I asked a  
25 question. I said, if a state has an early in-person voting

1 period and during that early in-person voting period there are  
2 evenings on multiple days and also weekends when a voter can  
3 cast a ballot, does that have any impact on the analysis on the  
4 calculus of voting?

5 Mr. Spiva objected.

6 And you answered, yes, that would be something a person  
7 interested in the calculus of voting would want to know about  
8 because it directly relates to cost.

9 My simple question to you is, does your analysis of the  
10 senate factors include an analysis of the voting opportunities  
11 in Ohio?

12 A. It does not assess the voting opportunities in Ohio  
13 relative to, let's say, another state. I think what I'm trying  
14 to do is assess, in part, especially in the latter part of the  
15 report, assess as best I can at that time the potential impact  
16 on minority voters of the challenged provisions. And so what I  
17 do is assess essentially usage rates of various kinds of voting  
18 mechanisms.

19 Maybe we are talking past each other but the point of  
20 the report was not to, for example, do an individual-level  
21 analysis of the burdens on individual voters and therefore try  
22 to understand how and when they voted. That would require  
23 individual-level data that I didn't have at the time.

24 Q. And sitting here today do you have any reason to believe  
25 that your testimony that we just put up on the screen, page 71

1 of your deposition, lines 11 to 22, is incorrect for any  
2 reason?

3 MR. SPIVA: Your Honor, he hasn't asked him a question  
4 that he's given a different answer to.

5 THE COURT: Correct.

6 MR. SPIVA: Or indicated that he's forgotten anything.

7 THE COURT: Sustained.

8 BY MR. VOIGT:

9 Q. Let's move on. Please turn to page 10 of your first  
10 report, your initial report. Fair to say this is the section  
11 where you begin to discuss senate factor 5?

12 A. Yes.

13 Q. Is the first sentence of that section your understanding  
14 of senate factor 5?

15 A. That is my understanding, yes.

16 Q. And that first sentence I'm just going to read it into  
17 the record. Senate factor 5 considers the extent to which  
18 members of the minority group bear the effects of  
19 discrimination in such areas as education, employment, and  
20 health which hinder their ability to participate effectively in  
21 the political process.

22 Did I read that correctly?

23 A. Yes. There are quotes around, quote, the extent to  
24 which and there's a quote at the end, but otherwise, yes.

25 Q. In this section of your report of which I guess is Roman

1 numeral three, senate factor 5 section, you assert there are  
2 racial inequalities in Ohio in education; is that right?

3 A. Assert is one word. I think I demonstrate with  
4 empirical data, too, but yes.

5 Q. And you also assert that there are racial inequalities  
6 in employment in Ohio; is that correct?

7 A. With the same caveat, yes.

8 Q. And you also assert that there are racial inequalities  
9 in health in Ohio; is that correct?

10 A. Yes.

11 Q. You did not conduct any analysis in your initial report  
12 or in your rebuttal report about whether racial inequalities in  
13 education, employment or health affect voter turnout; is that  
14 correct?

15 A. That's correct. I didn't have data that would allow me  
16 to do that sort of analysis.

17 Q. So your reports do not include any analysis linking the  
18 senate five issues and the rate of voter participation of  
19 minorities; is that correct?

20 A. That's correct. The idea is that in the -- sort of  
21 self-evidently in the, what was in quotations, the idea is that  
22 certain kinds of characteristics are believed to affect the  
23 capacity of people to participate in the political process.  
24 And then in addition, I cite a number of studies that discuss  
25 more direct empirical tests of this idea. But the data that I

1 had access to did not allow me to do that, a similar kind of  
2 empirical test.

3 Q. We're going to talk about those studies a little bit  
4 later. You did not conduct a study to determine whether the  
5 areas you discuss related to senate factor 5 actually cause  
6 individuals in Ohio not to vote; is that correct?

7 A. Not in the report. I do have -- I did some analysis of  
8 the current population survey data that shows that education  
9 and race and some other things are related to the propensity to  
10 vote, but it's not in the initial report.

11 Q. When did you do that analysis?

12 A. I think that I did it after I submitted my rebuttal  
13 report but it was mostly to sort of get a sense of -- I think I  
14 was interested in whether the voting patterns in midterm  
15 elections were particularly different from those in the  
16 presidential election years and in so doing, I did a couple of  
17 other kinds of supplementary analyses sort of for my own  
18 learning. But, yeah, they don't appear in the initial report.

19 MR. VOIGT: I'm going to move to strike the testimony  
20 related to the additional work he did that did not appear in  
21 his report, Your Honor.

22 MR. SPIVA: Objection. He opened the door to it.

23 MR. VOIGT: Your Honor, I don't think I did. I'm  
24 asking about what he did during his engagement and what he put  
25 into his report.

1 THE COURT: To the extent that he's offering an  
2 opinion beyond either his initial and rebuttal reports, I'm  
3 going to sustain the -- I guess I'm going to overrule the  
4 objection.

5 BY MR. VOIGT:

6 Q. Dr. Timberlake, would demographic turnout rates be  
7 helpful to understanding whether racial disparities in  
8 education, employment and health are hindering a particular  
9 group's participation in the political process?

10 A. I would say that it would be one thing you might be  
11 interested in looking at. I would be cautious about drawing  
12 any firm conclusions comparing any two elections in terms of  
13 turnout. So, in theory, if nothing else is happening in a  
14 state, for example, if the cost of voting or the burden on  
15 voters is increased, then you might expect to see differences  
16 in turnout. However, lots of other things change also that  
17 might affect turnout.

18 So I wouldn't use turnout as a very strong indicator of  
19 the effect of any given policy. But I wouldn't be opposed to  
20 looking at it or using it.

21 Q. But you don't disagree that data on minority turnout is  
22 relevant to understanding whether the senate factor 5 issues  
23 are actually hindering minority participation in the political  
24 process?

25 A. I certainly don't think it's irrelevant. I think it's

1 one of many possible things you might want to look at.

2 Q. If a higher percentage of African-Americans than whites  
3 have voted in recent elections in Ohio, is this relevant to  
4 understanding whether socioeconomic disparities have hindered  
5 minority participation in the political process?

6 A. Again, it's not irrelevant but what I would say is that  
7 there are really -- in theory there are a set of things  
8 happening. One is that, for example, and a very simple way to  
9 think about it would be that the racial disparities and all the  
10 different kinds of characteristics that we've been talking  
11 about might, on average, everything else equal, tend to  
12 suppress minority turnout. That's the idea behind the costs of  
13 voting or the calculus of voting framework.

14 As a sociologist, though, I would say that that doesn't  
15 account for all of the other kinds of ways in which turnout can  
16 happen or can be generated. And so simply because -- so a  
17 simple examination, let's say, of minority turnout over two  
18 different elections -- I'm hesitant to put much -- to draw very  
19 many firm conclusions about the impact of the kinds of senate  
20 factor 5 characteristics that we've been talking about because  
21 there's so many other things that lead to turnout. So turnout  
22 itself is, again, I wouldn't be averse to looking at any kind  
23 of data but that doesn't strike me as a particularly kind of  
24 useful way of looking at how changes in voting law might  
25 increase or decrease burdens on particular kinds of voters.

1 Q. Let's pull up page 58 to 59 of Dr. Timberlake's  
2 deposition transcript. I ask you a question at your  
3 deposition. I said, if there are disparities in education and  
4 employment and health between African-Americans and whites, as  
5 you claim in this section of your report, and African-American  
6 turnout in recent elections has been equal to or exceeded white  
7 turnout, why wouldn't that be something relevant to this  
8 discussion of whether these factors hinder the ability of  
9 minorities to participate effectively in the political process?

10 There's an objection to form.

11 Then you asked to rephrase and I asked the court  
12 reporter to reread the question.

13 And then you responded, so in terms of why wouldn't it  
14 be relevant, I mean, it is relevant.

15 And then you continue.

16 So minority turnout would be relevant. And I understand  
17 you're saying there are other issues, there are other  
18 considerations, but minority turnout certainly would be one of  
19 those issues that is relevant to understanding whether  
20 socioeconomic disparities have hindered minority participation  
21 in the political process. Fair to say?

22 A. Yeah. I mean, I'm not trying to be argumentative here.  
23 I think it's more the case that it wouldn't be irrelevant.  
24 It's not something that I would say oh, under no circumstances  
25 should you look at minority turnout. In terms of whether it's

1 the most important thing, I would say not.

2 MR. SPIVA: I also object to him only reading part of  
3 the answer, Your Honor. I think if he had read the rest of it,  
4 it would have been exactly consistent with what he's just said.

5 THE COURT: You're going to have an opportunity. You  
6 can have him do that.

7 BY MR. VOIGT:

8 Q. Dr. Timberlake, your discussion of senate factor 5 does  
9 not include a discussion of African-American turnout in recent  
10 elections in Ohio; is that correct?

11 A. I think that is correct.

12 Q. How do the racial disparities in education, employment  
13 and health in Ohio compare with those disparities in Kentucky?

14 A. I don't know the answer to that.

15 Q. Did you do any analysis in your reports about racial  
16 disparities in education, employment and health in states other  
17 than Ohio?

18 A. No. My understanding, which may have been faulty, I  
19 don't know, I guess it's kind of a legal matter, is that the  
20 case is really just about what's going on in Ohio and so I was  
21 neither asked to nor did I think to examine Ohio in its  
22 relationship to other states. So that was the premise I was  
23 working under both in my analysis of racial disparities and the  
24 socioeconomic characteristics. And also, again, to the extent  
25 that I could, analyze racial disparities in different kinds of

1 voting behaviors. My understanding was that this was a case  
2 only about Ohio and so I was not asked to nor did I volunteer  
3 to compare Ohio with other states.

4 Q. Okay. So you focused on Ohio because counsel told you  
5 to focus on Ohio?

6 A. I think that's generally correct, yes.

7 Q. Your reports do not examine racial disparities in  
8 education, employment and health nationwide; is that correct?

9 A. In the report, the two reports we've been discussing?

10 Q. Yes, sir.

11 A. No, they do not.

12 Q. Is it possible that racial disparities in education,  
13 employment and health exist in every state?

14 A. I think it's virtually certain that they do.

15 Q. Does your report compare racial disparities -- strike  
16 that.

17 Does your report compare racial disparities in income in  
18 Ohio with the rest of the nation?

19 A. No, it does not.

20 Q. Does your report compare racial disparities in health in  
21 Ohio with the rest of the nation?

22 A. It doesn't compare Ohio with any other state or the  
23 nation as a whole. None of the things I looked at.

24 Q. Okay. To summarize, the senate factor 5 issues that you  
25 looked at, you did not compare Ohio with any other state?

1 A. That's correct.

2 Q. Let's turn to senate factor 6 in your report. It starts  
3 on page 41. Fair to say your understanding of senate factor 6  
4 is set forth in the first sentence of that section. And I'll  
5 read it into the record. Senate factor 6 of the Voting Rights  
6 Act prompts consideration of, quote, whether political  
7 campaigns have been characterized by overt or subtle racial  
8 appeals, end quote.

9 A. Yes. That's my -- that is where -- that's my  
10 understanding of senate factor 6, if that was your question.

11 Q. And in this section of your report you provided five  
12 examples of what you characterize as racial appeals; is that  
13 right?

14 A. I think that's right, yes.

15 Q. Is it fair to say that there have been a large number of  
16 political campaigns in Ohio in the last 15 years?

17 A. Yes.

18 Q. Is it fair to say there have been a large number of  
19 political rallies in Ohio in the last 15 years?

20 A. Yes.

21 Q. Is it fair to say there have been a large number of  
22 blogs written about Ohio politics in the last 15 years?

23 A. Yes.

24 Q. Is it fair to say there have been a large number of  
25 articles written about Ohio politics in the last 15 years?

1 A. Yes.

2 Q. Out of all of the political campaigns, political  
3 rallies, political blogs and political articles related to Ohio  
4 over the past 15 years, you put five examples in your report;  
5 is that correct?

6 A. Yes. I would say that, yeah, I would say that trying  
7 to -- for the reasons you mentioned, actually, if the goal were  
8 to examine all or a sample of the campaigns and all the  
9 different kinds of things you've been discussing and then code,  
10 let's say, whether or not a particular blog post had a racial  
11 appeal or not, that could be done. It would take a very long  
12 time. I think it would be the subject of its own, you know,  
13 kind of report in and of itself and so the purpose of this  
14 section was to give examples of the kinds of racialized appeals  
15 that did exist in Ohio.

16 But you're right that it's not a -- I didn't examine  
17 every single blog or article or campaign and assess whether,  
18 for example, there was a majority of the campaigns that had  
19 those appeals, that is true.

20 Q. Were those five examples examples that you copied from  
21 Dr. Roscigno's report?

22 A. Those were examples, yes, that I took from his report.

23 Q. Suppose you were trying to prove in a journal paper that  
24 the majority of political activities in Ohio over the past 15  
25 years are marked by racism and you set forth five examples in

1 your paper. In your opinion, would the study pass peer review?

2 A. If I stated that the goal of the paper was to  
3 demonstrate that the majority of political campaigns and blogs  
4 and articles had had these kinds of appeals, if that was the  
5 purpose of the paper and then I presented five cases, no, it  
6 would not pass peer review.

7 Q. And so based on your analysis of senate factor 6, you  
8 could not conclude that the majority of political activities in  
9 Ohio are marked by racism; is that correct?

10 A. That's correct.

11 Q. And your analysis of racial appeals is not a  
12 comprehensive analysis of political campaigns in Ohio; is that  
13 correct?

14 A. That's true. I didn't examine every political campaign  
15 in Ohio.

16 Q. Did you do any research during your engagement about the  
17 number of political activities that do not include racialized  
18 appeals?

19 A. No.

20 Q. You do not claim in your report that the Secretary of  
21 State of Ohio has made racialized appeals associated with the  
22 laws that the plaintiffs are challenging; is that correct?

23 A. That's correct.

24 Q. You do not claim in your report that the Secretary of  
25 State has made any racialized appeals in any context; is that

1 correct?

2 A. Correct.

3 Q. You do not claim in your report that the Ohio General  
4 Assembly has made racialized appeals related to the laws the  
5 plaintiffs are challenging; is that correct?

6 A. That's correct.

7 Q. And you do not claim in your report that the Ohio  
8 General Assembly has made any racialized appeals in any  
9 context; is that correct?

10 A. That is correct.

11 Q. Is evidence counter to racialized appeals a fair subject  
12 matter to include in a discussion of senate factor 6?

13 A. It's a good question. This is where my sort of  
14 unfamiliarity with this particular form of report might come  
15 out. Again, I think you asked me in my deposition if --  
16 similar kinds of questions. If you were trying to get a paper  
17 published in a journal and you didn't present any contrary  
18 evidence, if that contrary evidence existed would you get  
19 essentially dinged for that.

20 Again, as a kind of a way of -- as a matter of the  
21 interpretation of senate factor 6, I simply don't know whether  
22 courts in past cases have required kind of a balance of the  
23 evidence. In other words, that somebody has done a study  
24 showing that some high percentage of political activities  
25 contain racial appeals.

1           So in terms of whether -- so if I had written a study  
2 about the proportion of Ohio political activities that  
3 contained racial appeals, what I would have done is developed  
4 an estimate of the percentage or the proportion that did and  
5 then, by definition, that would mean the other proportion  
6 didn't. So an article that I would write for peer review  
7 trying to get published would look pretty different from this.

8           This is a place where I wasn't particularly aware of the  
9 requirements that a court would need to evaluate the evidence,  
10 whether they would need lots of pro and cons kinds of evidence.

11         Q.    Okay. Let me step back because maybe part of my  
12 question was a little confusing. I wasn't asking you for a  
13 legal conclusion about what the Court needs. I was wondering,  
14 from your perspective, your sociology perspective, is evidence  
15 counter to racialized appeals a fair subject matter to include  
16 in a discussion of senate factor 6?

17         A.    Well, again, depending on the context. So in this  
18 context what I was under the -- I was under the impression that  
19 the question is whether they do exist. In other words, whether  
20 these appeals do exist. I don't think that I implied or would  
21 ever argue that that's the only thing that happens so I was  
22 assuming that a reader would say, well here's some examples of  
23 racialized appeals and not conclude that I was trying to argue  
24 that that's all that existed in Ohio politics.

25           So for that reason, I don't think that I felt like it

1 was important to say here are five examples and now here's  
2 another five where it didn't happen. That's just simply not  
3 what I thought was the point of sort of elaborating on the  
4 senate factors.

5 Similarly, I didn't present data on all of the different  
6 kinds of ways in which there aren't racial disparities in Ohio.  
7 I presented data on the important racial disparities that are  
8 connected to voting, at least theoretically.

9 MR. VOIGT: Mr. Conover, could you please pull up  
10 pages 86 to 87 of the transcript.

11 BY MR. VOIGT:

12 Q. This is another question from you're deposition. I  
13 asked you, do you think that evidence counter to racialized  
14 appeals would be a fair subject matter to discuss in this  
15 section?

16 Mr. Spiva objected and then you responded.

17 I think it's pretty hard to know 'cause I think -- I  
18 mean, so it's certainly not irrelevant.

19 And then you continue. I'm not going to read the whole  
20 thing. But at the very end you say, I don't think it's  
21 irrelevant, no.

22 If you want me to read the whole thing in Mr. Spiva?

23 MR. SPIVA: That's not my objection actually but I  
24 didn't want to interrupt you.

25 Objection, Your Honor. This is a different question and

1 there's no contradiction here. So, again, I think this is  
2 improper impeachment.

3 THE COURT: Sustained.

4 BY MR. VOIGT:

5 Q. During your engagement did you conduct any research  
6 related to racial unity in political advertising?

7 A. No.

8 Q. And in this section of your report you cite to a blog by  
9 Joe the Plumber; is that right?

10 A. Yes.

11 Q. And that's something you took from Dr. Roscigno's  
12 report?

13 A. Yes. The idea for it. So for all of those examples, my  
14 process was to follow the links and verify that they at least  
15 existed at the time I followed the links. And so that blog  
16 post is still active as far as I know. It was when I checked  
17 it.

18 Q. Did you do any research about the Romney campaign's  
19 reaction to the Joe the Plumber article that you cited?

20 A. No. You made me aware of that in my deposition that  
21 that existed.

22 Q. And so there's nothing in your report about the Romney  
23 campaign's reaction to the Joe the Plumber article that you  
24 cited in your report; is that right?

25 A. That's correct.

1 Q. So you did not discuss in your report whether the Romney  
2 campaign denounced the article, fair to say?

3 A. Also true, yes.

4 Q. Let's move on to senate factor 7. I believe it starts  
5 on page 45 of your report. Again, the first sentence -- does  
6 the first sentence of that section describe your understanding  
7 of senate factor 6?

