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

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.	:	Case No. 2:14-cv-00404
Plaintiffs,	:	Judge Peter C. Economus
v.	:	Magistrate Judge King
JON HUSTED, et al.	:	
Defendants.	:	

MEMORANDUM OF PROPOSED INTERVENOR-DEFENDANT THE OHIO GENERAL ASSEMBLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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SUMMARY OF THE ARGUMENT

There is no constitutional right to vote by absentee ballot, let alone a right to vote by absentee ballot early, in person, on specified days and hours. Likewise, there is no constitutional right to register and vote on the same day. Rather, the United States Constitution and Section 2 of the Voting Right Act ("VRA") provide for an equal *opportunity* to vote in the same manner as others. Senate Bill 238 ("SB 238"), which moved the beginning of early in-person ("EIP") absentee voting to the first day after the close of voter registration, does not deny any voter an equal opportunity to vote. Pursuant to SB 238, every Ohio citizen will be provided an equal opportunity to participate in the electoral process, including an equal opportunity to participate in EIP absentee voting. The changes enacted by SB 238 to Ohio's early voting laws have been previously proposed or supported by both Republican and Democratic legislators, and supported by both Republican and Democratic Secretaries of State and local election officials.

Plaintiffs' alleged statistical evidence that African-Americans may have participated in EIP absentee voting at greater rates in the 2010 and 2012 elections than other voters is not relevant to this Court's determination on the questions of law related to SB 238. Merely because African-Americans *might* have participated at a higher frequency in EIP absentee voting for the 2010 and 2012 elections does not mean that African-Americans will not have an equal *opportunity* to participate in the electoral process if EIP absentee voting begins the first day after the close of registration in Ohio. The proper legal analysis is not the maximization or retrogression arguments advocated by Plaintiffs, but equality. Plaintiffs incorrectly argue that any showing of disparate usages of different voting methods by African-American and white voters can be transformed into a violation of the Equal Protection Clause or Section 2 of the VRA.

Even if this Court were to accept Plaintiffs' legal analysis, however, they still have failed to provide factual evidence to support it. First, Plaintiffs have failed to prove that African-Americans used the first week of EIP absentee voting at a significantly higher rate than white voters in Ohio. Second, even if African-Americans participated at higher rates in EIP absentee voting statewide than white voters during the entire early voting period, Plaintiffs have failed to provide any statistical evidence of a causal relationship between African-American participation rates and the length of EIP absentee voting.

The clear consensus of political science research is that EIP absentee voting does not increase voter turnout. Simply stated, there is nothing in the statistical records of votes cast in Ohio or across the nation on which this Court can reasonably conclude that SB 238 will reduce African-American turnout. Plaintiffs are not entitled to the extraordinary remedy of having this Court overturn reasonable election laws designed to protect the integrity and efficiency of Ohio's electoral process. The General Assembly has legitimate interests in deterring voter fraud, allowing boards of elections sufficient time to verify voters' identities, easing the administrative and financial burdens on local boards of elections, and cutting down on wasteful, early campaign spending. Theses interests greatly outweigh any of the unsubstantiated burdens Plaintiffs claim they will suffer by amending the start of Ohio's early voting period in SB 238.

FACTUAL BACKGROUND

A. Summary on the Use of Early Voting in Ohio.

Even with the modifications to Ohio's early voting laws challenged in this litigation, Ohio has one of the most expansive and permissive systems of early voting in the country. (Expert Report of Sean P. Trende ("Trende Rep.") at ¶ 167, attached as Ex. A). Indeed, 17 states do not allow any EIP absentee voting, and another 11 do not have any EIP absentee voting on

weekends. (*Id*. at ¶ 52). Only 11 states and the District of Columbia allow for any same-day registration. (*Id*. at ¶ 67). Thus, even following the changes challenged in this litigation, Ohio still has the 9th longest early voting period and the 9th largest total number of early voting days in the country. (*Id*. at ¶ 7, Figures 1 & 2). Additionally, it is one of the few states that allow voting on any Sunday. (*Id*.).

Despite such an expansive system, EIP absentee voting, and in particular, EIP absentee voting during the first week of early voting, is still one of the least-used methods of voting by Ohio voters. According to Plaintiffs' expert, Dr. Daniel Smith, for the 2012 election, less than 11% of all the early voting ballots were cast through EIP absentee voting. (Expert Report of Dr. Daniel A. Smith ("Smith Rep.") at 6, attached as Ex. 1 to Declaration of Freda J. Levenson ("Levenson Decl.") filed with Pls' Mot. for P.I.). Dr. Smith also estimates that it was only 9% for the 2008 election. (*Id*. at 6-7). More importantly, the majority of EIP absentee votes were cast towards the end of the early voting period, during days in which early voting has already been restored, not during the first week. According to Smith, only 14.8% of the EIP absentee votes (or 1.6% of the total votes cast) were cast during the first week of early voting in the 2012 election. (*Id*. at 8). Smith's analysis of certain select counties reveals that only 5.5% of voters both registered to vote during 2012's Golden Week also cast an EIP absentee ballot the same day they registered. (*Id*. at 10).

B. Introduction of SB 238 by the Ohio General Assembly.

In response to concerns with both the administrative burdens and the potential for voter fraud brought about by Ohio's early voting system, on November 13, 2013, the Ohio Senate introduced SB 238 which established that EIP absentee voting begins on the first day after the close of voter registration before the election. S.B. 238, 130th General Assembly (2013). By

moving the start of early voting until after the close of registration, SB 238 eliminated the week overlap where voters could both register and cast their vote at the same time – often referred to as "Golden Week." Following the passage of SB 238, Ohio's early voting period lasts 28 or 29 days depending on the close of voter registration – still one of the longest in the country.

As discussed more fully below, this was the seventh time that either the Ohio House or the Ohio Senate voted to amend Ohio's early voting system. There were two committee hearings in the Senate and five hearings in the House Policy and Legislative Oversight Committee on SB 238, during which both the House and Senate heard testimony from various legislators, citizens, and community interest groups. (*See* Declaration of Brad Young ("Young Decl.") at Exs. 1-4, attached as Ex. B; Declaration of Vincent Keeran ("Keeran Decl.") at Exs. 1-2, attached as Ex. C). SB 238 passed the Senate on November 20, 2013. During the Senate committee process, no amendments were offered by any Democratic senators. Similarly, when the bill was voted on the Senate floor, not one amendment was offered. During the House committee process, two amendments were offered for SB 238, and one was accepted by the committee. SB 238 passed the House on February 19, 2014. That same day, the Senate concurred in the House amendments, and SB 238 was subsequently signed by the governor on February 21, 2014. Following the enactment of SB 238, on February 25, 2014, Ohio Secretary of State Jon Husted ("Secretary Husted") issued Directive 2014-06[1], which set uniform hours for all EIP absentee voting at boards of election for the May 6, 2014 Primary Election and the November 4, 2014 General Election. (Directive 2014-06, attached as Ex. 36 to Levenson Decl.).

SB 238 is consistent with the bipartisan recommendations of the Ohio Association of Election Officials' Report and Recommendation for Absentee Voting Reform ("OAEO Report").

[1] Following this Court's decision in *Obama for Am. v. Husted*, No. 2:12-cv-636, 2014 WL 2611316 (S.D. Ohio June 11, 2014) ("*OFA III*"), Secretary Husted issued a new directive, Directive 2014-17 amending the uniform hours for EIP absentee voting.

(Levenson Decl. at Ex. 33). The OAEO commissioned a bipartisan task force to explore possible ways to reform Ohio's early voting laws. (*Id*. at pg. 1). The OAEO Report recommended uniform hours for EIP absentee voting which concluded on the Sunday before the election at 5 pm for presidential elections, and on the Saturday before the election at 4 pm for gubernatorial elections. It also recommended eliminating the so-called "Golden Week." (*Id*. at p. 2-3). The OAEO felt that "bringing uniformity and certainty to these hours is paramount to avoid confusion for voters, provide certainty for elections officials in planning and budgeting, and to avoid equal protection lawsuits." (*Id*. at p. 3). Ironically, although SB 238 is consistent with the recommendations in the bipartisan OAEO Report, SB 238 is now being attacked as violating the Equal Protection Clause – the very claim the OAEO Report sought to avoid with its recommendation.

