

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 X
BEFORE THE HONORABLE MICHAEL H. WATSON
THURSDAY, DECEMBER 3, 2015; 9:00 A.M.
COLUMBUS, OHIO

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1 Thursday Morning Session

2 December 3, 2013

3 - - -

4 THE COURT: Rather than having an objection each time
5 they try to introduce one of these e-mails, I'm not clear that
6 they are fully admissible or not. I'm not sure that they're
7 business records or not at this point. But I'm going to allow
8 them to lay the foundation they think they need for a
9 particular document and I'll sort it out in the opinion.

10 MS. RICHARDSON: Thank you, Your Honor.

11 MR. VOIGT: Your Honor, in addition, we did -- the
12 plaintiffs set forth a list of the exhibits that they wanted to
13 enter. I don't know, whatever is most convenient for you in
14 terms of how we put forward our objections. We can do it in
15 our brief. We could do it today.

16 THE COURT: I think do it in the brief.

17 MR. VOIGT: Okay.

18 THE COURT: Let's do that.

19 You've already gone over a list of exhibits, correct,
20 that you wanted to admit?

21 MR. KAUL: We have, Your Honor, yes.

22 THE COURT: And you've reserved or you've objected to
23 a number of those, correct?

24 MR. VOIGT: We have, but we haven't put our objections
25 on the record, or at least the reasons for our objections. As

1 long as we're able to do that in the brief.

2 THE COURT: Yes.

3 MR. VOIGT: That's fine by us.

4 THE COURT: Yes. I think that's best.

5 And, Josh.

6 MR. KAUL: Another housekeeping issue. We were
7 discussing yesterday some declarations and stipulations.

8 THE COURT: Yes.

9 MR. KAUL: There are three declarations that we're
10 planning to move today and there's one stipulation. The
11 stipulation relates to the OGTV, the videos.

12 THE COURT: Yes.

13 MR. KAUL: So that's agreed to. I'll bring that up in
14 a moment.

15 Second, there are two declarations from our paralegal,
16 Ms. Roberts.

17 THE COURT: Hold on, I think he's got an objection to
18 the OGTV thing.

19 MR. VOIGT: Yes, Your Honor. We did sign it. It is a
20 stipulation; however, I do want to preserve on the record our
21 objection to this based on relevance and the stipulations
22 herein don't reflect legislative intent.

23 MR. KAUL: We're fine with that.

24 THE COURT: All right.

25 MR. KAUL: We don't agree with it but we're fine with

1 him preserving that.

2 THE COURT: One legislator's statement on the floor is
3 not the will of the body, it seems to me. They speak through
4 their journal.

5 MR. KAUL: I don't necessarily disagree, Your Honor,
6 that one legislator's statement isn't. We do think it's part
7 of the totality of the circumstance's inquiry.

8 THE COURT: Go ahead.

9 MR. KAUL: That was the first issue. Secondly, we
10 have two declarations from Ms. Roberts, our paralegal. My
11 understanding, and defense counsel, please correct me if I'm
12 wrong, but my understanding is that the first declaration,
13 which is the one that also relates to the videos, is unobjected
14 to but that the second declaration is objected to.

15 THE COURT: And that is whose?

16 MR. KAUL: That is also Ms. Roberts. We don't need to
17 dress that right now but I think I bring it to the Court so I
18 Court can review it. And then the last declaration is the
19 declaration of Mr. Preisse that we discussed yesterday.

20 MR. VOIGT: I do actually object to -- I don't know
21 where you got that I didn't object to this one. But if you're
22 talking about the --

23 THE COURT: Which one?

24 MR. VOIGT: The declaration of Rachel Roberts dated
25 November 30th related to the floor debates. I object on the

1 basis of hearsay. Again, it's not relevant. It doesn't do
2 anything to assist in determining legislative intent.

3 MR. KAUL: There are two that are both dated -- one is
4 dated December 1st, one is dated November 30th. You're
5 objecting to both?

6 MR. VOIGT: No. I'm objecting to both but I'm
7 objecting to what I just said is the objections to the one that
8 you just mentioned. You need me to --

9 MR. KAUL: No. We can discuss this outside. You're
10 objecting to both declarations?

11 MR. VOIGT: We are. The objection is related to the
12 one where she's -- she said that she's listing the various
13 floor sessions. I'm not really sure what this does but I
14 object to it on the basis of hearsay and it's not relevant and
15 doesn't show legislative intent.

16 THE COURT: So there's a disagreement at this point.

17 MR. KAUL: I thought they weren't objecting to the
18 admissibility of the declaration but I guess I'm wrong.

19 May I approach, Your Honor?

20 Your Honor, my thought is that we ought to address it
21 after the witness.

22 THE COURT: Right. Let's get Mr. Damschroder on his
23 way. He has the people's work to take care of today.

24 MR. VOIGT: I'm sorry, but there was one other issue,
25 with your permission. You had asked me to describe the issue

1 in Summit County.

2 THE COURT: Yes.

3 MR. VOIGT: And I wanted to explain that.

4 THE COURT: Yes.

5 MR. VOIGT: Apparently there was a unique circumstance
6 there and it apparently stems from the Post Office closing one
7 of their facilities and creating additional work for the other
8 facilities and as a result, with one of the facilities shutting
9 down, there were several hundred absentee ballots that were
10 received by Summit County's Board of Elections that did not
11 have a postmark.

12 THE COURT: How many? Several hundred?

13 MR. VOIGT: Several hundred, Your Honor. My
14 understanding is that the Secretary's office is working with
15 the Post Office on this and the Post Office is also conducting
16 an investigation. But the most important thing is the postmark
17 issue here has nothing to do with this case. It doesn't have
18 any relevance to any of the claims that the plaintiffs are
19 raising in this case.

20 MR. KAUL: Your Honor, can I just add that our
21 understanding was that --

22 THE COURT: There was another mention of votes not
23 counted, I think, provisionals perhaps, that were not counted
24 for a postmark issue from one of the witnesses. But thank you
25 for --

1 MR. KAUL: Can I just clarify, several hundred was
2 900.

3 THE COURT: That was mine, too. That's why I said it
4 when I did. It was 900 or that's what was reported in the
5 paper in any event. Somebody else, I think, rejected several
6 hundred. Whether it was two, four or what it was, I'm not
7 sure, in any event. I don't think it's necessarily relevant to
8 the claims in this case.

9 Mr. Damschroder, if you'd resume the stand, sir. Thank
10 you for coming back. I can imagine there are things you'd
11 rather be doing.

12 THE WITNESS: This is part of the job.

13 THE COURT: That's a good answer.

14 Go ahead.

15 - - -

16 MATTHEW DAMSCHRODER

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

19 CROSS-EXAMINATION

20 BY MR. SPIVA:

21 Q. Good morning, Mr. Damschroder. How are you today?

22 A. I'm good. Thank you.

23 Q. In your deposition you didn't say you were good. No.

24 Mr. Damschroder, let me just show you an exhibit that's
25 been premarked as Plaintiffs' Exhibit 57. It will come up on

1 your screen. Ms. Halle Pelger, she was the Secretary of
2 State's Chief of Staff prior to your taking that position; is
3 that correct?

4 A. That's correct.

5 Q. Let me ask you, first of all. The work of the Secretary
6 of State's Office, I take it that a lot of it is conducted
7 through e-mails among staff at the Secretary of State's Office?

8 A. I don't know that a lot of it is but some of it is, yes.

9 Q. And also e-mails between the Secretary of State's Office
10 and other state officials in the legislature and at the board
11 of elections, various boards of elections?

12 A. Probably more e-mail with the boards than with
13 legislators.

14 Q. This is an e-mail from Ms. Pelger. The top one is from
15 Ms. Pelger to Matt McClellan dated February 25th, 2014. And I
16 think you said yesterday that Mr. McClellan was the press --
17 the chief press person in the Secretary of State's Office; is
18 that right?

19 A. Yes. At that time he was the press secretary.

20 Q. And below that is an e-mail from you, I think responding
21 to an e-mail from Ms. Pelger, dated February 13, 2014; is that
22 correct?

23 A. That's correct.

24 Q. And I just have a limited question about these e-mails
25 which is that these e-mails appear to be attaching some

1 information concerning the number of people who actually
2 registered and voted during golden week in 2008 and 2010; is
3 that correct?

4 A. I believe that's the case, yes.

5 Q. And also some information about certain voters who voted
6 and registered during golden week in 2012?

7 A. It's not clear from -- I'm sorry, yes. Down at the
8 bottom, the attachments. So it would be 2008, 2010 and 2012.

9 Q. And let me just ask, we'll flip through the pages that
10 follow here. If you can just confirm for me that the following
11 pages are the attachments to this document. Why don't you just
12 tell me if you need us to slow down a little bit here. I can
13 also get you the paper copy. I'm not going to have detailed
14 questions. I just want to confirm that these are, in fact, the
15 attachments that went with these e-mails.

16 A. Can you slow down on this one? It's a bit small.

17 THE COURT: It's in the second book.

18 BY MR. SPIVA:

19 Q. If you prefer to see the hard copy, which might be
20 easier.

21 A. I just want to confirm that it has the column that
22 you're talking about. It appears to.

23 Q. This portion of it dealing with 2012, am I correct that
24 that is only related to UOCAVA voters?

25 A. Yes. For this portion of the spreadsheet.

1 Q. So having seen this in the earlier pages, can you
2 confirm for these that these are the attachments that went with
3 these e-mails?

4 A. I believe so.

5 Q. We can go back to the first e-mail page, please. And I
6 take it from your e-mail to Ms. Pelger that this was
7 information that was also provided, I guess, to Stinziano. I
8 assume, is that Representative Stinziano?

9 A. Correct.

10 Q. Sometime in the fall or summer of 2013; is that correct?

11 A. I believe so, yes.

12 Q. Thank you. Let me show you what has been marked as
13 Plaintiffs' Exhibit 52. Again, this is an e-mail from
14 Ms. Pelger to Mr. Gardner May 17, 2013. I take it Mr. Gardner
15 is that Senator Gardner?

16 A. I believe so.

17 Q. And Ms. Pelger, if you can go to the e-mail itself,
18 says, Senator Gardner, Secretary Husted asked me to send you
19 the *Toledo Blade* article below. Please let me or Craig Forbes
20 know if you have any questions or if there is anything you
21 need. And then she has her signature block here as chief of
22 staff.

23 Let me ask you, was it a routine activity of the
24 Secretary of State's Office to send information to legislators
25 if they requested or if it was something that the secretary

1 wanted them to have?

2 A. I don't think that would be out of the ordinary.

3 Q. And this is something that, I take it, that the
4 Secretary of State's Office, an e-mail such as this, this is
5 the type of document that the office would keep in the ordinary
6 course of business?

7 A. I think so.

8 Q. Now, what she attaches here is a *Toledo Blade* article.
9 The article is about --

10 Can you go to the article, please?

11 The article is about early voting in Toledo in 2012; is
12 that correct?

13 A. It appears to be, yes.

14 Q. By the way, Senator Gardner, he was one of the sponsors
15 of S.B. 238, was he not?

16 A. I don't know.

17 Q. Senator Gardner is a republican senator in the Ohio
18 State Senate?

19 A. He is.

20 Q. Do you know if he voted for S.B. 238?

21 A. I don't know for sure.

22 Q. Okay. In the article that Ms. Pelger provided him notes
23 that nearly twice as many people turned out to the first day of
24 early voting in Lucas County on Tuesday as the number who voted
25 early on the first day in 2008 and it appeared to be a good day

1 for President Obama. Do you see that?

2 MS. RICHARDSON: Your Honor, I understand the Court's
3 ruling with respect to the e-mails but we do separately object
4 to reading in the actual article that's presented there. Based
5 on the Court's ruling, it seems like fair game to ask about
6 whether or not this article was forwarded and who it was sent
7 to but to actually read in the article itself substantively I
8 would object on hearsay grounds.

9 MR. SPIVA: It's not being offered for the truth of
10 the matter, Your Honor. It goes to the information before, at
11 least this legislator, who was one of the sponsors of S.B. 238
12 and what information he had in front of him. Whether or not
13 the information is true, it goes to motive and intent and
14 knowledge.

15 MS. RICHARDSON: And that would assume facts not in
16 evidence based on the testimony.

17 THE COURT: The witness isn't Tom Troy, who wrote the
18 article, but if a legislator were to request information from
19 the Secretary of State, it seems fairly obvious that they would
20 provide that.

21 Your objection is the reading into the record of the
22 substance of the article?

23 MS. RICHARDSON: That's right, Your Honor.

24 THE COURT: I'll sustain that. I can see it.

25 MS. RICHARDSON: Thank you, Your Honor.

1 MR. SPIVA: But I take it, Your Honor, though, that
2 the e-mail and the attachment are admitted as part of the
3 record?

4 THE COURT: I didn't know they'd been moved yet.

5 MR. SPIVA: Okay. I haven't moved it yet. We were
6 going to wait until the end to ask. I can do it one at a time
7 but I thought we were going to just move admission of all of
8 these exhibits at the end. But I just wanted to make sure that
9 Your Honor's ruling just now wouldn't foreclose the actual
10 e-mail and article being in evidence because our position would
11 be that, you know, this is -- whether or not it's true, this is
12 information that the legislature, or at least one legislator,
13 had at the time of the decision. And so an inference could be
14 drawn that they acted, at least with the knowledge of and
15 potentially the belief that this was true, whether or not it
16 actually is true.