8 A. I'm sorry, I'm lost. Which page again, page 41?

9 Q. Page 41.

10 A. I thought we had just talked about that.

11 THE COURT: Forty-five.

12 BY MR. VOIGT:

13 Q. Forty-five. I'm sorry. We're on senate factor 7. My  
14 apologies.

15 In your discussion of senate factor 7 you say that Ohio  
16 has made significant progress when it comes to minority  
17 representation at state and federal levels historically and  
18 especially since the 1960s. The numbers indicate -- the  
19 numbers indeed suggest significant progress toward generally  
20 proportional representation in the U.S. Congress and in Ohio's  
21 State House of Representatives and Senate, representation that  
22 is only bolstered by minority voter turnout.

23 Did I read that correctly?

24 A. Yes.

25 Q. And any reason to disagree with that statement in your

1 report?

2 A. No.

3 Q. Would you agree that data from 1875 is not relevant to  
4 understanding the effect of a recent election law on the  
5 success of minorities reaching political office?

6 A. Yes, in general. I mean, if the issue had to do with  
7 sort of the general political climate in a state then maybe  
8 that would be relevant but certainly not -- I don't think it  
9 would necessarily be sort of directly relevant to what was  
10 going on, let's say, in 2014 or something like that.

11 Q. So in a study about the impact of a recent election law  
12 on the success of minorities reaching public office, data from  
13 recent years would be more important than data from the 19th  
14 century; is that correct?

15 A. Yeah. So if you were trying to examine the kind of  
16 overall climate in a state historically then you might want to  
17 look at both old and new data. If you believe that, for  
18 example, the effect of a particular change in a law had  
19 direct -- a direct impact on, for example, minorities being  
20 elected then you'd want to look pretty close pre and post that  
21 change in the election law, if that was the point of the study.

22 Q. In other words, you would want to look closely at the  
23 data from recent years?

24 A. If you were -- if the thought was that the changes in  
25 the election law directly impacted minority electoral success,

1 let's say.

2 Q. And that would be more relevant to your analysis than  
3 data from the 19th century?

4 A. It would be if you thought that there was this kind of  
5 direct impact. My understanding of senate factor 7 was more  
6 that it was kind of an overall sense of the historical and  
7 contemporary minority representation in a state or the  
8 jurisdiction, in this case, of the state. So I don't think I'm  
9 arguing that, for example, the challenged provisions directly  
10 related to the inability, for example, of an African-American  
11 candidate to be elected.

12 Q. Let's turn to table 3 in your report. This is on page  
13 46. In table 3 you included information from the 19th century;  
14 is that correct?

15 A. Yes.

16 Q. And I think at your deposition you testified that to the  
17 best of your recollection you included data in this chart from  
18 as far back as 1803; is that correct?

19 A. I believe that what I did is, again, this is a table  
20 that the initial idea for it came from the Roscigno report.  
21 But what I did is I went back and looked on Wikipedia which has  
22 a kind of a list of all of the governors that have ever been  
23 elected or something like that and all the lieutenant governors  
24 and stuff like that in Ohio and just counted up the number of  
25 them, and that's in the left-hand column. And examined the

1 more recent -- well, in the 19th century there weren't any  
2 African-Americans elected to state office but since about 1960,  
3 these are the people who've been elected that show up in that  
4 number of blacks elected column.

5 So, yes, it does go back. It may or may not go back to  
6 1803 if the position existed but at least for governor I  
7 believe it does.

8 Q. I think you may have testified at your deposition that  
9 the state auditor position existed back in 1803, too.

10 A. I think that -- I don't remember whether I testified to  
11 that particular thing but I just looked at the number of those  
12 positions that were listed, the number of people who had been  
13 elected to those positions.

14 Q. In this table you do not include a column showing the  
15 number of African-Americans who have run for any of these  
16 offices; is that correct?

17 A. That's correct.

18 Q. So this table doesn't include a success ratio for  
19 African-Americans who have run for these offices?

20 A. That's correct. My understanding of, again, this senate  
21 factor is more about the kind of general climate or context  
22 rather than making an explicit causal argument that says, for  
23 example, blacks have disproportionately or that their rate of  
24 success of election is lower than that for whites. It's more  
25 about the general political climate that exists in the state.

1 That's my understanding, anyway, of this senate factor.

2 Q. If you were doing a table like this for every state in  
3 America, do you think that the tables would differ  
4 significantly from what you have here?

5 A. I don't really know. I'm sure there would be some  
6 variability but I don't know how much and I don't know where  
7 Ohio would fit in the sort of overall context of -- Ohio would  
8 probably be better than states that don't have very many  
9 African-American citizens. I don't know whether it would be  
10 better or worse than a comparable state in terms of the black  
11 percentage. I just don't know.

12 Q. Let's turn to page 49 of your report. This is the  
13 discussion of senate factor 9. We have up on the screen the  
14 second paragraph of that section that the first sentence is  
15 highlighted or blown up. And there you state, it is my  
16 understanding that the state has justified the recent voting  
17 restrictions on grounds of cost savings and fraud prevention.

18 Did I read that correctly?

19 A. Yes.

20 Q. Where did you get that understanding?

21 A. I think I got that from reading the -- one of the  
22 opinions, at least, and there may have been more than one, but  
23 at least one of the opinions in the *NAACP et al v. Husted*  
24 litigation. So that may be somewhat unclearly written in that  
25 I don't think I was referring directly to this particular

1 litigation. I think I was suggesting that, in general, the  
2 state has justified these changes on the grounds of cost  
3 savings and fraud prevention. And the evidence for that  
4 particular sentence comes from the *NAACP v. Husted* opinion.  
5 Somewhere in there there was the discussion by the Judge that  
6 the state is making this argument. That was where that came  
7 from.

8 Q. Do you know whether the NAACP case involved all of the  
9 same issues in this case?

10 A. I believe that it did not. So I couldn't say that all  
11 of the recent voting restrictions were being justified on those  
12 grounds.

13 Q. So actually that sentence would be incorrect, fair to  
14 say?

15 A. If you read it as justified all of the recent voting  
16 restrictions then it would be incorrect. If you read it as  
17 justified some of the recent voting restrictions then it would  
18 be correct. It's unclear. It's unclearly written.

19 Q. Did you get your understanding from anything else other  
20 than reading the NAACP opinion?

21 A. I think generally it's hard to know exactly where I  
22 learned this but I think that, in general, my understanding is  
23 that a lot of -- it makes sense that a lot of states would do  
24 this. In other words, would justify changes in the law. Those  
25 are reasonable justifications if they turn out to be true. So

1 I can't put my finger on any other particular source for that.  
2 That's where -- what I was trying to say there, a little bit  
3 clumsily, in recent cases this is what the state has justified  
4 these changes -- why the state has justified these changes and  
5 that information comes from, again, I think it was the opinion  
6 from the *NAACP v. Husted* case.

7 Q. Is it possible your understanding of the State's  
8 justifications could be wrong?

9 A. It certainly is possible for certain -- yeah, for  
10 certain aspects of this particular litigation I actually don't  
11 think I know what the State's case is, in part because I  
12 haven't been sitting in the courtroom the whole time. I think  
13 this sentence was really about kind of similar kinds of  
14 restrictions that came up in the *NAACP v. Husted* case.

15 Q. Do you recollect what those were? Do you know what  
16 those are?

17 A. I believe that some of them had to do with the reduction  
18 of early-voting hours but that's the only one I can remember at  
19 this moment.

20 Q. In the course of your engagement, did you interview any  
21 Ohio legislators?

22 A. I did not.

23 Q. In the course of your engagement, did you interview any  
24 election officials?

25 A. No.

1 Q. In the course of your engagement, did you do any  
2 research to try to understand the reasons why Ohio passed the  
3 laws that the plaintiffs are challenging, aside from reading  
4 the NAACP opinion?

5 A. My only knowledge of those justifications comes from,  
6 yes, from that opinion but also I think that some of that  
7 information is in the rebuttal reports of Mr. Trende and  
8 Dr. Hood, if I recall correctly. That may be mistaken. But so  
9 I didn't go out and research other things if that's what you  
10 meant by your question.

11 Q. In your -- strike that.

12 You did not include in your report any discussion of  
13 senate factor 4; is that correct?

14 A. That is correct.

15 Q. And does your analysis of the senate factors include any  
16 analysis related specifically to Latino voters?

17 A. It does not.

18 Q. Does your analysis of the senate factors include any  
19 analysis related specifically to younger voters?

20 A. No. The general idea of some of the -- some of sort of  
21 the costs of voting framework could apply to those voters but  
22 none of the data analysis related directly to younger or Latino  
23 voters.

24 Q. Do you know whether the Senate, and I'm speaking about  
25 the United States Senate, do you know whether the United States

1 Senate has stated that the senate factors are or are not the  
2 exclusive factors in a Voting Rights Act analysis?

3 A. I believe that it's true that they are not exclusive.  
4 In other words, the courts can use other kinds of ways of  
5 evaluating whether there's been a violation.

6 Q. Did you do anything to ascertain what other factors  
7 courts take into consideration in voting rights analysis cases?

8 A. I did not.

9 Q. Are you aware that the courts have characterized the  
10 nine senate factors -- the eight that you considered in your  
11 report, more relevant to what's called a vote dilution case?

12 A. I know from reading, with some difficulty, the *Thornburg*  
13 *v. Gingles*, some discussion of that case, that the senate  
14 factors were applied directly in that case which I believe is  
15 some sort of vote dilution case. I guess I did not know that  
16 the senate factors were considered to be more relevant for such  
17 a case than for some other kind of case. That I wouldn't know.

18 Q. Do you know anything about how application of the senate  
19 factors, and not just the nine senate factors but all  
20 considerations beyond those nine, differ between vote denial  
21 and vote dilution cases?

22 MR. SPIVA: Objection, Your Honor. This calls for a  
23 legal conclusion and is well outside the scope of any of his  
24 reports.

25 THE COURT: Seems to me it calls for a yes or no

1 answer. I'm going to overrule the objection. You may answer  
2 it, if you can.

3 THE WITNESS: I think if I recall the question  
4 correctly the answer is no.

5 MR. VOIGT: I can't even remember the question. Maybe  
6 I could ask the question again.

7 THE COURT: Would you like the reporter to read it  
8 back?

9 MR. VOIGT: That would be great. I'm sorry.

10 (Thereupon, the last question was read by the court  
11 reporter.)

12 THE WITNESS: That's what I thought the question was  
13 and the answer is no.

14 BY MR. VOIGT:

15 Q. During your engagement, did you consider any factors  
16 beyond the eight senate factors that you discussed in your  
17 report?

18 A. I'm sorry, do you mean other factors that courts might  
19 consider relevant?

20 Q. I guess that's fair, yes. Any other factors. Any other  
21 factors beyond the eight that you looked at in your report, did  
22 you consider any other factors beyond those eight senate  
23 factors in your reports?

24 A. I don't think so, no.

25 Q. Let's turn to page 52 of your report. On page 52 you're

1 reciting conclusions that Dr. Daniel Smith made in his report  
2 in the *NAACP v. Husted* case; is that correct?

3 A. Yes. Maybe summarizing would be better than reciting,  
4 but yes.

5 Q. Fair enough.

6 In the first paragraph on page 52 you state, in my  
7 judgment, this report was carried out using the appropriate  
8 data and statistical methods and the conclusions Dr. Smith drew  
9 are sound.

10 Did I read that correctly?

11 A. Yes.

12 THE COURT: Mr. Voigt, let's break for lunch.

13 MR. VOIGT: Yes, Your Honor.

14 THE COURT: We'll come back at 1:30.

15 MR. VOIGT: Okay.

16 (A recess was taken at 11:55 a.m.)

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1 Monday Afternoon Session,  
2 November 23, 2015.  
3 1:30 p.m.

4 - - -

5 THE COURT: Please proceed.

6 BY MR. VOIGT:

7 Q. Dr. Timberlake, we left off on page 52 of your report  
8 and I directed your attention to a sentence on page 52 where  
9 you said, in my judgment, this report was carried out using the  
10 appropriate data and statistical methods and the conclusions  
11 Dr. Smith drew are sound. You see that?

12 A. Yes.

13 Q. In that sentence you're referring to Dr. Smith's report  
14 in the NAACP case; is that right?

15 A. That's right.

16 Q. Before you summarized Dr. Smith's conclusions in your  
17 report, you did not actually look at the data that Dr. Smith  
18 used in his report; is that right?

19 A. That's correct. I did not have access to those data.

20 Q. And before you summarized Dr. Smith's conclusions, you  
21 also did not try to replicate his calculations; is that  
22 correct?

23 A. No. I think I would have had I had the data but I  
24 didn't have the data.

25 Q. So you did not replicate his calculations?

1 A. That's correct.

2 Q. Let's show deposition page 40 or page 140, line --  
3 there. This is a page from your deposition, page 140. I asked  
4 you a question, I said, but you didn't actually have the data?

5 And you answered, no. Based on his description of what  
6 he did -- and there you're referring to Dr. Smith -- it seemed  
7 like it was done correctly.

8 Does that appear to be --

9 MR. SPIVA: Objection, Your Honor. Here again, there  
10 hasn't been any contradiction and there's no failure of memory  
11 here.

12 MR. VOIGT: I'm just -- may I respond? I'm just  
13 setting a foundation for the next question, Your Honor.

14 THE COURT: He's right there and he hasn't answered  
15 you differently than what that says, I don't believe. So I  
16 think this is improper. In any event, I'm going to sustain the  
17 objection. Press on.

18 BY MR. VOIGT:

19 Q. And you wrote in your report that Dr. Smith's -- in your  
20 report that Dr. Smith's report was carried out using the  
21 appropriate data and statistical methods. But you had not  
22 looked at the data that he used?

23 A. That's correct.

24 Q. Before putting Dr. Smith's conclusions in your report,  
25 had you had any conversations with Dr. Smith about his report?

1 A. No.

2 Q. When you wrote your report, were you aware that there  
3 were reports by other experts in the NAACP case calling into  
4 question Dr. Smith's conclusions?

5 A. I believe at that time I was not aware of that.

6 Q. This is an excerpt of Defendants' Exhibit 25 which is  
7 Dr. McCarty's surrebuttal report in the NAACP/Husted matter.  
8 Toward the bottom of the page he writes, presumably due to  
9 errors in geocoding and/or the voter files that there are a  
10 number of census block for which the number of EIP votes  
11 exceeds the total number of votes. Do you see that?

12 A. Yes.

13 Q. And so you didn't do anything in your report to account  
14 for these data errors -- that data error that Dr. McCarty  
15 pointed out?

16 A. No. I believe I was made aware of this during my  
17 deposition which was after I submitted my initial report.

18 Q. And he also notes on page 15 of his surrebuttal, over  
19 4,000 EIP absentee votes appear in Dr. Smith's data file on  
20 days in which there was no EIP voting during 2012. Again, you  
21 didn't account for that data error?

22 A. Correct. If Dr. McCarty is correct about that, I did  
23 not account for that, again, because I didn't know about --  
24 actually, this is the first I've seen of this particular issue,  
25 I believe.

1 Q. And on the next page he writes, the errors described  
2 above are only those obvious enough to be detected by simple  
3 inspection of the data provided by Dr. Smith. The complete set  
4 of errors may be significantly larger. Do you see that?

5 A. Yes.

6 Q. As we already discussed, on page 52 of your report you  
7 stated that, in your judgment, Dr. Smith's report was carried  
8 out using the appropriate data?

9 A. Yes.

10 Q. And you said that without even looking at the data that  
11 Dr. Smith used; is that correct?

12 A. It was based on a description of the data and methods  
13 used in Dr. Smith's report, yes.

14 Q. Let's turn to table 4 on page 51 of your report. If you  
15 could direct your attention to the number 12,842 which is under  
16 2008 first or updated registrations. Do you see that?

17 A. Yes.

18 Q. That number does not show the demographic breakdown of  
19 first or updated registrations; is that right?

20 A. That's correct.

21 Q. And in fact, none of the numbers in this chart depict  
22 numbers of African-American or white voters; is that correct?

23 A. That is correct.

24 Q. If you could turn your attention to the second column  
25 from the right, the bottom two quadrants, .90 and .96. Those

1 are ratios, correct?

2 A. Correct.

3 Q. And the ratios are less than one?

4 A. That's correct.

5 Q. Do those two numbers reflect that, based on the data you  
6 used, more voters in your low-minority bins cast ballots during  
7 golden week in 2012 than the voters in the high-minority bin?

8 A. That is what that says, yes.

9 Q. And also to the left there's a number .96 under 2008  
10 and, again, does this .96 show that a low-minority bin is  
11 casting ballots during golden week at a higher rate than the  
12 high-minority bin?

13 A. Yes.

14 Q. Let's move on to page 53 of your report. Here you  
15 discuss the one EIP voting location issue. In this section you  
16 write, it is a mathematical certainty that with one location  
17 and a fixed set of EIP voting hours, larger counties will have  
18 many more voters per available EIP voting hour than will small  
19 counties and thus will experience more crowding, longer lines  
20 and so on.

21 Did I read that excerpt correctly?

22 A. Yes.

23 Q. When you made your conclusion about mathematical  
24 certainty, you did not know that county boards are permitted to  
25 add voting machines to their early-voting center; is that

1 right?

2 A. I think that's right. I think we discussed this in my  
3 deposition that if I had -- if I could have written that over  
4 again, I may have changed -- I might change the word will. I  
5 didn't say this in my deposition, I don't think, but reading it  
6 now I think I would change that word will to may.

7 So what is a mathematical certainty is that there are  
8 more people per EIP voting hour in large counties than in small  
9 counties. What is not necessarily a mathematical certainty is  
10 that that will result directly in the kinds of things that I'm  
11 talking about that are longer lines and the crowding and that  
12 sort of thing. That would depend -- the extent of the crowding  
13 would depend upon resources, essentially, in the EIP voting  
14 center.

15 Q. Right. And also as part of those resources, when you  
16 wrote this you didn't know that county boards are permitted to  
17 increase the staffing at their early-voting center; is that  
18 right?

19 A. I think I didn't know much about how county boards do  
20 their work, that's correct. Including what you just said.

21 Q. If a county's early-voting site adds additional staff  
22 and additional voting equipment, could this shorten lines?

23 A. Relative to a situation in which they didn't add  
24 machines and staff, yes. At least that's what I would assume  
25 logically that if part of how lines are caused is more people

1 than the voting machines or the staff could handle then it  
2 stands to reason that adding more machines and more staff would  
3 relax some of that -- those lines.

4 Q. In this section of your report discussing EIP voting  
5 locations, you included no discussion about resources that  
6 could be added to early-voting centers; is that correct?