C. Prior Bipartisan Efforts to Amend Ohio's Early Voting Laws.

SB 238 is far from the first proposal to amend Ohio's early voting laws. And elimination of Golden Week, in particular, has not historically been a partisan issue. Both Democratic and Republican caucuses have advocated for changes to Ohio's early voting laws, including the elimination of Golden Week. Prior to the passage of SB 238, changes to Ohio's early voting laws, including the elimination of Golden Week, were passed on seven separate occasions by either a Democratic-controlled House, a Republican-controlled House, or a Republican-controlled Senate.

In 2008, Senate Bill 380 ("SB 380") was introduced. That bill reduced the number of days of EIP absentee voting from 35 days to 20 days for all non-military voters in Ohio. Sub. S.B. 380, 127th General Assembly (2008). The Senate committee received testimony from a representative of the OAEO supporting SB 380, including the elimination of Golden Week. (*See*

Testimony of Matthew Damschroder, Keeran Decl. at Ex. 3). Both the Senate and the House passed SB 380, but Governor Ted Strickland vetoed the bill in December 2008.

In 2009, the Ohio General Assembly tried a second time to amend Ohio's early voting system. House Bill 260 ("HB 260") and Senate Bill 8 ("SB 8") were both introduced in the General Assembly, and both eliminated Golden Week. Am. Sub. H.B. 260, 128th General Assembly (2009); Sub. S.B. 8, 128th General Assembly (2009). The first effort was HB 260, which was sponsored by two House Democrats, Representatives Dan Stewart and Tracy Heard. (*Id*.). As introduced, HB 260 would not only have eliminated Golden Week, but it would have started EIP absentee voting 21 days before the election for non-military voters, as opposed to the 28 or 29 days as enacted by SB 238. Indeed, Representatives Heard and Stewart provided sponsor testimony before the Senate Committee on State and Local Government and Veteran Affairs in support of HB 260, stating that it "standardizes the absentee voting period for both in-person absentee and traditional absentee voting to be 28 days." (Heard & Stewart Sponsor Testimony, Keeran Decl. at Ex. 4). A number of African-American legislators were co-sponsors of the bill. *See* Am. Sub. H.B. 260, 128th General Assembly (2009). On November 18, 2009, HB 260 was ultimately passed by the House Democrats along party lines at a time when the Democrats had a majority in the House, but it was not voted on by the Senate. (*Id*.).

Approximately one month later, on December 9, 2009, the Ohio Senate passed SB 8, which also would have eliminated Golden Week. Sub. S.B. 8, 128th General Assembly (2009). Michael Stinziano—then the Director of the Franklin County Board of Elections and now a Democratic member of the Ohio House of Representatives—testified on behalf of the OAEO to express the group's support for SB 8. SB 8, however, was never voted on by the House.

In 2011, the Ohio General Assembly tried yet a third time to amend Ohio's early voting system. That year, the Ohio House introduced House Bill 194 ("HB 194") and the Ohio Senate introduced Senate Bill 148 ("SB 148"). Both bills again proposed to eliminate Golden Week, and closed early voting as of 6 p.m. the Friday before the election. Am. Sub. H.B. 194, 129th General Assembly (2011); Am. Sub. S.B. No. 148, 129th General Assembly (2011). Once again, the OAEO provided testimony in support of SB 148, including the elimination of Golden Week. (Testimony of Llyn McCoy, Keeran Decl. at Ex. 5). On May 24, 2011, the Ohio Senate passed SB 148.[2] On June 29, 2011, the General Assembly passed HB 194 and it was signed into law on July 1, 2011. *Id*. Following its enactment, a referendum was put on the ballot to prevent HB 194 from going into effect.[3] Before a vote on that referendum, however, HB 194 was repealed by the Ohio General Assembly through Senate Bill 295. Sub. S.B. 295, 129th General Assembly (2012).

Additionally, during this time period, Republican and Democratic Secretaries of State (Secretary Husted and former Secretary of State Jennifer Brunner, respectively) have supported attempts to address the issues associated with Golden Week. (*See* Testimony by Secretary of State Jon Husted, Keeran Decl. at Ex. 6; Elections Enhancements for Ohio: A Report to the Governor and the General Assembly, p. 23 (April 22, 2009), available at: www.sos.state.oh.us/sos/upload/news/20090422postconferencereport.pdf (recommending EIP absentee voting to begin 20 days before Election Day).

[2] SB 148 and HB 194 were companion bills. Because HB 194 became the primary bill between the two pieces of legislation, the House did not vote on SB 148.

[3] David Eggert, *Ohio GOP votes to repeal election-law overhaul*, Columbus Dispatch, Apr. 24, 2012, available at http://www.dispatch.com/content/stories/local/2012/04/24/gop-votes-to-repeal-house-bill-194.html

As demonstrated below, the modest amendments and reductions to Ohio's early voting system, including elimination of Golden Week, are constitutional, apply equally to all voters, are based upon legitimate state interests, and they should be upheld.

LAW AND ANALYSIS

I. Plaintiffs Are Not Likely To Succeed On The Merits.

A. Plaintiffs are not likely to succeed on their Equal Protection Claim.

1. Standard of Review – Rational Basis.

Plaintiffs argue that *Anderson-Burdick*[4] scrutiny applies to their Equal Protection challenge to SB 238. *Anderson-Burdick* applies to election regulations that burden the "fundamental right to vote." *Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) ("*OFA II*"). Under *Anderson-Burdick*'s "flexible" test, when a "state election law provision imposes only 'reasonable, non-discriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788). Even under *Anderson-Burdick*, SB 238 is constitutional because it is a reasonable, non-discriminatory regulation supported by legitimate state interests.

But *Anderson-Burdick* does not apply because this case does not implicate the fundamental right to vote, and, therefore, SB 238 should be judged under rational basis scrutiny. The legislation sets a uniform number of days for EIP absentee voting, which is undeniably a form of absentee voting. The Supreme Court has held that absentee balloting, in general, does not impact the right to vote. *McDonald v. Bd. of Election Commrs. of Chicago*, 394 U.S. 802, 807-808 (1969) (affording rational basis review to Illinois statute limiting the availability of

[4] *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

absentee ballots to specific categories of electors). Regulations that do not burden the right to vote are evaluated with rational basis scrutiny, not *Anderson-Burdick* scrutiny. *Id.; see also Mixon v. Ohio*, 193 F.3d 389, 402 (6th Cir. 1999); *Biener v. Calio*, 361 F.3d 206, 214-215 (3d Cir. 2004); *Gustafson v. Ill. State Bd. of Elections*, No. 06-C-1159, 2007 WL 2892667, at *9 (N.D. Ill. Sept. 30, 2007).

The General Assembly recognizes that the majority opinion in *OFA II* applied *Anderson-Burdick* scrutiny to the EIP absentee voting regulations at issue there. In *OFA II*, the majority distinguished *McDonald*, reasoning that *McDonald* applied rational basis scrutiny because the plaintiffs there "presented no evidence to support their allegation that they were being prevented from voting," while the plaintiffs in *OFA II* had shown that a "significant number" of electors would be precluded from voting by the challenged regulations. 697 F.3d at 431.

OFA II is distinguishable from this case for two reasons. First, the plain text of SB 238 does not restrict electors' right to vote. Second, *OFA II* relied upon *McDonald*'s discussion of whether an absentee ballot law "precluded appellants from voting" so as to trigger heightened Equal Protection scrutiny. *See id.* In *McDonald* certain electors were subject to pre-trial confinement in the county jail and were unable to vote absentee. 394 U.S. at 803. The Court rejected their Equal Protection challenge due to a lack of proof that the State prevented them from voting through other means. *Id.* at 808. In a later case, also cited by *OFA II*, the Court held that a different group of pre-trial detainees *had* shown an Equal Protection violation because they demonstrated that they were unable to secure a release from jail in order to vote in person, and therefore required an absentee ballot. *OFA II*, 697 F.3d at 431 (citing *Goosby v. Osser*, 409 U.S. 512, 521-522 (1973) (finding that a claim that the State denied pre-trial detainees a right to vote was stated where the absentee ballot statute expressly forbid "persons confined in a penal

institution" from voting by absentee ballot and where the detainees' request to vote absentee, or by personal or proxy appearance at a polling station in or outside the jail, was denied).

In this case, there is no allegation that Ohio has outright barred groups of voters from exercising the franchise in a manner akin to *Goosby*, and therefore, as a matter of law, SB 238 cannot be said to "preclude" the right to vote so as to trigger *Anderson-Burdick* scrutiny. Regardless of the standard that is applied, however, Plaintiffs are not likely to succeed on their Equal Protection claim.