17 MS. RICHARDSON: May I respond?

18 THE COURT: The document will be admitted for what the
19 document says.

20 MS. RICHARDSON: And, Your Honor, may I just ask for
21 clarification? I understood the Court's ruling with respect to
22 the e-mails to be that questioning could go on today on those
23 but that the ultimate question of admissibility would be
24 determined later so that we would have an opportunity to brief
25 our objections to those documents.

1 THE COURT: You will.

2 MS. RICHARDSON: Thank you, Your Honor.

3 THE COURT: All right.

4 MR. SPIVA: Thank you, Your Honor. And just to
5 clarify, because I can do it, obviously, however Your Honor
6 wants me to do it.

7 THE COURT: I'd like to do it the quickest and least
8 painful.

9 MR. SPIVA: But at the end of each of these I wasn't
10 going to say I hereby move admission. My thought was that we
11 would give our list at the end that we'll address in our brief
12 why we think they're admissible and why I think I've laid the
13 foundation.

14 THE COURT: That would be great.

15 MR. SPIVA: Thank you, Your Honor.

16 BY MR. SPIVA:

17 Q. Let me show you, Mr. Damschroder -- well first let me
18 ask you. Is it the position of the Secretary of State's Office
19 that waiting in line to vote in instances where there are lines
20 is a choice?

21 A. Well, I think, as we talked about at the deposition, I
22 think you asked that question and I think there's --

23 Q. Your memory is better than mine because I don't recall.
24 But you're probably right.

25 A. And I think what our view is, is that it's easy to vote

1 in Ohio and that the Secretary goes so far as to send an
2 absentee-ballot application to virtually every registered voter
3 in the state which gives a person, every voter, the opportunity
4 to request that ballot, vote it from home at their own
5 convenience. And so if the voter chooses to go to early vote
6 in person, that's a voter's choice. If the voter chooses to
7 vote on election day, that's the voter's choice.

8 Q. And if they stand in a line during early voting, is that
9 also the voter's choice?

10 A. Well, I think it's an alternative. The by-mail
11 alternative exists for that voter. Obviously we don't want
12 there to be any lines and we want boards to work in planning to
13 avoid that. But there is a by-mail alternative that's
14 available for everybody.

15 Q. If you're an active voter, correct?

16 A. Well, the alternative exists for everybody, irrespective
17 of status, the voter status.

18 Q. But in terms of those who receive the unsolicited
19 absentee-ballot applications from the Secretary, that's if
20 you're an active voter, correct?

21 A. If you are an active voter or an inactive voter who
22 voted in one of the last two federal elections.

23 Q. Thank you. Let me show you what's been marked as
24 Plaintiffs' Exhibit 53. And this is an article from, I'm
25 sorry, not an article, an e-mail chain between Ms. Pelger and

1 Ms. Ostrowski and Mr. McClellan. It's referencing an article
2 or an editorial called Taking Out the Vote. Do you see that?

3 A. I see it at the bottom that there's what appeared to be
4 an editorial from a newspaper with that title, yes.

5 Q. One of the things referenced in this article, and I
6 think we may need to go to the second page, is that a number of
7 people ended up waiting in lines in the early-voting period
8 during the 2012 election; is that correct?

9 A. I haven't read this so I don't know what it says. I'm
10 looking down to see where it says that.

11 Q. Okay. Well let me ask you this actually. Let's go back
12 to the e-mail. Ms. Pelger says --

13 THE COURT: Does the Blade have problems with getting
14 new photos or did they like to attach the same photo to
15 everything they write?

16 MR. SPIVA: That I don't know, Your Honor.

17 THE COURT: Okay.

18 BY MR. SPIVA:

19 Q. Let me just ask you about Ms. Pelger's statement. She
20 says, well, not to belabor it, but the photo doesn't match the
21 words. Those people are waiting to vote early, not on election
22 day. That is a choice. There's a little smiley face emoticon
23 there.

24 Is it the position of the Secretary of State's Office
25 that those individuals who are waiting to vote in the

1 early-voting period is that they're doing that as a matter of
2 choice?

3 A. Well, I don't know. I wasn't on this e-mail so I don't
4 know what Halle was trying to communicate that. I think I
5 answered the question earlier that everyone has the alternative
6 to vote by mail and we want boards of elections to allocate
7 resources so that when a voter chooses to vote either on
8 election day or in person absentee that there's not a
9 significant wait in line.

10 Q. Someone who -- you can take down the exhibit.

11 As someone who has been the director of elections in the
12 Secretary of State's Office and now the chief of staff, you
13 would agree with me that most counties don't do anything to
14 inform voters when there will be lines during the early-voting
15 period; is that fair?

16 A. Well, I don't know that boards of elections know when
17 there is going to be a line. I think if they know when there's
18 going to be a line they can work to fix that. I don't know if
19 you're alluding to systems like exist in Georgia and other
20 places where they post online the wait time, you know, for the
21 voting location, things like that. We don't have, I'm not
22 aware of any boards of elections in Ohio that have those kind
23 of systems in place.

24 Q. Right. I wasn't actually alluding to that. It seems
25 like a great idea. But I think the point you're making, if I

1 understand you correctly, is that even the boards of elections
2 may not know when there will be long lines during the
3 early-voting period, correct?

4 A. Yeah. I mean, that's something that the boards don't
5 know ahead of time, you know, who and how many individuals are
6 going to come to vote at what time period but we want them to
7 allocate resources as best they can to be able to plan and
8 respond for that.

9 Q. Sure. So it follows, and you would agree with me, that
10 most ordinary voters wouldn't really know when there are likely
11 to be long lines during the early-voting period; is that fair?

12 A. Correct.

13 Q. Yesterday you were asked a number of questions about an
14 ACLU letter that was sent to Secretary Husted in August of
15 2012. Do you recall that?

16 A. Yes. I remember being asked the question.

17 Q. Okay. Let's pull up Defendants' Exhibit 41. And let me
18 just ask you to confirm, this was the letter that you were
19 being asked about; isn't that right?

20 A. Yes. I believe so.

21 Q. I believe the question that you got yesterday was
22 whether the ACLU supported the Secretary's directive to impose
23 uniform hours for the early-voting period in 2012; is that
24 correct?

25 MS. RICHARDSON: Objection. That mischaracterizes the

1 testimony and the questioning yesterday.

2 THE COURT: I don't remember the questioning or
3 testimony. It's a little hard for me to rule on that. What do
4 you think was said?

5 MR. SPIVA: The questions were asked whether the ACLU
6 supported the Secretary's directive that he issued in 2012 for
7 uniform hours and this letter was actually specifically asked
8 about. But what wasn't asked about were some of the other
9 things that the ACLU asked the Secretary to do in terms of
10 imposing uniform hours. And that's what I want to ask about.

11 MS. RICHARDSON: And I don't object to questioning
12 about this letter. I just wanted to clarify that, at least in
13 terms of my recollection, I asked him about whether or not the
14 ACLU reached out to the Secretary of State's Office encouraging
15 uniformity. And so it was a more narrow question than what's
16 being represented here.

17 MR. SPIVA: I think that's exactly what my question
18 asked. I don't know. It strikes me as --

19 THE COURT: Why don't you rephrase your question and
20 we'll see.

21 MR. SPIVA: Okay.

22 MS. RICHARDSON: Thank you, Your Honor.

23 BY MR. SPIVA:

24 Q. The ACLU letter, in addition to asking for uniform hours
25 across the counties, also makes the point, quote, that

1 uniformity should be attained and not by restricting all early
2 in-person voting hours but by extending weekend and evening
3 hours for all Ohioans.

4 I don't know if we can highlight that. It's on the
5 second paragraph there. Do you see that?

6 A. I do.

7 Q. You'd agree with me that the ACLU was not just asking
8 for uniformity but also for extended -- asking the Secretary to
9 have uniform extended hours for early in-person voting; is that
10 fair?

11 A. Yeah. I took the letter to be supporting the idea of
12 uniform days and hours across the state and advancing the idea
13 of additional hours on weekends and evenings.

14 Q. And in the consistency section of this letter, the ACLU
15 also asks that voters in several Ohio -- voters in several Ohio
16 counties have used extended hours for early in-person voting in
17 past elections. If the state removes this option, those voters
18 will suffer more and may need to find alternative ways to cast
19 their ballot.

20 THE COURT: I'm not looking at the same letter. What
21 did you say it was, Plaintiffs' 41?

22 MR. SPIVA: Defendants' 41, Your Honor.

23 THE COURT: All right. Thank you.

24 BY MR. SPIVA:

25 Q. So this was something else that the ACLU was stating to

1 the Secretary of State in this August 13th, 2012 letter. Would
2 you agree?

3 A. I think the letter advances the idea of consistency from
4 election to election and the use of extended hours because some
5 boards had had extended hours in the past.

6 Q. And on page 2 of the letter, the ACLU asks that the
7 Secretary, and again here I'm quoting, not disregard the
8 benefit that extended hours for early in-person voting have
9 given to voters around the state. Restricting these hours
10 would be a step back for our state and would needlessly
11 complicate the election for many Ohioans.

12 You see that as well?

13 A. I do.

14 Q. But the directive that the Secretary of State issued did
15 not extend weekend hours as the ACLU requested; is that fair?

16 A. Can you flip back to the first page so I can see the
17 date of the letter?

18 Q. Yes. It's August 13th, 2012.

19 A. That's correct. The directive that was issued at that
20 time frame did not have any weekend hours. It did, as I
21 recall, have some evening hours during at least the last week,
22 maybe last two weeks of the early-voting period.

23 Q. During the last two weeks they had extended hours
24 until 7:00 p.m.; is that correct?

25 A. Correct.

1 Q. Is that consistent with your recollection? And on one
2 day, I believe, maybe in the third week there was a Tuesday
3 where the hours would go until 9:00 p.m., I think?

4 A. Third week out because it coincided with the close of
5 registration where it was required by law, the board is
6 required to be open until 9:00 p.m. for registration.

7 Q. But beyond that, there were no other evening hours,
8 correct?

9 A. There were no other evening hours beyond 7:00 p.m. in
10 the directive.

11 Q. Fair enough.

12 Let me ask you, let me show you what has been labeled
13 Plaintiffs' Exhibit 58. And this is, if you can confirm for
14 me, that this is an e-mail --

15 Actually if you can highlight the whole e-mail that
16 would be great. Make it a little bigger.

17 An e-mail from you to Ms. Pelger and others within the
18 senior staff of the Secretary of State; is that correct?

19 A. Yes. It appears to be an e-mail from me to Halle and
20 some others.

21 Q. Each of the individuals on this e-mail are members of
22 the Secretary of State's staff; is that correct?

23 A. Yes.

24 Q. Actually maybe let's take a minute. Who is
25 JLCTWO@hotmail.com?

1 A. It's our general counsel, Jack Christopher.

2 Q. And Matthew Masterson, can you remind us who Matthew
3 Masterson is?

4 A. He was the deputy chief of staff at the time.

5 Q. And Craig Forbes, what was his position?

6 A. Director of legislative affairs at the time.

7 Q. And in this e-mail you say that you talked with Pat McD
8 via phone. I assume that's a reference to director --
9 executive director of the Cuyahoga County Board of Elections,
10 Pat McDonald?

11 A. Yes.

12 Q. And you say in here that he thinks Sandy and prosecuting
13 attorney are going to try to make a big deal about directives
14 and advisories generally. Sandy, I assume, is a reference to
15 Cuyahoga County board member Sandy McNair?

16 A. I believe so.

17 Q. And you refer in here to the Secretary of State issuing
18 a directive on early in-person hours; is that correct?

19 A. I'm sorry, can you say that again?

20 Q. Yes. I'm not quoting here. Just you make a reference
21 in here to the Secretary of State, that he's going to be
22 issuing a directive on early in-person voting hours; is that
23 correct?

24 A. I don't remember if the directive had already been
25 issued or if it was going to be issued, but it was about the

1 issuing of the directive for uniform hours.

2 Q. Okay. And you note under two other items that Pat said
3 Turner, Budish, et cetera and 11 churches are having a rally at
4 the Cuyahoga Board of Elections on Saturday to highlight the
5 need for more weekend and evening voting.

6 Did I read that correctly?

7 A. Yes.

8 Q. I take it that you were conveying to these other members
9 that there was going to be this rally in support of extended
10 hours for early in-person voting?

11 A. Yes.

12 Q. We can take that one down.

13 Let me ask you one more question about it. I know you
14 sent that from your personal e-mail account to the personal
15 e-mail accounts of the other members of the Secretary of
16 State's senior staff. But you were conveying information about
17 official business in that e-mail, correct?

18 A. Yes.

19 Q. Let me ask you about Plaintiffs' Exhibit 63. If we can
20 make the top one a little bigger.

21 This, I take it, is an e-mail dated September 6, 2014.
22 This is from Pat McDonald, correct?

23 A. Yes.

24 Q. And it's to you, correct?

25 A. Yes.

1 Q. And in this e-mail Mr. McDonald informs you -- well,
2 first. He asks you for advice concerning a board meeting
3 that's coming up on Monday of that year; is that correct?

