DEFENDANT SECRETARY OF STATE JON HUSTED’S STATEMENT OF CONTESTED AND/OR DISPUTED FACTS

Defendant Secretary of State Jon Husted submits the following statement of contested or disputed facts.

Introduction

1. Plaintiffs have introduced no evidence about the time of day when early voters cast their ballots.

2. Plaintiffs are seeking preliminary injunctive relief for a mid-term non-presidential election. Plaintiffs have not provided any evidence with respect to early voting turnout for the entire state of Ohio in any mid-term (non-presidential) election.

3. The method by which a person votes (e.g., early in-person or “EIP”, absentee mail-in, or Election Day) and the date when a person votes is not indicative of the method by which or the time when the same elector will participate as a voter in future elections.¹

¹ Damschroder Declaration, ¶ 39 (Ex. 1).
Plaintiffs' experts do not assess whether voters will vote in the same manner from one election to the next.\(^2\) Plaintiffs have introduced no evidence indicating that individuals always vote in every election on the same day at the same time and using the same method.

4. Plaintiffs have introduced no evidence related to Ohio’s no-excuse mail-in absentee voting opportunities and whether and to what extent African American and white voters will use mail-in voting in the upcoming 2014 mid-term election.

5. The limited data that Plaintiffs have introduced about early voting on pre-Election Day Sundays illustrates that the African American EIP voting rate on Sundays is very low, with the possible exception of the last Sunday before Election Day, which is a day when EIP voting is permitted under Directive 2014-17.\(^3\)

6. Plaintiffs have introduced no evidence that the Secretary of State’s intent for setting the voting hours found in Directive 2014-17 was discriminatory.

### Voting Data

7. Ohio’s Boards of Election (“BOEs”) do not all record voting data uniformly. There are five different county-level election management software systems used by Ohio’s 88 county BOEs and each tracks election data differently.\(^4\) In addition, each county BOE has different policies and procedures for using its system to track data.\(^5\) The differences across Ohio’s 88 BOEs means that EIP votes are labeled in different ways, with mail-in absentee votes

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\(^2\) Roscigno Depo., p. 79:2-23 (Ex. 2); Smith Depo., pp. 111:16-113:19 (Ex. 3).

\(^3\) Id. at pp. 62:10-67:9 (Ex. 3).

\(^4\) Damschroder Declaration, ¶¶ 18-19 (Ex. 1).

\(^5\) Id. at ¶ 18 (Ex. 1).
sometimes recorded in a way that they might appear to be an EIP vote, and the date a vote is recorded not always being the date when the vote was actually cast.  

8. Dr. Smith’s calculations are based on election data that has widespread lack of uniformity and overall differences in the manner that votes are recorded. Dr. Smith did not correct for these differences in the data set. In other words, the date Dr. Smith assumes a vote was cast may be incorrect and the method that Dr. Smith assumes was used (e.g., EIP) may be incorrect. Therefore, the data set used by Dr. Smith contains inconsistencies and Dr. Smith’s calculations based on the data contain errors.

**Facts About Ohio’s Voting Laws**

9. On August 4, 2009, the Ohio House of Representatives introduced HB 260 which, if passed, would have set EIP voting beginning on the 21st day before the election. A number of democratic legislators sponsored the bill.


11. Secretary of State Husted mailed unsolicited absentee ballot applications to all registered Ohio voters before the 2012 general election.

12. The Ohio Association of Election Officials (the “OAEO”) is a bi-partisan organization comprised of the members of Ohio’s 88 county BOEs, as well as BOE directors,

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6 *Id.* at ¶ 19 (Ex. 1).

7 *Id.* at ¶¶ 39 (Ex. 1).

8 Smith Depo., pp. 75:7-82:12, 85:4-93:9 (Ex. 3).
deputy directors, and staff.\textsuperscript{9} The OAEO’s trustees consist of 20 members – 10 Democrats and 10 Republicans – from a diverse cross-section of Ohio’s large, medium, and small counties.\textsuperscript{10}

13. As careful stewards of “other peoples’ money,” the OAEO’s trustees felt that the organization’s recommended plan presented the most efficient and effective use of resources to achieve the most positive results in terms of convenience for early voters and reduced lines for those voting early on Election Day.\textsuperscript{11}

14. The OAEO plan was drafted and approved by a task force and a committee that included bi-partisan representation from small, medium, and large counties.\textsuperscript{12} It balanced the needs of the large counties and small counties – taking into account their size, geographic location, and fiscal condition – and presented an appropriate and bi-partisan middle ground from the actual BOE workers who are ultimately charged with implementing elections.\textsuperscript{13} The OAEO plan distinguishes among presidential, gubernatorial, and special elections\textsuperscript{14} – among which voter turn-out, and thus the need to provide early-voting times, varies greatly.