2. The Equal Protection Clause provides a right to participate in elections on an equal basis with other voters, not equal results or outcomes.

In this case, Plaintiffs seek a declaration that the Equal Protection Clause forbids the State of Ohio from shortening—on a uniform, statewide basis—the duration of Ohio's EIP absentee voting period, reasoning that shortening the period unconstitutionally burdens the right to vote and has a disproportionate impact on African-American and low income voters. But the Equal Protection Clause demands that voters be given an equal opportunity to vote. Because it is undisputed that SB 238 provides such an equal opportunity, Plaintiffs' claim fails.

By way of background, it is settled law that there is no fundamental right to an absentee ballot. *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 910 (S.D. Ohio Aug. 31, 2012) ("*OFA I*") (citing *McDonald*, 394 U.S. at 807). Rather, "it is only when there is no alternative vehicle for voting that the Supreme Court has found a right to an absentee ballot." *OFA II*, 697 F.3d at 439 (White, J. concurring in part and dissenting in part); *see also Goosby*, 409 U.S. at 521-522 (finding a right to an absentee ballot for pre-trial detainees who were qualified electors but were disenfranchised because state law forbade them from receiving an absentee ballot and their confinement prohibited them from voting in-person). To be sure, as a constitutional matter, Ohio

has the *option* to provide EIP absentee voting. But it is not required to do so—and, in fact, Ohio did not offer EIP absentee voting for the first 200 years of its existence. Many States *still* do not offer EIP absentee voting. (Trende Rep. at ¶ 33, Fig. 1).[5]

Therefore, adopting Plaintiffs' Equal Protection theory would require the Court to conclude that Ohio can be held to violate the Equal Protection rights of its citizens by not offering "enough" EIP absentee voting, while thee of its five neighboring states (Michigan, Kentucky, and Pennsylvania) would be held to comply with Equal Protection while offering no EIP absentee voting at all. (*Id*.). This absurd result highlights Plaintiffs' misunderstanding of the role the Equal Protection Clause plays in election law.

The Equal Protection Clause affords an equal opportunity to vote. Thus, it has been held that "a citizen has a constitutionally protected right to participate in elections **on an equal basis** with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (emphasis added). A State's adoption of nondiscriminatory, generally applicable election regulations does not offend Equal Protection simply because the regulations may inconvenience some individual voters. Elections are heavily regulated, and have been for most of the Nation's existence. As the Court observed in *Burdick*, "common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Burdick*, 504 U.S. at 433 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Rather, "[t]he Equal Protection Clause applies when a state either classifies voters in disparate ways, or places restrictions on the right to vote." *OFA II*, 697 F.3d at 428. SB 238 does

[5] Alabama, Connecticut, Delaware, Kentucky, Massachusetts, Michigan, Missouri, Mississippi, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, and Washington.

neither. As set forth more fully below, limiting the duration of optional EIP absentee voting periods (something not constitutionally required) does not burden the fundamental right to vote. In addition, SB 238 provides a uniform statewide EIP absentee voting period applicable to all voters and does *not* classify voters disparately.

In this latter respect, this case is distinguishable from *OFA*, which considered an Ohio statute and Secretary of State Directive which classified voters in disparate ways by setting different deadlines for EIP absentee voting for UOCAVA and non-UOCAVA voters. *OFA I*, 888 F. Supp. 2d at 899. In particular, UOCAVA voters had until end of business on Monday before the election, while other non-UOCAVA voters had a deadline of 6 p.m. the Friday before the election. *Id*. at 901. Moreover, it was up to each county board of election to set hours for UOCAVA voters for the final Sunday and Monday before the election. This Court held that "Plaintiffs have a constitutionally protected right to participate in the 2012 election–and all elections–on an equal basis with all Ohio voters including UOCAVA voters." *Id*. at 907. The Sixth Circuit held that this Court's decision was not clearly erroneous. *OFA II*, 697 F.3d at 431. Then, this Court on June 11, 2014, granted a permanent injunction requiring Secretary Husted to set uniform and suitable EIP absentee voting hours for the three days preceding all future elections. *Obama for Am. v. Husted*, No. 2:12-cv-636, 2014 WL 2611316 (S.D. Ohio June 11, 2014) ("*OFA III*").[6]

[6] The Court in *OFA I* referenced statistical evidence that minority and working class voters will be disproportionately affected by the changes to EIP absentee voting, and that Defendants did not dispute those studies. 888 F. Supp. 2d at 906-07. As demonstrated in more detail below, the General Assembly vigorously disputes the assertion that changes to EIP absentee voting have a disproportionate impact on minority or low income voters. The Court has before it in this case ample evidence to conclude that changes to EIP absentee voting, including elimination of Golden Week, do not have a disproportionate impact. Moreover, in *OFA I*, the Court found that Defendants' justifications for the reduction in EIP absentee voting were insufficient to justify the burdens to the Plaintiffs. *Id*. at 909-10. The General Assembly, however, provides additional justifications for the changes made by SB 238 in this case, which are addressed below.

Likewise, in *League of Women Voters of Ohio v. Brunner*, the plaintiffs brought suit alleging that Ohio's then-in-effect voting system violated the Equal Protection Clause because it allegedly suffered from "non-uniform standards, processes, and rules," "employ[ed] untrained or improperly trained personnel," and had "wholly inadequate systems." 548 F.3d 463, 466 (6th Cir. 2008). The plaintiffs argued that during the 2004 election, the county boards of elections employed different interpretations of election laws and rules with respect to voter registration, provisional balloting, disabled voter accommodation, voter identification requirements, and the time each voter had to cast a ballot and assistance to voters with machines. The plaintiffs argued that this system violated the Equal Protection Clause by affording disparate treatment to voters based solely on their county and/or precinct of residence. *League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 723, 727 (N.D. Ohio 2005). The Sixth Circuit affirmed the district court's denial of the secretary of state and governor's motion to dismiss, in part, stating that the plaintiff's allegations, if true, "could establish that Ohio's voting system deprives its citizens of the right to vote or severely burdens the exercise of that right depending on where they live in violation of the Equal Protection Clause." *League of Women Voters*, 548 F.3d at 478.

But unlike *League of Women Voters* and *OFA*, SB 238 2014-06 applies **equally** to all Ohio voters—regardless of whether the voter is African-American, Hispanic, Asian, or white, etc.; regardless of whether the voter lives in a major urban area or a rural farm town; and regardless of the voter's wealth. All voters have an equal opportunity to vote by absentee ballot early at their local county board of election using a uniform set of rules.

Plaintiffs contend that SB 238 should be struck down because it has a disparate impact on some voters by making EIP absentee voting less convenient. But disparate impact Equal Protection claims have been rejected by the Sixth Circuit and other precedent. In *OFA II*, the

court held that "the Equal Protection Clause permits states to enact neutrally applicable laws, even if the impact of those laws falls disproportionately on a subset of the population." 697 F.3d at 433 n. 6 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 207 (2008) (Scalia, J., concurring)). As a consequence, the Sixth Circuit reasoned, "if the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its 'important regulatory interests' would likely be sufficient to justify the restriction." *Id.* at 433. That is precisely what the General Assembly has done with SB 238.

Also consider Justice Scalia's concurrence in *Crawford*, cited with approval in *OFA II*. Justice Scalia rejects the disparate impact claim raised by Plaintiffs here:

> Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.

553 U.S. at 207 (citation omitted).

Plaintiffs have, for all these reasons, failed to demonstrate a likelihood of success on the merits as to their Equal Protection claim (Count I), and their Motion should be denied.

3. SB 238 does not place any restrictions or burdens on the right to vote and applies equally to all voters.

Plaintiffs claim that SB 238 imposes substantial burdens on voters in violation of the Equal Protection Clause. But for constitutional purposes there are no *burdens* placed on voters by slightly reducing the availability of certain parts of a voting mechanism which were not in place for two centuries of Ohio elections. A state is not required to have early absentee voting. (Trende Rep. at ¶ 67). Indeed, if it were, 38 states' voting laws would violate the United States Constitution. If a state is not required to implement such a system, how can it violate the

Constitution by merely *reducing* the early voting period in a manner that applies equally to all voters? Such a conclusion would lead to the illogical result that states that cut back on an already expansive early voting period violates the Constitution, while states that provide for no early voting do not.