4 A. Yes. Pat asks any advice for my Monday's board meeting?

5 Q. And I assume he's asking you this in your position at
6 that time as the Director of Elections for the Secretary of
7 State?

8 A. I would presume so, yes.

9 Q. And he says, Sandy is going to go for additional hours,
10 or at least the final weekdays, while awaiting the Secretary of
11 State's decision. Sandy, again, here, I assume, is a reference
12 to Sandy McNair?

13 A. I would assume also.

14 Q. And he's informing you that Sandy McNair is seeking --
15 is going to seek additional hours for early in-person voting at
16 the next meeting; is that correct?

17 A. That's what it sounds like from this.

18 Q. And he asks about the time frame for JH's appeal. I
19 assume that JH is Jon Husted; is that correct?

20 A. Yes.

21 Q. And the appeal he's referring to, I assume, is an appeal
22 from the District Court's decision in *NAACP v. Husted*; is that
23 correct?

24 A. I think that was the only litigation going on at that
25 time, yes.

1 Q. We can take this one down.

2 Let me switch gears for a little bit and ask you some
3 questions about the new informational requirements in terms of
4 absentee and provisional ballots and maybe we can start by
5 talking about absentee ballots. Yesterday on direct
6 examination, I think, you discussed some of the new
7 informational requirements for absentee-ballot envelopes; is
8 that correct?

9 A. Yes.

10 Q. And even prior to the passage of S.B. 205,
11 absentee-ballot applications required the five fields that
12 we've been discussing; is that right?

13 A. That's correct.

14 Q. And so the change that S.B. 205 made was not to the
15 application but to the envelope of the ballot itself, that that
16 made clear that there would be five fields required on that
17 envelope; is that correct?

18 A. Correct.

19 Q. Now, we discussed in your deposition that in Franklin
20 County there was a time period, I think until sometime in 2008,
21 that there was some confusion about whether the date of birth
22 and address were required fields on the absentee-ballot
23 envelope. Do you recall that?

24 A. Correct.

25 Q. As I recall, and correct me if I'm wrong, until 2008,

1 Franklin County, at least, had been treating the date of birth
2 field as a required field on the absentee-ballot envelope,
3 correct?

4 A. That's correct.

5 Q. And but as a result of a call, I think, that you got
6 from a law professor, you got clarification from the Secretary
7 of State at the time that the law in fact did not require the
8 date of birth as a required field on the absentee-ballot
9 envelope; is that correct?

10 A. That's correct.

11 Q. And so after you got that clarification, if the date of
12 birth was not included on the absentee-ballot envelope, and
13 here I'm talking about prior to the passage of the S.B. 205, so
14 long as you could verify that the voter was eligible and
15 registered, you counted that ballot, correct?

16 A. That's correct.

17 Q. And was the same true of the address as well, that if
18 that was missing but you could verify that the voter was
19 registered and eligible that you would count that ballot?

20 A. Well, Franklin had always preprinted the voter's name
21 and address on all the identification envelopes. That predated
22 my coming to the board. So there was never an issue where the
23 address was not on the identification envelope in Franklin
24 County.

25 Q. So the issue was date of birth?

1 A. Correct.

2 Q. Do you know whether there was a similar issue in other
3 counties prior to this clarification in 2008 concerning whether
4 the date of birth was in fact a required field on the
5 absentee-ballot envelope?

6 A. I don't know. I don't recall for certain but my
7 presumption would be that because date of birth was a
8 required -- was required in the statute to be printed on the
9 envelope that most boards treated it as we did, that it was a
10 required field.

11 Q. But I assume the clarification that came from the
12 Secretary of State's Office sometime in 2008, that was a
13 clarification that was issued statewide, I assume, correct?

14 A. I don't actually remember that there was a directive on
15 it necessarily. I remember, at least in our circumstance, the
16 conversation was back and forth via e-mail just with the
17 Secretary of State's Office and us. I don't remember for sure
18 whether the Secretary -- whether Secretary Brunner sent
19 something out to everybody or clarified it in a subsequent
20 directive for everybody.

21 Q. But now -- but you can confirm for me, I take it, that
22 prior to the passage of S.B. 205 that for any county in Ohio,
23 if the date of birth was missing from the absentee-ballot
24 envelope that the boards could -- counted those ballots,
25 assuming they could verify that it was a registered and

1 eligible voter?

2 A. So actually the clarification we received in Franklin
3 County in '08, it was my understanding that that was the law
4 and so that, you know, if the voter did not affix the date of
5 birth to the envelope, that was not a reason to reject it.

6 Q. Now that S.B. 205 is in effect, if the date of birth is
7 left blank on the absentee-ballot application, that ballot
8 can't be counted, correct?

9 A. On the identification envelope?

10 Q. Yes.

11 A. It can't be counted unless the voter cures that
12 deficiency.

13 Q. And there's a cure period that follows the -- there's a
14 cure period, essentially, correct?

15 A. Correct.

16 Q. And that cure period is seven days, correct?

17 A. The board has to send a letter to the voter informing
18 them of what the deficiency is and giving them an opportunity
19 to cure. I don't remember exactly what the cure period is but
20 it's in the directive that we talked about yesterday on direct.

21 Q. Fair enough.

22 But if the voter doesn't cure, either because they
23 didn't get the letter or they didn't get there in time or
24 whatever reason, and the date of birth is blank on the
25 absentee-ballot envelope, that ballot can't be counted; is that

1 correct?

2 A. That's correct.

3 Q. And there's no discretion about that with the boards,
4 right? They are not permitted to count ballots that have blank
5 date of birth field in terms of the absentee-ballot envelopes?

6 A. That's correct.

7 Q. And that's true even if the board of elections is able
8 to determine that the absentee voter is an eligible and
9 registered voter, correct?

10 A. That's correct.

11 Q. Now, you discuss -- excuse me just one minute.

12 You discussed, yesterday on direct, the new
13 informational requirements for provisional ballots as well.
14 S.B. 216 made clear the date of birth and address were required
15 on the provisional ballot; is that correct?

16 A. Correct.

17 Q. And we discussed, I believe in your deposition, that in
18 Franklin County at least, until sometime in 2012, there was
19 some confusion about whether date of birth and address, I
20 believe, were required fields on the provisional ballot; is
21 that accurate?

22 A. Yes.

23 Q. In fact, in Franklin County, date of birth and address
24 were treated as required fields until sometime in 2012,
25 correct?

1 A. I had left Franklin County before 2012. There had been
2 confusion about provisional-ballot affirmations generally going
3 back to even 2006 of what should be the form of the envelope,
4 do counties get to create their own envelope and so, you
5 know -- and what's required to count versus what's required to
6 be printed on the envelope. So I think there was a great deal
7 of confusion for a number of years.

8 In 2012, Secretary Husted issued a new provisional
9 envelope that had just the fields on the envelope that were
10 required under the law for the board to evaluate to determine
11 the voter's eligibility. When we did that, we had a number of
12 people look at the envelope. Mr. McTigue looked at the
13 envelope before we issued it, as did a number of --

14 Q. Must have been solid then, I'm sure.

15 A. I thought it was pretty good. And so beginning in 2012,
16 I think there was no ambiguity about whether date of birth was
17 required on the envelope because date of birth wasn't even on
18 the envelope.

19 Q. Okay. So it was clear at that point that the law did
20 not require -- let me step back. I'm not asking you for a
21 legal conclusion here.

22 It was clear at that point, for all counties, that date
23 of birth was not a required field on the provisional-ballot
24 envelope?

25 A. That's correct. And in fact, beginning in 2012, date of

1 birth wasn't even a field on the envelope.

2 Q. And what about address?

3 A. So address was a little bit different because address,
4 as I recall, wasn't specifically required in the statute but it
5 was necessary -- it was a necessary component to determine
6 whether or not the provisional ballot was cast in the correct
7 precinct or in the correct polling place. So while the statute
8 didn't specifically require it, it was a necessary element to
9 determine the voter's eligibility to cast that ballot.

10 Q. So I just want to make -- I think this is clear but the
11 directive that you mentioned that the Secretary issued in 2012,
12 that was obviously directed to apply statewide to all boards of
13 elections, correct?

14 A. That's correct.

15 Q. And it was clear at that point that the law, in fact,
16 did not require the date of birth or the address on the
17 provisional-ballot envelope?

18 A. I think my testimony is that it was clear that the law
19 did not require date of birth and so we didn't put it on the
20 envelope in 2012 but that while state law didn't specifically
21 require address, address was a necessary component to determine
22 the voter's eligibility to cast a ballot that could be counted
23 and to determine whether it was cast in the right precinct or
24 the right polling place for that voter.

25 Q. Fair enough. And I'll focus on the date of birth for

1 the rest of my questions on this.

2 And so if the date of birth, prior to S.B. 216, if the
3 date of birth on the provisional-ballot envelope was blank,
4 that ballot would still be counted, assuming that the relevant
5 board of elections could determine that that was an eligible
6 and registered voter?

7 A. I apologize. I lost you for a second.

8 Q. Yeah. It was a bad question.

9 A. No. It was my fault.

10 Q. So prior to S.B. 216, if the date of birth was not
11 provided on the provisional-ballot envelope, that ballot would
12 still be counted, assuming that the board of elections could
13 verify that that was an eligible and registered voter?

14 A. Correct. And in fact, like I said, in 2012, we
15 eliminated date of birth even as a field on the envelope. It
16 wasn't even something whether it could be missing. It just
17 wasn't there. So before 2012 where date of birth was a blank
18 on the envelope, if the voter did not fill it in, that was not
19 a reason to reject the provisional.

20 Q. Now that S.B. 216 is in effect, if the date of birth is
21 left blank, that ballot can't be counted, correct?

22 A. Correct. If under the current statute and the new
23 design of the envelope that has a blank for date of birth, if
24 that blank is not completed by the voter, the provisional
25 ballot cannot count.

1 Q. And that's not a matter of discretion for the board of
2 elections, correct? If the date of birth is blank, they can't
3 count it even if they can determine that that voter is an
4 eligible and registered voter, correct?

5 A. That's correct.

6 Q. Do you know of any instance where there was not a date
7 of birth that the board could not otherwise determine the
8 voter's eligibility after --

9 THE COURT: You'll probably want to rephrase that
10 question.

11 MR. SPIVA: I think so, Your Honor.

12 BY MR. SPIVA:

13 Q. With respect to the absentee ballots, let me just step
14 back to that for a minute, the absentee-ballot envelopes. We
15 talked about the fact that Secretary Brunner clarified at one
16 point that the date of birth was no longer or was not required.
17 Do you know of any instance -- I'm sorry. At this point you
18 were still at Franklin County Board of Elections, correct?

19 A. In 2008?

20 Q. Yes.

21 A. Yes.

22 Q. And did you know of any instance where there was not a
23 date of birth where the board could not determine the voter's
24 eligibility after the Secretary of State, Secretary of State
25 Brunner, clarified that date of birth was not required?

1 A. In 2008, I don't recall that being the case.

2 THE COURT: What did the two of you just say?

3 MR. SPIVA: Do you want me to answer that, Your Honor?

4 THE COURT: Paraphrase for me.

5 MR. SPIVA: Sure. That once it was clarified, the
6 date of birth was not required by the law at that time. Were
7 there any instances where the date of birth was left blank
8 where the board couldn't figure out whether that voter was in
9 fact an eligible and registered voter and I believe the answer
10 was no.

11 THE COURT: Thank you.

12 MR. SPIVA: Sure thing.

13 BY MR. SPIVA:

14 Q. So let me turn to DRE machines for a minute. You were
15 asked yesterday about I think it's Directive 2014-03 which
16 deals with DRE machines, correct?

17 A. I don't remember the specific number. If we have it, we
18 can put it up.

19 Q. I'm glad I'm not the only one.

20 A. I can remember some but not all of them.

21 Q. If I didn't have it -- and if you need to look at it,
22 let me know and we'll pull it up. But the questions I have,
23 you may not need to see the directive.

24 You were asked about the portion of the directive that
25 says that if the county has more machines than are required to

1 meet the 1 to 175 ratio, they shouldn't get rid of any of
2 their, I guess, extra machines. Do you recall that?

3 A. I do recall. So that was an advisory that we issued
4 giving boards instructions about the law that had recently been
5 passed and, yes, we put a note in there saying, you know, if
6 you -- just because the formula is changed, if you happen to
7 have more machines than the new formula, you shouldn't get rid
8 of them.

9 Q. Right. Okay. And why was that note included?

10 A. It seemed to us to be poor stewardship for a board to
11 get rid of perfectly good machines that they would currently
12 have in their inventory just because the law has changed for
13 future procurement purposes. And so we just wanted to put a
14 flag in there for the boards in the event that their
15 commissioners wanted them to sell machines in order to get some
16 revenue, not that a machine necessarily has a market price.
17 But that was what our purpose was, don't get rid of perfectly
18 good machines if you have them.