15. Secretary of State Husted adopted the OAEO plan for EIP voting hours in Directive 2014-06.\textsuperscript{15} Then, in compliance with this Court’s ruling in \textit{Obama for America v. Husted}, Case No. 2:12-cv-636, 2014 WL 2611316 (S.D. Ohio June 11, 2014), Secretary of State Husted further expanded the uniform EIP voting permitted under Directive 2014-06 and issued

\textsuperscript{9} OAEO Report, p. 1 (Ex. 4); Ockerman Testimony, p.1 (Ex. 5); Jones Declaration, ¶ 7 (Ex. 6).
\textsuperscript{10} Ockerman Testimony, p. 1 (Ex. 5); Jones Declaration, ¶ 16 (Ex. 6).
\textsuperscript{11} Ockerman Testimony, pp. 2-3 (Ex. 5); see also Walch Declaration, ¶ 8 (Ex. 7).
\textsuperscript{12} Jones Declaration, ¶¶ 18-31 (Ex. 6).
\textsuperscript{13} \textit{Id.} at ¶ 28 (Ex. 6); OAEO Report, p. 1 (Ex. 4).
\textsuperscript{14} \textit{Id.} at p. 3 (Ex. 4).
\textsuperscript{15} Directive 2014-06 (Ex. 8).
Directive 2014-17. Directive 2014-17, issued on June 17, 2014, superseded Directive 2014-06 and permits uniform EIP voting in Ohio during the hours proposed by the OAEO plan – plus hours on the Sunday and Monday immediately preceding Election Day. There is no Ohio statutory law that sets uniform hours for EIP voting. Absent Directive 2014-17, a county could eliminate all EIP voting other than the Saturday, Sunday, and Monday before the election.

16. Ohio law in 2008 and 2010 did not require a BOE to be open during any particular days or hours. In most counties, this meant that EIP voting was only available during the BOE’s normal business hours Monday through Friday for the entire early voting period. In the vast majority of counties, there were no evening or weekend hours except one Saturday during which most BOEs that were open had four hours of voting.

17. Secretary of State Husted is mailing an absentee ballot application to Ohio’s registered voters for the 2014 general election. A voter could vote entirely through the mail for the 2014 election.

18. An application for an absentee ballot may be mailed to the BOE, taken to the BOE in person, taken to another location as designated by the BOE, or delivered to the BOE by another person on the voter’s behalf.

19. An absentee ballot may be received in person (if applied for in-person) or by mail (if applied for by mail or if the application was dropped off at the BOE by someone other than the voter).

20. An absentee ballot may be cast by returning it to the BOE in-person, mailing it to the BOE, or having a family member (e.g., a parent, step-parent, parent-in-law, grandparent, sibling, child, step-child, uncle, or aunt, among others) return the ballot to the BOE.

16 Directive 2014-17 (Ex. 9).
21. Many BOEs have ballot boxes located outside of their offices to allow electors returning their voted ballot in person to do so outside of normal business hours and/or without having to enter the building. In addition, absentee ballots may be placed in the mail at any time of the day or night. An absentee ballot will be counted so long as it is delivered in-person to the BOE by 7:30 pm on Election Day. Further, a valid absentee ballot returned by mail will be counted if it is postmarked the day before Election Day and received by the Board by the tenth day after the election.

22. In most of Ohio’s counties, there are more early voting hours available under Directive 2014-17 than were available in 2010.

Sean Trende

23. Defendants’ expert Sean Trende has a B.A. (Yale), a M.A. (Duke), and a J.D. (Duke). He is a Senior Elections Analyst with RealClearPolitics and a Senior Columnist with Dr. Larry Sabato’s “Crystal Ball.” Mr. Trende is the author and co-author of several influential books about politics and elections and the focus of his writing and research is rigorous statistical understanding of elections. Defendants engaged Mr. Trende in mid-July.

24. Ohio has one of the most expansive systems of early voting in the country. Ohio “offers one of the longest periods of early voting, among the most days of early voting, and is one of the few states to make any Sundays available.” Many States do not permit no-excuse mail-in absentee voting, as Ohio does.