7 A. That's correct. I think the point of this section was  
8 just to get a basic kind of demographic picture of the  
9 intuition that when you have one center and a fixed set of  
10 hours then counties that have more voters in them will have  
11 more people per hour of operation of the EIP center. So it did  
12 not take account of, for example, that big counties might have  
13 more resources to have more staff and more machines, let's say.

14 Q. All right. Let's talk a little bit about  
15 absentee-ballot applications. That begins on page 55 of your  
16 report.

17 When you wrote your report did you know whether in the  
18 2016 presidential election that the Secretary of State would  
19 mail absentee-ballot applications statewide?

20 A. No, I didn't know that at the time.

21 Q. And in the past -- you do know in the past the counties  
22 had discretion whether to mail the absentee-ballot application?

23 A. To be honest, the details of all of that are a little  
24 confusing but I accept that premise if that's true.

25 Q. So I guess it would follow that you don't know how many

1 counties actually mail absentee-ballot applications before the  
2 state started -- took over the process and mailed out the  
3 applications?

4 A. That's correct. I didn't know that.

5 Q. Is there anything in your reports comparing whether more  
6 voters will receive absentee-ballot applications in 2016 than  
7 the number of voters who received applications when the  
8 counties decided whether to mail the applications?

9 A. No, there is nothing.

10 Q. In your opinion, it would not be an equal-voting system  
11 for some of Ohio's counties to mail absentee-ballot  
12 applications while others do not; is that correct?

13 A. As I sit here now I guess I think that there are ways in  
14 which counties behaving differently from each other is more  
15 fair and counties all behaving the same is more fair. I think  
16 in general I would say that if, let's say, the chance of your  
17 receiving an absentee-ballot application depended entirely on  
18 which county you lived in, in my opinion, that's a geographic  
19 inequality, in other words. It would be -- in general, it's  
20 not as fair of a system when the way in which you get to cast  
21 your ballot or the chances you have to cast your ballot depend  
22 on which county you live in.

23 Q. I think in your deposition you testified that I think  
24 the fairest system would be for all of the counties to be able  
25 to do it. Sound right?

1 A. That may be. I don't recall that. I recall this  
2 general discussion. I don't recall my specific answers.

3 Q. I put up on the screen pages -- an excerpt from pages  
4 118 to 119 of your deposition. I asked you, in your opinion,  
5 would it be an equal-voting system to have large-population  
6 counties that have bigger budgets mail applications for  
7 absentee ballots while small-population counties that are  
8 unable to do so based on budget constraints?

9 Mr. Spiva objected.

10 And then you answered, I mean, I -- I think the fairest  
11 system would be for all of the counties to be able to do it.

12 And then the discussion continues.

13 Any reason to disagree with that answer today?

14 A. No. I definitely -- this is a question about budgets as  
15 opposed to legal constraints or whatever but, yeah, in general  
16 I think it's -- on the subject of absentee ballots it's  
17 probably fairest if all counties are able to do the work that  
18 they need to do. As I say there, that would necessarily mean  
19 that bigger counties would have bigger budgets but it would be  
20 fair if all counties were able to, in this case, get  
21 applications for absentee ballots to their voters.

22 Q. Let's turn to page 59 of your report. In this section  
23 of your report you discuss DRE machines. When you wrote this  
24 section of your report you did not know that the new formula  
25 for the DRE machines sets a floor for each county; is that

1 correct?

2 A. That's correct.

3 Q. And this section of your report is written under the  
4 assumption that counties will actually reduce the number of  
5 DREs in their inventory; is that right?

6 A. I think that I was -- yes. I think I was operating  
7 under the assumption that the change in the law would reduce  
8 the number of DRE machines available to the voters. I later  
9 learned that it only changes the minimum number of DRE machines  
10 available to the voters and so what this table then, the table  
11 on page 60 shows is that the reduction in the floor, the  
12 minimum number of DRE machines per county, is greater in  
13 high-minority counties than in the other kinds of counties.  
14 But that does not necessarily mean that the reduction -- that  
15 there will be a greater reduction in the number of DRE machines  
16 available to voters.

17 Q. Let's pull up Defendants' Exhibit 14BB. This is an  
18 advisory opinion from Secretary of State of Ohio. I just want  
19 to draw your attention to one little part of it. There's a  
20 note toward the end of this where the Secretary writes, this  
21 statutory revision does not impact the number of DREs deployed  
22 on election day. And here's the important part. Nor should  
23 any county divest itself of voting equipment should the  
24 calculation result in the county having more than the minimum  
25 number of DREs prescribed by law.

1 Do you see that?

2 A. Yes.

3 Q. And you do not include any discussion of not divesting  
4 DRE machines in this section of your report?

5 A. Yeah. As I think I said in my deposition, I think I  
6 just missed that note.

7 Q. But you actually were aware of this advisory?

8 A. I was aware of the advisory but I think I leapt to the  
9 end of it where the formula was being calculated.

10 Q. You do not have any evidence that counties in Ohio are  
11 going to have fewer DRE machines in the 2016 general election  
12 than they do now; is that correct?

13 A. I have no evidence of that.

14 Q. During your research did you gather any evidence showing  
15 that counties are not going to purchase more DRE machines to  
16 replace machines that may have problems?

17 A. No, I did not.

18 Q. Did you attempt to do so?

19 A. No. It took me a minute to decipher the question but,  
20 no, I didn't do that.

21 Q. We're bouncing back here. I'm sorry for bouncing back  
22 to page 55 on absentee ballots. But if you could turn to table  
23 6, please, which is on page 56. The categories along the left  
24 are your bins of the different counties; is that right?

25 A. Yes.

1 Q. In your report you did not calculate the percentage of  
2 African-American absentee ballots that are rejected; is that  
3 correct?

4 A. I don't believe so, no.

5 Q. And in your report you did not calculate whether  
6 minorities or whites have their absentee ballots rejected at a  
7 higher rate; is that right?

8 A. No. I don't believe that information is available. And  
9 if it were, I certainly would have used it. I was not aware  
10 that that information was available, if it was.

11 Q. In your report you did not examine the reasons why  
12 absentee ballots are rejected; is that correct?

13 A. That's correct.

14 Q. And in your report you did not consider whether absentee  
15 ballots are rejected because voters missed the deadline to mail  
16 in the ballot; is that right?

17 A. Correct.

18 Q. Please turn to table 7 on page 58 of your report.  
19 Again, this relates to provisional ballots. Again, you've  
20 divided this chart using the bins, correct?

21 A. Yes. Groups of counties, correct.

22 Q. In your report you did not calculate the percentage of  
23 African-American provisional ballots that are rejected; is that  
24 correct?

25 A. Correct. I don't believe that information is available

1 or if it is, I didn't have it.

2 Q. And you did not calculate whether minorities or whites  
3 have their provisional ballots rejected at a higher rate; is  
4 that right?

5 A. Correct.

6 Q. And you did not examine the reasons why provisional  
7 ballots are rejected; is that right?

8 A. Correct.

9 Q. Let's flip back to table 1 of your initial report. It  
10 appears on page 8. I think you described how you -- I think  
11 you described the three different bins during Mr. Spiva's  
12 direct so I don't need to go over that unless you want to  
13 explain the three different categories there.

14 A. Not unless you'd like me to. I think -- I don't  
15 remember, it's been a few days since I did that testimony but I  
16 don't have a strong need to do it.

17 Q. Very briefly then, you divided all of Ohio's counties  
18 into three bins. A high-minority bin, a  
19 low-minority/high-poverty bin, and a low-minority/low-poverty  
20 bin. Is that fair to say?

21 A. Yes.

22 Q. And by the way, you used the American Community Survey  
23 2008 to 2012 data for table 1; is that right?

24 A. Yes.

25 Q. There is more recent American Survey data that you could

1 have used; is that correct?

2 A. Yes. There's a five-year file from 2009 to 2013. So  
3 the data I used overlapped with the more recent data. Four of  
4 the years are the same.

5 Q. How did you decide which counties to put in the  
6 high-minority bin?

7 A. Initially the whole purpose of doing this was to divide  
8 up these counties into what people who do sampling for a living  
9 call strata and the idea was to sample counties from the  
10 different strata and in this case strata, bins, groups, those  
11 are all synonyms. And so what the effort was going to be was  
12 to ask for information from county boards of elections and  
13 rather than subpoenaing 88 counties, we would scientifically  
14 sample from these three strata and get, I think it was 17  
15 county subpoenas.

16 So that was the reason to initially divide the counties  
17 into these groups. So for the high-minority group I initially  
18 arrayed the percent minority voting-age population from high to  
19 low and looked for a point that seemed like a sensible cut  
20 point. And I think it was 18 percent if I'm not mistaken. And  
21 then among the counties that were less than 18 percent  
22 minority, I think I used the cutoff of 15 percent poverty, if  
23 I'm not mistaken.

24 And so then the counties that are in this table, even  
25 though some of the figures are incorrect in the right-hand side

1 of it, that second group, the low-minority/high-poverty group,  
2 is the counties with fewer than 18 percent of its minority  
3 voting-age population -- 18 percent of it's voting-age  
4 population are minority and greater than 15 percent of its  
5 population are in poverty. And then the  
6 low-minority/low-poverty group are counties with fewer than  
7 15 percent minority voting -- fewer than 18 percent voting-age  
8 population that are minority and less than 15 percent in  
9 poverty.

10 Q. So the 18 percent minority voting-age population number  
11 that you used to decide which counties go in the high-minority  
12 bin, that was just an arbitrary number. Fair to say?

13 A. It wasn't arbitrary in the sense that I decided on  
14 priori on the 18 percent. It was arbitrary in the sense that  
15 when I looked at the distribution of the county percent  
16 minority that seemed like a reasonable place to cut the  
17 distribution. So that was the initial reason. This table, as  
18 we know, has gone through several iterations. That was the  
19 first version of it.

20 Q. I understand.

21 And the 15 percent number that you used to determine  
22 whether counties are in the high or low-poverty bins, that's  
23 also just an arbitrary number?

24 A. I would phrase it the same way. That it was not  
25 arbitrary in the sense that I didn't come to the data thinking

1 15 percent would be the right number but as I looked at the  
2 distribution, that seemed like a reasonable place to cut the  
3 distribution. But there would be many other arbitrary or  
4 semi-arbitrary ways of doing it.

5 Q. But in other words, you could have picked different  
6 numbers to separate the counties?

7 A. That's correct.

8 Q. And the chart that you -- strike that.

9 Table 1 that you initially had in your report, that  
10 table is incorrect; is that right? At least in some respects?

11 A. Yes. There were two, I would say, problems with this  
12 table. The first problem that I believe Mr. Trende identified  
13 in his rebuttal report was that essentially the numbers on the  
14 right-hand side of the table didn't match up with the numbers  
15 on the left-hand side of the table and that was due to what I  
16 referred to in my deposition as a sorting error. In other  
17 words, that was purely the display of the numbers.

18 The second problem that we discovered in my deposition  
19 was that the county poverty rates were incorrectly calculated  
20 and what I think happened was that I used the overall number of  
21 people in poverty --

22 Q. Let's get to erratum one. I'm just talking about the  
23 initial table in your first report. I think you already  
24 described it but basically if you could just summarize the  
25 problem with the chart that -- table 1 that appeared in the

1 initial report without getting to the erratum.

2 A. Sure. As presented, many of the percentages on the  
3 right-hand side of the table don't match with the information  
4 on the left side of the table. So as best I can figure out,  
5 the three columns under total age 18 plus, those three columns  
6 are correct. In other words, they match with each county.

7 I believe the five columns on the right were misaligned  
8 with the information on the left side of the table in this  
9 table.

10 Q. And you prepared an initial erratum that you thought had  
11 fixed the errors in table 1; is that right?

12 A. The initial erratum fixed that problem, the problem that  
13 I just described, which was the misalignment of all of the data  
14 on the left-hand side with the data on the right-hand side.

15 Q. Let's talk about that erratum for a second. That is  
16 PX111 if you want to refer to it.

17 A. I can see it on the screen.

18 Q. And this is your first erratum related to table 1; is  
19 that right?

20 A. Yes.

21 Q. Or at least the first page of it. And as you said, at  
22 your deposition we walked through your calculations and  
23 determined that you had several counties in the wrong bin. Do  
24 you remember that?

25 A. Yes.

1 Q. And in fact, we found that there were at least four  
2 counties that you had in the wrong category?

3 A. So my memory is that Clark County was in the wrong group  
4 and that Marion and Ross Counties were also in the wrong group.  
5 You also identified Guernsey County, I believe, in my  
6 deposition. I thought when I recalculated all of the numbers  
7 for the second erratum that Guernsey County actually stayed  
8 where it was but that was -- that may be incorrect. I thought  
9 that I double-checked that and that Guernsey was actually in  
10 the correct group. But at least -- you're right, that Clark,  
11 Marion and Ross. Clark County switched groups and Marion and  
12 Ross together switched groups.

13 Q. Take a look at the third column to the right -- from the  
14 right in that table, in poverty total. What does that  
15 represent?

16 A. In this table what it's meant to represent is the  
17 poverty rate of persons age 18 and over. What I think it  
18 actually represents is the total number of persons in poverty  
19 divided by the voting-age population that is the number of  
20 people age 18 and over. And so when we walked through the  
21 calculations of several counties we discovered that that was  
22 not the correct way to calculate the poverty rates.

23 Q. So all of the poverty numbers in that column are not  
24 correct; is that right?

25 A. I believe all of them are incorrect, yes. Not all of

1     them result in counties switching groups. I think we  
2     discovered those three that we mentioned and maybe Guernsey,  
3     although I think that that's right, but the actual numbers that  
4     appear there are incorrect.

5     Q.    So fair to say that in figure 1 or table 1 in your  
6     original report there were errors?

7     A.    Yes.

8     Q.    And in table 2 or table 1 that was submitted as your  
9     first erratum there continued to be errors?

10    A.    Yes.

11    Q.    After you submitted your first erratum, you submitted a  
12    second erratum for table 1; is that correct?

13    A.    Yes.

14    Q.    And we have the first page of table 1 from your second  
15    erratum on the screen. In this second erratum, how many  
16    counties did you move into a different bin?

17    A.    I believe -- so this table reflects two kinds of  
18    changes. First, in the high-minority bin I responded to, I  
19    believe it was Mr. Trende's rebuttal report, and he argued that  
20    you could just as easily pick 15 percent as the cutoff for what  
21    was high minority. He also suggested that you could pick a set  
22    of counties that were at least one standard deviation above the  
23    mean and that could be your rule for which were high and which  
24    were low minority. And it turns out if you do either one of  
25    those you get the same answer, which is that Allen County and

1 Lorain County could be considered high minority. So in the  
2 second erratum I added those to the high-minority group. That  
3 was one kind of change.

4 The second change is the one we've been discussing which  
5 is hopefully now correct calculation of county poverty rates.  
6 And if you pick 15 percent as the cutoff for what's high  
7 poverty and what's low poverty, Clark County moves from the  
8 high-poverty group down to the low-poverty group and Marion and  
9 Ross Counties move from the low-poverty to the high-poverty  
10 group.

11 Q. So if we compare the bins in erratum two to the bins in  
12 your first report, the counties in your high-minority bin  
13 changed; is that right?

14 A. Right. That was not due to error. That was due to my  
15 response to Mr. Trende's critique because I thought, why not,  
16 let's try it that way. So I reran all of the numbers and you  
17 get basically the same overall story. I think I talked about  
18 this in my direct testimony. So the idea was to allow for that  
19 critique and if it's reasonable, it seemed reasonable, then  
20 I'll put Allen and Lorain Counties in the high-minority group.  
21 I guess that was the extent of your question there.

22 Q. I guess all I'm asking is in erratum two there are now  
23 different counties in the high-minority bin than there were in  
24 the initial report; is that right?

25 A. Yes. And again, that's because of a response to the

1 rebuttal report, not due to error. Not due to calculation --  
2 incorrect calculation, let's say, of the county percent  
3 minority or something like that.

4 Q. And in erratum two there are also different counties in  
5 the low-minority/high-poverty bin than there were in your  
6 initial report; is that right?

7 A. Yes. Clark County drops out. Marion and Ross County go  
8 in.

9 Q. And also in erratum two in are different counties in the  
10 low-minority/low-poverty bin than there were in your initial  
11 report; is that right?

12 A. Yes. Clark County now appears there and Marion and Ross  
13 County are not in there.

14 Q. There's some charts in your report where you illustrate  
15 information about employment, housing, poverty and some other  
16 things and you break the counties apart by the bins in your  
17 table 1; is that correct?

18 A. Yes.

19 Q. I'd like to specifically identify these. On page 12 of  
20 your report, figure 1, do you separate the counties in Ohio  
21 based on the bins in table 1?

22 A. Yes.

23 Q. And on figure 2 on page 13, same question.

24 A. Yes.

25 Q. And on page 17, figure 4, same question.

1 A. Yes.

2 Q. Figure 5 on page 18, same question.

3 A. Yes. All of the figures that look roughly like that  
4 would have the same answer.

5 Q. Okay. Figure 6 on page 19, same answer -- same  
6 question. I'm sorry.

7 A. Yes.

8 Q. Figure 8 on page 22, same question.

9 A. Yes.

10 Q. And figure 9 on page 23, same question.

11 A. Yes.

12 Q. Figure 11 on page 27, same question.

13 A. Yes.

14 Q. And figure 12 on page 28, same question.

15 A. Yes.

16 Q. If the three bins in your report now under erratum two  
17 contain different counties than they originally did in your  
18 original report, does this have an impact on the figures we  
19 just discussed?

20 A. It might have a small impact on the -- so I'm not sure  
21 which one you want to look at, maybe figure 12 on page 28,  
22 that's the last one we discussed. Moving from left to right,  
23 there's a dark black bar and then the bars get more gray as  
24 you -- lighter gray as you move to the right. It would not  
25 have an effect on the black bar because that's for all

1 counties. It would have a small -- well, and -- yeah. It  
2 would have a small effect on the other three bars. And the  
3 reason it would be small is because each of the counties that  
4 was moved because of error were all very small. I think Clark  
5 County is something like 1.2 percent of the population of Ohio  
6 and Marion and Ross are less than 1 percent each.

7 So these are all weighted averages of these groups,  
8 weighted by the population size of each county. So the  
9 differences would be very minor and may cancel each other out  
10 exactly because you're moving 1.2 percent of the population  
11 from one group to the other and something on the neighborhood  
12 of one and a half percent of the population from one group to  
13 another so they probably cancel each other out somewhat. There  
14 would be slight differences.

15 Q. You agree there would be slight differences in all of  
16 the figures we just went over?

17 A. All of the figures except for that dark black bar in  
18 each of the figures because that refers to the whole state.