19 Q. And why would a county maintain more machines than
20 necessary to meet the statutorily-required 1 in 175 ratio?

21 A. Well, I think the statute sets a floor and then the
22 boards can purchase more, as we did in Franklin County when I
23 was the director and we purchased new machines. So that would
24 just be a choice of the county.

25 Q. And as you said, Franklin County, when you were either

1 the director or the deputy director, had more than the -- more
2 machines, more DRE machines than was required to meet the 1 to
3 175 ratio floor; is that correct?

4 A. That's correct.

5 Q. And that was because you were concerned that the 1 in
6 175 ratio would be insufficient to prevent the types of long
7 lines that Franklin County had experienced in 2004; is that
8 correct?

9 A. I don't think that's an accurate characterization. I
10 think it was an issue of we did have long lines in 2004. One
11 of the many reasons we had long lines was we had an
12 insufficient inventory of the old pre-Help America Vote Act
13 machines. We were going to use that as a reason to have the
14 counties spend local money, if for no other reason that I was
15 ever going to be in a situation again to say we don't have
16 enough machines.

17 If we needed to change the ratio of 1 to 150, which is
18 what I think we ended up doing when we purchased extra machines
19 locally in Franklin County. I was not going to put the board
20 in a position where there could be a scenario where we didn't
21 have them. Not that we knew we didn't have enough with the 1
22 in 175 but we were going to use it as a reason to buy more.

23 Q. Fair enough. With that clarification, you wanted to be
24 sure that you had enough machines to meet the demands of the
25 next election, correct?

1 A. We wanted to make sure that we never had to say we
2 didn't have enough machines.

3 Q. And fair to say that having enough machines to meet --
4 just to meet the 1 to 175 floor was not sufficient to give you
5 comfort to know that you had enough to avoid long lines?

6 A. I don't know that -- I don't believe that that's an
7 accurate characterization. I think some of my conversations
8 with Mike Hackett and some of the board members kind of in line
9 with --

10 Q. For the record, who is Mike Hackett?

11 A. I'm sorry. He was my deputy director at the time in
12 Franklin County. And he retired and Denny White came in as
13 deputy director. The conversation was almost along the lines
14 of never let a good crisis go to waste. And so we had an
15 experience in 2004 and we knew that that would be, you know,
16 that the problems experienced there would give the
17 commissioners reason to loosen the purse strings and so we were
18 going to loosen the purse strings and buy more machines than
19 the federal government was going to buy for us.

20 Q. And the county commissioners approved you spending more
21 money on machines even though that would go beyond the
22 statutorily-required 1 in 175; is that correct?

23 A. That's correct.

24 Q. And if I understand your testimony from a minute ago,
25 one of the ways in which you convinced them to do that was to

1 suggest that that might be necessary to avoid another 2004,
2 fair?

3 A. That's fair.

4 Q. The 1 in 175 ratio, that was not determined based on any
5 type of study of the needs of the various counties in Ohio, was
6 it?

7 A. I wasn't involved in that determination at the Secretary
8 of State's Office at the time. But I'm not aware of any study
9 that they did to come to that ratio.

10 Q. Okay. And I take it from your answer that you're not
11 aware of anything, any study since whenever the 1 in 175 was
12 adopted that has been done that supports 1 to 175 as the
13 appropriate ratio, correct?

14 A. Correct.

15 Q. Now, no county has any obligation to maintain any more
16 machines than are required to meet the 1 to 175 ratio, correct?

17 A. Can you restate that? I'm sorry. I lost you.

18 Q. Yes. Here I'm putting aside if they've already got
19 machines, I understand the point about you can't throw them
20 away. But putting that aside, no county is under any
21 obligation to maintain more machines than is necessary to meet
22 the 1 to 175 ratio, correct?

23 A. Correct. The statutory obligation is to have at least
24 that, to have that as a minimum.

25 Q. So if budgets get tight in a given county and their

1 inventory is at the 1 to 175 ratio, there's no requirement that
2 the county provide additional funds to purchase more machines?

3 A. I mean, that's true. I'm not -- voting machines aren't
4 the kind of thing you go out and buy election to election.
5 It's the kind of thing that the commissioners make a one-time
6 capital purchase and they kind of project forward what their
7 needs are going to be in the future. So the question, as I
8 understand it, is, you know, the counties don't, from election
9 to election, go out and buy new machines unless they determine
10 that that's necessary but it's generally not an
11 election-to-election kind of evaluation.

12 Q. Now, you mentioned a minute ago that HAVA, and I think
13 you were referring to the Help America Vote Act?

14 A. That's correct.

15 Q. And the funds for most of the DRE machines that have
16 been purchased in Ohio came through funds provided by HAVA; is
17 that fair?

18 A. Correct.

19 Q. And that was provided how many years ago?

20 A. I think HAVA passed in 2002 and they started
21 appropriating the money in 2003.

22 Q. So these machines, I take it, were purchased sometime
23 around 2003, 2004; is that correct?

24 A. No. Counties first started implementing voting machines
25 in the fall -- first started implementing the HAVA-purchased

1 voting machines in the fall of 2005 and all counties had fully
2 implemented by the general election of '06.

3 Q. Okay. So but the machines that were purchased with
4 these HAVA funds were purchased sometime between 2003 and 2006,
5 correct?

6 A. Yeah. I think the purchases were actually made in '05.

7 Q. '05. Okay. And those are most of the machines that are
8 still being used in Ohio today, for those counties that use DRE
9 machines, correct?

10 A. Correct.

11 Q. These machines are getting pretty old, correct?

12 A. They are IT, information technology systems, and they do
13 have, like any IT system, an expected life expectancy.

14 THE COURT: What is that?

15 THE WITNESS: At the time the vendors told the
16 counties that it they would expect it to be 12 to 15 years.

17 THE COURT: Is that based on anything?

18 THE WITNESS: Not that I know of. Other than I think
19 it's, you know, I think there's -- most people replace their
20 home PC, to a certain extent, even more frequently than that.

21 BY MR. SPIVA:

22 Q. Is the Secretary's office aware of the problem that
23 arose in this November 2015 election in Trumbull County with
24 the DRE machines there?

25 A. Yes.

1 Q. So you were aware that there was a precinct in which all
2 the machines but one went down, all the DRE machines?

3 A. Based on our election administrator, who is Pat Wolfe,
4 her conversation with the director of the board, there were
5 three voting machines, DREs, in that precinct and actually only
6 one of the three machines went down and that all of the votes
7 that were recorded on that machine up until the point where the
8 machine stopped working, the board was able to accurately
9 remove all of those votes that night for the official canvass
10 from the internal redundant memories. And that according to
11 the director, they also had backup paper ballots in the
12 precinct that were available for voters to use.

13 Q. Have you heard any reports that they, in fact, didn't
14 have paper ballots or sufficient paper ballots to hand out in
15 that precinct?

16 A. Like I said, I was told from our election administrator
17 who talked to the director that they had backup paper ballots.

18 Q. So you're not aware of any, I guess, reports by anybody
19 other than the director that they, in fact, at least didn't
20 have sufficient paper ballots?

21 A. I haven't heard anything from anybody about sufficiency
22 or insufficiency of quantities.

23 Q. Anything reported in the press that you know of?

24 A. Not that I know of.

25 Q. Let me come back to an exhibit that we talked about

1 yesterday for a minute.

2 MR. SPIVA: Your Honor, I just want to acknowledge
3 that I know that --

4 THE COURT: Let me make sure before you do that. Let
5 me make sure I understand. Three DREs in that particular
6 voting location. Anybody could have voted on any of the three,
7 correct?

8 THE WITNESS: Correct.

9 THE COURT: And so the votes were retrieved
10 electronically, correct?

11 THE WITNESS: From the one machine that went down,
12 correct.

13 THE COURT: And so the business about sufficient
14 backup paper ballots, where's that come from? I mean, I know
15 you're supposed to have them, but is that an issue here in this
16 situation that you're aware of?

17 MR. SPIVA: Well, yes. One of the, I guess, defenses,
18 if you will, to the fact that there's a problem with the
19 various directives that have reduced, essentially effectively
20 reduced the number of DRE machines that counties have to use is
21 that, well, there are paper ballots that are kept that can be
22 used in the event something like what happened in Trumbull
23 County happened. I'm actually going to have a follow-up.

24 THE COURT: To give to subsequent voters, not those
25 that had already voted, correct?

1 MR. SPIVA: Right. To prevent long lines, to
2 prevent -- to allow people to go ahead and vote even though the
3 machine has failed.

4 THE COURT: Do you know whether or not the other two
5 machines were able to handle the rest of the volume of voters?

6 THE WITNESS: I don't know what the turnout in the
7 precinct was. All I know is that the other two machines remain
8 functioning for the balance of the election and that there were
9 backup paper ballots in the precinct and available for voters.

10 THE COURT: And do you know whether there were any
11 long lines as a result of it?

12 MR. SPIVA: Well, yes. Actually one of my colleagues
13 gave me a note. My understanding, I was going to ask
14 Mr. Damschroder, is that there were long lines and that
15 although there were paper ballots, they were not handed out,
16 potentially because of insufficient training.

17 THE COURT: Very good.

18 BY MR. SPIVA:

19 Q. And so my next question for you, Mr. Damschroder, is are
20 you aware that there were reports of long lines in Trumbull
21 County in that precinct as a result of the DRE failure that
22 night?

23 A. I'm not.

24 Q. And are you aware that the poll workers failed to hand
25 out the paper ballots after the machine malfunctioned?

1 A. I'm not aware of that.

2 MS. RICHARDSON: Your Honor, I would just object to,
3 essentially, the testifying from counsel in terms of those
4 things. Mr. Damschroder has indicated that he has no knowledge
5 that there were any lines.

6 THE COURT: That's the evidence.

7 MS. RICHARDSON: Thank you.

8 MR. SPIVA: Let me turn back to an exhibit we briefly
9 discussed yesterday. And I just wanted to acknowledge, Your
10 Honor, that this was one I believe that you excluded, but
11 there's an attachment to this e-mail and I just want to take a
12 minute to see whether he recalls the attachment. I'm not
13 trying to get around Your Honor's ruling.

14 THE COURT: Which document are we talking about?

15 MR. SPIVA: It is Plaintiffs' Exhibit 60 and I'm going
16 to follow that up by showing him Plaintiffs' Exhibit 124, which
17 I believe is the attachment to that e-mail. Plaintiffs'
18 Exhibit 60 is the e-mail. So we can pull up Plaintiffs'
19 Exhibit 60, please.

20 BY MR. SPIVA:

21 Q. Mr. Damschroder, we talked about this yesterday. This
22 is an e-mail that you received from Ms. Sonia Gill of the
23 Lawyers' Committee for Civil Rights Under Law on October 8th,
24 2012, correct?

25 A. That appears to be that e-mail.

1 Q. Ms. Gill was sending you this e-mail in your capacity
2 as, at that point I guess, Director of Elections in the
3 Secretary of State's Office?

4 A. I was the Director of Elections at the Secretary of
5 State's Office, yes.

6 Q. And she's sending it to you in that capacity, correct?

7 A. Yes.

8 Q. And I take it that --

9 THE COURT: What was the basis of the objection,
10 Ms. Richardson?

11 MS. RICHARDSON: Your Honor, it was a hearsay
12 objection.

13 THE COURT: Okay. I'll change my ruling and admit it
14 for now and you make your arguments in the brief.

15 MS. RICHARDSON: Thank you, Your Honor.

16 MR. SPIVA: Thank you, Your Honor.

17 BY MR. SPIVA:

18 Q. Ms. Gill, I think you testified yesterday, is somebody
19 who you've known for some period of time; is that correct?

20 A. Correct.

21 Q. And she is attaching or she says that she's attaching a
22 recent study of the Lawyers' Committee released on Friday
23 analyzing early-voting patterns by race in Cuyahoga County for
24 the 2008 presidential election; is that correct?

25 A. Yes.

1 Q. Let me ask you. I think you said yesterday that you
2 didn't recall whether you had reviewed that study?

3 A. That's correct.

4 Q. Okay. If we can pull up Plaintiffs' Exhibit 124. It
5 may be easier to look at this in the book, but my question for
6 you, Mr. Damschroder, is whether, looking at this, whether this
7 refreshes your recollection as to whether this was the
8 attachment that Ms. Gill provided to you, if this was the
9 document that was attached to that e-mail? We can maybe flip a
10 few pages or --

11 MR. SPIVA: May I approach, Your Honor? I want to
12 show him the hard copy. It's a multiple-page document.

13 MS. RICHARDSON: Your Honor, if I may. I don't object
14 to the foundational question that was just asked, given that
15 it's this Court's ruling that foundational questions may be
16 asked. But to the extent that the questions are going to go
17 into the actual substance of this document, I would make a
18 hearsay objection.

19 MR. SPIVA: I'm not intending, Your Honor, to ask
20 questions about specifics of the document. I was going to ask
21 a couple more foundational questions and I think I'll be done
22 with this one.

23 THE COURT: Very good.

24 BY MR. SPIVA:

25 Q. Actually, let me ask -- let me withdraw that question

1 for a moment and just ask you this.

2 Do you see on the front of this document that it says --
3 it has the names Russell Weaver, Ph.D. and Sonia Gill, Esquire,
4 October of 2012?