17 Damschroder Declaration, ¶ 16 (Ex. 1).
18 Cf. id.; see also R.C. 3509.05.
19 Damschroder Declaration, ¶ 17 (Ex. 1); R.C. 3509.05.
20 Damschroder Declaration, ¶ 17 (Ex. 1); R.C. 3509.05.
21 Trende Report, ¶ 167 (Ex. 10).
22 Id. at ¶ 52 (Ex. 10).
25. In New York, Michigan, New Jersey, Missouri, Pennsylvania, and Virginia – and in 11 other states – voting is available only on Election Day, Tuesday, November 4.\(^{23}\)

26. No state with an African-American population share equal to or larger than Ohio’s offers more EIP voting days than Ohio.\(^{24}\)

27. The median voting jurisdiction in America (the 50 states and Washington, D.C.) consists of an early voting period of between 12 and 13 days.\(^{25}\)

28. The median voting jurisdiction in America (the 50 states and Washington, D.C.) consists of 11 actual days of early voting.\(^{26}\)

29. Ohio will provide 22 EIP voting days for the 2014 mid-term general election and a total of 188 early in-person voting hours (in addition to the 13 voting hours available on Election Day).\(^{27}\)

30. In addition to the 17 jurisdictions that offer no EIP voting days, another 11 jurisdictions – Montana, Oklahoma, Utah, Wisconsin, North Dakota, Idaho, Georgia, Arizona, Maine, Wyoming, and Vermont – do not offer any EIP voting on the weekends, either by statute, statewide regulation, or county regulation.\(^{28}\)

31. In addition to Ohio, only eight states (Maryland, Florida, Texas, Nevada, Alaska, Illinois, Indiana, and Iowa) offer early voting on any Sunday.\(^{29}\)

\(^{23}\) Id. at ¶ 41 (Ex. 10).
\(^{24}\) Id. at ¶¶ 55-56 (Ex. 10).
\(^{25}\) Id. at ¶ 34 (Ex. 10).
\(^{26}\) Id. at ¶ 49 (Ex. 10).
\(^{27}\) Id. at ¶ 41 (Ex. 10); Directive 2014-17 (Ex. 9).
\(^{28}\) Trende Report, ¶ 52 (Ex. 10).
\(^{29}\) Id. at ¶ 54 (Ex. 10).
32. In addition to Ohio, thirty-five jurisdictions do not offer Election Day registration (registration and voting on Election Day) or same-day registration for all offices.\textsuperscript{30}

33. Much of the increase in African American participation in Ohio elections has been the “function of exogenous forces converging upon the state” and a failure to consider these exogenous factors “hopelessly complicates” any attempt to compare Ohio’s election laws with minority turn-out.\textsuperscript{31} Political parties have made Ohio the center of electioneering efforts.\textsuperscript{32} In 2008 and 2012, the Obama campaign invested heavily in Ohio, both in advertisements and in on-the-ground mobilization efforts.\textsuperscript{33} In 2008, “Obama’s decision to establish hundreds of county-level offices helped to boost his vote share by almost one point overall and by more than three points within some states.”\textsuperscript{34} These mobilization efforts specifically targeted African Americans, among other groups, who cast 97% of their ballots for the President in 2008 and 96% of their ballots for the President in 2012.\textsuperscript{35}

34. Plaintiffs have presented no evidence that mobilization efforts similar to 2008 and 2012 are underway for the 2014 mid-term election.

35. Factors particular to each election influence voting and voting patterns. The 2008 and 2012 elections were historic elections.\textsuperscript{36} In addition, there are significant differences

\textsuperscript{30} Id. at ¶ 68 (Ex. 10).
\textsuperscript{31} Id. at ¶¶ 70-73 (Ex. 10).
\textsuperscript{32} Id. at ¶ 98 (Ex. 10).
\textsuperscript{33} Id. at ¶ 103-04 (Ex. 10).
\textsuperscript{35} Trende Report, ¶ 112 (Ex. 10).
\textsuperscript{36} Id. at ¶ 118 (Ex. 10).
between mid-term elections, such as will occur this upcoming Fall, and presidential-year elections, such as the 2008 and 2012 elections.37

**Dr. Nolan McCarty**

36. On July 14, 2014, Defendants engaged Nolan McCarty, Ph.D., as an expert. Dr. McCarty is the Susan Dod Brown Professor of Politics and Public Affairs and the chair of the Politics Department at Princeton University. He earned his Ph.D. in political economy at Carnegie Mellon University. He has published widely on topics related to legislative and electoral politics, especially the effects of electoral rules on legislative partisanship and polarization. His work utilizes sophisticated quantitative methods and mathematical models. He is the co-author of a PhD-level textbook on the application of mathematical models in political science. He is the co-editor-in-chief of the Quarterly Journal of Political Science, a journal that specializes in quantitative and analytical political science.38