19 Q. Did you fix any of the figures in your report to account  
20 for the errors that we just discussed?

21 A. No. I did not submit an additional report, let's say.  
22 I've gone back and reanalyzed -- I've gone back and reanalyzed  
23 the data from the latter part of the report and the findings  
24 are qualitatively the same as in my report. Again, the numbers  
25 change a tiny little bit but it doesn't change the overall

1 story.

2 Q. Did you go back and recalculate every single one of  
3 those figures based on the new bins?

4 A. I didn't calculate any of the figures that we've been  
5 talking about, figures one through twelve, the ones from the  
6 American Community Survey.

7 Q. So basically you're just asking us to take your word for  
8 it that the changes in those figures are going to be small?

9 A. Well, with respect to the three gray bars, I guess I am.  
10 With respect to the black bar, which is sort of the overall  
11 picture of racial inequality in Ohio, I'm not asking you to  
12 take my word for it because those wouldn't change.

13 Q. And just to be clear, when you're talking about the one  
14 that wouldn't change, let's just take a look at figure 1.  
15 You're referring to the column on the far left?

16 A. Let me get to figure 1. Yes.

17 Q. But the other three are subject to change?

18 A. Subject to minor changes, yes.

19 Q. Let's turn to your second report, your rebuttal report.  
20 That's Plaintiffs' Exhibit 110. If you could turn to page 4,  
21 please.

22 Toward the bottom of -- on this page you discuss golden  
23 week. Toward the bottom of this page there's a sentence, Ohio  
24 law has made it more difficult for some 27,000 voters who chose  
25 golden week as the most convenient, and for perhaps -- for

1 many, perhaps, the only time to register and vote. You see  
2 that?

3 A. Yes.

4 Q. And that number comes from two separate elections,  
5 right?

6 A. Yes.

7 Q. You didn't do anything in your reports to determine the  
8 demographic makeup of those 27,000 voters; is that right?

9 A. No. In fact, as I look at it, it's probably more  
10 accurate to say -- it would be unknown from the data that I  
11 have whether there were a total of 27,000 different people. So  
12 it's really about 13,000 in one election and about 14,000 in  
13 another. Some of those could be the same people. So that's  
14 maybe a little bit misleading the way that's written.

15 Q. I see. In other words -- okay. I understand.

16 So the 27,000 may be overstated?

17 A. Yes.

18 Q. And you also did not determine the political affiliation  
19 of those 27,000 people; is that correct?

20 A. No. That information -- neither the racial makeup of  
21 that population nor the political party I don't think is  
22 available from the documents I used to generate those numbers.

23 Q. Did you do any analysis in either of your reports about  
24 how people who have previously registered during golden week  
25 could have or would have registered in some other way had

1 golden week not been available?

2 A. No.

3 Q. And your reports also do not contain any calculation  
4 whether voters who voted during golden week one year voted  
5 outside of golden week in a later election; is that right?

6 A. That's correct.

7 Q. I think you testified or I think you stated at your  
8 deposition that if an early-voting center is located fairly  
9 close to an African-American population area in a county that  
10 this could lead to a higher rate of early voting among  
11 African-Americans; is that correct?

12 A. Yes. Because that would be related to the -- again, the  
13 distance that you would have to travel would be a cost and so  
14 if the cost -- the distance were lower then the cost would be  
15 lower and so, in theory, that would lead to a higher rate of  
16 use.

17 Q. A higher rate of use by African-Americans?

18 A. By African-Americans. Really it's higher rate of use by  
19 whoever is close to the voting center. In theory, that would  
20 be the conclusion. I don't have any empirical evidence of that  
21 one way or the other.

22 Q. You also agree that campaign strategy can have an effect  
23 on the way particular groups of people decide to vote; is that  
24 right?

25 A. Yes. Absolutely.

1 Q. Please turn to page 6 of your rebuttal report. For the  
2 census blocks that you used in this chart, which census year  
3 did you use?

4 A. 2010.

5 Q. There's data in here from 2008 and 2012 as well. Does  
6 using 2010 Census data to examine years other than 2010 create  
7 data problems?

8 A. It would only create data problems if -- so let's begin  
9 with thinking that the distribution, the population of census  
10 blocks in 2008 and 2012 are going to be slightly different than  
11 the racial composition of blocks in 2010. The only way this  
12 would create bias in the results is if the change in census  
13 blocks either from 2008 to 2010 or from 2010 to 2012 was in one  
14 direction. That is, that census blocks uniformly became more  
15 white or more black. If some census blocks start out all black  
16 and get a little bit white and other census blocks start out  
17 all white and get a little bit black, those errors will cancel  
18 each other out and the resulting coefficients won't be affected  
19 by that.

20 Q. In this chart did you do anything to account for those  
21 potential changes?

22 A. No. In fact, there's nothing you could do because the  
23 only -- I don't believe that the Census Bureau releases  
24 block-level information except in the decennial year, so 2010.

25 Q. In your opinion, were the 2008 and 2012 elections

1 galvanizing elections for African-Americans?

2 A. I'm not totally sure what you mean by galvanizing but  
3 they certainly were high turnout, I think. These were the  
4 presidential elections in which Barack Obama was on the ballot  
5 and I think they probably were quite salient to  
6 African-Americans in Ohio.

7 Q. Let's turn to page 7 of your rebuttal. Toward the end  
8 of this section, which is still in the golden-week section, you  
9 write, and this is the last sentence of your -- of that  
10 section. You say, prior research has shown that the costs of  
11 voting and their impacts on voter turnout are higher for  
12 minority populations, given the association of race in the  
13 United States generally and Ohio specifically with enduring and  
14 persistent employment, residential, economic and health  
15 inequalities.

16 You see that?

17 A. Yes.

18 Q. And you cite to three different journal articles or  
19 maybe two?

20 A. I think it's two.

21 Q. Two different journal articles. Neither of those  
22 journal articles relates to Ohio specifically; is that right?

23 A. No. We talked about this in my deposition. That's a  
24 clumsily-worded sentence. Really the Ohio-specifically part of  
25 the clause could be taken out. I think I was just trying to

1 make the point that the findings from this research concludes  
2 what it says it concludes and that then I was probably making a  
3 second point there which is that Ohio wouldn't be expected to  
4 be different in the sense that it also has these persistent  
5 racial inequalities. But that's a clumsily written sentence.

6 Q. Okay. Let's turn to page 8. Here in this section of  
7 your report you discuss the EIP voting sites. And toward  
8 the -- it's in the third full paragraph. You write, just for  
9 the sake of argument, one could imagine that EIP locations  
10 would be distributed according to the following rule. All  
11 counties get one EIP location and an additional one for every  
12 100,000 registered voters above 100,000, rounding to the  
13 nearest 100,000.

14 Did I read that correctly?

15 A. Yes.

16 Q. You stated in your deposition that you're not advocating  
17 for that approach; is that right?

18 A. That's correct.

19 Q. And under this approach that you're not advocating, the  
20 approach would require an additional early-voting center for  
21 every 100,000 voters in a county; is that right?

22 A. For every 100,000 voters above 100,000 I think is what  
23 it means.

24 Q. Correct. I'm sorry.

25 So under your example, a county with 149,000 voters

1 would have one early-voting site?

2 A. Yes. That's correct. In this scenario.

3 Q. And a county with 151,000 voters would have two centers;  
4 is that right?

5 A. In this scenario, yes.

6 Q. In this section do you set forth any other hypothetical  
7 arguments for calculating the number of EIP locations to be  
8 added to counties?

9 A. I don't think so. All I was trying to show was that the  
10 number 784 which came -- my memory is that it came from both  
11 Dr. Hood and Mr. Trende's rebuttal reports, that that's not  
12 necessarily the scenario that would have to be adopted. In  
13 other words, 784 sounds like a lot of extra early-voting  
14 centers and I was saying there'd be many other possible ways in  
15 which you could open additional centers that would result in  
16 far fewer being opened. But that was just a hypothetical  
17 scenario for the sake of argument.

18 Q. You say 784 is not the number that would be required.  
19 Why do you say that?

20 A. Well, I'm saying that using the terms that Dr. Hood and  
21 Mr. Trende laid out and my understanding of what they did is to  
22 say if you have one early-voting center in the smallest county  
23 which maybe is around 10,000 registered voters then they are  
24 saying that following that logic, you'd have to have one  
25 early-voting center per 10,000 residents in each county. And

1 again, my understanding is that if you add all those groups of  
2 10,000 up, you get 784 additional centers. That's my  
3 understanding of what they did.

4 My argument was if you don't use that population  
5 scenario, you could get a very different answer. So I just  
6 presented one other way to think about what could be done. But  
7 I'm not advocating any particular position one way or the  
8 other.

9 Q. Do you recall also at your deposition talking about how  
10 you may have had a misunderstanding of what the plaintiffs are  
11 seeking in this case with regard to early-voting centers?

12 A. I believe that my understanding was that what Plaintiffs  
13 were seeking was both additional discretion on the part of  
14 counties and additional resources. And then my memory is that  
15 you showed me a sentence from the -- probably the amended  
16 complaint and that in that language it talked more about  
17 resources than it did about discretion. So in that sense I  
18 think I did have a misunderstanding about the discretion part  
19 of it.

20 I don't know whether or not the -- I don't know what the  
21 actual request for relief is but I think I was under the  
22 impression that part of it was enhanced discretion for counties  
23 to open additional early-voting centers if they wish.

24 Q. So when you wrote this section you were under the  
25 assumption that the plaintiffs were asking for discretion to

1 open additional sites?

2 A. Both discretion and resources. Or that at least that  
3 the resources could be part of the relief granted.

4 Q. Let's pull up the next slide. At your deposition, if  
5 you recall, I maybe showed you this or another allegation in  
6 there in the plaintiffs' complaint. This is from their prayer  
7 for relief. It says, they're asking for the Court to issue an  
8 order mandating that Secretary Husted direct each county BOE to  
9 provide EIP voting locations on a reasonably equitable  
10 population-per-county basis. Do you see that?

11 A. Yes.

12 Q. The word discretion does not appear in that sentence?

13 A. That's correct.

14 Q. Assuming that the word discretion does not appear  
15 anywhere in there in the plaintiffs' complaint related to this  
16 issue, you had a flawed understanding that the plaintiffs are  
17 asking for relief?

18 MR. SPIVA: Objection, Your Honor. He's now asking  
19 for a legal conclusion about what the plaintiffs are seeking  
20 based on one sentence in the complaint. And he's not here to  
21 opine on the relief the plaintiffs are seeking.

22 MR. VOIGT: Your Honor, this goes directly to the  
23 portion of his report where he talked about discretion.

24 THE COURT: Don't you preface all of this by getting  
25 him to admit that he perhaps misunderstood this portion of the

1 claim?

2 MR. VOIGT: I think we have elicited that, to some  
3 extent, through the prior questions, Your Honor.

4 THE COURT: And this question, assuming the word  
5 discretion does not appear anywhere in there in the plaintiffs'  
6 complaint related to this issue of a flawed understanding that  
7 the plaintiffs are asking for relief. You have a flawed  
8 understanding.

9 MR. VOIGT: Your Honor, I could actually just bring  
10 out a very similar question that I asked at the deposition.

11 THE COURT: Why don't you do that. Was it objected  
12 to?

13 MR. SPIVA: I think so, Your Honor. I was going to  
14 wait to see what he brought up but I'm pretty sure I objected  
15 on the same grounds. I also think it's not true that the word  
16 discretion doesn't appear in the complaint.

17 MR. VOIGT: Page 226.

18 BY MR. VOIGT:

19 Q. Here we go. Page 225 to 226.

20 Question: Well, let me ask you this. How did -- to  
21 your knowledge, how did Sean Trende come up with the number  
22 784?

23 Answer: Well, first of all, I think it was Dr. Hood,  
24 but I think that what he did is took the smallest county and  
25 said that -- said if that gets one -- smallest county in terms

1 of registered voters, I think, and said if that county gets one  
2 center, then we ought to make all counties have that same rate  
3 of centers. So in other words, if Vinton County had 10,000  
4 registered voters, then every other county ought to have one  
5 early-voting center per 10,000 registered voters. That's my  
6 understanding of what he did. So that, I think, was -- I think  
7 that Sean Trende, Mr. Trende, cited to that, Dr. Hood's expert  
8 report.

9 So back to the question of does that change my thinking.  
10 If this is the only place in which this discussion of  
11 early-voting centers comes up and there's no mention of  
12 discretion, then I may have had a flawed understanding of what  
13 the relief was that Plaintiffs sought.

14 And then it continues.

15 MR. SPIVA: I just move to strike. I guess it's funny  
16 to move to strike your witness' own answer but this is outside  
17 the scope of his report. He wasn't hired to provide a legal  
18 opinion on what relief the plaintiffs are seeking.

19 THE COURT: What's the basis of your question? What  
20 are you trying to get here?

21 MR. VOIGT: His analysis in this section is based on a  
22 flawed understanding of what the plaintiffs are seeking. It's  
23 not helpful to the Court's determination in this case.

24 THE COURT: And you're concerned about whether or not  
25 I'm receiving that message or what?

1 MR. VOIGT: I'm just trying to establish the record,  
2 Your Honor.

3 MR. SPIVA: Was that question directed to me or to  
4 him, Your Honor?

5 THE COURT: That was directed to Mr. Voigt.

6 MR. VOIGT: I apologize if --

7 THE COURT: I heard what you read and I heard what you  
8 asked and I heard his responses. So I think we've established  
9 what you want to establish. I don't think we're calling on  
10 this witness for a legal conclusion about what the plaintiffs  
11 are claiming.

12 MR. VOIGT: I understand, Your Honor. Thank you.

13 BY MR. VOIGT:

14 Q. If early-voting centers are located, on average, closer  
15 to minority voters than to white voters, does this lower the  
16 cost of voting for minority voters as compared to white voters?

17 A. It would if the -- so that average, it would be averaged  
18 over a lot of people and so if -- generally speaking, yes. So  
19 it would not simply be the average distance, it would also be  
20 how many people live within some average distance. But  
21 generally speaking I think it would. In other words, I think  
22 it would be lower -- if everyone had the same access to  
23 transportation and the same income and all that stuff then it  
24 would be lower for the group that was closer.

25 Q. We're getting close. Page 9 of your rebuttal report,

1 please. If you could take a look at table 2.

2 Could you explain what the boxes around the numbers in  
3 the chart mean?

4 A. Yes. So there's a lot of numbers on that table and I  
5 was trying to highlight the most important ones by putting  
6 boxes around them. Those are known as incident-rate ratios  
7 which I think I described in my direct testimony, as the name  
8 suggests, the ratio of two rates. And so they mean slightly  
9 different things in the different rows but essentially they are  
10 the ratio of the rate in one sort of place versus the ratio of  
11 the rate in another sort of place.

12 Q. Let's take a look at the second row. What does 4.316  
13 refer to?

14 A. That says that in 2008 the rate of using early in-person  
15 voting in homogeneous African-American tracts -- I'm sorry,  
16 blocks, is 4.3 times the rate that it is in homogeneous white  
17 census blocks.

18 Q. And again, this is limited to three counties; is that  
19 right?

20 A. Correct.

21 Q. Let's compare the years 2010 and 2014. Does this chart  
22 show that based on the data from the three counties that you  
23 used that African-Americans in those three counties, at least  
24 based on the census blocks, used early in-person voting in 2014  
25 at a higher rate than they did in 2010?

1       A.     Technically it just shows that the gap got bigger in  
2     2014.  So the gap in the rate of early in-person voting between  
3     people in homogeneous black and homogeneous white census  
4     blocks.  It says that that gap got bigger.  That could be  
5     driven by a couple different things.

6             It could be that the black rate of use of early  
7     in-person voting went up and the white rate stayed the same or  
8     it could mean that the rate of use of early in-person voting in  
9     people in homogeneous white census blocks got lower and the  
10    rate among -- in homogeneous black census blocks stayed the  
11    same.  It could be driven by a couple of different processes.

12    Q.     One final topic.  Who is Vincent Roscigno?

13    A.     Vincent Roscigno is a professor of sociology at The Ohio  
14    State University.

15    Q.     Is he a testifying expert in this case?

16    A.     Not to my knowledge.

17    Q.     And you copied, verbatim, portions of your report from a  
18    report that Dr. Roscigno wrote?

19    A.     He's from the Bronx.  He's Italian.

20    Q.     Dr. Roscigno wrote?

21    A.     Yes.

22             MR. VOIGT:  May I approach the witness, Your Honor?

23             THE COURT:  You may.

24    BY MR. VOIGT:

25    Q.     Dr. Timberlake, this is a red line that I showed you at

1 your deposition. Again, as I stated at the deposition, not  
2 every single --

3 MR. SPIVA: Your Honor, I'm going to object. This  
4 document, first of all, hasn't been authenticated and second of  
5 all, it appears to be missing significant chunks of pages which  
6 is partly the reason for the authentication objection.

7 MR. VOIGT: Your Honor, I can authenticate that I have  
8 a declaration related to that but also I can premise that this  
9 does not include, simply to avoid having a large stack of  
10 papers, every single page of his report. I'm just trying to  
11 make a very simple point. I'm not actually introducing this  
12 into evidence. I'm just going to ask --

13 THE COURT: You're not moving it into evidence?

14 MR. VOIGT: No, Your Honor.

15 MR. SPIVA: Then I don't have an objection to him  
16 asking him questions about it then. I would note that it's not  
17 clearly complete, though.

18 THE COURT: Which he just admitted.

19 MR. VOIGT: Yes.

20 BY MR. VOIGT:

21 Q. As I stated at the deposition, these are some of the  
22 pages from your report where we conducted a red line of your  
23 report with Dr. Roscigno's expert report. The parts of the  
24 report that you copied from Dr. Roscigno, those are not your  
25 own work product; is that right?

1 A. Well, I don't know what the technical definition of that  
2 is but the parts that are copied are the parts where my process  
3 was to read what he wrote and consider whether the examples he  
4 used were good examples and whether the arguments he was making  
5 were good arguments and then I verified the data analysis and  
6 replicated it to a large degree and then on occasion didn't  
7 rewrite the description of the analysis.

8 Q. And you also directly copied source material from  
9 Dr. Roscigno; is that correct?

10 A. You mean use the same sources that he did?

11 Q. Yes, sir.

12 A. Yeah. And that's, I mean, that piece of it is fairly  
13 standard practice in the sense that you read other materials  
14 and you use ideas about what are appropriate sources and then  
15 you look up those same sources. So that part of it I don't  
16 consider to be copying quite in the same way as some of the  
17 language in the report.