Plaintiffs argue that SB 238's elimination of Golden Week will place burdens on (1) low income voters, especially those who are homeless and have greater need to resolve pending registration issues while voting in one stop, and (2) other groups such as first-time voters, those recently released from prison, voters with disabilities, women, and the elderly. The evidentiary burden is on Plaintiffs to prove a substantial burden on the voter's fundamental right to vote. There is no statistical evidence demonstrating that individuals who voted during Golden Week will not otherwise vote EIP at one of the other available days and times during the 28-day period of early voting, or through another available method such as by mail. Indeed, statistics from Franklin County demonstrate that a voter's selection of one method of voting during a particular election year is not indicative that the same elector will use the same method for future elections. (Declaration of Matthew Damschroder ("Damschroder Decl.") at ¶ 39, attached as Ex. D). Based upon data analyzed by the Franklin County Board of Elections, of the 8,534 people who voted EIP during Golden Week in 2008, only 259 (or 3.35%) voted EIP during Golden Week in 2012. (*Id*). And only 115 electors were identified as having voted during Golden Week in all three elections in 2008, 2010, and 2012. (*Id*.).

Moreover, Plaintiffs have not cited to a single case where a reduction in the time periods for voting have been held to constitute a "burden" on the right to vote in violation of the Equal Protection Clause. The single case Plaintiffs cite that does address the time of early voting, *Florida v. United States*, 885 F. Supp. 2d 299 (D.D.C. 2012), arose in the context of a

retrogression claim under Section 5 of the VRA. But for all the reasons set forth in Section B(3) *infra*, Ohio is not subject to Section 5's preclearance requirements, Plaintiffs cannot state a retrogression claim against the State of Ohio, and *Florida* is therefore inapposite.

This is noteworthy because courts have historically upheld reasonable time limitations on the exercise of the right to vote. *See, e.g., Marston v. Lewis*, 410 U.S. 679, 681 (1973) (upholding a 50-day residency requirement and observing that the deadline "reflects a state legislative judgment that the period is necessary to achieve the State's legitimate goals"); *Burns v. Fortson*, 410 U.S. 686, 687 (1973) (upholding a 50-day registration deadline); *Barilla v. Ervin*, 886 F.2d 1514, 1523 (9th Cir. 1989), overruled on other grounds, *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1774 (9th Cir. 1996) (holding that Oregon's 20-day registration cutoff was "necessary"). Those deadlines have not generally been viewed as an impermissible "burden" on the right to vote. *See, e.g., Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (upholding constitutionality of statute requiring voters to register for a primary election 30 days before the preceding general election, finding that if the petitioners' "plight can be characterized as disenfranchisement at all, it was not caused by [the law], but by their own failure to take timely steps to effect their enrollment"); *Barilla*, 886 F.2d at 1525 (finding that the disenfranchisement of voters "by their willful or negligent failure to register on time" did not constitute a severe burden on the right to vote and the registration cut-off requirement "easily passes the rational basis test"); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (holding that 7:00 pm deadline to return absentee ballots on election day was, at most, a "light imposition" on plaintiffs' right to vote that "does not disenfranchise a class of voters"). *See also Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004) (affirming dismissal of claim that Illinois violated the

equal protection rights of working mothers by not permitting them to vote absentee, despite the claim that working mothers experienced difficulty making it to the polls on election day).

The line-drawing problems associated with Plaintiffs' position are significant. Plaintiffs do not quarrel with the proposition that the State may validly provide *some* limitation on EIP absentee voting periods. They simply argue that the specific limitations chosen by the General Assembly in SB 238 violate the Equal Protection Clause because it eliminated Golden Week. There are numerous modifications that could be theorized or proposed to change Ohio's election system that would likely make voting more convenient for some Ohioans. Does the Equal Protection Clause require keeping the polls open 24 hours a day, seven days a week, simply because it would be more convenient for some voters? What of offering six or seven weeks of EIP absentee voting? Plaintiffs offer no meaningful mechanism to draw the line.

The problems associated with Plaintiffs' position go beyond mere time limitations. Having only a single location for early voting in rural counties certainly is more inconvenient or burdensome for citizens in these rural areas because of longer travel distance and the unavailability of public transportation. In urban areas, election-day polling places are often within walking distance for many residents and public transportation is more readily available. Certainly, it could be argued that Ohio rural citizens are inconvenienced or "burdened" by the lack of more EIP absentee voting locations. Shall future plaintiffs tell Ohio how many additional polling places should be placed in the rural counties so that transportation problems do not burden rural citizens' voting rights?

A substantial burden on voters in violation of the Equal Protection Clause is not created simply when one system or process is more convenient to a group of voters. Any other analysis would be an endless replacement of constitutionally mandated legislative decision-making in our

election process with judicial micro-management whenever changes in technology, demography and residency patterns in Ohio might make a different system more convenient for a group of citizens.

4. The State had valid interests in enacting SB 238.

Ohio has strong, valid interests supporting the reasonable modifications to its voting procedures found in SB 238, including deterring any potential voter fraud, allowing boards of elections sufficient time to verify voters' identities and addresses to provide them with the correct ballot for the correct precinct, easing the administrative and financial burdens on local boards of elections, and cutting down on wasteful, early campaign spending.

First, the State of Ohio, including the General Assembly, has an exceedingly strong interest in upholding the integrity of its elections by preventing any potential voter fraud--even the appearance of voter fraud may be sufficient. *See, e.g.*, *Crawford*, 553 U.S. at 196 (Stevens, J.) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("A State indisputably has a compelling interest in preserving the integrity of its election process.") (citation omitted).

Those interests are furthered by laws that seek to ensure that those casting votes are actually eligible to vote in Ohio. Indeed, in November 1977, the citizens of Ohio voted overwhelmingly to amend the Ohio Constitution, effectively banning Election Day registration. Ohio Constitution § 5.01 (requiring Ohio voters to be "registered to vote for thirty days" in advance of an election). Ohioans approved this amendment to Article V, Section 1 of the Ohio Constitution in 1977 in response to legislation that the General Assembly passed earlier that year that expressly *allowed* Election Day Registration. See Am. Sub. S.B. 125, 112th General

Assembly (1977). Subsequently, the General Assembly effectuated the will of Ohioans by enacting legislation the following year in 1978 that established a 30 day registration period Sub. H.B. 1209, 112th General Assembly (1978).

Senator Frank LaRose, who sponsored SB 238, cited the specter of voter fraud as a key motivating factor behind SB 238 in testimony before the Senate State Government Oversight and Reform Committee:

> Same day registration and voting has created a situation where boards of elections do not have adequate time to properly verify a registration application. . . . Maintaining the current number of absentee voting days at thirty-five days, overlapping with the Ohio Constitution's requirement that voters must register thirty days before an election, perpetuates an election system that is susceptible to voter fraud and undermines citizens' confidence in this crucial aspect of our democratic process.

(*See* LaRose Sponsor Testimony, Keeran Decl. at Ex. 2, pp. 1-2). Aaron Ockerman, Executive Director of the OAEO, echoed this concern during Senate committee deliberations of SB 238, noting that same-day registration hampered election workers' ability to verify whether an individual had validly registered before casting a ballot:

> Ohio has a registration system and a registration deadline for very clear purposes, namely so that we can confirm that a voter is who they say they are before they cast a ballot. The overlap between the close of registration and the beginning of early in-person absentee voting places this system of checks and balances in jeopardy. I have had first-hand [*sic*] conversations with election officials who have had votes counted by people who fraudulently registered during this period, because the election officials could not confirm their registration status before Election Day. Only after their ballot was counted did they discover that the registration was fraudulent, but by then it was too late to do anything about it.

(Ockerman Testimony, Keeran Decl. at Ex. 1, p. 3). As another elections official testified in support of SB 238, the "current process sets our system up for circumstances in which an undeliverable acknowledgment card could get returned to us after the election and thus allowing an unqualified voter to cast a ballot." (Testimony of Dana Walch, Young Decl. at Ex. 2, p. 2).

Closing registration prior to the beginning of early voting, therefore, reduces the potential risks of voter fraud. Even if voter fraud is not as prevalent as often feared, it can occur. (*Id*. at p. 3). And, as the Supreme Court has recognized, such fraudulent conduct undermines the public's confidence in the entire electoral system and can reduce participation:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

Purcell, 549 U.S. at 4. Moreover, in the voting context, the Supreme Court has recognized that compelling government interests include not just the limiting of improper corruption, but even the mere *appearance* of impropriety. *See, e.g., McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (recognizing the governmental interest in "preventing corruption or the appearance of corruption" as a justification for campaign finance limitations). In a similar way, here, same day registration and voting raises appearance concerns, as voters may well believe—not unreasonably—that individuals may be able to submit a fraudulent ballot without poll workers having sufficient time to verify the new registrant's identity.