37. Dr. McCarty states as follows regarding EIP voting:

- Contrary to popular assumptions, EIP voting reduces aggregate voter turn-out.39
- Reducing the number of EIP voting days is unlikely to have any effect on the size or composition of the electorate.40
- Reducing the number of EIP voting days is unlikely to have any effect on the turnout of African American voters.41

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37 Roger Larocca and John S. Klemanski, U.S. State Election reform and Turnout in Presidential Elections, State Politics & Policy Quarterly 2011 11:76 p. 97 n.1 (“In midterm elections, the highest office on the ballot may be a governor, a senator, or neither. Turnout may vary depending on the perceived stakes of the election, which will vary from state to state and midterm election to midterm election”) (Ex. 12).

38 McCarty Report, p. 1 (Ex. 13).

39 *Id.* at p. 11 (Ex. 13).

40 *Id.* at p. 12 (Ex. 13).

41 *Id.* at pp. 12-15 (Ex. 13).
38. Dr. Smith’s report is flawed in a number of ways, including but not limited to the following:

- Dr. Smith’s use of five counties in 2010 is “so unrepresentative of the state in terms of several factors such as racial composition, partisanship, [and] urban density” that “inferences from the 2010 data” is not valid.42

- Dr. Smith found only “weak relationships” between EIP voting and race, “imply[ing] that many factors beyond the racial composition of the districts drives participation in voting.”43

- Dr. Smith’s report does not consider several important variables including Election Day participation by African Americans and the 2012 EIP voting rates of whites in racially mixed neighborhoods. The lack of these analyses is a significant problem and makes it difficult to infer any relationship between EIP voting and demographics.44

- Dr. Smith’s 2012 analysis excludes heterogeneous census blocks. EIP usage across various demographics in heterogeneous census blocks may be different than EIP usage in homogeneous census blocks.45

- Dr. McCarty has “strong suspicions that the method of bounds was employed incorrectly in Dr. Smith’s report” and consequently EIP voting rates may have been “mismeasured.”46

- The CPS data that Dr. Smith relied on “does not ask when during the early voting period voters cast their ballots” so “it is difficult to infer anything from this information about the impact of the recent legislative and administrative changes to early voting in Ohio.”47

- Aggregating data beyond the census block level to the county level shows that “Counties with higher black VAP tend to utilize EIP voting at lower rates on average” – the opposite conclusion that Dr. Smith presented in his report.48

42 Id. at p. 2, fn. 1 (Ex. 13).
43 Id. at pp. 4-6 (Ex. 13).
44 Id. (Ex. 13).
45 Id. at p. 7 (Ex. 13).
46 Id. at p. 8 (Ex. 13).
47 Id. at p. 9 (Ex. 13).
48 Id. at p. 5 (Ex. 13).
• Dr. Smith based his conclusions related to 2012 on analyses that excluded a large portion of the available data. 49

• Data errors exist underlying Dr. Smith’s calculations related to 2012 census blocks, including EIP votes exceeding the total number of votes, EIP votes exceeding the number of registered voters, and EIP votes exceeding the voting age population, among others. 50

• Dr. Smith’s 2010 calculations are based on a “biased sample” that excludes counties for which both the white VAP and EIP voting rates were statistically higher than those counties included in Dr. Smith’s report. 51

**Dr. Thomas Brunell**

39. Defendants’ third expert is Dr. Thomas Brunell. Dr. Brunell is a professor of Political Science at the University of Texas at Dallas. He received his Ph.D. in Political Science in 1997 from the University of California, Irvine. He is the author of dozens of articles in peer-reviewed journals including the American Political Science Review, the Journal of Politics, Legislative Studies Quarterly, Election Law Journal, among others.

40. Dr. Brunell found several issues with Dr. Smith’s report that render it unreliable. These include generalizing from very limited data and inconsistencies throughout the report. 52

41. Dr. Brunell wrote that voters will adapt to changes in early voting periods and vote on other voting days. 53

42. Dr. Brunell also concluded that African American participation in elections over the past decade has increased at a faster rate nationally than in Ohio, making it “hard to attribute

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49  McCarty Rebuttal, p. 4 (Ex. 14).
50  Id. at pp. 14-15 (Ex. 14).
51  Id. at p. 6 (Ex. 14).  See also Affidavit of Clark H. Bensen (discussing difficulties obtaining usable data related to Dr. Smith’s report) (Ex. 15).
52  Brunell Report, pp.5-6 (Ex. 16).
53  Id. at p. 5 (Ex. 16).
high black turnout in Ohio to early in-person voting or same day registration.  