5 A. It does.

6 Q. And the e-mail that we were just reviewing, that was
7 sent to you in -- sorry. That was sent to you on October 8,
8 2012, correct?

9 A. Correct.

10 Q. Does this refresh your recollection as to whether this
11 was the document that was attached to the e-mail that Ms. Gill
12 sent you?

13 A. This doesn't refresh my memory. I don't remember seeing
14 this.

15 Q. And that was going to be my next question is whether you
16 remember having reviewed this document at any point?

17 A. I don't.

18 Q. We can take this down.

19 Did the Secretary of State's Office, during the period
20 that you were there, ever do anything to analyze early-voting
21 usage by race?

22 A. No.

23 Q. Did the Secretary of State's Office hear reports of the
24 demographics of people who were using early voting in terms of
25 race?

1 A. I think there were newspaper reports and other things
2 like that.

3 Q. And what were the reports that you were hearing?

4 A. I think that African-Americans were using early voting.

5 Q. Were you also hearing that democrats primarily used
6 early voting?

7 A. Yes.

8 MR. SPIVA: Excuse me one second.

9 BY MR. SPIVA:

10 Q. Mr. Damschroder, the e-mails that we reviewed yesterday
11 among the Secretary of State's senior staff, were those e-mails
12 that were sent and received in the ordinary course of business
13 of the Office of the Secretary of State? And I can show them
14 to you again if you need that.

15 MS. RICHARDSON: To the extent he's asking for a legal
16 conclusion about whether these qualify as business records, I
17 would object.

18 MR. SPIVA: It's not -- that wasn't my question, Your
19 Honor. My question was whether they were sent in the ordinary
20 course of business.

21 MS. RICHARDSON: And I also believe there may be some
22 difference based on the individual e-mails. There were several
23 that were reviewed and so I'm not sure that he can generalize
24 across the board to all of the e-mails that have been
25 discussed.

1 MR. SPIVA: I can probably quickly go back through
2 them, Your Honor, without getting into any of the substance
3 again, just to verify. Our position is that these are all
4 admissible under the statement of party opponent hearsay
5 exception. Mr. Damschroder was also the 30(b)(6) witness for
6 the Secretary of State's Office and testified about many, if
7 not all, of these documents in that capacity.

8 THE COURT: So let's save this argument for the brief.

9 MR. SPIVA: The only thing is --

10 THE COURT: I do think it's going to take an
11 item-by-item analysis to determine.

12 MR. SPIVA: Okay. Your Honor, that makes sense to me.
13 The only issue is I just didn't know if I didn't insert the
14 magic words with respect to each specific document, it strikes
15 me that a lot of these are very similar and he has testified
16 generally and with respect to some specific documents that this
17 is the way they conduct their business. But I wasn't sure
18 whether there would be an issue if I hadn't, with each specific
19 document, said was this sent, you know, in furtherance of
20 official business. That was the only issue.

21 THE COURT: Do you have an answer for that without
22 seeing the documents?

23 THE WITNESS: So I would say that it's unlikely that
24 any of those e-mails would have been sent to all of the people
25 they were sent to if we didn't work at the Secretary of State's

1 Office.

2 THE COURT: Okay.

3 MS. RICHARDSON: And, Your Honor, I don't want to get
4 into argument because I understand that the Court has indicated
5 we should do that in our briefs. But I think that this may be
6 missing -- mixing topics a little bit. Clearly, sending
7 e-mails is something that one would do in the ordinary course
8 of business. That's a different question, in our view, from
9 whether or not the particular e-mails by one individual
10 employee can constitute the position of the office.

11 THE COURT: I've fought this battle before. I
12 understand.

13 MS. RICHARDSON: Thank you, Your Honor.

14 THE COURT: Go ahead.

15 MR. SPIVA: Your Honor, I think -- I don't think I
16 have anything further. Unless Your Honor thinks it's necessary
17 for me to go back through.

18 THE COURT: Why don't, if you've got them there, why
19 don't you run down the specific e-mails that you're talking
20 about. Just tell me what the documents are. Just identify the
21 documents, if you would, so that we can --

22 MR. SPIVA: Will do.

23 THE COURT: -- make sure that we have them all. And
24 only if you have them.

25 MR. SPIVA: Yes, Your Honor. And this is just with

1 respect to the ones that are done in the Secretary of State's
2 Office.

3 THE COURT: And I suspect that they're also going to
4 appear in the transcript if we've talked about them already.

5 MR. SPIVA: Yes, they would.

6 THE COURT: So that will suffice.

7 MR. SPIVA: Okay. Let me just confirm one second.

8 Thank you very much, Mr. Damschroder. I don't have
9 anything further.

10 THE COURT: Thank you, Mr. Spiva.

11 MR. SPIVA: Thank you.

12 THE COURT: Ms. Richardson, redirect?

13 MS. RICHARDSON: Thank you, Your Honor.

14 - - -

15 REDIRECT EXAMINATION

16 BY MS. RICHARDSON:

17 Q. Good morning, Mr. Damschroder.

18 A. Good morning.

19 Q. During your cross yesterday, you were asked again about
20 a series of tie votes that Secretary Husted broke with respect
21 to the schedule for early voting in 2012. Do you recall that?

22 A. I do.

23 Q. And you also testified about those tie votes during your
24 direct; is that correct?

25 A. Yes.

1 Q. And so when -- did Secretary Husted encourage the boards
2 prior to -- and let me actually step back.

3 So during the period prior to Secretary Husted sending
4 out a directive mandating hours across the state, did Secretary
5 Husted encourage the boards to work together and come to an
6 agreement with respect to hours?

7 A. The Secretary wanted the bipartisan county boards of
8 elections to come to a local bipartisan decision on what their
9 hours would be.

10 Q. And in an effort to incentivize them to come to an
11 agreement amongst themselves, did he indicate, in advance, to
12 the counties what he would do in the event that he had to break
13 a tie?

14 A. That's correct.

15 Q. And can you just remind me again what he told the
16 counties with respect to what he would do if there was a tie
17 vote?

18 A. It was that if the counties could not come to a local
19 bipartisan decision and that if it came to the Secretary as a
20 tie, he would resolve the matter of controversy in favor of the
21 board's existing regular business hours.

22 Q. And notwithstanding the Secretary's attempts to
23 encourage the counties to come to their own agreements with
24 respect to early-voting hours, were many of the counties unable
25 to reach an agreement?

1 MR. SPIVA: Objection. Leading, Your Honor.

2 THE COURT: I think we've heard there were a defined
3 number of counties that ties had to be broken. So rephrase.

4 MS. RICHARDSON: I'll actually move on. Thank you,
5 Your Honor.

6 BY MS. RICHARDSON:

7 Q. You were shown yesterday during your cross the directive
8 that Secretary Husted ultimately issued mandating uniform hours
9 across the state. Do you recall that?

10 A. I do.

11 Q. And I'll ask you to turn to that document again. It's
12 Plaintiffs' Exhibit 40-005.

13 MS. RICHARDSON: May I approach, Your Honor.

14 THE WITNESS: I'm sorry, what's the exhibit number
15 again?

16 BY MS. RICHARDSON:

17 Q. It's Exhibit 40-005.

18 A. I must have the wrong book. My apologies.

19 Q. And yesterday during your cross you were asked to read
20 into the record certain parts of this document. I'll ask you
21 to turn to a couple of portions of the record that you were not
22 asked about during cross yesterday.

23 And if you take a look at the third paragraph down,
24 starts with, having local boards.

25 A. Yes.

1 Q. Would you mind reading that paragraph, please.

2 A. Having local boards of elections establish voting hours
3 ensures a level of local control that is reflective of local
4 resources. However, it also creates a patchwork of policies
5 from one county to the next.

6 Q. And if you go down to the last paragraph on that page,
7 could you read that paragraph, please.

8 A. Absent a statutory mandate for uniformity, I urged
9 boards of elections to find local compromise on days and hours
10 during my summer regional elections conferences. However, four
11 tie votes have since come to my office on this matter. In each
12 I have resolved the controversy by setting voting hours to the
13 board's existing office hours to avoid having a state actor
14 establish voting hours differently in different counties as was
15 done in 2008.

16 Q. And if you'll turn to page 2, the first paragraph on
17 that page. If you wouldn't mind just reading that paragraph.

18 A. However, after talking with elections officials across
19 the state, I have decided to level the playing field on voting
20 days and hours during the absentee-voting period in order to
21 ensure that the presidential election in Ohio will be uniform,
22 accessible for all, fair and secure.

23 Q. Thank you.

24 And this directive ultimately set forth the uniform
25 hours for all counties in the state of Ohio for 2012, correct?

1 A. Correct.

2 Q. And did the hours that Secretary Husted set include
3 evening hours?

4 A. For the last two weeks. In this directive the hours
5 were 8:00 a.m. to 7:00 p.m. Monday through Friday, with the
6 exception of the statutory cutoff at the time of 6:00 p.m. the
7 last Friday before the election.

8 Q. And what was the date of this directive?

9 A. August 15, 2012.

10 Q. Prior to issuing this directive, did Secretary Husted --
11 I'm sorry. Prior to issuing this directive, you testified that
12 the ACLU reached out to the Secretary of State's Office to
13 discuss uniformity?

14 A. Yes.

15 Q. And you were shown, during your cross, the actual letter
16 that was sent from the ACLU to the Secretary of State's Office,
17 correct?

18 A. That's correct.

19 Q. And I'll ask you to turn to that again. I apologize.
20 This is going to be in a different binder.

21 MS. RICHARDSON: If I may approach again, Your Honor.

22 BY MS. RICHARDSON:

23 Q. Defendants' Exhibit 41. Do you have that in front of
24 you?

25 A. I do.

1 Q. Is that the ACLU letter to the Secretary of State's
2 Office?

3 A. Yes, it is. August 13, 2012.

4 Q. Would you mind reading the first paragraph in that
5 letter?

6 A. According to recent media reports, you have indicated
7 that you may issue statewide rules to standardize early
8 in-person voting hours prior to the November 2012 election.
9 Such different access to the polls from one county to the next
10 appears unfair and shakes credibility and it is unsupportable.
11 In order to dispel even the appearance of unequal access to the
12 polls, we believe that you must issue statewide standards that
13 will ensure uniformity across counties.

14 Q. And if you'll turn to the next page of that letter, the
15 first full paragraph under the bullets that begins with our
16 democracy.

17 A. Read the paragraph?

18 Q. Yes. Would you mind, please?

19 A. Our democracy was founded on the premise of, quote, one
20 person, one vote, closed quote, but allowing individual boards
21 of elections to provide different opportunities for Ohioans to
22 cast their ballot turns that notion on its head. All voters,
23 whether they live in Lucas or Lawrence County, should have
24 consistent times to vote.

25 Q. And in the letter, the ACLU encouraged the Secretary to

1 offer some extended hours beyond regular business. Is that a
2 fair characterization?

3 A. Yes.

4 Q. And you just testified that the directive that the
5 Secretary issued in 2012 did include some evening hours?

6 A. It included, during the working week, until 7:00 p.m.
7 the last two weeks before the election.

8 Q. And did some -- did boards also open early on some days
9 during the period as well in 2012?

10 A. I don't think anybody opened earlier than 8:00 a.m.

11 Q. But they opened at 8:00 a.m.?

12 A. That's correct.

13 Q. And that would be earlier than some business hours. My
14 business hours.

15 A. It would probably be, in some counties, a little bit
16 earlier than their otherwise normal business hours.

17 Q. Thank you. You have also testified --

18 THE COURT: You have the luxury of having your own
19 business hours?

20 BY MS. RICHARDSON:

21 Q. And you have also testified about an agreement that was
22 reached in the NAACP litigation. Do you recall that?

23 A. Yes.

24 Q. Who was counsel for the NAACP in that litigation?

25 A. The ACLU. Attorneys with the ACLU were, I think, lead

1 counsel in that.

2 Q. And you, I believe, indicated previously that in that
3 litigation the NAACP agreed to a schedule for hours; is that
4 correct?

5 A. That's correct.

6 Q. And those are the hours that will be in place for the
7 2016 election?

8 A. Yes.

9 Q. Is that correct?

10 Did counsel from the ACLU publicly praise the schedule
11 that was ultimately reached?

12 MR. SPIVA: Objection, Your Honor.

13 THE COURT: Basis.

14 MR. SPIVA: Calls for hearsay. Leading as well.

15 THE COURT: Overruled. Go ahead.

16 THE WITNESS: My recollection is that a number of the
17 parties issued press releases and statements, you know,
18 praising the agreement as being good for Ohio voters.

19 BY MS. RICHARDSON:

20 Q. And do you recall specifically whether counsel for the
21 ACLU described the resulting system as being incredibly robust?

22 A. Honestly I don't remember for sure what language they
23 used in the press statement other than that, like I said, I
24 think all the parties praised the agreement as being good for
25 Ohio voters.

1 Q. And is it your recollection that the settlement
2 agreement added only one Sunday for a total of an additional
3 four hours to the schedule that would have been in place absent
4 the agreement?