Second, shortening the EIP absentee voting period reduces administrative and financial burdens on the governmental and private actors who are most involved in the election process. Local county boards of election must be staffed to support early voting. The Franklin County Board of Elections, for example, has a full time staff of 42 people and hires seasonal staff of as many as 200 people. (Declaration of Dana Walch ("Walch Decl.") at ¶ 3, attached as Ex. E). They also train as many as 4,600 poll workers. (*Id*.). The budget for the upcoming 2014 General Election has already been approved, and expanding absentee voting will require additional funding because it drives up the local boards' costs. (*Id*. at ¶¶ 7-8).

Boards of elections are extremely busy in the weeks leading up to Election Day. (Damschroder Decl. at ¶ 24). In particular, they must perform the following tasks, among others:

- Process and mail any absentee ballots;
- Validate, scan, and tabulate returned absentee ballots that must be hand fed into scanners one at a time;
- Ensure that each polling location has sufficient ballots, instruction cards, registration forms, poll books, tally sheets, writing implements and other supplies;
- Ensure each polling location has sufficient provisional ballots and envelopes;
- Set up polling locations with equipment, tables, chairs, and proper signage;
- Ensure that each polling location is accessible and make any necessary improvements;
- Prepare official lists of registered voters for each precinct;
- Registering voters in person, by mail, and processing online address changes;
- Assisting voters in person, over the phone, and by email with any questions.

(Damschroder Decl. at ¶¶ 25-33; Walch Decl. at ¶ 10-12).

Mr. Ockerman, testifying in support of SB 238 and for the reduction in the early voting period, noted that the "cost of administering elections has skyrocketed" and that "reasonably shorten[ing] the period for casting absentee ballots" would allow local boards of elections to be "more efficient with our tax payer [*sic*] dollars." (Ockerman Testimony, Keeran Decl. Ex. 1, pp. 2-3). In particular, eliminating the first week of EIP absentee voting during which the fewest individuals cast EIP absentee votes would result in a significant savings of resources to the local boards of election. (*See* Testimony of Ronald Koehler, Young Decl. at Ex. 4 ("The boards of election will save 20% of the cost of extra temporary workers, since they will be working four weeks instead of five.")).

Third, elimination of the first week of the early voting period serves to help decrease the costs of political campaigns. Early voting significantly increases the cost of campaigns because it increases the amount of resources the candidates need to expend in the months prior to Election Day. Smaller campaigns with fewer resources often wait until only a few weeks before Election Day to use political advertising. Expanded EIP absentee voting imposes additional burdens on party and campaign volunteers, who are vital to our political process. More hours and days of early voting mean more hours and days for poll watchers, observers, and campaign workers to work. And while EIP absentee voting is more likely to benefit those who are willing to already absorb the costs of voting, the simple fact that campaigns do not last until Election Day can have its own set of unintended consequences. Campaigns and the media still aim substantially towards the timeframe of the actual event of Election Day. Thus, EIP absentee voting may cause certain voters to have "buyer's regret" wishing they could change their vote for a different candidate on Election Day. (Expert Report of Thomas Brunell, Ph.D ("Brunell Rep.") at 4, attached as Ex. F).

The State has legitimate justifications for the changes to Ohio's early voting laws enacted by SB 238. These numerous legitimate justifications for the changes to Ohio's early voting laws in SB 238 greatly outweigh any of the unsubstantiated burdens on African-American, or any other voters.

B. Plaintiffs are not likely to succeed on their claim for violations of Section 2 of the Voting Rights Act.

1. Section 2 requires more than a demonstration of a disparate impact. Moreover, Plaintiffs have failed to identify an objective benchmark against which to judge the current early voting system.

Section 2 of the VRA prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account or race

or color." 42 U.S.C. §1973(a). Subsection (b) provides the standard to apply when evaluating Section 2 claims:

> A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are **not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice**.

42 U.S.C. § 1973(b) (emphasis added). A plaintiff can state a Section 2 claim by showing that under the "totality of circumstances," a "certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

Plaintiffs make much of the alleged discrepancy in voter turnout along racial lines. However, a disparate impact on a minority group does not by itself establish a violation of Section 2 of the VRA. The threshold question in a Section 2 claim is whether there is a discriminatory result. *Holder v. Hall*, 512 U.S. 874, 880 (1994). The plain language of Section 2(b) speaks of *opportunity* to participate in the political process, not a mere comparative difference in how this opportunity may be used by some and ignored by others in voter turnout for minorities. Under the current system, all Ohio citizens have precisely the same hours and locations for early voting (and regular voting on Election Day) available to them. "[O]bviously, a protected class is not entitled to Section 2 relief merely because it turns out in a lower percentage than whites to vote." *Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 311 (3d Cir. 1994) (*quoting Salas v. Southwest Texas Junior College District*, 964 F.2d 1542 (5th Cir. 1992)).

Courts across the country, including the Sixth Circuit, have confirmed that a mere difference in voting outcome does not establish a claim under Section 2. *See, e.g.*, *Wesley v. Collins*, 791 F.2d 1255, 1260–61 (6th Cir.1986) ("[A] showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act."); *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) ("[A] § 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence that the challenged voting qualification causes that disparity, will be rejected.") (quoting *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)); *Johnson v. Florida*, 405 F.3d 1214, 1228 (11th Cir. 2005) ("Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect."); *Ortiz*, 28 F.3d at 312. Accordingly, Plaintiffs' reliance on an alleged disparate impact on minority groups, without more, is insufficient to establish a right to relief under Section 2.

Finally, the disparate impact that is allegedly created by SB 238 would only exist when compared to the previous voting system that included same-day registration during Golden Week. But a previous or proposed alternative system does not create a benchmark against which to judge a current system under a Section 2 analysis. *Holder*, 512 U.S. at 884 (1994) ("[W]ith some voting practices, there in fact may be no appropriate benchmark to determine if an existing voting practice is dilutive under § 2."). The fact that some other system might afford a method of voting that is preferred by minority groups does not render a current system in violation of Section 2. *Id.*

In *Holder*, the Supreme Court considered a Section 2 challenge to a government commission consisting of a sole elected member, rather than a proposed five-member commission that would permit minority groups a greater chance of electing a representative of

their choice to at least some of the five seats. *Id*. at 876–77. The court rejected the Section 2 challenge, determining that there was no objective, non-arbitrary benchmark against which to measure the number of commissioners. Why not six commissioners, or seven, or eight? "The wide range of possibilities makes the choice inherently standardless." *Id.* at 885. There was "no principled reason why [that size] should be picked . . . as the benchmark for comparison." *Id.* at 881.

Just as in *Holder*, Plaintiffs' failure to provide an objective, non-arbitrary benchmark is fatal to their Section 2 claim. This is borne out by Plaintiffs' requested relief, which does not seek a particular number of days or hours to ameliorate any alleged disparate impact. Rather, Plaintiffs seek only an order for Secretary Husted to set uniform hours that include "multiple Sundays" and an undetermined number of weekday hours. (Pls.' Mot. at 45, n. 34.) Indeed, there is no magic number of days or hours of early voting that would correct any purported disparate impact on minorities – how could there be? How much early voting is enough early voting, when the State could always establish additional early voting hours including ones where the voter can both register and cast a vote simultaneously? *See Johnson v. De Grandy*, 512 U.S. 997, 1017, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) ("Failure to maximize cannot be the measure of Section 2."). Section 2 is not "concerned with maximizing minority voting strength." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009). In other words, the purpose of Section 2 is not to maximize minority voter turnout, or electoral success, but to ensure that minorities have the same opportunities to vote for their candidates of choice as non-minorities. *Johnson*, 512 U.S. at 1016-17.

Accordingly, the mere fact that voters have fewer days available to visit an early polling location than they were previously afforded, or can no longer register and vote on the same day, cannot constitute a violation of Section 2.

2. Statistical evidence demonstrates that elimination of Golden Week and other reductions in early voting will not have a disparate impact on African-American or low-income voters.