Drawing conclusions by comparing mid-term and presidential elections is not a reliable methodology.  

**Daniel A. Smith**

43. Plaintiffs commenced this litigation on May 1, 2014. They engaged Dr. Smith to work on this matter in January of 2014 and he began working on his initial report in late January or February 2014.  

44. Dr. Smith’s initial report is dated June 27, 2014, Plaintiffs produced it to the Defendants as an attachment to Plaintiffs’ June 30, 2014 filing seeking a preliminary injunction. Plaintiffs produced Dr. Smith’s second report on Wednesday, July 30, 2014 at 11:18 PM. Dr. Smith’s deposition occurred on August 1, 2014 and was scheduled before Defendants received or knew about Dr. Smith’s second report.

45. Dr. Smith’s first report purports to show information about EIP voting in Ohio for 2010 and 2012, with a brief discussion of 2008. Dr. Smith’s first report was drafted without consideration of Directive 2014-17 and therefore its calculations are based on the assumption that the Saturday, Sunday, and Monday before Election Day are not available as EIP voting days. In his second report, Dr. Smith purports to re-do certain charts from his first report “restoring EIP votes cast on the final Sunday and Monday of early voting.”

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54 Id. at p. 8 (Ex. 16).
55 Brunell Rebuttal, pp. 1-2 (Ex. 17).
56 Smith Depo, p. 8:11-19 (Ex. A).
57 Expert Rebuttal Report of Daniel Smith (Ex. 3-C).
58 See Smith Report, p. 8 (Ex. 3-B).
59 See Smith Rebuttal Report, p. 12 (Ex. 3-C).
46. At his deposition, Dr. Smith agreed there is a “possibility” that errors in underlying data can result in errors in calculations based on that data.\textsuperscript{60} He also agreed that a researcher should be objective and not pick and choose data to support a pre-determined conclusion.\textsuperscript{61}

47. With regard to 2010, Dr. Smith purports to show the EIP absentee voting rates for each EIP voting day for whites and African Americans, limited to homogeneous census blocks in five of Ohio’s 88 counties (Cuyahoga, Franklin, Hamilton, Montgomery, and Summit).\textsuperscript{62} The five counties that Dr. Smith chose have large populations of African Americans.\textsuperscript{63} Dr. Smith stated that he used only five counties as “a matter of expediency as well as the probative value.”\textsuperscript{64} He stated that he did not attempt to obtain 2010 data from all of the other 83 counties and could not recall from how many of those 83 he attempted to obtain data.\textsuperscript{65}

48. Homogeneous census blocks, as Dr. Smith uses the term in his reports, consists of US Census Blocks having 100\% African American or 100\% white populations. Heterogeneous census blocks, in contrast, do not have 100\% African American or 100\% white populations.\textsuperscript{66}

49. Dr. Smith testified that he “would not be surprised that there would [have] be[en] a GOTV [“get out the vote”] effort” in 2010 “by a major political party to target” the African American voters in those five counties “to come out to vote using one form or another.”\textsuperscript{67}

\textsuperscript{60} Smith Depo. p. 18:3-19 (Ex. 3).
\textsuperscript{61} Id. at p. 23:10-16 (Ex. 3).
\textsuperscript{62} See Smith Report, Figure 9, p. 25 (Ex. 3-B).
\textsuperscript{63} See Smith Depo., p. 32:6-19 (Ex. 3).
\textsuperscript{64} Id. at p. 25:15-18 (Ex. 3).
\textsuperscript{65} Id. at pp. 28:12-30:20 (Ex. 3).
\textsuperscript{66} Id. at pp. 14:19-16:14(Ex. 3).
\textsuperscript{67} Id. at p. 33:18-22 (Ex. 3).
50. Dr. Smith stated that his conclusions about the 2010 election (which are based on homogeneous census blocks in five counties) are not a “full analysis” of Ohio’s 88 counties and conclusions should not be “extrapolate[d] from these five counties to say that they are representative of all 88 counties with respect to the white EIP voting rate.” With regard to the data from the homogeneous census blocks in the five counties, both related to white and African American voters, Dr. Smith testified “I have never said that they are representative of the rest of the state.” He stated that in “no way have I drawn a conclusion that” data from homogeneous census blocks within Cuyahoga, Franklin, Hamilton, Montgomery, and Summit counties “are somehow representative of all 88 counties….”