5 MR. SPIVA: Objection. Leading, Your Honor.

6 THE COURT: Rephrase.

7 BY MS. RICHARDSON:

8 Q. What is your understanding of what the NAACP's schedule
9 did to the schedule that would have been in place absent that
10 agreement?

11 A. So the schedule has, for the 2016 presidential general,
12 two Saturdays and two Sundays.

13 Q. And prior to reaching the agreement in the NAACP case,
14 had the Secretary issued a directive setting forth hours that
15 would have been in place for 2014?

16 A. Yes. The Secretary issued a directive that, I think,
17 adopted the OAE0 recommendations.

18 THE COURT: And that is in the absence of the General
19 Assembly doing anything, correct?

20 THE WITNESS: That's correct. The Secretary called on
21 the General Assembly to enact legislation and they did not.
22 And so the only specific proposal for days and hours had come
23 from the bipartisan OAE0.

24 THE COURT: Thank you.

25 MS. RICHARDSON: Thank you, Your Honor.

1 BY MS. RICHARDSON:

2 Q. And do you recall whether the directive that the
3 Secretary issued prior to the NAACP agreement based on the OAE0
4 recommendation included some weekend hours?

5 A. It did.

6 Q. And did it also include extended hours during the week?

7 A. I believe that it did, I think, on the last week. I
8 don't remember for sure.

9 Q. You were asked a series of questions about the new
10 identifiers required under the law that's challenged in this
11 case for absentee-ballot envelopes. Do you recall that during
12 your cross?

13 A. Yes.

14 Q. And just to clarify. With the changes that are
15 implemented in the law that's challenged here, are the
16 requirements for an absentee-ballot envelope now the same as
17 the requirements for an application to vote by absentee mail?

18 A. That's correct.

19 Q. And are they also the same five fields that are required
20 for voting provisionally?

21 A. Correct.

22 Q. And so there is now uniformity across those various
23 methods in terms of what identifiers are required. Is that a
24 fair characterization?

25 MR. SPIVA: Objection. Leading.

1 THE COURT: Overruled.

2 THE WITNESS: Now the same five fields that are used
3 for registration are used to request an absentee, to cast an
4 absentee and to cast a provisional.

5 BY MS. RICHARDSON:

6 Q. And you testified on cross about the Franklin County
7 board's position at some point prior to 2008 that birthdate was
8 a required field. Do you recall that?

9 A. Correct. In 2008, we received information from a law
10 professor at Ohio State questioning the board's previous
11 position that date of birth was a required field but it was
12 required to be printed on the envelope. And so up until that
13 point in time in 2008, the board's position was the date of
14 birth was a required field.

15 Q. And just so I understand your testimony. Was there
16 actually a field on the absentee envelope for birthdate?

17 A. Yes. And I believe that field also appeared in state
18 law as part of the form of the envelope.

19 Q. And so that discrepancy between what was required and
20 what was printed on the envelope, did that create some
21 confusion for you as a board of election?

22 A. It didn't create any confusion before 2008 because we
23 just assumed that what was required to be printed on the
24 envelope was required to be completed in order for the ballot
25 to count. The confusion arose in 2008 when somebody asked a

1 question and then the confusion was eliminated in that same
2 election when everybody looked at the statute and said, it's
3 required to be on the form but not required to be completed in
4 order to be counted.

5 Q. And during cross you were asked about an e-mail that you
6 sent during your time at the Franklin County Board of Elections
7 to legislators asking for various pieces of reform with respect
8 to the election law. Do you recall that?

9 A. Yes.

10 Q. And was one of the things you asked about, getting
11 clarification regarding what fields and what identifiers were
12 actually required for absentee ballots?

13 A. I don't remember for sure whether e-mails had
14 clarification but I think it was setting forth, you know,
15 definitively what are the required fields.

16 Q. And as a result of the law that's challenged in this
17 case, which makes clear that birthdate and address are required
18 identifiers, is it clear to all boards which identifiers are
19 actually required?

20 A. Yes.

21 Q. And you testified, I believe yesterday during direct,
22 about the rejection rates for absentee and provisional ballots
23 in the state of Ohio?

24 A. Yes.

25 Q. Do you recall that? And what are those rejection rates?

1 A. In the 2014 general election, the validation rate of
2 provisionals, as I recall, was more than 92 --more than
3 90 percent. I think it was 92 percent. I can't remember for
4 sure. But it was around 90 percent. And that the validation
5 rate in 2014 for both absentees and provisionals was higher
6 than in 2010.

7 Q. And do you recall, generally, of those few that were
8 rejected, what the reasons for the rejection were?

9 A. For provisional, the most common reason a provisional is
10 rejected is that the voter just isn't registered to vote
11 anywhere in the state of Ohio. So that would be the largest
12 percentage of the rejected provisionals. And then it kind of
13 goes down from there for the other reasons to not validate a
14 provisional.

15 For absentee, I don't remember specifically the
16 breakdown or the most common reason an absentee isn't accepted.

17 Q. And with respect to provisional ballots, the failure to
18 register, did you testify yesterday during direct that now,
19 with the fields that are required, a provisional -- a person
20 who votes provisionally and is not registered will be
21 registered as a result of that provisional ballot?

22 A. That's correct.

23 Q. And so while that voter's ballot would be rejected in
24 that election because that voter wasn't registered, the voter
25 will be able to cast a regular ballot in the next election. Is

1 that an accurate characterization?

2 A. So in completing the envelope, an unregistered voter
3 would be registered to vote in future elections. Assuming that
4 person also doesn't move between the next time they vote, they
5 will be able to vote a regular ballot in that polling place the
6 next election.

7 Q. Thank you.

8 Yesterday you were also asked a few questions about
9 multiprecinct voting. Do you recall that during your cross?

10 A. Yes. I think so.

11 Q. Is there currently a draft directive related to
12 consolidating poll books?

13 A. There is.

14 Q. And can you just describe very briefly what that
15 directive involves?

16 A. So for a number of years, some boards of elections,
17 including Franklin County when I was there, consolidated poll
18 books within -- of the precincts in a multiple-precinct
19 location. The General Assembly then put that in state law as
20 something that was explicitly permissive for boards of
21 elections and so the Secretary has posted a draft directive
22 that we intend on issuing later this month that will require
23 all boards of elections to consolidate the poll books of the
24 precincts within a multiple-precinct polling place.

25 Q. And you were also asked about a number of different

1 e-mails. Can I just ask you, do you know approximately how
2 many employees work for the Secretary of State's Office?

3 A. I think we have about 200 or 250 employees.

4 Q. And do those employees all send a number of e-mails on a
5 day-to-day basis?

6 A. Yes.

7 Q. And do you personally send a number of e-mails on a
8 day-to-day basis?

9 A. Probably more than I should.

10 Q. And is every e-mail sent by you or every employee
11 reflective of the position of the Secretary of State's Office?

12 A. Probably not every e-mail that I send.

13 Q. I'm sorry?

14 A. Probably not every e-mail that I would send.

15 Q. And in fact, do many e-mails reflect simply the personal
16 views of the individual who is sending out the e-mail?

17 A. Probably some of them, yes.

18 Q. Just one follow-up question with respect to the draft
19 directive related to the consolidation of poll books. Do you
20 have any reason to believe that that directive would not be
21 issued in December as you expect?

22 A. It will be issued in December.

23 MS. RICHARDSON: No further questions. Thank you,
24 Mr. Damschroder.

25 THE COURT: Thank you, Ms. Richardson.

1 MS. RICHARDSON: Thank you, Your Honor.

2 MR. SPIVA: I just have a couple, Your Honor.

3 - - -

4 RE-CROSS-EXAMINATION

5 BY MR. SPIVA:

6 Q. I know you can never trust an attorney that says he has
7 a couple questions, but I really do.

8 Mr. Damschroder, you were asked a minute ago on redirect
9 about provisional ballots and rejection rate. You're aware,
10 are you not, that Ohio has one of the highest rates of
11 provisional-ballot casting in the country?

12 A. I know that we did. I don't know -- I haven't looked at
13 the data from 2014 to know where we stack up now. I think
14 we're also one of the states that allow people to, who have
15 still moved, to vote a ballot that can count on election day.

16 Q. Was that 2013 that Ohio -- that you know that Ohio was
17 one of the states with the highest rates of provisional-ballot
18 casting in the country?

19 A. I think it was from -- I think the last time I looked at
20 it was the '08 data collected by the EAC.

21 Q. You haven't seen any data since the data for '08?

22 A. I haven't looked at the rankings.

23 Q. Do you know whether Ohio was in the top five at any time
24 since '08 for provisional-ballot casting?

25 A. I don't know for sure what the ranking was since '08.

1 Q. And then my last question is you were asked, again,
2 about the ACLU letter, DX41. And particularly about the
3 paragraph, our democracy was founded on the premise of one
4 person, one vote, but allowing individual boards of elections
5 to provide different opportunities for Ohioans to cast their
6 ballot turns that notion on its head.

7 Would you agree with me that having long lines in some
8 counties, but not in others, also deprives individuals,
9 Ohioans, of an equal right to cast ballots?

10 MS. RICHARDSON: Objection, Your Honor. Not entirely
11 sure I understood, but I think it may be calling for a legal
12 conclusion.

13 MR. SPIVA: This was read in during the redirect and
14 inquired about.

15 MS. RICHARDSON: And I don't object to questions about
16 that letter but, and I may have missed --

17 THE COURT: I'll draw the legal conclusions. So
18 answer, if you can, or restate.

19 THE WITNESS: Can you reask the question?

20 MR. SPIVA: I'll restate it.

21 BY MR. SPIVA:

22 Q. I'm not asking you for a legal conclusion. And I won't
23 reread the paragraph. But would you agree with me that having
24 citizens of Ohio in certain counties have to stand in long
25 lines to vote provides an unequal opportunity for them to vote

1 as compared to citizens of Ohio in other counties that don't
2 have to stand in long lines to vote?

3 A. So I don't know about the unequal part but I don't know
4 of any election official in this state, county level or state
5 level, who wants to have a situation where lines for any
6 election are the norm as opposed to an anomaly. And so the
7 Secretary of State's Office has worked very hard to make it
8 easy to vote, as we've mentioned multiple times, and so that's
9 the position of the Secretary of State's Office, that we want
10 to work to make sure that there aren't lines on election day.

11 MR. SPIVA: Thank you very much, Mr. Damschroder.

12 THE COURT: Mr. Damschroder --

13 MS. RICHARDSON: I apologize, Your Honor. I just have
14 one question.

15 - - -

16 FURTHER REDIRECT EXAMINATION

17 BY MS. RICHARDSON:

18 Q. Mr. Damschroder, you were asked about whether Ohio has
19 one of the highest rates in terms of provisional-ballot usage.
20 Do you recall that?

21 A. Yes.

22 Q. Do you know whether Ohio also is among the top five in
23 terms of having the highest rate of accepting provisional
24 ballots in the country?

25 A. Again, I don't remember the specific rankings but I

1 remember that, while we did have a lot of provisional ballots,
2 we also count a lot. In particular, and not only do we count
3 the vast majority, in 2014 our rate of provisional voting, as
4 it related to all ballots as a percentage of all ballots cast,
5 dropped by 50 percent compared to the 2010 general election.

6 MS. RICHARDSON: Thank you, Mr. Damschroder. Thank
7 you, Your Honor.

8 MR. SPIVA: Nothing further, Your Honor.

9 THE COURT: Thank you, Matt. You may step down.

10 MR. VOIGT: Your Honor, at this time we would like to
11 move into evidence various Defendants' exhibits. And I suppose
12 I don't know what the easiest way to do this is. I did speak
13 with Mr. Kaul beforehand and they do not object to some of
14 them.

15 THE COURT: Start with the ones you don't object to.

16 MR. KAUL: And, Your Honor, may I? If we are going to
17 take a break this morning, may I ask that we take it now so I
18 can collect my notes on this? I don't have it in front of me.

19 THE COURT: Okay. That's fine. Do that.

20 (A recess was taken at 10:50 a.m. until 11:12 a.m.)

21 THE COURT: Do you have any more witnesses?

22 MR. KAUL: Depending on the resolution of the
23 declaration of Ms. Roberts. No, if the declarations are
24 admitted, frankly, and if they're not, then we'll have to call
25 Ms. Roberts.

1 THE COURT: Anybody else have declaration problems?

2 MR. VOIGT: Your Honor, unfortunately the plaintiffs
3 have objected to three of our declarations and the declarants
4 are actually here and so as necessary I'll --

5 MR. KAUL: We're not going to object to theirs.

6 MR. VOIGT: You changed. Okay. I take that back.

7 THE COURT: That was very magnanimous of you. Let me
8 tell you what --

9 MR. KAUL: So Mr. Voigt understands me clearly. We're
10 not objecting to Ms. Reed's or Mr. Conover's declarations.
11 Bensen's we are, but not theirs.

12 THE COURT: Does that fix it?

13 MR. VOIGT: Yes, Your Honor.

14 THE COURT: So the issue of objections to the various
15 e-mails and so forth that we talked about, I want that in a
16 separate brief so that you don't clog up the other brief. I
17 know we have other issues rather than closing. Ultimately I
18 want this to be in the form of findings of fact and -- proposed
19 findings of fact and conclusions of law.