18 Q. If you could just flip through, I'm just going to ask  
19 you about one page here. If you could flip through to the page  
20 that has a 14 in the upper right-hand corner.

21 A. Uh-huh.

22 Q. And it shows footnote 19.

23 A. Yes. I see that.

24 Q. It begins Amy Myrick and it lists a number of  
25 periodicals. Do you see that?

1 A. Yes.

2 Q. Did you review each of those source materials before you  
3 copied them and relied upon them in your report?

4 A. I examined them. I did not read every word of every one  
5 of those citations but I examined them to verify that they were  
6 making the point that he was trying to make.

7 Q. Did Plaintiffs' counsel tell you to use Dr. Roscigno's  
8 report?

9 A. No.

10 Q. I just want to ask you -- I just want to bring up one  
11 question from your deposition. And this is my last question.  
12 This relates to our discussion of this red line on your  
13 deposition.

14 I asked you, you know, from my reading of this, it looks  
15 like you took an awful lot from his report.

16 And you answered, I think that -- well, I definitely  
17 took more in some places than others. And, again, I kind of  
18 asked about intellectual property issues and that sort of  
19 thing, and nothing ever came up as a problem. So, yeah, I  
20 mean, the -- there are -- you know, there are parts of the  
21 report that are entirely rewritten, there's parts of the report  
22 that are entirely new, and there are other parts that are  
23 basically, you know, what he wrote.

24 Do you have any reason to disagree with your answer?

25 A. No.

1 MR. VOIGT: No further questions at this time.

2 THE COURT: Redirect.

3 - - -

4 REDIRECT EXAMINATION

5 BY MR. SPIVA:

6 Q. Afternoon, Dr. Timberlake. Did you review  
7 Dr. Roscigno's entire report?

8 A. Yes.

9 Q. Did you agree with his conclusions?

10 A. In the place -- in general, the parts that I rewrote, I  
11 wouldn't say that there were any major areas of radical  
12 disagreement. There were lots of parts of it that I,  
13 especially when I reanalyze the data and would highlight  
14 certain kinds of things more than others. In the parts that  
15 I -- in the language of Mr. Voigt -- copied, yes, I agreed with  
16 his conclusions.

17 Q. You had a conversation with Mr. Roscigno in the spring  
18 of this year before you accepted your retention for this  
19 matter?

20 A. Yes. I think I said --

21 Q. The way we have to phrase this because of the  
22 evidentiary rules, I have to be careful about how I ask the  
23 question. Did you come away with an understanding that you had  
24 permission to use portions of Dr. Roscigno's report?

25 A. Yes.

1 Q. I didn't mean to interrupt you. As long as you're not  
2 going to tell what somebody else told you, you can finish your  
3 response.

4 A. No. I was only going to correct the date. I think in  
5 my deposition I referred to speaking with counsel for the  
6 plaintiffs in early April and it was actually in late April and  
7 then that conversation with Dr. Roscigno took place in late  
8 April as well.

9 Q. Thank you.

10 At the beginning of the cross-examination, Mr. Voigt  
11 asked you a number of questions about the calculus of voting.  
12 Do you recall that?

13 A. Yes.

14 Q. And you mentioned that you had never written any  
15 articles or taught any courses on the calculus of voting. You  
16 recall that?

17 A. Yes.

18 Q. Have you ever studied or written about any other topics  
19 that relate to the calculus of voting?

20 A. Well, not directly about voting but the general  
21 framework that the calculus of voting refers to is rational  
22 choice theory and I think I described in my direct testimony  
23 that it's as close as we get to a unifying theory in the social  
24 sciences. It doesn't mean that everybody agrees with it, it  
25 just means that if you're going to write about any topic, it's

1 pretty certain that somebody has written about it from a  
2 rational-choice perspective.

3 So rational choice's theory is kind of the theory that  
4 undergirds almost everything in the social sciences. Calculus  
5 of voting framework is a particular version of rational choice  
6 theory in that it tries to understand how people choose or  
7 choose not to vote but it's a part of rational choice theory or  
8 at least an offshoot of it or an application of rational choice  
9 theory.

10 Q. I think this was implicit in what you said but I want to  
11 make sure. You have studied rational choice theory?

12 A. Absolutely. This is -- you can't read a sociology book  
13 without running across -- and typically in sociology it's how  
14 sociology is different from rational choice theory, but  
15 rational choice theory is kind of the, I'm not sure what the  
16 right metaphor is but it's sort of the grand theory against  
17 which lots of other theories are compared, particularly in  
18 sociology.

19 Q. The difference between sociologists and the political  
20 scientist is the sociologists think that people are irrational?  
21 Sorry. That's just a joke.

22 Mr. Voigt also asked you a number of questions towards  
23 the beginning about whether you had made comparisons to other  
24 states and whether they had more generous or favorable voting  
25 methods or less favorable voting methods than Ohio. Do you

1 recall that line of questions?

2 A. I do.

3 Q. And I noticed in your answers a number of times you  
4 said, all things being equal that having more early-voting  
5 days, for example, would be -- would reduce the cost of voting;  
6 is that correct?

7 A. Yes.

8 Q. Are all things typically equal among states?

9 A. No. There would certainly be many, many differences in  
10 addition to differences in kind of the voting laws or voting  
11 regime in various different states. The populations would be  
12 slightly different, lots of other kinds of things would be  
13 different across states.

14 Q. Can you tell me whether there would be any relevance to  
15 whether another state had had problems with voting in the past?

16 MR. VOIGT: Objection, Your Honor. Vague.

17 BY MR. SPIVA:

18 Q. In terms of long lines and that type of thing?

19 THE COURT: Restate the question. I'm not quite sure  
20 what you're asking myself.

21 BY MR. SPIVA:

22 Q. In terms of doing a comparison with another state and  
23 the availability of voting mechanisms in the other state as  
24 compared to Ohio, would the issue of whether the other state  
25 had had problems such as long lines have any relevance to such

1 a comparison?

2 A. I would think so in the sense that if you observed that  
3 a particular state had very few, for lack of a better term,  
4 problems with voting, that is to say not long lines, not having  
5 people leave lines because they were frustrated with the length  
6 of them, that sort of thing, you might expect that that  
7 state -- you might not necessarily expect that that state would  
8 have either changed its voting laws to accommodate voters or  
9 even that it would have a particular regime of voting.

10 I think that in order to know how states decide upon  
11 their voting laws, you'd have to know a lot about each of the  
12 different states. I think it would be overly simple just to  
13 compare two states and say this state is better than that state  
14 without knowing the broader context within which people vote in  
15 each state.

16 Q. Would it make a difference whether a state was taking  
17 away something that had previously been available in terms of a  
18 method of voting as opposed to whether they had it to begin  
19 with?

20 MR. VOIGT: Objection. Vague.

21 MR. SPIVA: That's probably a fair objection, Your  
22 Honor. I'll rephrase.

23 BY MR. SPIVA:

24 Q. In terms of determining whether one, Ohio's laws, for  
25 instance, lower the costs of voting as compared to another

1 state, would it make any difference if one were to investigate  
2 that whether Ohio was taking -- was cutting back on a method of  
3 voting that previously had been available as compared to the  
4 other state?

5 A. Here this is -- here I'm using logic more than my own  
6 direct analyses but I would think that voters in any state  
7 would, to some degree, get used to the voting laws that exist  
8 in their state and then if the laws change then the voters have  
9 to adapt to this new set of laws in their state. I don't  
10 think -- again, this is just using logic. I don't think that  
11 voters in any given state compare themselves to voters in --  
12 the voting laws in another state. I think that they would  
13 experience the changes in the voting laws based on what they  
14 had come to know rather than where that state fit in with a  
15 broader ecology of states.

16 Q. You were asked a number of questions about Dr. Smith's  
17 report and your reliance on Dr. Smith's report. Do you recall  
18 that?

19 A. Yes.

20 Q. And you examined or analyzed Dr. Smith's report in  
21 drafting your own initial report; is that right?

22 A. Yes.

23 Q. I think Mr. Voigt asked you about a state in your report  
24 that you determined that the data was appropriate and you said  
25 that you hadn't actually examined the underlying data. How did

1 you come to make that determination that it appeared that the  
2 data used was appropriate?

3 A. I think by appropriate what I really mean is an  
4 advantage over some of the problems that all of the experts, I  
5 think, have been facing, which I think I described in my direct  
6 testimony that because Ohio doesn't keep track of the race of  
7 its voters, to some degree we're all faced with the same  
8 problem of trying to figure out what the race of the voter is.  
9 And so in my reading of his description of what he did, it  
10 struck me that this was a way, one of several potential ways of  
11 trying to solve that problem as best anyone could.

12 It's pretty clear from all of the expert reports that  
13 we're all faced with this underlying problem of not actually  
14 being able to observe the voter race and so we all have to use  
15 some, one method or another or variety of methods to try to get  
16 at this question. So I guess the word appropriate in that  
17 sense meant it's a reasonable way to try to understand the  
18 differences that you might observe between African-Americans  
19 and whites in their use of early in-person voting, for example.

20 Q. Is the manner in which you evaluated Dr. Smith's report,  
21 is that analogous in any way to the manner in which you would  
22 review any kind of a research article or paper in the social  
23 sciences?

24 A. Yes. I mean, I think I mentioned in my direct testimony  
25 that there are quite a few differences between my academic work

1 and what I was asked to do for this case. But that particular  
2 piece of it was very similar, at least it felt similar to me.  
3 It's very customary, I think probably in all of the sciences,  
4 to do peer reviews of -- an unpublished manuscript will be sent  
5 and you'll evaluate the quality of the work and whether you  
6 think it's a worthy contribution to literature.

7 It's extraordinarily rare for a peer reviewer to get the  
8 data that were used by the author of the manuscript and  
9 reanalyze it. I can think of just a few cases in 20 years of  
10 doing this where that's happened. So that piece of it was very  
11 consistent with my usual academic work that I do.

12 Q. Do you know Dr. Smith to be a reputable political  
13 scientist?

14 A. I don't know anything about him.

15 Q. At the time you were writing your initial report and  
16 looking at Dr. Smith's report, did you also say that you  
17 reviewed the District Court's opinion?

18 A. I believe I did, yes.

19 Q. District Court's opinion in the *NAACP v. Husted* case?

20 A. I believe so because that appears in the initial report.

21 Q. Did that have any impact on your evaluation of  
22 Dr. Smith's report?

23 A. I believe that -- well, it's hard to know. If the  
24 opinion had said, we think Dr. Smith's report is not credible,  
25 I suppose that would have been a piece of information that I

1 would have included in my evaluation. But I really thought of  
2 them as two different things.

3 One was sort of reading the report as though it were a  
4 manuscript sent out for peer review and trying to think  
5 through, so we have this problem of not being able to  
6 understand who are the African-Americans and who are the white  
7 voters. He was proposing a method for doing it. I thought that  
8 was sound. And I believe I also -- and I think I read that  
9 report before I read the Court's opinion and I think I noted in  
10 my initial report that the Court found Dr. Smith's report  
11 persuasive, if I'm recalling correctly.

12 Much of my reasoning behind using Dr. Smith's report at  
13 all is just to see what kinds of additional evidence I could  
14 generate beyond what was in my report that might corroborate or  
15 not corroborate, I suppose, the findings in my report.

16 Q. After your -- before you did your rebuttal report, did  
17 you get additional data about three counties that allowed you  
18 to do additional analysis?

19 A. Yes. As I discussed, both in the direct and  
20 cross-examination, I think I used data from Cuyahoga, Hamilton  
21 and Mahoning Counties.

22 Q. So the method that you used to analyze that data for  
23 those three counties, was that similar to the method that  
24 Dr. Smith described for the five counties that he analyzed in  
25 his report?

1       A.    I tried as best I could to replicate his method.  Not  
2   having spoken with him and not, for example, having computer  
3   programs that he might have written, I can't guarantee it was  
4   precisely the same method, but it was as similar as I thought I  
5   could make it.

6       Q.    In terms of using homogeneous census blocks, near  
7   homogeneous census blocks, was that the same type of  
8   methodology that he described in his report?

9       A.    I did the best job I could in replicating his method.

10      Q.    What were your conclusions?  I'm going to make this a  
11   little more precise.  Did you come out with a different  
12   conclusion from Dr. Smith after you conducted that analysis on  
13   the three counties for which you had data?

14      A.    I don't believe that I replicated every piece of  
15   Dr. Smith's analysis but in the main I came away with the same  
16   conclusion which is that the evidence that I reported and the  
17   evidence that Dr. Smith reported both suggest, indicate that  
18   African-Americans used early in-person voting during golden  
19   week at a higher rate than whites did and that  
20   African-Americans used early in-person voting overall at a  
21   higher rate than whites did.

22            Neither Dr. Smith nor I nor anyone in this case can  
23   definitively, without any shred of doubt, prove that, simply  
24   because we lack the necessary data.  So the analysis that I did  
25   provides indicative evidence that that's true and so that's as

1 far as I'm able to draw a conclusion.

2 Q. Have you done any analysis that points in any different  
3 direction than that conclusion that you just stated?

4 A. None of the analysis that I did -- no. I did some  
5 additional analysis that seemed like I was not able to talk  
6 about earlier today.

7 Q. I'm not asking you for anything outside of your reports.  
8 I just wanted to know --

9 A. No.

10 Q. -- whether any of the analysis that you've done point in  
11 a different direction?

12 A. Certainly not in 2008 and 2012. There is some evidence  
13 that the rates of voting early in person in my initial report  
14 in 2010 may have been fairly similar in these high-minority  
15 counties versus the remainder but the data using actual voter  
16 files, voter records all points in the same direction as  
17 Dr. Smith concluded in his report.

18 Q. And have you seen any other analysis in this case that  
19 points in the opposite direction of the conclusions you reached  
20 in your rebuttal report or that -- yes, that you reached in  
21 your rebuttal report?

22 A. No, I don't believe so. I know that Dr. McCarty's  
23 report examined rates of early in-person voting just among  
24 African-Americans or at least that was the main thrust of his  
25 report. I don't believe that I recall that he did a comparison

1 of black or white early in-person voting. I don't think that  
2 I've seen other kinds of --

3 MR. VOIGT: Objection, Your Honor. He's testifying to  
4 what Dr. McCarty wrote in his report. Dr. McCarty's report was  
5 a rebuttal report. This is improper -- this, again, goes back  
6 to the supplemental report issue.

7 THE COURT: Sustained.

8 MR. SPIVA: Can we put up Plaintiffs' Exhibit 112?

9 BY MR. SPIVA:

10 Q. Dr. Timberlake, you can look at it in your book. It's  
11 your second erratum. It's actually the second page, the table.  
12 You went through a series of questions with Mr. Voigt about  
13 changes to this table. And my question is, did any of those  
14 changes result in any changes to any of your conclusions in  
15 your report?

16 A. No, they did not.

17 Q. And why was that?

18 A. Well, the technical answer is that the basic pattern of  
19 numbers and findings that I produced in reanalyzing the data  
20 didn't lead to different conclusions. The mathematical or  
21 demographic reason for that, I suspect, is because the counties  
22 that changed groups were very small percentages of the overall  
23 population. And so even if, for example, even if all whites in  
24 a particular small county had voted in a particular way and  
25 they were in a different group then you're still talking about

1 very small proportions of the overall population.

2 So this sort of mathematical or numerical impact on the  
3 overall story, it sort of mathematically has to be small  
4 because the county populations are fairly small. In other  
5 words, the ones that switched groups were very small.

6 Q. I think this is my last question. At the end of  
7 Mr. Voigt's examination he asked you about the locations of  
8 early in-person voting centers. You recall that?

9 A. Yes.

10 Q. And he said or he asked you, are the costs of voting  
11 lower for people who are closer to the early in-person voting  
12 centers. You recall that?

13 A. Yes.

14 Q. And I think your answer was, I'm paraphrasing, but if  
15 everyone has the same access to transportation then they would.  
16 Is that what you said?

17 A. Yes. So I guess what I was getting at is intuitively it  
18 might seem like if, for example, the black population, on  
19 average, was closer to the early-voting center than the white  
20 population that that must mean that the costs of getting to  
21 that early-voting center would necessarily be lower for the  
22 black population than the white population. That would only be  
23 true if the two populations were equal in terms of all of the  
24 other causes of getting to an early-voting center. Income,  
25 child care, transportation, all of those things.



1 exactly when you know things, but I think I knew that it had  
2 been settled -- yeah. Settled. I'm not entirely certain what  
3 that meant at that time.

4 MR. VOIGT: No further questions, Your Honor.

5 THE COURT: Thank you, Dr. Timberlake.

6 THE WITNESS: Thank you.

7 THE COURT: Thank you for coming back.

8 THE WITNESS: You're welcome.

9 THE COURT: You are excused.

10 Let's take our afternoon break. Who's next?

11 MR. KAUL: Timothy Burke, Your Honor. And we have  
12 David Cannon here also if we get to him.

13 THE COURT: All right. Let's take a break and come  
14 back and do that.

15 (A recess was taken at 3:15 p.m. until 3:30 p.m.)

16 THE COURT: How close are we to getting through your  
17 case? About a week and a half down?

18 MR. SPIVA: Just counting witnesses, of course we've  
19 been interspersing defense witnesses for a number of days  
20 but --

21 MR. KAUL: While Bruce is looking at the specifics,  
22 Your Honor, we have one or two witnesses we'll get through  
23 today. I think we have about two-thirds of the day that we'll  
24 fill tomorrow and we're discussing with Defendants whether to  
25 fill the rest of that time with either exhibits or perhaps a

1 defense witness. And then we have two witnesses for the Monday  
2 after we're back and that's our case.

3 MR. SPIVA: I think we have, looks like, about seven  
4 additional witnesses through Monday.

5 THE COURT: Let's press on. How many more do you  
6 have?

7 MR. VOIGT: Your Honor, my co-counsel can correct me  
8 if I'm wrong but we have three fact witnesses, Poland, Munroe  
9 and Ward, and Mr. Damschroder as well. And two experts, Sean  
10 Trende and Dr. Allen. So that's two experts and four fact  
11 witnesses.

12 THE COURT: Okay. Who's next?

13 MS. CALLAIS: Plaintiffs call Timothy Burke, Your  
14 Honor.

15 (Witness sworn.)

