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 Norah McCann King
JON HUSTED, et al.,	:	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**
Defendants.	:	

The State cannot eliminate voting opportunities that thousands of Ohioans, especially low-income voters, have relied on over the last eight years without a sufficient and legitimate justification. Yet Defendants' opposition briefs (ECF Nos. 41 ("Defs.' Br.") and 42) proffer no defense to SB 238 *at all*, thus *conceding* that preliminarily enjoining SB 238 is appropriate.[1] And their briefs only confirm that no adequate justification exists for the dramatic reduction in after-hours voting caused by the 2014 Directives.

Contrary to what Defendants would have this Court believe, this case is not about the electoral systems of other states, an abstract right to absentee voting, or academic musings about the effect that creating early voting opportunities generally has on turnout. This case is about restoring the specific early voting opportunities that have been targeted for elimination *in Ohio*,

[1] At the time Defendants filed their opposition brief, they chose not to defend SB 238 (Defs.' Br. at 1), instead relying on Proposed Defendant-Intervenor Ohio General Assembly ("OGA") to file a separate brief defending SB 238 (ECF No. 40) before this Court had even ruled on OGA's motion to intervene. Today this Court denied OGA's motion to intervene and struck OGA's brief from the docket. (ECF No. 48.) Thus, Plaintiffs need not reply to OGA's opposition brief.

namely: same-day registration and non-workday early voting opportunities (i.e., weekday evenings and multiple Sundays). The evidence shows that, *in Ohio*, tens of thousands of voters have relied on these opportunities, and that low-income voters will have difficulty adjusting to the elimination of same-day registration and the dramatic reduction of after-hours voting. The evidence shows that, *in Ohio*, due to a legacy of discrimination, African Americans use these voting opportunities at greater rates than whites. And the evidence shows that, *in Ohio*, these cutbacks are not justified. Plaintiffs' motion for a preliminary injunction should be granted.

I. DEFENDANTS DO NOT DISPUTE THE ESSENTIAL FACTS DEMONSTRATING A LIKELIHOOD OF SUCCESS

The following undisputed facts establish Plaintiffs' likelihood of success and entitlement to a preliminary injunction. *First*, Defendants do not dispute that *tens of thousands* of Ohioans have relied on the specific voting opportunities that have been eliminated by SB 238 and the 2014 Directives. Indeed, Defendants concede each of the following facts:

- Tens of thousands of Ohioans rely on the first week of early voting. Over 90,000 Ohioans voted during the first week in 2012 (Ex. 1 at 8), a dramatic increase from the 67,000 Ohioans who voted during that week in 2008 according to Defendants' own internal documents (Ex. 50 at 00134). Even in the non-presidential elections of 2010, over 26,000 Ohioans cast a vote during that week. (Ex. 51 at 01928.)

- Thousands of Ohioans rely on same-day registration ("SDR"). Over 14,000 Ohioans took advantage of SDR in 2012, an increase from the over 12,800 Ohioans who did so in 2008. (Ex. 52 at 00153; Ex. 50 at 00134.)

- Tens of thousands of Ohioans rely on weekend early voting hours that remain eliminated under Directive 2014-17. An undisputed study reveals that, in 2008, over 38,000 Ohioans voted during the weekends *prior to the final weekend* before Election Day in 2008. (Ex. 4 at 1, 6.)

- Tens of thousands of Ohioans rely on early voting hours during weekday evenings. The same study showed that at least 42,500 votes were cast during weekday evening hours in 2008. (*Id.* at 7.)

Second, Defendants do not dispute that the elimination of SDR will place particularly significant burdens on low-income Ohioans. Defendants do not dispute the testimony that low-income and homeless Ohioans have a greater need to resolve registration and voting issues in one shot, because they must update their registration more frequently (Pls.' Mot. for Prelim. Inj. (ECF No. 17) ("Pls.' Mot.") at 11 & n.5, 13); because they are less likely to be aware of registration deadlines and requirements (*id.* at 11-12 & n.6); and because they are less able to make two separate trips to register and then to vote (*id.* at 12).