20 You have 70 pages of briefs already. You probably don't
21 need to reinvent the wheel unless you absolutely want to, but I
22 certainly want to incorporate the evidence and certainly the
23 testimony that you feel has met your burden of proof on either
24 side. So how many pages do you anticipate needing with all the
25 other issues that you have to brief as well?

1 MR. KAUL: Your Honor, the parties have been
2 conferring about this. We were -- I think the last we had it
3 was -- this is before we knew about the separate brief. So the
4 last we had it we were at about 55 pages and Mr. Voigt was at
5 about 50 I think, it's fair to say somewhere in that range. To
6 the extent that we're taking some of those pages and putting
7 them in a separate brief, I think we're fine reducing that in
8 line with that.

9 THE COURT: Okay.

10 MR. KAUL: So given that, I think somewhere in the
11 range of 40, 45.

12 MR. VOIGT: I think 45 might do the trick.

13 THE COURT: Because of the time of the year, I'm
14 feeling magnanimous, so 50. And then I think on the e-mails,
15 do what you've got to do.

16 MS. RICHARDSON: Thank you, Your Honor.

17 THE COURT: As for the declarations, I'm going to read
18 all of them. What are your declarations about? Just give me a
19 thumbnail sketch.

20 MR. VOIGT: The ones that we were admitting today?

21 THE COURT: Yes.

22 MR. VOIGT: One of them is from Mr. Conover and it's
23 the distance calculations for the various declarants. One is
24 from Ms. Reed and it relates to the number of pages that the
25 different entities have produced in this litigation during

1 discovery. And the third is from Ms. Reed and it lists the
2 locations of the early-voting centers. So it's pretty basic
3 stuff.

4 THE COURT: And as I understand it, there are no
5 objections to those, correct?

6 MR. KAUL: That's correct.

7 THE COURT: All right. And your declarations are,
8 give them to me again?

9 MR. KAUL: There's Mr. Preisse's declaration. I think
10 the Court knows those issues.

11 Ms. Roberts has two declarations. One confirms that the
12 videos on the OGTV website, the excerpts of those videos are
13 contained on the DVDs we've submitted into evidence.

14 The second one confirms that she oversaw the process of
15 having transcripts prepared for those videos. And also does
16 some authenticating or establishing sort of underlying facts
17 about documents. For instance, she points out that certain
18 documents were produced consecutively or as part of a single
19 document, which we are going to argue establishes that one
20 document was an attachment to the other. That sort of thing.
21 Or that we received it from the legislative -- the Ohio House,
22 their counsel.

23 I have some documents that I gave to defense counsel
24 that I can also give to the Court, or not. To the extent we
25 can rely on the declaration in our evidentiary arguments, I

1 think we're fine, frankly. But to the extent that we may not
2 be able to authenticate the documents -- in order to
3 authenticate the documents we need some of that.

4 MS. COONTZ: We have some problems. First of all, the
5 second declaration wasn't produced to us until this week. We
6 didn't find out about the second declaration until this week.
7 What the declaration, I believe counsel has indicated, attempts
8 to do is authenticate documents that a third party, an attorney
9 at Perkins Coie, made public records request from a third
10 party, the Ohio General Assembly, and the documents that were
11 sent to the Ohio General Assembly from another third party.

12 So we are hearsay upon hearsay with respect to documents
13 that were received by somebody else, not by Ms. Roberts. I
14 understand if she has a job -- her responsibilities at Perkins
15 Coie involve cataloging public records requests received. But
16 she didn't make the request. The exhibits that were just
17 pointed out to us today that she would be relying upon to
18 establish this authenticity are also hearsay because they are
19 e-mail exchanges between other people.

20 We're on the tenth day of trial. These public records
21 requests were made in December of 2014. They were made to the
22 General Assembly. The General Assembly can provide certified
23 copies of records. So if somebody needed to authenticate the
24 record, somebody could have provided a certification or could
25 have been called, and that wasn't done.

1 So the attempt to authenticate these records through
2 Ms. Roberts, she simply can't authenticate these records. They
3 are not her records. They're not Perkins Coie records.
4 They're records of the General Assembly reflecting,
5 potentially, documents that were sent to the General Assembly.
6 But to the extent that Ms. Roberts wants to testify as to what
7 documents were connected to which e-mails, that goes to the
8 records retention practices and the public records response
9 practices of the General Assembly.

10 That is information that needs to come from the General
11 Assembly, not from Ms. Roberts. The documents themselves are
12 hearsay. The underlying exhibits that are going to be used as
13 foundation for those documents are also hearsay. We've been
14 talking about the declaration with respect to videotapes for
15 three weeks. We just found out about this declaration this
16 week and the exhibits are not on the exhibit list to which
17 Ms. Roberts would be asked to testify.

18 MR. KAUL: The exhibits that we're moving to admit
19 into evidence are on the exhibit list. The things that we
20 would be using to help establish the authenticity of them are
21 not. Frankly, Your Honor, this is a routine matter that is
22 normally handled between lawyers and doesn't require a half day
23 of testimony. If we need to call Ms. Roberts to discuss these
24 issues, she's ready to go and we can do that. But that's just
25 the position we're in, unfortunately.

1 May I approach with the copies of the documents that
2 Ms. Coontz is referring to?

3 MS. COONTZ: The State's position is that testimony
4 won't fix this. These are General Assembly records provided to
5 a third attorney at Perkins Coie that they apparently kept.
6 But essentially what the standard that Plaintiffs are seeking
7 to impose is now anytime somebody makes a public records
8 request, somebody else can authenticate the records of the
9 public office even if those records are received from a third
10 party. So we have layers and layers of hearsay and
11 authenticity, not to mention the fact that is this is
12 testimony, once again, goes to legislative intent that is
13 entirely irrelevant as to the issue for which it's being used.

14 But she simply cannot authenticate this document even
15 with her testimony. The General Assembly could. And a
16 certification from the General Assembly may have cured this
17 problem.

18 MR. KAUL: Your Honor, just briefly. We're happy to
19 litigate the sufficiency of the declaration in the papers that
20 we're filing. We're going to be doing that. This is just, for
21 today's purposes I think all we need to resolve is can we
22 submit a declaration that we can rely on from Ms. Roberts or do
23 we need to call her as a live witness.

24 THE COURT: Why don't you submit the declarations.

25 MR. KAUL: That's the one we submitted previously.

1 THE COURT: All right.

2 MR. KAUL: The only other thing that goes with that is
3 we have included in the package I gave you there are some PXA
4 numbers which correspond. So there's, for example, I think
5 68A. It's the same document of 68 but it was produced from a
6 different party. And then we have --

7 MS. COONTZ: Are these the additional exhibits that
8 were pointed out this morning?

9 THE COURT: These are testimony that were offered or
10 what? John Sherman?

11 MR. KAUL: John Sherman is -- so 20A, that was written
12 testimony. It's the exact same document as Exhibit 20, it's
13 just produced by a different party.

14 MS. COONTZ: Is this the NEOCH document?

15 MR. KAUL: The written testimony submitted by Brian
16 Davis.

17 MS. COONTZ: I would just also note for the record
18 that Mr. McTigue is counsel for NEOCH. If they wanted NEOCH to
19 come in and testify as to what they told the General Assembly,
20 they could have done it.

21 MR. KAUL: That goes to the merits of the
22 admissibility that we can address. I'm not sure why we're
23 arguing about that.

24 THE COURT: Let's do that. Argue it in the brief.
25 And I'm going to increase the brief to 70 pages just to make

1 sure that you've got all the room you need.

2 MR. MCTIGUE: Your Honor, I wanted to state for the
3 record I've never been counsel for NEOCH, only counsel for the
4 democratic party in what's called the NEOCH case. Just so
5 we're clear.

6 MS. COONTZ: So the declaration is being admitted but
7 not the additional exhibits that were pointed out to us this
8 morning and that don't appear on any exhibit list?

9 MR. KAUL: What we're giving you, Your Honor, are
10 copies that are identical to the documents on our exhibit list.
11 So 20A is a copy of 20. Just in the declarations we explain
12 they were produced by a different party. So it's a different
13 version of the exact same document.

14 THE COURT: That's fine.

15 MS. COONTZ: But I'm referring to the packet you gave
16 us this morning.

17 MR. KAUL: We're only admitting those for purposes of
18 this evidentiary discussion.

19 THE COURT: Very good.

20 MR. KAUL: Or admitting isn't even the right word.
21 We're putting them before the Court for that purpose.

22 THE COURT: You're tendering them. You're proffering
23 them.

24 MR. KAUL: And then the other related thing we have
25 are the final versions of the transcripts that go with that.

1 Which we can, I think, provide to the court reporter
2 afterwards.

3 THE COURT: That would be great. She needs more
4 paper.

5 MR. KAUL: I was thinking that.

6 Transcripts of the legislative videos.

7 MR. VOIGT: If I could ask for clarification. So Your
8 Honor would like the discussion that we've just talked about
9 now in the big brief?

10 THE COURT: Yes.

11 MR. VOIGT: And then the e-mail issue in the separate
12 brief?

13 THE COURT: Yes.

14 MR. VOIGT: Thank you, Your Honor.

15 THE COURT: So are we done with your case then?

16 MR. KAUL: I hope. Designations were the other thing.
17 I assume the Court wants us to address that?

18 THE COURT: In the brief.

19 MR. SPIVA: Although, Your Honor, we have -- it's the
20 same designations we submitted, but we put exhibit numbers on
21 them. We assume that the Court would need that and we can hand
22 those up or however you want us to handle that. The only ones
23 that we are continuing to seek to admit are the two from
24 Mr. Damschroder, Mr. McDonald's deposition testimony,
25 Mr. Weber, John Weber and Mr. Daniel Troy. I think I got them

1 all. So those are the only ones that we are continuing to try
2 to admit. But we've put exhibit numbers on them. I can hand
3 those up and provide you all with the copies of them as well.

4 MR. VOIGT: Do you mind listing those again?

5 MR. SPIVA: Sure. The Damschroder 30(b)(6)
6 designations that we made, the Damschroder individual
7 deposition designations, the John Weber designations, the
8 Daniel Troy designations and the Patrick McDonald designations.

9 MR. VOIGT: Again, Your Honor, I apologize for
10 repeating myself on this again. We will put it in the brief as
11 well. But it's our position that if these depositions do come
12 in, that the underlying transcript should come in as well --
13 I'm sorry. Did I misspeak? The underlying declarations should
14 come in as well.

15 MR. SPIVA: And we could put it in the brief as well.
16 Our position is that they're not on equal footing. The
17 declarations are simple hearsay by a party that's trying to
18 submit it on its own behalf whereas the depositions are -- they
19 either qualify as statements of a party opponent --

20 THE COURT: Or they don't.

21 MR. SPIVA: Yeah.

22 MR. VOIGT: And also, Your Honor, if I may.

23 THE COURT: You have counterdesignations is what
24 you're talking about, correct?

25 MR. VOIGT: Your Honor, we would like to place

1 counterdesignations into our filings as well for the
2 depositions that they're seeking to admit.

3 THE COURT: So for our purposes today, I'll admit
4 those that you seek to go to weight, not admissibility, and you
5 can argue about them in your briefs.

6 MR. SPIVA: Okay. Thank you, Your Honor.

7 THE COURT: Damschroder, Weber, McDonald, Troy. Who
8 else?

9 MR. SPIVA: I think that was it, Your Honor. The only
10 question would be -- Damschroder is a 30(b)(6) one and an
11 individual one.

12 THE COURT: Right. I'm leaning towards we had him on
13 the stand but with the 30(b)(6) I'd allow that probably to come
14 in.

15 MR. SPIVA: Okay. And with the individual one --

16 THE COURT: I assume they have counterdesignations
17 from that, but I don't know.

18 MR. SPIVA: Sure. And of course consistent with the
19 Court's rules, we put in the entire transcript and we've
20 designated --

21 THE COURT: I appreciate that.

22 MR. SPIVA: I would just say one word about the
23 individual Damschroder one is there are a number of documents
24 that he talks about and I would say essentially authenticates
25 in that deposition.

1 THE COURT: Do I have those documents? Are they
2 attached?

3 MR. SPIVA: They are Plaintiffs' --

4 THE COURT: Are they filed with the depositions?

5 MR. SPIVA: I don't believe they were. The ones that
6 I'm seeking to rely on are Plaintiffs' exhibit numbers but I
7 don't believe we attached the documents from the depositions to
8 the documents we designated into the deposition designations.

9 THE COURT: I may call you down the road and ask for
10 them.

11 MR. SPIVA: Sure. We'd be glad to do that.

12 MR. VOIGT: Your Honor, two final things. So we did
13 want to move to have our exhibits put in. And I also don't
14 think that we've talked about a date, a due date.

15 THE COURT: Right. Exactly. I know you've got a
16 trial date maybe in January. You've got Virginia and
17 Wisconsin. When are those going?

18 MR. KAUL: We think we're probably going to be okay on
19 January. We think we'll be able to get out of that one. But
20 we probably have something in February and May. We talked
21 between the parties and we're inclined to suggest
22 December 18th, which is obviously not that far from now.