16 THE COURT: Please have a seat on the stand.

17 Ms. Callais, you may inquire.

18 - - -

19 TIMOTHY BURKE

20 Called as a witness on behalf of the Plaintiffs, being first  
21 duly sworn, testified as follows:

22 DIRECT EXAMINATION

23 BY MS. CALLAIS:

24 Q. Good afternoon, Mr. Burke. Could you please state your  
25 full name for the record?

1 A. Timothy Michael Burke.

2 Q. Could you spell that?

3 A. Last name is B-U-R-K-E.

4 Q. Where do you currently live?

5 A. Cincinnati, Ohio.

6 Q. How long have you lived there?

7 A. I've lived in Cincinnati since 1966.

8 Q. What do you do for a living?

9 A. I'm an attorney.

10 Q. About how long have you been an attorney?

11 A. Since 1973.

12 Q. And are you involved in any community organizations,  
13 Mr. Burke?

14 A. I am the Chair of the Hamilton County Democratic Party  
15 and Chair of the Hamilton County Board of Elections.

16 Q. How long have you been Chair of the Hamilton County  
17 Board of Elections?

18 A. I'm been on the board of elections a little over 23  
19 years and all but four of those years I've been chair.

20 Q. And the four years that you were not chair, do you know  
21 what time period that was?

22 A. Roughly during the same period of time that Jennifer  
23 Brunner was the Secretary of State.

24 Q. So is that approximately 2005 to 2009?

25 A. Approximately.

1 Q. Can you tell the Court what you do in your role as Chair  
2 of Hamilton County Board of Elections?

3 A. I oversee -- I conduct the meetings of the board and,  
4 together with the other members of the board, we oversee hiring  
5 and firing of personnel, we oversee the policies -- we adopt  
6 the policies under which the board of elections operates. We  
7 fulfill those duties mandated by Title 35 of the Ohio Revised  
8 Code and oversee the conduct of elections.

9 Q. What are some of the duties mandated by the Ohio Revised  
10 Code?

11 A. This morning we had a meeting of the board of elections  
12 to review and approve remade provisional ballots that had to be  
13 presented to the board of elections because certain provisional  
14 ballots had been damaged by either voters or by our staff when  
15 they were opening envelopes. And we had to approve the  
16 computer run to ensure that before we did the official count,  
17 which has now been done today but not yet certified, that the  
18 computer program was clean. We had to fulfill those  
19 responsibilities as a board. We had several ballots this  
20 morning that the board had to determine what the voter's intent  
21 was on certain issues.

22 Q. And in your role on the Hamilton County Board of  
23 Elections do you ever review absentee ballots?

24 A. We do.

25 Q. Are you ever involved in the budgeting process?

1 A. We are.

2 Q. Do you review ballots for the possibility of fraud or  
3 anomalies?

4 A. When there are anomalies brought to our attention, yes,  
5 the board does review those and, on occasion, we issue  
6 subpoenas and investigate.

7 Q. When golden week was in place in Ohio, did you ever  
8 participate in the review of any golden-week ballots?

9 A. Yes.

10 Q. Mr. Burke, do you know approximately how many registered  
11 voters there are in Hamilton County?

12 A. Roughly 550,000.

13 Q. And based on your years of experience in Hamilton County  
14 have you made any observations or do you have knowledge about  
15 the breakdown of those voters?

16 A. I would -- based on my experience and observation, 25 to  
17 30 percent of the voting population in Hamilton County is  
18 African-American. A much smaller percentage is Hispanic.

19 Q. Mr. Burke, I'd like to turn now by discussing the use of  
20 golden week in Hamilton County. Are you familiar with the term  
21 golden week?

22 A. I am.

23 Q. And what do you understand that to mean?

24 A. I understand that to have been a period of roughly one  
25 week in duration when the period during which someone could

1 register to vote overlapped with the period in which someone  
2 could vote. Which meant that a new registrant could come to  
3 the board of elections, register and vote during the same trip  
4 to the board of elections.

5 Q. And golden week, has that been in place during your time  
6 on the Hamilton County Board of Elections?

7 A. It was, yes.

8 Q. And was it in place during the 2008 elections?

9 A. Yes.

10 Q. And you were serving on the board at that time?

11 A. I was.

12 Q. Mr. Burke, do you know approximately how many voters  
13 registered and voted during golden week in 2008 in Hamilton  
14 County?

15 A. As I recall, approximately 650 people registered and  
16 voted during golden week.

17 Q. And do you know approximate how many voters voted during  
18 golden week?

19 A. A total of roughly 4,500 people registered -- I'm sorry,  
20 voted during that week.

21 Q. Did you actually observe voters using golden week in  
22 Hamilton County?

23 A. I have observed voters using golden week. I typically,  
24 on the first day of voting I've typically made it a point,  
25 particularly during the presidential cycles of being at the

1 board of elections and observing some of the voting process.  
2 During those kinds of observations I have observed peopling  
3 taking advantage of golden week.

4 Q. And based on your observations, what was the racial  
5 makeup of the voters using golden week?

6 A. Overwhelmingly African-American.

7 Q. Are there any ways from an election administration  
8 standpoint that golden week facilitated your administration of  
9 elections?

10 A. In a couple of ways. First of all, one of the goals of  
11 a board of elections should be to offer as much of an  
12 opportunity people to vote as possible. Golden week certainly  
13 made that possible for some voters who could, in one stop, both  
14 register and vote. And I believe that was a good thing to have  
15 happened.

16 That also, just as with early voting, helps to reduce  
17 the number of people who need to go to a polling place and vote  
18 on election day. That helps to reduce the lines at polling  
19 places and make voting more convenient for those people who are  
20 going to vote on election day.

21 Q. Have there been lines in Hamilton County on election  
22 day?

23 A. Yes.

24 Q. Were there lines in 2004?

25 A. There were long lines in 2004.

1 Q. What about during 2008?

2 A. In 2008 there were also lines, especially early in the  
3 morning.

4 Q. How did those lines compare to 2004?

5 A. They were less than the lines in 2004 because roughly, I  
6 want to say 25 percent of those who cast ballots, cast early  
7 ballots and therefore helped reduce the lines on election day.

8 Q. Were there also lines on election day in 2012?

9 A. Yes, there were.

10 Q. Mr. Burke, as a board member of the Hamilton County  
11 Board of Elections, if the board of elections faced any  
12 constraints or problems with its budget, is that something you  
13 would be made aware of?

14 A. Yes.

15 Q. Were you made aware of any concerns about the cost of  
16 golden week during the 2008 cycle?

17 A. No.

18 Q. What about during 2012?

19 A. No.

20 Q. 2010?

21 A. No.

22 Q. 2000 -- not 2014.

23 At any point within which golden week was in place, were  
24 you made aware of any concerns about the cost?

25 A. No. Golden week would have added a very small

1 percentage to our budget. In part because, at that time,  
2 voters were coming in anyway. They had to be accommodated. So  
3 our staff was there, and there to fulfill the needs of any  
4 voters coming into the board of elections to vote. So it  
5 didn't require any significant increase in manpower to meet  
6 those needs.

7 Q. Mr. Burke, did there come a time, either during or after  
8 the 2008 election, in which the Hamilton County Prosecutor  
9 launched an investigation into golden-week voters?

10 A. Yes.

11 Q. And do you know anything about that investigation?

12 A. Yes, I do. On the weekend I believe just as golden week  
13 was closing in 2008, all of a sudden the county prosecutor held  
14 a major press conference and announced that he believed there  
15 was substantial fraud involved in golden week and he was going  
16 to conduct --

17 MS. RICHARDSON: Objection.

18 THE WITNESS: -- an investigation.

19 MS. RICHARDSON: Hearsay in terms of what the  
20 prosecutor actually stated.

21 MS. CALLAIS: Your Honor, we're not offering this for  
22 the truth. Just the context of how he knows about this and he  
23 can explain his understanding of the investigation.

24 THE COURT: I'll sort it out.

25

1 BY MS. CALLAIS:

2 Q. You can continue, Mr. Burke.

3 A. One of the ways I know about it is because I had a  
4 grandchild who was being baptized that Sunday afternoon when I  
5 was contacted by the press and the television stations ended  
6 upcoming out to the baptismal party to get my reaction as chair  
7 of the democratic party to the prosecutor, who was also the  
8 chair of the McCain campaign in Hamilton County announcing he  
9 was going to conduct this investigation.

10 Frankly, we became pretty active in criticizing that  
11 because the prosecutor was clearly wearing two hats. Within 24  
12 or 48 hours, he announced that he would have an independent  
13 prosecutor. There was an independent prosecutor.

14 I am aware that the independent prosecutor reviewed our  
15 records at the board of elections, that they examined all 600  
16 plus voters' records, they ended up subpoenaing a couple of  
17 hundred voters. In the end there was only a single individual  
18 who was found to have engaged in voter fraud and that was an  
19 individual who had self-reported his violation to the Hamilton  
20 County Board of Elections before that investigation ever  
21 started.

22 He was a kid who came to Cincinnati from the east coast  
23 to visit his buddies at the University of Cincinnati. They all  
24 went down to the board of elections, registered and voted and  
25 that kid, who I believe was from Connecticut, the next week

1 called the board of elections and reported what he had done.  
2 We would have reported that to the prosecutor's office anyway.  
3 There was no major fraud.

4 Q. Mr. Burke, did that investigation -- was that publicized  
5 within the county?

6 A. It was publicized a great deal in the county, yes.

7 Q. Mr. Burke, I just wanted to verify, the ballot of the  
8 golden-week voter that you actually mentioned, that was  
9 discovered during the -- by the prosecutor --

10 A. It wasn't discovered by the prosecutor. It was  
11 self-reported by the perpetrator and the board of elections  
12 knew about it and was able to report it to the independent  
13 prosecutor.

14 Q. Was that ballot actually counted?

15 A. It was not counted.

16 Q. Mr. Burke, how did the amount of individuals who  
17 registered and voted during golden week in the following  
18 presidential election in 2012, how did that compare to the  
19 amount of individuals who had registered and voted in 2008?

20 A. It was about one-third. We had just under 200 people  
21 take advantage of golden week in 2012.

22 Q. When you say take advantage, is that referring to the  
23 amount of individuals who voted or those who just who  
24 registered?

25 A. Those who registered and voted.

1 Q. Mr. Burke, you actually presented --

2 THE COURT: Slow down. You guys are racing with each  
3 other here.

4 BY MS. CALLAIS:

5 Q. You actually presented a count of these incidents to the  
6 legislature in the form of written testimony, correct?

7 A. I did.

8 Q. Why did you do that?

9 A. Because I was concerned about what I understood to be  
10 some of the legislation that was being considered by the  
11 legislature that would have eliminated certain voting rights in  
12 the state of Ohio, including eliminating golden week.

13 Q. And why were you concerned about the elimination of  
14 golden week?

15 A. Because I believe that golden week fulfilled a needed  
16 purpose, that it assisted voters in being able to register and  
17 conveniently vote.

18 Q. And you submitted this account to the legislature even  
19 after this ballot was cast by this individual in Connecticut?

20 A. Correct.

21 Q. And so did you have concerns about fraud during golden  
22 week?

23 A. No. Because we didn't see any significant amount of  
24 fraud. And in the instances where fraud was discovered, the  
25 vote didn't count anyway. So the integrity of the election was

1 preserved.

2 Q. Was the process that you had in place in 2008 to detect  
3 fraud, do you believe that that was sufficient?

4 A. I do.

5 Q. Why is that?

6 A. Because we have a system where postcard confirmations  
7 are mailed to any individual who comes in during golden week  
8 and if -- and that card is nonforwardable. So if the Post  
9 Office is unable to deliver the card, it's returned to the  
10 board. And if that card is returned to the board, that ballot  
11 is set aside and is not counted.

12 Q. Are those golden-week ballots, are they kept with other  
13 ballots that are cast or are they segregated?

14 A. They are segregated until we determine whether or not a  
15 postcard has been returned to the board.

16 Q. Mr. Burke, the testimony that you submitted to the  
17 legislature, did you submit that as a member of the Hamilton  
18 County Board of Elections?

19 A. I submitted it as a member. I did not submit it on  
20 behalf of the board but as a member of the board, yes.

21 Q. And did your statement discuss matters that you observed  
22 while you were a member of the board?

23 A. Yes.

24 MS. CALLAIS: Your Honor, may I have permission to  
25 approach?

1 THE COURT: Yes.

2 BY MS. CALLAIS:

3 Q. Mr. Burke, you have in front of you at tab 121, the  
4 document, in the bottom right-hand corner it should say  
5 PX121-001.

6 A. I have it.

7 Q. Mr. Burke, do you recognize this document?

8 A. I do.

9 Q. What is it?

10 MS. RICHARDSON: Your Honor, we are going to object to  
11 this exhibit for the same grounds that we objected to the  
12 previous testimony to the General Assembly on the basis that it  
13 is hearsay and to the extent that it's being offered as  
14 evidence of General Assembly intent or legislative intent. We  
15 believe it's inappropriate evidence.

16 Again, we don't object to his testifying as to what he  
17 stated or his opinion, certainly, but we do object to this  
18 document being admitted.

19 MS. CALLAIS: Your Honor, we would ask that it be  
20 introduced on the same grounds that we asked for previously.  
21 Additionally, there are two other grounds that make this not  
22 hearsay.

23 First, I believe as opposing counsel pointed out  
24 earlier, statements of the county board when they're acting,  
25 they're acting as a representative of the Secretary of State.

1 This is a statement that he made as a representative of the  
2 Secretary of State in his role as a county board member which  
3 makes him a county opponent in this case. Counsel pointed to  
4 Ohio Revised Code 3501.06 which says that a member of the  
5 county board is a representative of the Secretary of State  
6 which would make this a statement of a party opponent.

7 Further, it is a public record.

8 THE COURT: You just said that he's not testifying on  
9 behalf of the board. The board speaks as a body. The board  
10 does not speak based upon individual members. Mr. Burke was  
11 the chairman of the board at the time. He gave this -- he  
12 presented this statement. As far as your objection is  
13 concerned, whether we admit it or not, I'm still going to read  
14 it.

15 Let's see if we can't elicit his testimony here.

16 MS. RICHARDSON: Thank you, Your Honor.

17 THE COURT: But I disagree with you in terms of one  
18 person's statement representing the board.

19 MS. CALLAIS: As I have it, and I understand that,  
20 Your Honor, what I have in the language is that there are four  
21 qualified electors to serve as the Secretary's representatives  
22 in plural form. But can I go ahead and authenticate the  
23 document, that way when you make your decision you know that  
24 it's properly authenticated?

25 THE COURT: Please.

1 MS. CALLAIS: Thank you.

2 BY MS. CALLAIS:

3 Q. So Mr. Burke, what is the PX121 that we've been  
4 discussing, what is that?

5 A. It is a statement that I prepared and submitted to the  
6 state senate that was considering S.B. 380.

7 Your Honor, just to clarify, I was not the chairman of  
8 the board at that particular time.

9 THE COURT: Very good.

10 THE WITNESS: This particular document was prepared  
11 during the period when I was not chair.

12 THE COURT: Ms. Brunner was Secretary of State at the  
13 time?

14 THE WITNESS: Yes, Your Honor.

15 BY MS. CALLAIS:

16 Q. Is this letter a true -- is this a true and accurate  
17 copy of the letter?

18 A. It is.

19 Q. Is this the letter that we just discussed your written  
20 testimony to the legislature?

21 A. That's correct. This is a -- as opposed to two other  
22 letters, this one is a statement to the legislature.

23 THE COURT: Was it your intention to speak on behalf  
24 of the board?

25 THE WITNESS: Your Honor, it was only my intention to

1 express my personal opinion.

2 THE COURT: Very good. Thank you.

3 BY MS. CALLAIS:

4 Q. Mr. Burke, this letter, this S. B. 380, is it your  
5 understanding that this was a bill, among other things,  
6 discussing the loss of golden week?

7 A. Correct.

8 Q. And what were you -- what statement were you making in  
9 this bill to the legislature?

10 A. I was concerned that if we were to eliminate golden  
11 week, we would be eliminating something that had proven to be  
12 very useful to a significant number of voters both in Hamilton  
13 County and throughout Ohio.

14 Q. Mr. Burke, is this letter the only time that you've  
15 submitted written testimony to the legislature --

16 A. It is not.

17 Q. -- regarding the loss of golden week?

18 A. It is not.

19 Q. Did you also submit written testimony with regard to the  
20 passage of S.B. 238?

21 A. I did.

22 Q. Is it your understanding that S.B. 238 is one of the  
23 laws at issue in this case?

24 A. It is my understanding.

25 Q. Mr. Burke, could you please turn to tab 71 in that

1 binder?

2 MS. RICHARDSON: Your Honor, we understand your ruling  
3 that these documents will come in but if I could just make a  
4 standing objection to all of these exhibits to the extent that  
5 they're being offered as purported evidence of legislative  
6 intent.

7 THE COURT: I can tell you I'm not receiving them as  
8 such.

9 MS. RICHARDSON: Thank you, Your Honor.

10 THE COURT: I'll admit them for whatever purpose  
11 people want to. Mr. Burke made statements to the legislature.

12 MS. RICHARDSON: Thank you.

13 BY MS. CALLAIS:

14 Q. In the corner of that document it says PX0071-001?

15 A. It does.

16 Q. Mr. Burke, do you recognize this document?

17 A. I do.

18 Q. What is it?

19 A. It is a letter that I wrote and submitted to the chair  
20 of the Policy and Legislative Oversight Committee of the Ohio  
21 House of Representatives. It was dated December 10th, 2013.

22 Q. Is this a true and accurate copy of that letter?

23 A. It is.

24 Q. Is this the letter we just discussed -- another letter  
25 with regard to the loss of golden week?

1 A. That was one of the issues that was addressed in this  
2 letter, yes.

3 Q. Mr. Burke, why did you file this letter with the  
4 legislature?

5 A. Again, because I was concerned that the legislature was  
6 considering legislation which would eliminate golden week.

7 Q. And this was filed in 2000 or after the 2012  
8 presidential election?

9 A. Correct.

10 Q. During the 2012 presidential election, did the Hamilton  
11 County Board of Election examine any ballots that had anomalies  
12 in them?

13 A. Yes, we did.

14 Q. And these were ballots cast during golden week?

15 A. There were some ballots we examined for anomalies as a  
16 result of golden week. I believe in 2012 there were a total of  
17 six ballots that we examined for potential violations and none  
18 of them were counted. After our investigation was completed,  
19 after the count had been completed, we determined that four of  
20 those ballots actually should have been counted but postcards  
21 had been returned to us by the Post Office in spite of the fact  
22 that the individuals actually lived where they had registered.

23 In the other two cases we determined that the  
24 individuals who had voted should not have voted. In one case  
25 an elderly woman -- and this one was questionable. An elderly

1 woman from Tennessee lived part of the year with her daughter  
2 in Hamilton County. The daughter was a registered voter in  
3 Hamilton County. She brought Mom down to the board during  
4 golden week when the daughter was voting. Mom registered and  
5 voted in Hamilton County.

6 A second individual lived in northern Kentucky. Without  
7 the approval of his sister, who lived and was a registered  
8 voter in Hamilton County, he used her address, registered and  
9 voted during golden week.