51. Dr. Smith testified that he did not know whether the five counties that he considered for his 2010 calculations differ from the rest of the state in terms of per capita income, education, employment, and public transportation, among other issues. He testified, “I do not know of any differences between those five counties, much less the other 83 counties. That’s beyond the scope of my report.”

52. Dr. Smith testified that using different counties as his data set could have generated different results. For example, he testified that had he included in his calculations a sixth county that has a mostly white population and a high EIP voting rate that this would “have an increasing effect on that lighter colored dots on the bottom line [i.e., the line representing the

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68 Id. at pp. 206:11-207:11 (Ex. 3).
69 Id. at p. 50:4-8 (Ex. 3).
70 Id. at p. 193:4-8 (emphasis added) (Ex. 3).
71 Id. at pp. 202:22-203:4 (Ex. 3). See also Id. at p. 167:13-15 (Ex. 3) (“I would give great reservation to extrapolating findings from a non-representative sample.”); Id. at p. 169:12-14 (Ex. 3) (discussing data generally, Dr. Smith believes that “generalizing” from “cherry picked data” is “probably not a good thing”).
72 Id. at pp. 194:19-195:8 (Ex. 3).
73 Id. at p. 195:12-15 (Ex. 3).
white EIP voting rate].”  

As an example of a county not included in Dr. Smith’s 2010 calculations, Wood County has a white population of approximately 93.6% and an African American population of 2.7% according to 2013 census data. Based on at least one week of data, Wood County appears likely to have had a significant number of EIP votes cast during the 2010 election. Sean Trende, one of Defendants’ experts, ran calculations for 2010 using data obtained from all of Ohio’s 88 counties and Mr. Trende found no statistically significant difference between the EIP voting rates of African Americans and whites.

53. Dr. Smith testified that he did not conclude that African American and white EIP voting rates are identical across Ohio’s 88 counties.

54. On Dr. Smith’s Figure 9, which purports to depict the daily EIP absentee voting rate for homogeneous African American census blocks within the five counties, the highest days of African American EIP voting within those census blocks occur on the final seven days before Election Day. All of those seven days are EIP voting days under Directive 2014-17 and all seven will be EIP voting days this upcoming Fall in the 2014 midterm election.

55. In contrast, according to Dr. Smith, the prior four Sundays, October 3, 10, 17, and 24, are “among the lower rates for” African American EIP voting within those census blocks. In fact, according to Dr. Smith’s Figure 9, all of the Saturdays and Sundays that would not have been EIP voting days under Directive 2014-17 (October 2, 3, 9, 10, 16, 17, and 24, 2010) rank

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74 Id. at pp. 36:25-37:15 (Ex. 3).
75 http://quickfacts.census.gov/qfd/states/39/39173.html
76 Doc. 53-2, Exhibit 51, Plaintiffs’ Reply Brief, PAGE ID # 1549.
77 See Trende Report, ¶ 7 (Ex. 10).
78 Smith Depo., p. 50:9-18 (Ex. 3).
79 Smith Report, Figure 9, p. 25, (Ex. 3-C); Smith Depo., pp. 59:16-62:5 (Ex. 3).
80 Id. at pp. 62:19-63:3, 63:15-16 (Ex. 3).
among the days with the lowest African American EIP voting.\textsuperscript{81} Among all votes cast by
African Americans in the five counties, these seven days represent very small rates of voting.
For each of the seven days, the African American votes from homogeneous census blocks in the
five counties measured against the total African American votes in those counties was less than
0.1 percent per day.\textsuperscript{82}

56. Dr. Smith’s illustration of EIP voting in 2010 broken down by day includes
significant errors. For example, Dr. Smith’s chart shows an African American EIP rate of
greater than zero on October 11, 2010, even though that day was a Holiday and there was no EIP
voting.\textsuperscript{83} Dr. Smith knew about this problem when he wrote his report and did not include a
disclaimer that EIP votes should not appear on October 11, 2010.\textsuperscript{84} At his deposition, Dr. Smith
acknowledged the errors related to October 11 — “The data that I received from these five
counties clearly has some evidence that votes were tabulated as early in-person votes on this day
in question.”\textsuperscript{85}