23 THE COURT: You're going to be done when?

24 THE COURT REPORTER: I've told them Monday.

25 THE COURT: By next Monday.

1 MR. KAUL: We've received several of the transcripts
2 already, and I will add very quickly.

3 MR. SPIVA: We appreciate it.

4 MR. KAUL: We all think we can get rolling on those
5 right away.

6 MR. VOIGT: We agree with December 18th, Your Honor.

7 THE COURT: Okay. I want them to be simultaneous with
8 no replies, responses.

9 MR. VOIGT: Understood, Your Honor.

10 MR. KAUL: And, Your Honor, just because I know this
11 will come up probably between the parties at some point. Just
12 a couple quick points of clarification. One is when we'll be
13 doing the two briefs as you explained. In the second
14 evidentiary one do you just want admissibility of exhibits or
15 do you want sort of all the ancillary evidentiary disputes?

16 THE COURT: The latter.

17 MR. KAUL: By e-mail.

18 THE COURT: The latter.

19 MR. KAUL: And then the brief will be the proposed
20 findings of fact and conclusions of law. The other document
21 will be evidentiary issues; is that right?

22 THE COURT: Yes.

23 MR. KAUL: I'm being told I'm not being clear.

24 THE COURT: That's only because I'm not being clear.

25 MR. KAUL: No. And then the second related question

1 is you said you wanted them in the form of proposed findings of
2 fact and conclusions of law. Do you want them written in sort
3 of paragraph form like they are in some filings or do you want
4 them in the same format as the previous filings or does it not
5 matter?

6 THE COURT: My sense was that the trial briefs were to
7 be proposed findings of fact and conclusions of law, and they
8 weren't. So, informative, but just apply the evidence to what
9 you have at this point. So separate paragraphs would be nice.
10 Thank you.

11 MR. KAUL: Numbered paragraphs. That's what I meant
12 to say.

13 THE COURT: Yes.

14 MR. KAUL: And then I think Mr. Voigt is going to move
15 exhibits. We moved in exhibits that were unobjected to before
16 and we noted the ones that were objected to. To the extent
17 that we didn't formally move those, can I just put on the
18 record that we are formally moving them?

19 THE COURT: Just move them now and then argue whatever
20 the contentions are from either side in your briefs.

21 MR. KAUL: All the exhibits that were listed as
22 objected to before we'll formally move.

23 THE COURT: Very good.

24 MR. VOIGT: Okay.

25 THE COURT: You're on, Mr. Voigt.

1 MR. VOIGT: Your Honor, Defendants move to introduce
2 the following exhibits, and I guess I'll list all of the ones
3 that I believe the plaintiffs do not object to. Please
4 interrupt me if I misspeak.

5 Defendants' Exhibit Number 1. And in addition, an
6 exhibit -- a document that we didn't have on our exhibit list
7 which is the answer to the amended complaint as well. Exhibit
8 Number 2, number 3, number 5, number 6, number 8, 9, 10, 11,
9 12, 13, 14C, 14D, 14E, 14F, 14G, 14H, 14I, 14J, 14K, 14AA,
10 14BB, 14CC, 14DD, 14GG, 14HH, 14II.

11 THE COURT: I don't remember these.

12 MR. VOIGT: 14JJ.

13 THE COURT: I don't remember G, H and I. Go ahead.

14 MR. VOIGT: Yes, Your Honor. Those are attachments to
15 Ms. Reed's declaration.

16 THE COURT: Very good. Again, those are without
17 objection?

18 MR. KAUL: That's correct.

19 THE COURT: All right. So does that conclude your
20 without objections?

21 MR. VOIGT: No, Your Honor.

22 THE COURT: Of course not.

23 MR. VOIGT: I'm sorry.

24 THE COURT: Go ahead.

25 MR. VOIGT: 16, 19, 20, 26, 27, 29. And Mr. Kaul

1 asked me to explain what these are. These are the proposed
2 directives that the Secretary has put out for public comment.
3 They're going to be permanent directives.

4 THE COURT: Later in December?

5 MR. VOIGT: Yes, Your Honor.

6 THE COURT: All right.

7 MR. VOIGT: And so I just mentioned 29. 31, 32, 34,
8 36, 61, 62, 63, 64, 66, 67, 68 and 71, 71A and 72. Those were
9 the additional declarations.

10 THE COURT: All right.

11 MR. VOIGT: And now for the ones that are objected to.

12 THE COURT: All right. Without objection, Defendants'
13 1, 2, 3, 5, 6, 8, 9, 10, 11, 12, 13, 14C, D, E, F, G, H, I, J,
14 K, AA, BB, CC, DD, GG, HH, II, 16, 19, 20, 26, 27, 29, 31, 32,
15 34, 36, 61, 62, 63, 64, 66, 67, 68, 71, 71A and 72 are
16 admitted.

17 THE COURTROOM DEPUTY: Do we have 14JJ?

18 THE COURT: Do we have JJ as well?

19 MR. VOIGT: 14JJ.

20 THE COURT: I missed that one.

21 MR. VOIGT: I'm not sure if I heard Exhibit 14.

22 MR. KAUL: No.

23 MR. VOIGT: I'm sorry. That's an objected one.

24 THE COURT: So do you have them?

25 THE COURT REPORTER: Yes.

1 THE COURT: Very good.

2 MR. VOIGT: Now for the objections where there are
3 objections. Number 14 which is the initial expert report of
4 Sean Trende.

5 MR. KAUL: And I think Mr. Voigt's going to identify
6 four expert reports. For each of them we're only objecting on
7 the grounds that we previously raised with respect to Daubert,
8 not any other grounds. In other words, not on hearsay grounds
9 or anything like that.

10 THE COURT: Very good. Thank you.

11 MR. VOIGT: And 14A and 14B, which go along with the
12 report. That's his CV.

13 THE COURT: Noting your standing objection, 14A and B
14 will be admitted.

15 MR. VOIGT: The next is number 15 and that is the
16 initial report of Dr. Hood.

17 MR. KAUL: Same objection.

18 THE COURT: And noting that standing objection,
19 Dr. Hood's report will be admitted.

20 MR. VOIGT: And then the next two are 17 and 18. 17
21 is the rebuttal report of Sean Trende and 18 is the rebuttal
22 report of Dr. Hood.

23 MR. KAUL: Same objection again.

24 THE COURT: Noted and admitted.

25 MR. VOIGT: 20A and 21.

1 THE COURT: 18 is Dr. Hood's rebuttal?

2 MR. VOIGT: Yes, Your Honor. 18 is Dr. Hood's
3 rebuttal expert report.

4 THE COURT: Very good. Okay. Go ahead.

5 MR. KAUL: 20 and 21 we object to on hearsay grounds.

6 THE COURT: And they are what again?

7 MR. VOIGT: Not 20.

8 MR. KAUL: I'm sorry, I misspoke. 20A and 21.

9 MR. VOIGT: 20A is the initial declaration of Clark
10 Bensen, and 21 is Clark Bensen's supplemental declaration.

11 THE COURT: Again, Bensen provided numbers to
12 somebody, is that it?

13 MR. VOIGT: That's correct, Your Honor. He was an
14 expert who was retained to basically obtain data from the
15 counties. He crunched some numbers, gave data to Dr. McCarty.
16 Dr. McCarty used the data, found it reliable, testified that it
17 was reliable and used it in his calculations.

18 THE COURT: And your objection is what?

19 MR. KAUL: Mr. Bensen submitted -- Mr. McCarty
20 testified to what he testified to and we don't object to that.
21 But we object to the admission of the declarations that
22 Mr. Bensen prepared on hearsay grounds.

23 THE COURT: Okay. I'm noting the objection. I'll
24 admit them.

25 MR. VOIGT: The next is number 23 and that is the

1 rebuttal expert report of Dr. McCarty in the NAACP matter.

2 MR. KAUL: And we object to that both as hearsay but
3 also outside the scope of Mr. McCarty's expert report in this
4 case. It's a different -- it's a report from a different case.

5 MR. VOIGT: And our response to that is that directly
6 addresses Dr. Smith's findings which were adopted by
7 Dr. Timberlake.

8 THE COURT: He's testified about them, right?

9 MR. VOIGT: Yes, Your Honor.

10 THE COURT: Okay. Noting your objection, 23 will be
11 admitted.

12 MR. VOIGT: 25, which is the surrebuttal expert report
13 of Dr. McCarty in the NAACP case.

14 MR. KAUL: And same objection, Your Honor. I will add
15 that I don't think we admitted Dr. Smith's report. It was on
16 our exhibit list, I guess.

17 THE COURT: You want to move it?

18 MR. KAUL: Yes. We'll find the number in a minute.

19 MR. VOIGT: We strenuously object to that.

20 THE COURT: Of course you do.

21 MR. VOIGT: Your Honor, he didn't testify in this
22 case.

23 THE COURT: Neither did Bensen, right?

24 MR. VOIGT: Yes, Your Honor. But Mr. Bensen's role
25 was much more limited. He simply collected data. Dr. Smith

1 did actual calculations.

2 THE COURT: You can tender it. Argue.

3 MR. KAUL: I'm sorry. I missed --

4 THE COURT: You can tender Dr. Smith's report to the
5 extent that it has any relevance at all in the case. If it
6 doesn't, don't tender it.

7 Go ahead.

8 McCarty was questioned on it, correct?

9 MR. VOIGT: McCarty was questioned on -- yes, Your
10 Honor. Your Honor, Dr. McCarty discussed Timberlake's report
11 and Timberlake -- Dr. Timberlake's report copied portions of
12 Dr. Smith's report.

13 THE COURT: That was it.

14 MR. KAUL: That's not -- the allegation was that he
15 copied Roscigno's report. But the allegation is that he had
16 done it with a different report, not Smith. It was Roscigno.

17 THE COURT: The jury is instructed to rely on your
18 collective memory.

19 In any event, let's not get Dr. Smith's report in
20 because there is the allegation that he copied it, maybe even
21 directly. He did also testify that he reran the numbers and so
22 forth.

23 MR. KAUL: I don't think that's Defendants' position
24 actually. I think they were misspeaking. I think the
25 allegation is that it was Roscigno's report. That was the red

1 line that he talked about. That's a different report.

2 THE COURT: I'll read it in the transcript. So don't
3 move Smith's report.

4 MR. VOIGT: Let me double check. I think that might
5 be it.

6 THE COURT: If you want me to revisit it, put it in a
7 brief.

8 MR. KAUL: Thank you, Your Honor.

9 MR. VOIGT: That's it, Your Honor.

10 THE COURT: I've enjoyed our time together. Keep me
11 posted if there's a ruling in the North Carolina case, please.

12 MR. SPIVA: Will do, Your Honor.

13 THE COURT: When are the other cases going to trial?

14 MR. SPIVA: We have a case in Virginia in February.

15 February 22nd I think is the day. There is a North Carolina
16 trial happening which we have some limited --

17 THE COURT: Are you not part of it or what?

18 MR. SPIVA: We are --

19 THE COURT: You'd like not to be part of it.

20 MR. SPIVA: Basically there was a voter ID issue. Try
21 not to give you more information than you actually want but the
22 legislature passed a law right before the trial in the summer
23 and so the Court kind of took that issue mainly out of the case
24 this summer and that issue is now going to be tried in January.
25 But mainly that's going to be handled by our co-plaintiffs'

1 counsel who they represent different parties than we do. So we
2 will probably be monitoring that but we won't have as much
3 involvement in that as the one we had this summer.

4 But there is a trial that we are primarily handling or
5 only handling in Virginia and then there another one in
6 Wisconsin in May. So still a full year ahead of us.

7 The only other thing, Your Honor, I wanted -- I can do
8 this after we're off the record. I just wanted to hand up the
9 deposition designations and give them to you or the clerk and
10 of course give you all a copy with the exhibit number on it.

11 THE COURT: Very good.

12 MR. SPIVA: I just wanted to say what a pleasure it's
13 been for all of us to appear before you. Thank you.

14 THE COURT: I'm sorry you chose the Courtyard by
15 Marriott to stay in and the view is just so beautiful from
16 there.

17 MR. KAUL: We see all the buses coming and going from
18 the terminal.

19 THE COURT: So you looked east then, didn't you?

20 MR. KAUL: Mr. Martin did.

21 THE COURT: Anyway, actually in the springtime
22 Columbus is very beautiful. This is a gray time of year and I
23 make apologies for it now, but we've enjoyed having you.

24 MR. SPIVA: Thank you very much, Your Honor.

25 THE COURT: If I need anything else, I'll get ahold of

1 you. Okay. Thank you. Have a pleasant holiday.

2 The standing issue, make sure it's in the briefs.

3 You're going to argue the legislative history material in the
4 briefs?

5 MS. COONTZ: Yes.

6 THE COURT: Key deadlines. February what, 16th is the
7 cutoff? What are the key deadlines for the primary?

8 MS. COONTZ: Can we look at the election calendar,
9 it's online and then e-mail everybody. We can e-mail the
10 calendar itself, just PDF it to you.

11 THE COURT: Very good. Thank you.

12 MR. SPIVA: Thank you, Your Honor.

13 MR. VOIGT: Thank you, Your Honor.

14 (The proceedings were adjourned at 11:50 a.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