10 Neither of those ballots were counted. None of those  
11 six were counted but those last two individuals were, in fact,  
12 referred to the Hamilton County Prosecutor.

13 Q. And they were referred to the prosecutor for  
14 investigation?

15 A. For further investigation. And ultimately the  
16 prosecutor did indict both of those individuals.

17 Q. Mr. Burke, do you know if either of those two  
18 individuals actually voted in another state other than Ohio?

19 A. I do not know.

20 Q. Do you know the final disposition of those two cases?

21 A. Other than the fact that they were indicted, I do not  
22 know. I do not believe anything more has happened with the  
23 woman from Tennessee. I don't know what the situation is with  
24 the brother from northern Kentucky.

25 Q. Mr. Burke, under this system that existed in 2012 --

1 THE COURT: He indicted an elderly woman?

2 THE WITNESS: Your Honor, I've got a real question  
3 with that one.

4 THE COURT: Okay.

5 BY MS. CALLAIS:

6 Q. Mr. Burke, you mentioned that neither of those two  
7 ballots was counted?

8 A. Correct.

9 Q. Why is that? Why were the ballots --

10 A. Because as I described before, they were segregated  
11 waiting to see whether or not postcards would be returned. In  
12 those six cases the postcards were returned and as a result,  
13 none those ballots were counted.

14 Q. Do you know any incidents in which fraudulent ballots  
15 have been cast and counted -- that were cast during golden week  
16 have been counted in Hamilton County?

17 A. No, I do not.

18 Q. Mr. Burke, the letter that we just discussed about S.B.  
19 238, PX71, that was sent after these incidents, correct?

20 A. Correct.

21 Q. So why, after these two incidents were referred to the  
22 prosecutor, did you still advocate on behalf of golden week?

23 A. Because the process had worked the way it should.  
24 Hundreds of people had been able to vote successfully without  
25 any problem during golden week. We had two instances of people

1 who should not have voted and because of the process we had in  
2 place to prevent illegal ballots from being counted, not only  
3 did we not count the two that were illegal, we also didn't  
4 count three or four that were legal.

5 Q. Is it possible today for a voter to register during the  
6 last days of the registration period? So let's say during that  
7 last week that would have been golden week, is it possible for  
8 a voter to register during that week currently?

9 A. Yes.

10 Q. And is it possible for a voter to vote during the  
11 early-voting period the following week?

12 A. Yes.

13 Q. And could a situation in which this confirmation ballot  
14 is received for that voter after they've already voted, could  
15 that still occur?

16 A. Yes.

17 Q. Mr. Burke, I know we spent some time talking about  
18 golden week and S.B. 238. I'd like to switch topics now and  
19 talk about changes to the absentee ballot -- to absentee  
20 ballots in Ohio.

21 Mr. Burke, is it your understanding that the legislature  
22 has recently passed a bill about who can send out unsolicited  
23 absentee-ballot application?

24 A. Yes, it is.

25 Q. And in particular, does this bill provide that these

1 ballots can only be sent by the Secretary of State in  
2 even-numbered years?

3 A. That is my understanding.

4 Q. Did you provide written testimony with regard to this  
5 bill?

6 A. I did.

7 Q. And you provided that to the legislature?

8 A. I did.

9 Q. Is this testimony also provided in the letter we've just  
10 been discussing, PX71?

11 A. It is.

12 Q. So can you explain to the Court why you provided  
13 testimony to the legislature on this particular bill?

14 A. Certainly. Over the last ten or twelve years, the  
15 Hamilton County Board of Elections has dramatically reduced the  
16 number of voting precincts we have in Hamilton County. We had  
17 been a little over 1,000 precincts. We now have only a little  
18 over 500 precincts. What that's done is dramatically increased  
19 the average number of voters in each precinct. That has the  
20 potential to have dramatically increased lines at polling  
21 places.

22 One of the reasons why we felt comfortable in doing that  
23 was because we had a program in place of sending out  
24 applications for early-vote ballots to all registered voters in  
25 Hamilton County.

1 THE COURT: So the board mailed those out?

2 THE WITNESS: The board mailed those out.

3 THE COURT: With postage, without?

4 THE WITNESS: Mailing them out had postage on them but  
5 without return postage. The voter had to put on their own  
6 return postage.

7 That had the impact of -- in the last two -- in the 2008  
8 and 2012 presidential elections, we had roughly 110,000 voters  
9 take advantage of early voting. In gubernatorial -- well,  
10 particularly in local municipal elections obviously you have  
11 fewer voters but still, that roughly a 25 percent participation  
12 rate of registered -- of those people voting did so early and  
13 that helped control and reduce the lines at polling places.  
14 And that was particularly important during presidential  
15 elections.

16 BY MS. CALLAIS:

17 Q. Mr. Burke, I just wanted to follow up on a couple of  
18 things you said. What universe of voters did Hamilton County  
19 send its absentee-ballot request forms to?

20 A. Hamilton County sent its absentee-ballot request forms  
21 to all registered voters, both active and inactive.

22 Q. Were ballots sent in odd as well as even years?

23 A. They were sent in odd numbered years, even numbered  
24 general elections and presidential primaries.

25 Q. And did you -- I think you've talked about some of the

1 ways that it facilitated the administration of your elections.

2 Is it your understanding that the Secretary of State only sends  
3 ballots out in even-numbered years?

4 A. Yes.

5 Q. And based on your observations since the Secretary of  
6 State's program has been in place, has that been an adequate  
7 substitute for the program you described?

8 A. I do not believe it's an adequate substitute because  
9 it's not going to the same universe of voters and it's not  
10 going in municipal or odd-numbered election years.

11 Q. Have you observed any confusion since this program has  
12 been implemented?

13 A. Yes.

14 MS. RICHARDSON: Objection. Vague.

15 THE COURT: I think he can testify.

16 THE WITNESS: Yes. Just in this past election year we  
17 had a number of complaints from voters who at the last minute  
18 realized that they hadn't been given -- they hadn't received an  
19 application for an absentee ballot.

20 BY MS. CALLAIS:

21 Q. And you mention, Mr. Burke, that Hamilton County did not  
22 provide prepaid postage. Are you aware of any incidents in  
23 which voters in Hamilton County did not provide a sufficient  
24 amount of postage on their absentee ballots?

25 A. Yes. It can be confusing to a voter to determine how

1 much postage is due on a return because, in different years,  
2 the ballots are bigger or smaller depending upon how many  
3 issues and candidates are on the ballot. So it may require  
4 more than a single first-class stamp.

5 We do have an understanding with our Post Office that  
6 they will deliver to the board of elections any envelopes that  
7 contain ballots in them and the board of elections takes care  
8 of the postage.

9 Q. And has your local Post Office had to deliver ballots to  
10 you that did not have the --

11 A. Yes.

12 Q. Mr. Burke, is it your understanding that the bill we've  
13 just been discussing also made changes to the requirements for  
14 the absentee-ballot identification envelopes?

15 A. That is my understanding.

16 Q. Are you aware of what those changes were?

17 A. It now requires an address and a date of birth on it.

18 Q. Did you address this issue in your written testimony to  
19 the legislature?

20 A. I did generally, yes.

21 Q. And why did you write to the legislature about this?

22 A. Because I'm very concerned both with regard to absentee  
23 ballots and with regard to provisional ballots that the more  
24 requirements for information you demand of a voter, the more  
25 likely it is that a qualified voter will have their ballot

1 rejected for some hypertechnical reason. And we've experienced  
2 that.

3 Q. Are you aware of any absentee ballots that have been --

4 THE COURT: What's hypertechnical?

5 THE WITNESS: The best example I can give you, Your  
6 Honor, is one that I cited in one of these letters. We had --  
7 and this happened to be a provisional voter -- again, elderly  
8 woman. She filled out the provisional-ballot envelope  
9 absolutely correctly. All of the information she provided was  
10 accurate. Her signature matched our records. There was no  
11 question that the ballot inside that envelope was cast by a  
12 valid registered voter.

13 She had neglected to print her name on the top of the  
14 envelope. We were required to reject that ballot even though  
15 we all knew it was valid. That, in my mind, is a  
16 hypertechnical rejection.

17 THE COURT: All right. Thank you.

18 BY MS. CALLAIS:

19 Q. Mr. Burke, I guess in part based on the issue you just  
20 described, prior to the changes by S.B. 205, was the board able  
21 to identify absentee ballots without a date of birth or an  
22 address on them?

23 A. Absolutely. And even today we can't necessarily  
24 identify a ballot based on a date of birth because we know that  
25 we've got over 5,000 registered voters in Hamilton County for

1 whom we do not have a date of birth because they registered  
2 prior to the time when that was required.

3 Q. Mr. Burke, you mentioned some changes to provisional  
4 ballots as well and some testimony that you gave on provisional  
5 ballots so I just want to go ahead and confirm. Have you  
6 provided written testimony to the legislature regarding changes  
7 to the provisional ballot?

8 A. I did.

9 Q. Can you turn to tab 67 in the notebook that you have?

10 A. I have it.

11 Q. Do you recognize this document, Mr. Burke?

12 A. I do. This was a letter that I sent to the chairman of  
13 the Policy and Legislative Oversight Committee of the Ohio  
14 House of Representatives dated February 15, 2014.

15 Q. Is this letter regarding S.B. 216?

16 A. It is.

17 Q. Is this a true and accurate copy of that letter?

18 A. It is.

19 Q. Is this the letter that you had just mentioned as your  
20 written testimony on this issue?

21 A. Yes. This is the letter where I described the situation  
22 that I just described to the Judge with the elderly woman who  
23 neglected to print her name.

24 Q. Mr. Burke, I understand that there were a lot of  
25 provisional ballots cast in Hamilton County in this last

1 election?

2 A. In 2015, there were. A lot.

3 Q. And I'm not going to go into too much detail but my  
4 understanding is there was a set of provisional ballots that  
5 were cast because there were some problems with the electronic  
6 poll books?

7 A. This was the first election at which we did county-wide  
8 use of electronic poll books and there were some problems that  
9 were not anticipated. The biggest one that impacted the number  
10 of provisional ballots was that the programming used as the  
11 cutoff date for registration, the cutoff date for the August  
12 special election instead of the registration cutoff date for  
13 the November election.

14 The result of that was that on the electronic poll  
15 books, though not on the board's records, on the electronic  
16 poll books about 12,000 people came up as not being registered  
17 to vote in the November election. Any of those voters who did  
18 come to vote were required to vote provisional ballots. But  
19 once that problem was recognized, all of those provisional  
20 ballots were counted even if the envelope was not properly  
21 filled out because those voters should have been entitled to  
22 vote a regular ballot.

23 THE COURT: And what order are they counted in?

24 THE WITNESS: Well, we can't count provisional  
25 ballots, by law, for ten days after the election and all of

1 those envelopes during that ten-day period are examined by a  
2 bipartisan board staff. They determined in this particular  
3 case which of those voters were, in fact, properly registered  
4 voters and should not have had to cast a provisional ballot to  
5 begin with. And those ballots were determined to be valid  
6 ballots.

7 Your question is what order are they counted in? Any of  
8 the provisional ballots, whether it's those kinds that I just  
9 described or the other types of provisional ballots that are  
10 found to be valid, those are the ones that, in our particular  
11 case, they were counted today for the first time because this  
12 was the first time that all of the provisional ballots were  
13 scanned in and counted along with a recount of what we had  
14 counted on election night, the unofficial results.

15 THE COURT: So that's military and so forth?

16 THE WITNESS: It would include late-arriving military  
17 ballots. Military ballots that arrived prior to -- on or prior  
18 to election day, those would have been accounted -- those would  
19 have been counted in the unofficial count on election night.

20 THE COURT: Thank you.

21 BY MS. CALLAIS:

22 Q. So, Mr. Burke, aside from this set of provisional  
23 ballots that were counted because they should have been cast as  
24 regular ballots, were there other provisional ballots?

25 A. Yes, there were. We had, if I remember correctly, about

1 12,000 provisional ballots that were counted in this election.

2 Q. Mr. Burke, were any of the provisional ballots that were  
3 cast in this election, aside from this subset that were due to  
4 this other anomaly, were any of those rejected because they did  
5 not have a date of birth or because they did not have the  
6 address on them?

7 A. Yes. My recollection is that 23 voters did not have  
8 their ballots counted because either they had left off their  
9 date of birth or they left off their address.

10 Q. Mr. Burke, in 2014 did the Hamilton County Board of  
11 Elections consider moving its board of elections office?

12 A. Yes.

13 Q. And would that move also have resulted in the movement  
14 of the early-vote location for Hamilton County?

15 A. Yes.

16 Q. Can you just describe where the board of elections is  
17 currently located?

18 A. We had a hospital that had shut down the hospital and  
19 they had proposed to give the building and the grounds to  
20 Hamilton County. Hamilton County was looking at putting a  
21 number of facilities out at this site in northern Cincinnati.  
22 It would have included the board of elections, the coroner's  
23 office and much of the sheriff's operation.

24 Q. Did you support that move?

25 A. No.

1 Q. Why not?

2 A. Because there was terrible bus service to that location.  
3 Almost -- there was very little bus service. As I recall,  
4 there was only one route and it was cross county. The one  
5 great benefit of having the location downtown is it's easily  
6 accessible by mass transit.

7 Q. Was there a vote on the movement of that location?

8 A. The board of elections tied two to two. The Secretary  
9 of State broke that tie and ordered that we continue to work  
10 with the county on the relocation of the board.

11 Q. Mr. Burke, was the board ultimately moved?

12 A. No. In the end, Hamilton County decided that it  
13 couldn't afford the gift of the hospital.

14 Q. Mr. Burke, are you aware that one of the claims in this  
15 suit concerns the discretion of a board to open a second  
16 early-voting location?

17 A. I am.

18 Q. Based on your experience as chair of the Hamilton County  
19 Board of Elections but having the option or discretion to open  
20 a second location, would that be a problem for the board?

21 A. It certainly would not be a problem to at least have  
22 that option and to be able to consider doing that.

23 Q. Mr. Burke, were you contacted by the Secretary of  
24 State's office or the Attorney General's Office to submit a  
25 declaration in this case?

1 A. No.

2 Q. Were you contacted by an expert for the defendants in  
3 this case to give an interview?

4 A. No.

5 Q. If you had been asked to submit a declaration in this  
6 case would you have done that?

7 A. Yes.

8 Q. Why?

9 A. Because I believe in being able to express my opinion on  
10 voting rights in the state of Ohio.

11 Q. Have you ever been threatened with removal from your  
12 position as chair or a position on the county board of  
13 elections, Mr. Burke?

14 A. Yes.

15 Q. Can you explain the circumstances of that?

16 A. Sure. In 2010, we had an election for Juvenile Court  
17 Judge in Hamilton County that was extraordinarily close and it  
18 came down to the question of whether or not we would count what  
19 I recall as some 273 provisional ballots that were cast by  
20 voters in the right polling place but the wrong precinct. It  
21 was a multiple-precinct polling place. We've referred to them  
22 as right church, wrong pew voters.

23 That developed into an 18-month legal dispute that was  
24 in the state Supreme Court, in the District Court in Cincinnati  
25 in the Sixth Circuit Court of Appeals twice, I believe. Early

1 on in that process I had filed, essentially, an amicus in the  
2 Supreme Court and then an amicus in the Sixth Circuit.

3 After filing that court paper in the Sixth Circuit, I  
4 was contacted by the Secretary of State and told if I did  
5 anything more that I would be removed from the board of  
6 elections.

7 Q. Who was the Secretary of State that contacted you,  
8 Mr. Burke?

9 A. The Secretary of State's Office. In office at that time  
10 was Jon Husted.

11 Q. So just to make sure, just to clarify, Mr. Burke, you  
12 opposed the position of the Secretary of State?

13 A. Correct.

14 Q. And you were then threatened with removal?

15 A. Yes.

16 MS. CALLAIS: No further questions?

17 MS. RICHARDSON: Object.

18 THE COURT: Ms. Richardson.

19 - - -

20 CROSS-EXAMINATION

21 BY MS. RICHARDSON:

22 Q. Good afternoon, Mr. Burke.

23 A. Good afternoon.

24 Q. My name is Ryan Richardson and I represent the  
25 defendants in this case, Ohio Secretary of State Jon Husted and

1 Ohio Attorney General Mike DeWine. I have just a few questions  
2 for you today.

3 First, you are the chairman of the board of elections  
4 for Hamilton County, right?

5 A. Correct.

6 Q. And I think you mentioned you're also the chair of the  
7 Hamilton County Democratic Party; is that correct?

8 A. Correct.

9 Q. And so I think we spent some time talking about  
10 different hats. Fair to say that you similarly wear different  
11 hats at different times depending on what you're doing?

12 A. Correct.

13 Q. And so I want to just clarify for purposes of your  
14 testimony here today, you don't purport to represent the entire  
15 Hamilton County Board of Elections in your testimony today,  
16 right?

17 A. I do not.

18 Q. You're offering your own personal opinions?

19 A. Correct.

20 Q. And are you offering opinions in support of the  
21 democratic party here today?

22 A. I hadn't thought about it that way. I'm offering  
23 opinions in support of my own opinions.

24 Q. But not the opinions or the views or the policies of the  
25 Hamilton County Board of Elections?

1 A. No.

2 Q. And I want to go back to a few of the documents that you  
3 testified about during your direct. One of them, I believe, is  
4 Exhibit 67.

5 A. I have that in front of me.

6 Q. At the top of this page it says board of elections.  
7 It's on board of elections letterhead; is that correct?

8 A. Yes.

9 Q. But this wasn't a statement on behalf of the board of  
10 elections?

11 A. It was a statement on behalf of me as a member of the  
12 board of elections. I did not purport to write it on behalf of  
13 the board of elections.

14 Q. Similarly, you testified about, it's Exhibit 121.

15 A. Yes.

16 Q. And it's a statement on Senate Bill 380; is that right?

17 A. Yes.

18 Q. And that, similarly, is on board of elections  
19 letterhead, correct?

20 A. It is.

21 Q. But that was also not an opinion of the Hamilton County  
22 Board of Elections, right?

23 A. Correct.

24 Q. That was your personal opinion?

25 A. And that's the way I signed it, correct.

1 Q. And up in the top left-hand part of this document it has  
2 the name Alex Triantafilou. Am I saying that correctly?

3 A. Triantafilou, I think, but I understand the difficulty.

4 Q. And who is Mr. Triantafilou?

5 A. He is my counterpart and is the Chair of the Hamilton  
6 County Republican Party and at that time was actually the chair  
7 of the board of elections.

8 Q. And although his name is on this document, he did not  
9 have anything to do with the content of the statement, correct?