57. Dr. Smith’s illustration purporting to show daily EIP voting for the 2012 election
likewise includes significant errors. On multiple days where there was no EIP voting, Dr. Smith
recorded an African American EIP voting rate above zero. These days included October 13,
2012, October 14, 2012, October 20, 2012, and October 27, 2012.\textsuperscript{86} When asked at his

\textsuperscript{81} Id. at Ex. 9 (Ex. 3-I).
\textsuperscript{82} Id. at p. 73:6-17 (Ex. 3).
\textsuperscript{83} Id. at pp. 73:24-74:17 (Ex. 3).
\textsuperscript{84} Id. at pp. 74:18-79:12 (Ex. 3); See also infra Damschroder Declaration, ¶¶ 7-8 (Ex. 1).
\textsuperscript{85} Smith Depo., p. 79:9-12 (Ex. 3).
\textsuperscript{86} Id. at pp. 84:21-85:5, 87:12-19, 278:19-281:13 (Ex. 3).
deposition whether the data underlying other points on the charts might be erroneous, Dr. Smith responded, “If you say it’s raining outside, perhaps it’s raining outside . . . .”87

58. Dr. Smith agreed that nowhere in his reports does he conclude that voters will vote in upcoming elections on the same day and at the same time when they voted in a past election.88

59. Dr. Smith (and Plaintiffs) did not present any evidence related to the time of day when individuals vote.89

60. Dr. Smith testified that turnout in 2014 will be significantly lower than in the 2012 presidential election. He testified, “in the 2014 general election, I will eat my hat if turnout is higher in the mid-term election in Ohio in 2014 compared to 2012.”90 The Center for the Study of the American Electorate released a statement this year predicting that the 2014 election is “likely to witness the greatest number of states setting records for low voter turnout.”91 In the same paper, the Center stated, “Both no-excuse absentee voting and mail voting have been shown in all elections, save ones that are very local, to hurt turnout.”92 Evidence of low early voting in Ohio is beginning to materialize. By way of example, on the weekend before an August special election in Cuyahoga County, seven people voted early on Saturday and not a single person voted early on Sunday.93

87 Id. at pp. 91:15-92:18 (Ex. 3).
88 Id. at pp. 110:24-111:15 (Ex. 3).
89 Id. at pp. 130:21-131:2 (Ex. 3).
90 Id. at p. 133:16-19 (Ex. 3).
91 Id. at Ex. 16, p. 1, 6 (Ex. 3).
92 Id. at Ex. 16, p. 6 (Ex. 3).
93 See Pat McDonald Twitter Post dated August 3, 2014 (Ex. 18).
61. Plaintiffs (and Dr. Smith) did not present any evidence that the 2014 election will have similar demographic and overall voter participation as past elections. The 2014 mid-term election is especially different than 2008 and 2012, which were years with presidential elections including an historic candidacy.

62. Dr. Smith testified that there are “many factors,” and “[c]ertainly partisanship” is one of them, that are “important in terms of why people turn out to vote and vote the way they do.” He has written that in at least the 2008 presidential election there was an “early voting mobilization effort[] by the Obama campaign and their allies which overtly targeted African Americans.” He wrote that the 2008 election was an “historical one” and voting rates among early voters could have been “anomalous.”

63. Scholarly literature suggests that early voting usage is not necessarily consistent among classifications over time. For example, commenting on the 1994 Texas gubernatorial election, Dr. Robert Stein of Rice University wrote “I fail to detect any significant partisan advantage among early voters. Early voters were equally likely to be Republicans and Democrats and supporters of the candidates of both parties.” In 2008, Professor Paul Gronke wrote “we have individual evidence that early voters tend to be from higher socioeconomic categories and face longer commutes” and “rates of early voting are a consequence of context, campaigns, and individuals.” In 2012, Dr. Smith wrote, “It is important to acknowledge

94 Smith Depo., p. 110:14-17 (Ex. 3).
95 Id. at Ex. 13, p. 341 (Ex. 3).
96 Id. at Ex. 13, p. 346 (Ex. 3).
97 Id. at Ex. 14, p. 67 (Ex. 3).
several caveats pertaining to our findings. First, our study analyzes EIP voting in a single
election…”99

64. Dr. Smith’s report does not take into account differences in voting hours that
existed among the BOEs in 2010.100

65. Dr. Smith’s report does not discuss the number of African Americans who utilize
no-excuse mail-in voting, the number of whites who use no-excuse mail-in voting, the effect of
no-excuse absentee opportunities on voter turnout, or whether individuals will vote using this
method in 2014 or the future.101 Dr. Smith was unaware that the Secretary of State will be
mailing applications for absentee ballots to nearly all eligible voters prior to the 2014 election
(“That is news to me”) and did not include any analysis of the affect this will have on voting.102