Regardless, statistical evidence demonstrates that elimination of Golden Week and a reduction in other voting days/hours will not have a disproportionate impact on African-Americans. Despite the obvious conveniences of same-day registration and the availability of different absentee voting times and days for some individual voters, it does not come without costs to others. Plaintiffs' entire case is based upon the incorrect premise that any reduction in early voting days, including the elimination of Golden Week, will have a disproportionate impact on African-American and low income voters. Plaintiffs rely upon the conclusions of their expert, Dr. Daniel Smith, who opines that African-American voters use EIP absentee voting at higher rates than white voters, and then leap to the conclusion that a reduction in early voting will therefore have a disparate impact on African-American turnout. Plaintiffs' assertions that African-American voters use EIP absentee voting at higher rates versus white voters is likely wrong, and the assertion that a reduction in early voting will have a disparate impact on African-American turnout is clearly wrong.

a. Dr. Smith's conclusion that African-American voters use EIP absentee voting at higher rates is fatally flawed.

Dr. Smith concludes that African-Americans use EIP absentee voting at rates that exceed that of white voters based upon administrative voter files and data from 84 of 88 counties for the 2012 election, and 5 counties for the 2010 election. (Smith Rep. at 7, 10). Based upon these two sets of data, Dr. Smith concluded that African-American voters used EIP absentee voting at

higher rates than white voters for the 2010 and 2012 elections. As explained by Defendants' experts–Thomas Brunell, PhD., Nolan McCarty, Ph.D., and Sean Trende–Dr. Smith's report is limited by several problems: (1) his analysis was done assuming the last Sunday and Monday before the election would not be EIP absentee voting days, (2) he assumes that any voter who would have voted on these days will not otherwise vote on a different day, or through a different method, and (3) his data is not for the entire state, but largely limited to two elections and in some cases, just a handful of counties. (*See* Brunell Rep. at 1). Dr. Brunell also identifies flaws in Dr. Smith's use of census blocks (which are just 24 voting age persons on average) rather than precinct-level data. (*Id*. at 6). As such, he concludes that "[i]n order to make reliable generalizations Smith's study needs to be more comprehensive in scope." (*Id*. at 1).

Dr. McCarty, Chair of the Department of Politics at Princeton University, likewise finds several flaws in Dr. Smith's methodology. First, Dr. Smith uses a regression analysis to estimate the relationship between EIP absentee voting rate and percentage of African-American voting age population ("VAP") of each census block. As Dr. McCarty indicates, the relationships between early voting rates and African-American voting VAP are relatively weak. (Expert Report of Dr. Nolan McCarty ("McCarty Rep.") at 3, attached as Ex. G). "These weak relationships imply that many factors beyond the racial composition of the districts drive participation in early voting." (*Id*. at 4). Dr. McCarty also identifies numerous other reasons why EIP absentee voting rates and African-American VAP correlate, including, for example, that white voters in racially-mixed neighborhoods may be more likely to use EIP absentee voting than those in homogenous neighborhoods. (*Id*.). In addition, Dr. McCarty points to other methodological concerns such as the degree to which estimating turnout on the basis of overall

(that is early and Election Day) turnout could affect the calculations by the behavior of fellow residents on Election Day. (*Id*.).

Dr. McCarty also addresses Dr. Smith's use of census blocks as the level of analysis, summarizing that there would be a concern about the validity of the inference if the behavior of the voters in a block was affected by factors of surrounding blocks. (McCarty Rep. at 7-8). Aggregating to the precinct would have at least partially addressed this concern. (*Id*. at 5). In a similar fashion, Dr. McCarty undertakes an analysis similar to Dr. Smith's at the county level and finds that the relationship does not hold—indicating the variation in EIP absentee voting rates across blocks was **not** driven primarily by differential usage across races. (*Id*.). Next, Dr. McCarty reviews the method of bounds used by Dr. Smith as the alternative to regression. He concludes that based upon the information provided "one would not be able to say that the black EIP rate exceeds that of whites with certainty" (*Id.* at 20). In sum, Dr. McCarty concludes that "Dr. Smith's regression analysis does not provide very strong evidence of differential rates in EIP usage between black and white voters." (*Id*. at 6).

As such, Dr. Smith's report is too flawed to provide this Court with the concrete evidence that African-Americans vote EIP at a higher rate than other voters.

b. The conclusion that early voting increases turnout, and, in particular, African-American turnout, is also fatally flawed.

Regardless of whether African-American voters participate in EIP absentee voting at higher rates than white voters, the claim that early voting increases turnout, and in particular, African-American turnout, is unproven at best. In other words, Plaintiffs have not demonstrated the causal link between EIP absentee voting and African-American participation in the electoral process.

In fact, "[t]he claim that early voting enhances African-American participation does not hold up to scrutiny. African-American participation is up both in states with both early voting laws and in those without early voting laws. Despite testing the variables in almost 100 different ways, a significant, positive relationship remains elusive." (Trende Rep. at ¶ 169). As Dr. Brunell also opines: "The existing political science research in this area (the relationship between early voting days in American elections and voting participation) is clear – early voting does not increase turnout, in fact, if anything it decreases it." (Brunell Rep. at 2). Rather, early voting takes away from Election Day as a civic event with no exciting culmination, and has the effect of decreasing turnout. (*Id*. at 3-4) (citing various studies).

Dr. McCarty likewise finds that "the popular idea that early voting boosts turnout finds very little support in the academic literature. In fact, most studies find the opposite – that EIP [voting] reduces aggregate turnout." (McCarty Rep. at 11). Dr. McCarty summarizes several studies conducted using different levels of analysis and cites one based upon a large dataset of comprehensive variables that concludes that "states that allow EIP voting have a lower likelihood of voting by 3 to 4 percentage points." (*Id.*).

If the research demonstrates that EIP absentee voting does not increase turnout, the logical conclusion is that a reduction in a EIP absentee voting period will not have a disparate impact on African-American turnout even if they use EIP absentee voting at higher percentages than white voters. Dr. McCarty addresses the relationship between the reduction of early voting days by summarizing studies finding that early voters are more motivated than other potential voters, and, thus, are also more likely to adjust their desire to vote to meet the opportunities afforded them. Thus, "evidence that the reductions of EIP voting would reduce black voting participation relative to whites is non-existent." (McCarty Rep. at 15).

Indeed, analyzing the study from Florida cited by Plaintiffs in this case, Dr. McCarty concludes that "the overwhelming majority of those who cast votes on the eliminated days in 2008 simply adjusted by choosing an alternative date." (McCarty Rep. at 13). In another study cited by Dr. McCarty, it was found that shortening the EIP absentee voting window would *increase* turnout by about a percentage point. (*Id*.). "Because Ohio has maintained a much longer [EIP] window than Florida, it is reasonable to assume that similarly situated Ohio voters will have an easier time adjusting." (*Id*.). As Dr. McCarty identified, according to Dr. Smith's report, as between the 2008 and 2012 elections in Ohio, African-American voters were more likely to switch to Election Day, and, thus, the African-American share of the electorate in 2012 was actually higher than in 2008, despite the decrease in the EIP absentee voting window. (*Id*. at 14). Dr. Brunell agrees, concluding that in all likelihood nearly all voters who cast a ballot on the eliminated days and times will still cast a ballot. (Brunell Rep. at 5). As he concludes, "early voting is not the panacea for low turnout – people who are not interested in voting are not going to become interested in voting just because it is marginally easier to cast a vote." (*Id*.).

Mr. Trende likewise addresses the impact, or lack thereof, of the reduction in early voting:

> The problem with the theory that shortening early voting would adversely impact African-American turnout is that it assumes largely stagnant responses to changing incentives. Even accepting, arguendo, that African-Americans disproportionately use early voting in Ohio, there is little evidence that these voters would fail to adjust their behavior in response to new laws and regulations, and vote during the 22 days of early voting remaining (or on Election Day). Indeed, the data suggest that this is exactly what occurred in states that did not have these sorts of laws in place.

(Trende Rep. at ¶ 72.)

Even Plaintiffs' own expert report undermines their conclusion that a reduction in early voting will have a disparate impact on African-American voters. Plaintiffs describe at length the

attempted "erosion" of Ohio's early voting laws. On page 8 of their motion, they provide a chart showing the "cutbacks" that have been made to early voting in Ohio. The chart showed that that for the 2008 election, multiple Saturdays and Sundays were available, whereas for the 2012 election, only one Saturday and one Sunday were available. Under Plaintiffs' theory, one would thus expect to see a decrease in EIP absentee voting in 2012 as a result of these cutbacks. But that was not the case.