Third, Defendants do not dispute that low-income voters will face greater difficulties adjusting to the dramatic reduction of voting opportunities outside regular business hours. They do not dispute the overwhelming evidence that low-income voters have substantial difficulty taking time off of work or arranging for childcare during regular business hours. (Pls.' Mot. at 15-16, 30-32.) They do not dispute the studies showing that low-income voters disproportionately rely on weekend voting (Ex. 6 at 4, Table 2), and they do not dispute that Ohioans who relied on weekday evening voting in 2008 had less income than Ohioans who voted on Election Day or voted by mail (*id.*).

Fourth, Defendants do not dispute a plethora of independent indicators which together point towards the conclusion that African Americans disproportionately vote on the eliminated days: they do not dispute Dr. Smith's finding of a racial correlation at the census block level (Pls.' Mot. at 22); they do not dispute his finding of racially disparate early voting among Ohio's homogeneous census blocks (*id.* at 22-23); they do not dispute *five* other studies cited by Plaintiffs confirming that African Americans disproportionately use early voting during weekends and weekday evenings (*id.* at 24; *see also* Exs. 4-8); and they do not dispute U.S. Census Bureau data showing dramatically different rates of early voting use between African

Americans and whites, a disparity that is only increasing with time (Pls.' Mot. at 23). They do not dispute their own admission by a Board of Elections member that Sunday voting is an African-American phenomenon (albeit one that, in his view, must be stamped out). (Ex. 48 at 1.) They do not dispute that because of a legacy of discrimination in Ohio, African Americans in Ohio are disproportionately low-income and will thus have greater difficulty adjusting to a reduction in after-hours voting (Pls.' Mot. at 30-33), or that African Americans have had to contend with numerous other factors that tend to exclude them from the political process (*id.* at 34-38).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR FOURTEENTH AMENDMENT CLAIM

Defendants do not dispute that under the *Anderson-Burdick* framework, a court considering a Fourteenth Amendment challenge "must weigh the character and magnitude of the asserted injury . . . against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiffs' rights." *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) ("*OFA II*") (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))) (internal quotation marks omitted). (*See* Defs.' Br. at 32-33.) Defendants' brief, however, confirms that both SB 238 and the 2014 Directives fall short on both sides of the scale. Plaintiffs are thus likely to succeed on their Fourteenth Amendment claim.

A. Heightened Scrutiny Under *Anderson-Burdick* Is Appropriate

1. The elimination of same-day registration and after-hours voting opportunities imposes significant burdens on voting

Although Defendants do not dispute that tens of thousands of Ohioans have relied on the voting opportunities that are now eliminated, they assert that the burdens imposed by the 2014 Directives are not "severe" (Defs.' Br. at 34-36), because, in their view, voters who have relied on the eliminated voting opportunities can simply switch to voting on other days (*id.* at 19-23; Defs.' Ex. C, ECF No. 41-5 ("Brunell") at 5). But Defendants and their purported expert callously disregard the overwhelming undisputed evidence that low-income voters do not simply "prefer" or find it more "convenient" to vote outside regular business hours – they often *cannot* take unpaid time off of work or arrange for childcare during such hours. (Pls.' Mot. at 15-16, 30-32.) And Ohioans who would have taken advantage of SDR *cannot* vote after the registration deadline. For low-income voters, the burden arising from these restrictions is severe, and for other voters, even if it "is not severe, . . . neither is it slight." *OFA II*, 697 F.3d at 433.[2]

Ignoring these very real burdens, Defendants raise a host of erroneous legal arguments. *First*, Defendants attempt to move the goalposts by suggesting that there is *no* constitutional standard governing the elimination of early voting opportunities, and/or that rational basis should apply under *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), because there is no absolute right to in-person absentee voting. (Defs.' Br. at 29-31.) But *OFA II* already rejected these arguments and established a clear standard: if the State has eliminated *existing* voting opportunities that a significant number of voters rely upon, resulting in substantial burdens on those voters, *Anderson-Burdick* scrutiny applies. *See OFA II*, 697 F.3d at 430-31. As this Court explained, "[t]he issue here is ***not*** the right to absentee voting . . . . The issue