Professor Roscigno

66. Plaintiffs proffer Professor Vincent Roscigno as another purported expert.
Professor Roscigno is a sociologist with no significant experience in election matters.103
Professor Roscigno’s knowledge of Ohio’s election laws came from reading the newspaper.104
He stated that “It’s certainly possible” some people could view his report’s description of
changes in Ohio’s voting laws as something other than objective.105

67. Professor Roscigno purported to opine on effects of changes in Ohio’s early
voting laws on African Americans. However, Professor Roscigno testified that he did not

99 Smith Depo., Ex. 13, p. 346 (Ex. 3).
100 Id. at pp. 145:25-146:5, 146:23-147:5 (Ex. 3).
101 Id. at pp. 271:21-274:17 (Ex. 3).
102 Id. at pp. 275:22-277:21 (Ex. 3).
104 Id. at pp. 45:2-49:9 (Ex. 2).
105 Id. at p. 52:4-25 (Ex. 2).
understand Ohio’s election laws and that his conclusions did not take into consideration all of the voting opportunities available to Ohioans.

68. By way of example, Professor Roscigno incorrectly assumed for purposes of his report that there are no evening hours on Election Day.\textsuperscript{106} He did not take into consideration the additional days added to EIP absentee voting by Directive 2014-17.\textsuperscript{107} He did testify, however, that Directive 2014-17’s two Saturdays and one Sunday of voting “expanded” access to voting, that “there is more opportunity now to vote” because of them, and these additional days could weaken his conclusions.\textsuperscript{108}

69. Professor Roscigno testified that the availability of no-excuse voting by mail (which he did not consider in his Report) “increase[s]” access to the political process for African Americans.\textsuperscript{109} He testified that his report did not consider whether the Secretary of State would mail absentee ballot applications to registered voters in 2014 but testified that doing so would “expand” voting opportunities.\textsuperscript{110}

70. After learning about these additional voting opportunities at his deposition, Professor Roscigno testified that Ohio is a State where access to voting is virtually unlimited in terms of days and hours:

Q. Given that a voter can drop off a mail-in absentee ballot in a postal box at any time of the day in Ohio, isn’t access to voting in Ohio really unlimited in terms of days and hours?

\textsuperscript{106} Id. at pp. 44:19-45:1 (Ex. 2); Cf. Damschroder Declaration, ¶ 17 (Ex. 1) (“For all voters, an absentee ballot will be counted so long as it is delivered in person to the board of elections by 7:30 pm on Election Day.”).

\textsuperscript{107} Roscigno Depo., pp. 45:2-46:2 (Ex. 2).

\textsuperscript{108} Id. at pp. 54:9-59:5 (Ex. 2).

\textsuperscript{109} Id. at pp. 61:18-63:2 (Ex. 2).

\textsuperscript{110} Id. at p. 48:5-13 (Ex. 2).
A. Yes.\textsuperscript{111}

71. Professor Roscigno testified that he did not consider whether national trends and campaign spending could have contributed to African American voting patterns in recent elections.\textsuperscript{112}

72. Professor Roscigno testified that he was not opining whether the Senate Factors actually apply in this case, he did not consider all of the Senate Factors in his report, and he testified that a state can have a legitimate interest in setting uniform pre-election voting hours.\textsuperscript{113}

\textbf{Conclusion}

73. Repeatedly throughout their Preliminary Injunction Reply brief, Plaintiffs erroneously tell the Court that Defendants “do not dispute” various propositions and that numerous issues are “undisputed.” This is misleading. Defendants dispute everything in Plaintiffs’ briefing and proffered reports, either substantively or otherwise because Plaintiffs have failed to introduce evidence or otherwise meet their burden. Moreover, Defendants dispute the opinions of Drs. Gronke and Burden. Defendants have not had sufficient time to counter these declarations, which Defendants received only a few days ago. The only facts that are uncontested facts by Defendants are contained in the Parties’ Joint Stipulation of Uncontested Facts.

\textsuperscript{111} Id. at p. 78:20-25 (Ex. 2).
\textsuperscript{112} Id. at pp. 74:9-77:24 (Ex. 2).
\textsuperscript{113} Id. at pp. 19:20-24, 32:1-3, 80:7-16, 82:5-13 (Ex. 2).
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court,  
Southern District of Ohio, on August 7, 2014, and served upon all parties of record via the  
court’s electronic filing system.

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