In fact, the experiences of the 2008 and 2012 elections in Ohio demonstrate the fallacy of Plaintiffs' argument that there is a correlation between early voting and high participation rates by African-American voters. As Plaintiffs' expert's report demonstrates, nearly 125,000 more people voted EIP in 2012 versus 2008 (639,000 v. 512,000), despite the fact that there was only one Saturday and one Sunday available for EIP in 2012. (Smith Rep. at 6-8). More importantly, according to Dr. Smith, nearly the same percentage of African-Americans voted EIP in 2012 as did in 2008 despite the "cutbacks" (19.55% v. 19.88%). (*Id*. at 31).

Additionally, Plaintiffs fail to consider factors other than EIP absentee voting that could have led to increased African-American turnout in recent elections. Mr. Trende's analysis points out the impact that factors outside the State of Ohio may have on early voting behavior–namely the focus and enormous commitment of resources to the battleground State of Ohio and the changing strategies of the parties. He notes that Ohio has been near the national average in the partisan split of votes for some time, especially in the past four presidential elections. (Trende Rep. at ¶ 96). "A failure to take account of these factors hopelessly complicates any attempt to conclude that the increase in minority turnout is a function of Ohio's early voting laws, or that the increased usage of early voting among African-Americans represents a revealed preference that will continue to manifest in future elections." (Trende Rep. at ¶ 74).

As Mr. Trende explains, the increases in African-American voter turnout in 2008 and 2012—and early voting, in particular—were heavily influenced by the deliberate strategies of President Obama's campaign. "It is unsurprising that participation among core Democratic groups increased, as campaign activity, such as advertising spending, has been linked to voter mobilization." (Trende Rep. at ¶ 103). "But the Obama campaign did not simply invest in advertisements. Across the country, the Obama campaign invested heavily in on-the-ground voter mobilization efforts. In 2008, it established nearly twice as many field offices as the McCain campaign." (*Id*. at ¶ 104). "Early voting in particular was a target of the Obama campaign." (*Id*. at ¶ 109). "Whether this trend will continue into the future is unknowable." (*Id*. at ¶ 113). But notwithstanding the number of competitive races in the state in 2010, the rate of early voting among African-Americans in the 2012 election was 20 percent versus only 3.3 percent in the 2010 election. (*Id*. at ¶ 117). As Dr. Brunell similarly concludes: "The 2012 election had President Obama running for reelection, so one might reasonably expect black voter turnout to be higher than average." (Brunell Rep. at 5.) As such, the increase in African-American turnout in 2008 and 2012 could be as much a result of a difference in campaign strategies, and who was running, as opposed to any amount of days of EIP absentee voting available.

A further analysis of a multi-year cross-state national regression analysis performed by Mr. Trende supports these conclusions: "it is difficult to conclude that early voting enhances African-American turnout." (Trende Rep. at ¶ 154, 157). Mr. Trende undertook the analysis for both on-year elections and off-year elections with strikingly similar results under 96 different variations. In numerous cases, the results were actually negative, "which would suggest that early voting decreases African-American turnout under those codings." (*Id*. at ¶ 155). From a

statistical perspective the claim that early voting laws increase turnout remains unproven. (*Id*. at ¶ 160).

Additionally, African-Americans in Ohio have traditionally voted at higher rates versus those in other states. (Brunell Rep. at 8). But the proportion of African-Americans voting in the 2004, 2008, and 2012 elections rose at a faster rate in the U.S. compared to Ohio. (*Id*.). "So it is hard to attribute high black turnout in Ohio to early in-person voting or same day registration." (*Id*.). In fact, the gap by which the Ohio rate was higher than the national rate decreased in 2008 and 2012 from what it was in 2004 before early voting in Ohio. (*Id*.).

Plaintiffs state that African-Americans use EIP absentee voting at higher percentages than white voters. Even if true, this alone does not demonstrate that they will be disenfranchised or disproportionately impacted by a reduction in early voting, including elimination of Golden Week. Indeed, the evidence they submitted, and the opinions of Defendants' experts undermine the notion that African-Americans will be disproportionately burdened by the challenged legislation. Reductions in EIP absentee voting in Ohio in the past did not result in a lower turnout of EIP absentee voters, or a lower percentage of African-American voting EIP. Plaintiffs submit insufficient evidence demonstrating that there is any causal relationship between EIP absentee voting and African-American turnout in the recent elections. There is no indication in the political science research or studies that it will have any such effect in the future.

3. Plaintiffs cannot convert a Section 5 retrogression claim into a Section 2 claim.

Plaintiffs' argument against the changes enacted by SB 238 is really a claim for preclearance under Section 5 of the Voting Rights Act. But Plaintiffs cannot maintain such a claim against Defendants in this case. Ohio is not and has never been covered by Section 5. Plaintiffs' emphasis is placed on the decrease in early voting days and elimination of same-day

registration during Golden Week compared to those of the most recent election cycles. This type of comparative analysis may properly form the subject of a claim under Section 5 of the VRA, which prohibits changes to election standards that have a retrogressive effect on the voting rights of minorities. *Beer v. United States*, 425 U.S. 130, 141 (1976). However, courts have "consistently understood" Section 2 and Section 5 to "combat different evils and, accordingly, to impose very different duties upon the States." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471 (1997). To begin with, Section 2 is applicable to all states, whereas Section 5 applies only to certain covered jurisdictions. *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). Ohio is not a covered jurisdiction.

Challenges to Ohio election laws are therefore limited to claims under Section 2, and "[r]etrogression is not the inquiry" in Section 2 cases. *Holder*, 512 U.S. at 884. Rather, the "essence" of a Section 2 claim is that "a certain electoral law, practice, or structure . . . cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. "Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group." *Holder*, 512 U.S. at 884 (*quoting* S.Rep. No. 97–417, p. 68, n. 224 (1982) U.S.Code Cong. & Admin.News 1982, p. 177). Accordingly, the mere fact that voters have a shortened period available to visit a polling station than they were previously afforded cannot constitute a violation of Section 2.

II. The Remaining Equitable Factors Weigh Against Injunctive Relief.

In addition to showing a likelihood of success on the merits, a party seeking a preliminary injunction must also show "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). In *OFA II*, the Sixth Circuit recognized that "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." 697 F.3d at 436 (citation omitted). As discussed above, Plaintiffs are not likely to succeed in showing that SB 238 is unconstitutional or violates the VRA. That fact, alone, is dispositive and precludes entry of a preliminary injunction. However, consideration of the remaining equitable factors also cautions against granting the excessive and improper relief sought by Plaintiffs. In this case, the speculative allegations of harm envisioned by Plaintiffs cannot overcome the *actual* harm that would occur if the Court were to prevent the State from enforcing a reasonable voting law enacted to address voter confusion, to prevent even the appearance of voter fraud, and to ease financial and administrative burdens on local election boards.

A. Plaintiffs have not shown that they are likely to suffer irreparable harm from SB 238.

A party seeking a preliminary injunction must show more than a "possibility" of irreparable harm; the party must show "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). A finding that a fundamental right is threatened leads to a presumption of irreparable harm. *See OFA II*, 697 F.3d at 436. In this case, however, Plaintiffs have failed to provide sufficient evidence showing that any fundamental voting rights are likely to be impacted by the elimination of same-day registration or the reduction of the early voting period. This is especially true for the 2014 off-year elections. Whatever the level of differential observed by Plaintiffs' expert for 2012 may be, the "relationship is extraordinarily modest" for 2010. (*See* Brunell Rep. at 7). As discussed above, *see* Section I.A.3 and I.B.2, *supra*, Plaintiffs' evidence fails to establish that decreased

availability of early voting will depress African-American voter turnout; indeed, Defendants' experts squarely contradict Plaintiffs'—and their expert's—flawed assumptions.