[2] *See OFA II*, 697 F.3d at 431 ("because early voters have disproportionately lower incomes and less education than election day voters, . . . thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person." (internal quotation omitted)); *cf. Florida v. United States*, 885 F. Supp. 2d 299, 329 (D.D.C. 2012) ("Although such [early voting cutbacks] would not bar African-Americans from voting, [they] would impose a sufficiently material burden to cause some reasonable minority voters not to vote.").

presented is the State's redefinition of in-person early voting and the *resultant restriction* of the right of Ohio voters to cast their votes **in person**" during the times and days that have been eliminated. *Obama for Am. v. Husted* ("*OFA I*"), 888 F. Supp. 2d 897, 910 (S.D. Ohio 2012).[3]

Second, Defendants argue these cutbacks are lawful because Ohio has numerically more early voting days than the national average. (Defs.' Br. at 8-11.) This position is impossible to square with *OFA*, which enjoined the elimination of three out of 35 early voting days without any regard to practices in other states. Further, such a crude comparison ignores substantial variation in the *types* of early voting times, such as whether other states offer more evening and weekend early voting hours, which are far more valuable to low-income voters. And facially similar voting restrictions may impose completely *different* burdens in two different states due to a host of unique factors in each state, which Defendants' apples-to-oranges comparisons ignore. (Burden Rebuttal Decl. (Ex. 53) ¶ 6; Gronke Rebuttal Decl. (Ex. 54) ¶ 13.)[4]

Lastly, Defendants suggest that vote-by-mail is the panacea for all ills, providing purported "unlimited" access to early voting. (*See, e.g.*, Defs.' Br. at 28.) But vote-by-mail was also available in 2012, and *OFA II* still found a likely constitutional violation arising from restrictions on early in-person voting. *See* 697 F.3d at 431 (rejecting State's argument that voting by mail provides "ample" opportunities). The unrefuted data shows that low-income and African-American Ohioans vote by mail at significantly lower rates (Ex. 6 at 4-5; Ex. 8 at 10) for

[3] Defendants argue that Plaintiffs have put forth "multiple Sundays and weekday evening hours" as the benchmark for comparison, which is "'inherently standardless.'" (Defs.' Br. at 25 (citation omitted).) This confuses liability with remedy. For liability purposes, this Court should look at the tens of thousands of disproportionately minority and low-income voters who took advantage of the opportunities now eliminated by SB 238 and the 2014 Directives in prior elections. The question of remedy is separate.

[4] For example, Defendants ignore the unique circumstances of each state that may affect the need for early voting, such as Ohio's experience with extremely long waiting times (Pls.' Mot. at 1-2), as well as differences in how states implement early voting, such as the number of early voting locations per county, *e.g.*, one in Ohio versus multiple in other states (Ex. 54 ¶ 13).

a variety of reasons unrefuted by Defendants. (*See, e.g.*, Ex. 41 at 2; Ex. 11 ¶¶ 29-30; Ex. 21 ¶ 15; Ex. 17 ¶ 25); *cf. Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614, at *2 (D.N.D. Oct. 21, 2007) (minority voters "do not trust that their vote will be counted under the mail-in ballot procedure"); *id.* at *4 ("voting by mail imposes at least minimal additional formalities on the voting process, a burden that would fall inordinately on the poorly educated").