10 A. He did not, and I did not intend it to suggest that he  
11 was.

12 Q. And in fact, he did not even see this document before it  
13 was submitted?

14 A. He did not.

15 Q. The board -- as a member of the -- as the chair of the  
16 board of elections for Hamilton County, one of the things that  
17 you have to do on a regular basis is work with members of other  
18 parties, people who might feel differently from you, is that  
19 fair?

20 A. Absolutely.

21 Q. In Hamilton County, as in all boards across the state,  
22 there are an equal number of republican and democrat members?

23 A. Correct.

24 Q. And so in order to effectively run an election, you have  
25 to put aside your views as a democrat or a republican and put

1 the interest of the county in?

2 A. Sure. If you had seen the article that the two of us,  
3 Alex and I both published in the *Cincinnati Enquirer* after this  
4 election in November, you would have seen exactly that at work.

5 Q. You two have been working together for a long time,  
6 right?

7 A. We have.

8 Q. And Hamilton County does a good job of setting aside  
9 partisan politics and running an election, is that fair?

10 A. We also can engage in some pretty spirited disputes on  
11 the board of elections as well. But, no, I think it's fair  
12 that we do endeavor to work together to ensure that elections  
13 are fairly administered.

14 Q. Reasonable minds can disagree about appropriate policy  
15 choices but ultimately you work together to try to make  
16 decisions that are in the best interest of the board, is that  
17 fair?

18 A. Even unreasonable minds can disagree about appropriate  
19 policy choices but, yes, we do endeavor to work hard to try and  
20 make the election system work hard for everybody.

21 Q. Fair enough. Thank you.

22 As the board, you don't have unlimited staff; is that  
23 right?

24 A. That's correct.

25 Q. You don't have an unlimited budget?

1 A. Correct.

2 Q. You don't have unlimited equipment?

3 A. Correct.

4 Q. And so --

5 THE COURT: What is the budget for '16 going to be?

6 THE WITNESS: Your Honor, I'd be guessing if I tried  
7 to give you a number. I'm sorry. I can't off the top of my  
8 head.

9 THE COURT: All right.

10 THE WITNESS: I can tell you, for example, Your Honor,  
11 we just, in part because of some of the confusion over this  
12 last election, one of our Common Pleas Court judges at  
13 about 6:45 on election night ordered that the polling places  
14 stay open for another 90 minutes. That decision cost us  
15 \$50,000 to pay, essentially, overtime to the 2500 poll workers  
16 who were working in polling places that day.

17 THE COURT: All right. Thank you.

18 BY MS. RICHARDSON:

19 Q. So one of the things you have to do as a board is make  
20 decisions about how to allocate the resources that you have  
21 available to you?

22 A. Correct.

23 Q. Fair to say that you might not be able as a board to do  
24 everything that you might want to do in advancing elections,  
25 right?

1 A. Correct.

2 Q. You have to make judgment calls?

3 A. Correct.

4 Q. And you have to balance the costs and benefits of each  
5 particular option that might be available to you, right?

6 A. Correct.

7 Q. I want to go back and talk about golden week. That was  
8 one of the things that you mentioned during direct that you are  
9 in favor of; is that right?

10 A. Yes.

11 Q. And first of all, not every member of the boards of  
12 election across the state are in favor of golden week, right?

13 A. I don't know. I assume that's true.

14 Q. You wouldn't be surprised to learn that many admin --  
15 election-administration officials have expressed concerns about  
16 golden week, would you?

17 A. I do not know that but I wouldn't argue with you about  
18 it.

19 Q. And you don't disagree that there are costs associated  
20 with having golden week, right?

21 A. Certainly. But I don't think that they're very  
22 significant costs given that that occurred at a period of time  
23 when the boards were open for early voting anyway.

24 Q. And so if the boards were not open at all for early  
25 voting during that time frame, that would reduce the costs

1 associated with those days, right?

2 A. I suppose if we closed the board of elections entirely  
3 that would reduce the costs, but yes.

4 Q. So reducing the number of early-voting days does reduce  
5 some of the costs associated with those days?

6 A. It also reduces the opportunity for people to vote.

7 Q. Sure. I understand. But first I'm just focusing on the  
8 costs. You don't disagree that there are costs associated with  
9 those days, correct?

10 A. I would agree that there are costs involved in operating  
11 a board of elections and preserving people's right to vote.

12 Q. Sure. And the costs that any county experiences during  
13 those days have to be balanced against the number of people who  
14 are utilizing that mechanism to vote, right?

15 A. Okay.

16 Q. You don't disagree with that as a general proposition,  
17 do you?

18 A. Ask the question again, please.

19 Q. Sure. The cost associated with the days during golden  
20 week have to be balanced against the benefits, as with any  
21 decision that you make on behalf of the board of elections?

22 A. I'll accept that.

23 Q. You mentioned during your direct, I believe, that 650  
24 people registered to vote and voted during golden week in 2012.  
25 Is that an accurate characterization?

1 A. Yes.

2 Q. And that was out of 550,000 registered voters. Was that  
3 your testimony?

4 A. My testimony was that there are approximately 550,000  
5 registered voters in Hamilton County today. It would have been  
6 different in 2008. I don't remember what that number was.

7 Q. Thank you for clarifying. But it's probably generally  
8 in the range of --

9 A. Something in the range of half a million people, yes.

10 Q. Thank you. And you mentioned that, in your view, fraud  
11 during golden week is not a pervasive problem. Is that a fair  
12 characterization or paraphrasing of your testimony?

13 A. It's virtually no problem would have been a more  
14 accurate statement about my testimony. We had one instance of  
15 fraud in 2008.

16 Q. But there was at least one instance in 2008 that you've  
17 described?

18 A. Yes.

19 Q. And you don't disagree that there are instances of fraud  
20 that do exist across the state?

21 A. Very, very few, but yes.

22 Q. To state the obvious, if an instance of fraud is not  
23 caught, that wouldn't be counted in the numbers that you're  
24 looking at, right?

25 A. True.

1 Q. And the instance you described was an instance in which  
2 the voter who committed the fraud ultimately self-reported. Is  
3 that your testimony?

4 A. Yes.

5 Q. And if he had not done so then that fraud might not have  
6 been caught?

7 A. No. I disagree with that. It would have been caught  
8 because the confirmation postcard would not have been delivered  
9 to him since he was back out on the east coast, I think in  
10 Connecticut, when the address that he used was a false address.

11 Q. So those confirmation cards then play an important role  
12 in helping the boards identify fraud or potential fraud, right?

13 A. Yes.

14 Q. And there are certainly other costs associated with  
15 golden week aside from just the issues related to fraud?

16 A. Yes.

17 Q. There are administrative burdens that might be  
18 associated with having both registration and early voting  
19 happening at the same time, right?

20 A. Yes.

21 Q. You also testified about the number of early in-person  
22 voting centers, right?

23 A. Yes.

24 Q. You mentioned that you would like to have the discretion  
25 as a county to have more than one voting center during the

1 early-voting period; is that right?

2 A. I'd at least like to have the option of considering  
3 that, yes.

4 Q. Sitting here today, you're not committing that Hamilton  
5 County would in fact open up any additional early-voting  
6 centers if it had the discretion to do so, right?

7 A. No. And I certainly don't have the ability to do that.  
8 I can tell you that I think there would be great reason to do  
9 it. We're in an old building that has all kinds of problems  
10 associated with it. If you saw the lines outside of our  
11 building in both the 2008 and 2012 elections, there's plenty of  
12 reason to suggest it would be nice to have a second  
13 early-voting location. But I recognize that I've got at least  
14 two members on our board of elections who probably would not  
15 want to do that.

16 Q. And before you could add an additional early-voting  
17 location, there would be many steps that you'd have to go  
18 through as a board before that would happen, right?

19 A. Sure.

20 Q. And that would include finding a location, fair?

21 A. Yes.

22 Q. And not just any location will serve the needs of an  
23 early-voting center, correct?

24 A. Correct.

25 Q. In fact, you testified about some of those difficulties

1 earlier, right?

2 A. I testified about a difficulty that would have existed  
3 had they moved us to the place where they were talking about.  
4 Yes. You have to pick out a good location.

5 Q. So you have to take into account things like parking,  
6 for example?

7 A. Yes.

8 Q. And issues related to technological capabilities, you  
9 have to have a place where the wiring could take place?

10 A. Absolutely.

11 Q. And you would need to have a place that would be ADA  
12 accessible for people?

13 A. Absolutely. Which is one of the problems at our current  
14 board location.

15 Q. And you would have to obviously obtain a lease or  
16 purchase the new building?

17 A. Sure.

18 Q. That's not an easy process, is it?

19 A. No.

20 Q. And ultimately you would not only have to find a place  
21 that satisfies these and other criteria but you would have to  
22 agree, I think you mentioned this already, with everyone else  
23 that the particular location's satisfied?

24 A. And of all the challenges you mentioned, that would be  
25 the biggest.

1 Q. So there's certainly no guarantee, sitting here today,  
2 that even if Hamilton County had the discretion to add  
3 additional early-voting centers that it would do so?

4 A. Correct.

5 Q. You testified about lines that you witnessed. I wanted  
6 to just clarify the time frame for some of those.

7 2012, did you see lines at the early-voting centers or  
8 at the early-voting center?

9 A. I saw lines at the board of elections which was the  
10 early-voting center. The lines on our third floor went back  
11 and forth through the system that we had set up. They went  
12 down the stairway, out the front door, down past the old Post  
13 Times-Star building, turned the corner down the street to the  
14 next block, turned the corner, back around and wrapped up the  
15 other side of the board of elections building. Yes, I saw  
16 lines.

17 Q. And when specifically during the early-voting period did  
18 you see those line?

19 A. Those lines were particularly heavy during the weekend  
20 before the election.

21 Q. Did you take a look --

22 A. And on the first day that the board was open for early  
23 voting.

24 Q. So on the first day of early voting and the weekend  
25 prior to the election you saw lines?

1 A. Those were the days that I saw the heaviest lines.

2 Q. And were there also many days that there were no lines?

3 A. No. Not during these past two presidential elections.

4 We experienced lines every day.

5 Q. And did you personally go to the early-voting center and  
6 witness the lines every day?

7 A. No. But I did review every day the reports from the  
8 board of elections as to the number of people voting by early  
9 voting either by mail or in person at the board of elections.  
10 So I saw the numbers every day.

11 Q. And how many additional early in-person voting centers  
12 do you think would be necessary in order to eliminate lines  
13 during the early-voting period?

14 A. I don't know that you could ever eliminate all lines and  
15 I don't know that that needs to be a goal. You need to control  
16 the lines. I do think that a second early-vote center,  
17 especially in large urban counties, could be helpful.

18 Q. And do you have an opinion as to precisely how the  
19 second center would cut down on the lines?

20 A. I think it could reduce the lines by 50 percent.

21 Q. And that assumes then that the people who would be  
22 voting during the early in-person voting period would split up  
23 evenly between the two centers, right?

24 A. I think that's the kind of thing that you ought to shoot  
25 for and that then helps to determine where you look for the

1 second site.

2 Q. Sure. And if that didn't happen, notwithstanding the  
3 goal, it could actually increase the lines at one of the  
4 early-voting centers, right?

5 A. I don't see how it would increase the lines at one --  
6 one line may be longer than the other but neither line is going  
7 to be longer than the lines were when there was only a single  
8 place.

9 Q. And that assumes then that you're doubling the resources  
10 that you have available to you during the early-voting period,  
11 right?

12 THE COURT: Ms. Richardson, I get it.

13 MS. RICHARDSON: Thank you, Your Honor.

14 THE COURT: You're beating a dead horse.

15 MS. RICHARDSON: Thank you, Your Honor.

16 BY MS. RICHARDSON:

17 Q. You also testified about changes to the  
18 provisional-ballot requirements?

19 A. Yes.

20 Q. And you oppose those changes, right?

21 A. Yes.

22 Q. And the example that you provided was a woman whose  
23 ballot was rejected because she didn't sign or print her name  
24 on her envelope, correct?

25 A. Correct.

1 Q. And that is not something that has anything to do with  
2 the laws that are at issue in this case, right?

3 A. I believe that's correct.

4 Q. And you don't disagree that the requirements do, in  
5 fact, help to make identifications in some circumstances,  
6 correct?

7 A. I do disagree with that. I don't think those additional  
8 requirements are necessary given the information that the board  
9 of elections has about voters to begin with.

10 Q. The number of overall provisional ballots that were  
11 rejected has actually gone down since those additional  
12 identification requirements were added, right?

13 A. I do not know that.

14 Q. And just to clarify, the additional requirements that  
15 we're talking about are just the address and the date of birth,  
16 correct?

17 A. In the most recent changes, yes.

18 THE COURT: I believe we heard a figure of something  
19 about \$41,000 in golden week in Cuyahoga County from  
20 Mr. Perlatti; is that correct?

21 MS. RICHARDSON: That is my recollection as well, Your  
22 Honor.

23 THE COURT: So is it reasonable to assume that that  
24 would be the extra cost in Hamilton County or in that range?

25 THE WITNESS: I don't know, but I assume it would be

1 somewhat less because we are a somewhat smaller county.

2 BY MS. RICHARDSON:

3 Q. And just a couple more questions. You testified that  
4 Hamilton County mailed out absentee-ballot registration  
5 applications -- absentee-ballot applications, correct?

6 A. Yes.

7 Q. And in your opinion, that was very effective at  
8 decreasing lines on election day, right?

9 A. Yes. And it was a bipartisan decision. There was no  
10 dispute over that. We all agreed it was a good thing to do.  
11 And nobody thought it was a bad thing until the Secretary of  
12 State decided it was.

13 Q. And so Hamilton County did this mailing but the vast  
14 majority of counties across the state did not, correct?

15 A. Well, the smaller counties certainly did not and nor did  
16 they need it the way that a large urban county like Hamilton  
17 County did when we had so dramatically reduced our number of  
18 polling places.

19 Q. And so now that the Secretary of State has made the  
20 decision to send out absentee-ballot applications statewide  
21 across the state, far more people are receiving this  
22 unsolicited mailing, correct?

23 A. First of all, as I understand the law now, the Secretary  
24 of State can't decide to do it by himself. When the  
25 legislature approves it then, yes, more people across the state

1 are receiving them and that's a good thing. I'm fine with  
2 that. But the Secretary of State is now sending those  
3 applications to fewer people in Hamilton County than who  
4 received it when we were doing it because he's sending to a  
5 smaller universe of voters than we did.

6 Q. In 2012, the Secretary of State did send out the  
7 unsolicited statewide mailing, correct?

8 A. To some voters.

9 Q. And to all active voters, correct?

10 A. That's my understanding.

11 Q. And to anyone who had voted in the previous -- in either  
12 of the previous two elections, correct?

13 A. I don't know that but I think that's right.

14 Q. But you don't disagree that across the state in 2012  
15 more people -- many more people received the absentee-ballot  
16 application as a result of the statewide mailing?

17 A. No. But what I deal with is Hamilton County and what I  
18 can tell you is that fewer people in Hamilton County got it  
19 than would have received it had we been doing it the way we  
20 were.

21 Q. And you're aware that in 2016, the Secretary of State  
22 will again have the statewide mailing?

23 A. To that smaller group of voters in Hamilton County.

24 Q. Across the state?

25 A. Yes.

1 Q. It's a statewide mailing?

2 A. Yes.

3 MS. RICHARDSON: No further questions. Thank you,  
4 Your Honor. Thank you, Mr. Burke.

5 THE WITNESS: Thank you.

6 MS. CALLAIS: Just a few, Your Honor.

7 THE COURT: Ms. Callais.

8 - - -

9 REDIRECT EXAMINATION

10 BY MS. CALLAIS:

11 Q. Mr. Burke, I just had a few follow-up questions. On  
12 cross you were asked a few questions about the different hats  
13 that we wear when we're making decisions and testifying and you  
14 said that you were giving your personal opinions. Are your  
15 personal opinions based upon your experience as chair of the  
16 Hamilton County Board?

17 A. They're based on my experience as Chair of the Hamilton  
18 County Board of Elections, as someone who served as an  
19 supervisor of intranational elections in Bosnia and conducted  
20 election work in Slovakia, and all of my experience being  
21 engaged in the democratic process. So, yeah, all of that forms  
22 the opinions that I have about voting rights in the state of  
23 Ohio.

24 Q. Does it help form the opinions that you have about  
25 administering elections in the state of Ohio?

1 A. Yes.

2 Q. And then I had had one follow-up question about the  
3 hours that the board of elections was open during golden week.  
4 I think you stated on cross that the board of elections was  
5 open because people were early voting. Do you remember the  
6 hours of that week that the board of elections was open?

7 A. I don't remember specifically, I'm sorry. I do remember  
8 that on the last day of golden week, which happens to be the  
9 last day of registration, by statute the board has to be open  
10 until nine o'clock at night, I believe.

11 Q. So, Mr. Burke, the week of golden week in 2014, is the  
12 board of elections still open that week, is it actually open  
13 even though people can't come in to early vote, is it open for  
14 business?

15 A. Yes.

16 Q. And so there are people staffed during that week that  
17 would have been golden week?

18 A. Yes. And we would still be open on the last day of  
19 registration to that uniquely late hour in the evening.

20 Q. So you're not specifically open because of early voting,  
21 you're just open because people are registering?

22 A. Correct.

23 MS. CALLAIS: Thank you. That's all, Your Honor.

24 THE COURT: Ms. Richardson, anything further?

25 MS. RICHARDSON: No. Thank you, Your Honor.

1 THE COURT: Thank you, Mr. Burke.

2 Approach.

3 - - -

4 Thereupon, the following proceeding was held at side-bar:

5 THE COURT: Who's next?

6 MR. KAUL: Dr. Cannon, Your Honor.

7 THE COURT: How long will that go?

8 MR. KAUL: Probably 45 minutes on direct.

9 THE COURT: Okay. Where's he from?

10 MR. KAUL: He's from Madison. He's staying overnight.

11 We can do him tomorrow morning first thing.

12 THE COURT: Where are you guys staying?

13 MR. SPIVA: At the Courtyard Marriott.

14 THE COURT: And he's staying there, too?

15 MR. KAUL: Yes.

16 THE COURT: Okay. Let's start at 9:00. It's been a  
17 long day. Thank you all.

18 - - -

19 Thereupon, the following proceedings were had in open  
20 court:

21 THE COURT: We will adjourn until tomorrow morning at  
22 nine o'clock.

23 (The proceedings were adjourned at 4:40 p.m.)

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I, Lahana DuFour, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Michael H. Watson, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Lahana DuFour  
Lahana DuFour, RMR, CRR  
Official Federal Court Reporter