Even with the slight reduction in the early voting period, Ohio voters still enjoy one of the most liberal early voting regimes in the country, including a multi-week early voting period that comprises multiple Saturdays and one Sunday. (*See* Trende Rep. at ¶ 7). Indeed, as Mr. Trende points out in his expert report, ***no other state with a higher African American share of the population offers more days of early voting than Ohio***. (*Id.* at ¶ 56). And, of course, SB 238 does nothing to prevent any Ohioan from registering to vote more than thirty days prior to the election. Nor does it change the fact that:

- ***all*** Ohio voters can request and mail an absent voter's ballot without physically visiting a polling location, *see* Ohio Rev. Code §§ 3509.02, 3509.03;
- Secretary Husted, as he did in the 2012 general election, will be mailing absentee ballot applications to all active, registered Ohio voters to facilitate absentee voting by mail, (Damschroder Decl. ¶22) ;
- Ohio, as it has for more than sixty years, recognizes the afternoon of Election Day as a legal holiday and is "one of just a handful of U.S. states" that does so, *see* Ohio Rev. Code § 5.20; (Brunell Rep. at 8); and
- Ohio law guarantees employees time off to vote on Election Day without fear of reprisal from their employers. *See* Ohio Rev. Code § 3599.06.

Because ***all*** Ohioans—regardless of race, color, or socioeconomic status—plainly have considerable "alternate means of access to the ballot," *OFA II*, 697 F.3d at 431, and because Plaintiffs have ***not*** credibly demonstrated that eliminating Golden Week will reduce voter turnout, they cannot establish that enforcement of SB 238 will cause irreparable harm.

B. The balance of equities and consideration of the public interest weigh in favor of allowing Ohio to implement laws designed to reasonably regulate election administration and deter any potential voter fraud.

In evaluating the balance of equities and the public interest, it is worth remembering the important policy goals served by SB 238. First, the elimination of Golden Week was intended to combat the threat or perception of voter fraud made possible by the existence of same-day registration. (*See* Section I.A.4, *supra*). Second, the reduction in, and standardization of, early voting hours was intended to promote fairness and equality, and ease administrative and financial burdens on local election officials. *Id*.

In enacting SB 238, the General Assembly weighed these legitimate concerns against any inconvenience that voters would suffer and made reasoned policy determinations that the changes were justified. Plaintiffs, of course, seek to have this Court jettison the State's judgment and force Ohio to re-institute a longer early voting period and a Golden Week with same-day registration (which Ohio voters previously defeated soundly). Plaintiffs' desire for different voting practices, however, cannot overcome the harm to the State and to the public, at large, that would result from invalidating the State's attempts to reasonably regulate its elections and uphold the integrity of the voting process.

1. The balance of equities tips in favor of the State.

The Court must consider "whether issuance of the injunction would cause substantial harm to others." *OFA I*, 888 F. Supp. 2d at 905 (citing *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011)). The injunctive relief sought by Plaintiffs—annulling SB 238 and forcing Ohio to reinstate longer early voting periods and same-day registration—would cause substantial, irreparable harm to the State, which has a considerable interest in seeing that its laws are enforced. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers)

("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). This is particularly true in the voting context, where the state "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4; *see also Summit Cnty. Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("If the plaintiffs are not correct in their view of the law, the State will be irreparably injured in its ability to execute valid laws, which are presumed constitutional, for keeping ineligible voters from voting.").

Beyond the inherent irreparable injury that the State would suffer by having its voting laws nullified, the reinstatement of Golden Week and a longer EIP absentee voting period would impose a considerable burden on local boards, who will be forced to spend time and money in order to prepare for a week's worth of additional early-voting days and also for the added burden of individuals who are simultaneously registering and voting. (*See generally* Walch and Damschroder Decls.). These burdens are exacerbated by the fact that many boards have already made plans for the fast-approaching registration and voting seasons using the schedule established in SB 238. (Walch Decl. at ¶¶ 9). SB 238 was signed into law on February 21, 2014. Local boards have already set budgets, recruited volunteers, and planned operations under the (correct) assumption that they will be operating in a shorter early voting period and would not need to prepare for a week's worth of same-day registration and voting.

In *OFA I*, this Court issued an injunction requiring the reinstatement of voting days where the defendant had produced "***no*** definitive evidence that elections boards will be tremendously burdened" by the addition of the extra early voting days. *See* 888 F. Supp. 2d at 910 (emphasis added). Here, by contrast, the General Assembly *has* presented clear evidence of the administrative burden that local election boards will face in the event the Court forces Ohio

to re-instate Golden Week and a longer EIP absentee voting period. (*See* Damschroder Decl. at ¶¶ 24-34; Walch Decl. at ¶¶ 5-10 (noting that opening polling locations to permit EIP absentee voting on weekends and evenings "can be burdensome and costly for boards that are already operating under tight budgetary restrictions" and diverts staff resources away from other necessary tasks and that "expanding the number of days the Board is open drives up costs" and that "more hours [of early voting] means more money")). Because the injunctive relief requested by Plaintiffs would impose serious burdens on the State and local boards of elections, the Court should decline to enter the preliminary injunction.

2. Enforcement of the challenged laws furthers the public interest.

Consideration of the public interest also counsels against enjoining enforcement of SB 238. Certainly, "the public has a strong interest in exercising the fundamental political right to vote." *OFA II*, 697 F.3d at 437 (internal quotation and citation omitted). That interest, however, is tempered by the state's considerable interest in ensuring that only qualified voters cast ballots. In *OFA II*, the appellate court considered election regulations that, allegedly, reduced voting opportunities for those ***who were already qualified to vote***. Indeed, the Sixth Circuit noted the public interest in "permitting as many ***qualified voters*** to vote as possible." *Id*. (emphasis added); *see also Summit Cnty. Democratic Cent. & Executive Comm*, 388 F.3d at 551 (recognizing the "strong public interest in allowing every ***registered*** voter to vote freely") (emphasis added). This case, however, is not simply about giving additional voting opportunities to those who are indisputably qualified to vote in a given election. Rather, this case involves a law designed to ensure that voters *are* qualified *before* casting their ballot. *See* Ohio Rev. Code § 3503.01(A) (providing that one of the "qualifications of electors" is the requirement that the individual "has been registered to vote for thirty days" preceding the election); Ohio Constitution, Art. V,

Section I. Election authorities need sufficient time to know the qualifications of the voter before their ballot is commingled with others during the tabulation process.

Therefore, in this case, any public interest in maintaining same-day registration and a longer early voting period must be weighed against the considerable public interest in favor of enforcing reasonable election laws—particularly those aimed at ensuring that only those who are legally entitled to vote can register and vote the correct ballot at the correct precinct. *See Summit Cnty.*, 388 F.3d at 551 (recognizing the "strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote"). Eliminating same-day registration helps to combat the erosion of public confidence in the voting process that accompanies voter fraud, which can, itself, lead to voter cynicism and disenfranchisement. *See, e.g.*, *Purcell*, 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."). Allowing the State to enforce SB 238 advances the public interest by maintaining public confidence in Ohio's electoral process. And upholding SB 238 at this stage—just over two months before the opening of the early voting period—serves the "strong public interest in smooth and effective administration of the voting laws," *Summit Cnty.*, 388 F.3d at 551, by ensuring that local boards can carry out their early voting plans without having to scramble to accommodate a longer and more administratively burdensome early voting period.

Lastly, to the extent that the public interest favors increased voter turnout, the challenged laws should be permitted to stand, as the academic studies discussed by Defendants' experts indicate an ***inverse*** relationship between longer early voting periods and overall voter turnout. (*See, e.g.*, Brunell Decl., p. 2) ("The existing political science research in this area (the

relationship between early voting days in American elections and voting participation) is clear—***early voting does not increase turnout, in fact, if anything it decreases it***.") (Emphasis added); (McCarty Rep. at 10-11).

CONCLUSION

Since 2008, the General Assembly, including both Republican and Democratic members of the House and Senate, has on numerous occasions proposed the changes to Ohio's early voting laws enacted by SB 238–including the elimination of Golden Week. The changes garnered support from both Republican and Democratic Secretaries of State (the chief elections officer of the State of Ohio) and bipartisan election officials across the State. Prohibiting the State from enforcing SB 238 will undermine the public interest in deterring fraud, including even the appearance of voter fraud. It will impose financial and administrative burdens on local boards of elections. It will also impose additional financial burdens on political campaigns and parties for all offices and questions on the ballot.

These certain harms outweigh any inconvenience or speculative harm that Plaintiffs and their members allege they will suffer, yet fail to prove. Article I, Section 4 of the U.S. Constitution provides: "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the Legislature thereof." Plaintiffs have not provided a basis for this Court to take from Ohio's elected representatives that constitutionally granted duty. The challenged laws should be upheld.

Plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record via the Court's electronic filing system on this 23rd day of July, 2014.

/s/ Robert J. Tucker
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