2. Facial neutrality does not insulate SB 238 and the 2014 Directives from constitutional review

Defendants argue that early voting restrictions are categorically constitutional when they facially treat all voters "equally." (Defs.' Br. at 33-34.) However, this same defense was rejected a long time ago in *Anderson*, which involved a successful challenge to a facially-neutral candidate filing deadline. *See* 460 U.S. at 799-801; *id.* at 801 ("[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." (internal quotation omitted)); *see also Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) (rejecting defense that the challenged electoral practice "treats all voters equally"); *id.* (noting that *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181 (2008) "applied some form of *Burdick*'s burden-measuring equal protection standard to Indiana's facially neutral voter-identification requirement"). Defendants suggest that the only reason the elimination of the last weekend of early voting was unconstitutional in *OFA* was because of its differential treatment of UOCAVA and non-UOCAVA voters, but the Sixth Circuit also examined evidence of the real burdens imposed by the elimination of the final weekend. *See OFA II*, 697 F.3d at 431. Indeed, it explained that "[t]he Equal Protection Clause applies when a state *either* classifies voters in disparate ways, *or* places restrictions on the right to vote." *Id.* at 428 (emphases added, citation omitted). Because SB 238 and the 2014 Directives "place[] restrictions on the right to vote," *Anderson-Burdick* scrutiny is triggered. And contrary to

Defendants' suggestion (Defs.' Br. at 35-36), nothing in *Anderson* or *OFA II* suggests that a showing of invidious intent is required.

3. Defendants' turnout arguments are meritless

Defendants next launch into an academic round-table discussion of whether the introduction of early voting generally increases overall turnout. (*See* Defs.' Br. at 21-23; Defs.' Ex. A, ECF No. 41-3 ("Trende") ¶¶ 160-66; Defs.' Ex. B, ECF No. 41-4 ("McCarty") at 10-14; Brunell at 2-4.) However, none of Defendants' purported experts has ever published a peer-reviewed study on the relationship between early voting and turnout. Rather, their opinions are derived from the empirical work of other scholars who have actual experience in early voting research, such as Drs. Barry Burden and Paul Gronke (*see* Trende ¶¶ 24, 161, 163, 165; McCarty at 10-13; Brunell at 2-3), two well-regarded political scientists who have now submitted rebuttal declarations explaining that Defendants' experts severely misconstrued their work in several respects (*see* Dr. Barry Burden Rebuttal Decl. dated July 29, 2014 (Ex. 53); Dr. Paul Gronke Rebuttal Decl. dated July 30, 2014 (Ex. 54) ¶ 8).[5]

[5] Defendants' lone attempt to measure the effect of early voting on turnout themselves is by blogger Sean Trende, who does not attempt to measure the effect of same-day registration or the non-workday early voting hours and days at issue in this case. Moreover, Trende is not a political scientist, does not have a PhD, and describes himself as an expert in "psephology," which Trende has conceded is not a recognized academic discipline. (Ex. 55 at 26:22-27:9.) Prior to serving as an expert in early voting litigation this year, he had never previously conducted a quantitative analysis of whether voting laws affect turnout. (*Id.* at 281:9-19.) His opinion should be rejected on that basis alone. *See Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 435 (6th Cir. 2007); *Reece v. Astrazeneca Pharm., LP*, 500 F. Supp. 2d 736, 745 (S.D. Ohio 2007).

Moreover, Trende proffered a similar report during litigation in North Carolina that was littered with basic factual errors and voluminous fatal methodological defects. (Ex. 56 at 7-20.) His report in this case suffers from some of the same flaws. For example, as in his North Carolina report, here he attempts to measure the effects of early voting on turnout without conducting an appropriate multivariate analysis that would control for a host of other demographic and historical factors. (*Id.* at 11.) Contrast this to a study by Dr. Burden cited by Trende himself, which controls for many factors that can affect turnout such as age, education, income, length of residence, gender, marital status, naturalized citizenship status (and time since naturalization), and residence in a southern state. (Ex. 57 at 101-02.) Trende's failure to account for any of these variables renders his comparison of turnout across states wholly unreliable.

First, the studies relied upon by Defendants concern early voting *in general*, but not the specific forms of early voting at issue in this case, namely: (i) early voting combined with SDR and (ii) early voting opportunities during non-work hours. Regardless of the effects of early voting in general, Defendants do not dispute that early voting *coupled with SDR* has a positive effect on turnout (Burden Rebuttal Decl. (Ex. 53) ¶ 7; Gronke Rebuttal Decl. (Ex. 54) ¶¶ 21-22), a fact that Trende conceded at a deposition in separate litigation (Ex. 55 at 252:24-253:1); that SDR provides crucial opportunities for low-income voters to participate (Pls.' Mot. at 10-15); or that early voting *during non-work hours* is critical for low-income and African-American voters (*id.* at 15-17, 24-27, 30-33).

Second, the studies relied upon by Defendants' experts – which are all based on data from 2008 and earlier – only examine the impact of *creating* early voting opportunities. They do not actually consider whether the *elimination* of early voting opportunities upon which voters have come to rely over time has an impact on turnout. The difference is critical, because research concerning the "question of how *adding* early voting days affects overall voter turnout . . . does not address the specific question [of] how *decreasing* an established early voting period . . . will affect . . . voter turnout." *Florida v. United States*, 885 F. Supp. 2d 299, 332 (D.D.C. 2012). As Dr. Burden explains, "it is inappropriate to draw inferences from our study to situations where voting opportunities are removed." (Ex. 53 ¶ 9.) Because of "scholarly research that conceives of voting as a 'habit,' I expect the removal of options being used by voters to have different effects than when they are introduced. . . . Constricting early voting days and hours is thus likely to deter or dissuade existing voters from participating." (*Id.*; *see also* Ex. 54 ¶ 23.) As the *Florida* three-judge court explained, "even if the addition of early voting days does not significantly increase turnout, it is not methodologically sound to assume that there will . . . be

little or no impact on overall turnout when voters (who have habituated to early in-person voting) face a loss of previously available voting days. Indeed, common sense suggests the opposite." 885 F. Supp. 2d 299, 332 (citations and quotation marks omitted). (*See also* Ex. 54 ¶ 23; Ex. 10 ¶ 29; Ex. 11 ¶ 20; Ex. 13 ¶ 30; Ex. 19 ¶ 12.)

Third, Defendants' crude comparisons of *overall turnout* in different years after the introduction of early voting are not probative of whether early voting cutbacks will burden voters, because an almost infinite number of factors can affect turnout from election to election or from state to state. (Gronke Rebuttal Decl. (Ex. 54) ¶ 26.) Early voting cutbacks can have a separate and independent effect on voters regardless of ultimate turnout (*id.*), such as forcing low-income voters to take time off of work or overcome other barriers. None of Defendants' experts examine those independent barriers except Dr. Brunell, who *concedes* that "early voting makes casting a ballot easier" and "makes it more convenient for voters to vote" (Brunell at 5), and thereby "lowers the cost of voting for people who intend on voting" (*id.* at 4).

In any event, the studies relied upon by Defendants' experts are all based on old data, collected when in-person early voting was a relatively new phenomenon. (Ex. 54 ¶ 12.) While their experts seize upon Dr. Gronke's opinion from 2007 doubting that early voting has a positive effect on turnout (Brunell at 3, 10; McCarty at 10), Dr. Gronke more recently explained that the "2008 presidential and subsequent election have challenged the conventional wisdom," *Florida*, 885 F. Supp. 2d at 331. In fact, the most recent research on early voting analyzing data from after the 2008 election indicates that early voting can in fact be used to increase turnout among historically low-participation groups. (Gronke Rebuttal Decl. (Ex. 54) ¶¶ 14-18, 24-25; Burden Rebuttal Decl. (Ex. 53) ¶ 8); *cf. Florida*, 885 F. Supp. 2d at 331-32.

For all the above reasons, the burden imposed by SB 238 and the 2014 Directives is "significant and weighs heavily in [Plaintiffs'] favor." *OFA I*, 888 F. Supp. 2d at 907.

B. Defendants Cannot Justify These Burdens

Defendants have failed to proffer any precise interests sufficiently weighty to justify these burdens. They proffer *no interests* to justify SB 238, and the *only* justification proffered in support of the 2014 Directives is "uniformity." (Defs.' Br. at 36-37.) Yet Defendants remain unable to logically explain why uniformity necessarily justifies the *elimination* of after-work voting opportunities in *all* counties, as opposed to ensuring the same *adequate* voting hours across *all* counties. (*See* Pls.' Mot. at 18.) Because this flimsy justification does not outweigh the significant burdens imposed by SB 238 and the 2014 Directives, Plaintiffs are likely to succeed on their Fourteenth Amendment claim.

Though this Court no longer needs to consider the arguments raised by OGA in defense of SB 238, even if it did, those justifications would fail. *First*, OGA attempts to justify SB 238 with "the specter of voter fraud." But they provide no specific or verifiable investigation, prosecution, or conviction of voter fraud committed by individuals who registered and voted the same day. Ghostbusting specters of voter fraud hardly amounts to the "precise interest" that *Anderson-Burdick* requires to justify the burdens imposed on thousands of voters. *See Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 704-05 (N.D. Ohio 2006) ("general[] assum[ptions]" about voter fraud insufficient).[6] In that sense, Plaintiffs agree with Defendant Husted's attack on "unsubstantiated rumors, innuendo and hyperbole surrounding voter fraud." (Ex. 63 at 3.) OGA

[6] Aaron Ockerman refers to vague and unconfirmed "first hand" conversations with election officials about possible voter fraud (Defs.' Ex. R at 4), but there are no specifics concerning follow-up investigations or prosecutions (*id.*; Ex. 58 ¶ 4). The remaining testimony cited by OGA's now-stricken brief are no less vague. Senator LaRose does nothing more than note vague "concerns" brought by unnamed elections officials. (OGA Ex. C at 10.) And Dana Walch testified that SDR "is ripe for potential fraud" without citing any corroborating facts or specific cases. (OGA Ex. B at 10.)

makes it seem as if SDR allows any unregistered voter to simply walk into a board of elections and cast a ballot that will immediately be counted. But this is wrong. According to Defendant Husted's own Directive 2012-36, when a same-day registrant casts a ballot, that ballot is segregated and *cannot be counted until the registration is verified*. (Ex. 59.) Nothing suggests that Defendant Husted's proscribed procedure does not work. (Ex. 58 ¶ 6; Defs.' Ex. P ¶ 15.) *Cf. Stewart v. Blackwell*, 444 F.3d 843, 870 (6th Cir. 2006) ("the State's alleged concern with voter fraud . . . is not compelling in light of the Secretary of State's report concluding that the technology can securely be implemented"), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007).

Second, OGA asserts that allowing the first week of early voting imposes financial and administrative costs on elections officials. Whether such "costs" are truly material is questionable, given that Boards of Elections' offices are open during that week anyway; the only issue is whether they will distribute and accept ballots during those times. (*Cf.* Ex. 13 ¶¶ 27-28.) Moreover, *OFA II* readily dispenses with this old saw. As the Sixth Circuit explained, notwithstanding the many administrative tasks that elections volunteers and staff valiantly perform in each election (*compare* Defs.' Ex. P *with OFA II*, 697 F.3d at 432), there is "no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005." *OFA II*, 697 F.3d at 433. The generic testimony cited by OGA's now-stricken brief asserts nothing more than a "vague interest in the smooth functioning of local boards of elections,"[7] and

[7] Ronald Koehler testified that Summit County hired "dozens of extra temporary workers" to implement early voting and that eliminating one out of five weeks of early voting will thus save "20% of the cost of extra temporary workers." (OGA Ex. B at 15.) But Koehler goes on to allege that "the least busy part of our operation was the off-site voting location during the first week of the 35-day walk-in voting period." (*Id.*) He does not explain why the cost cannot be mitigated by simply hiring fewer temporary workers if the demand is supposedly so low during that week, or why early voting cannot be conducted onsite at the Board of Elections office. In any event, he fails to establish that Summit County has had tremendous

does not establish that "local boards of elections have *struggled to cope* with early voting in the past." *OFA II*, 697 F.3d at 434 (emphasis added); *see Stewart*, 444 F.3d at 869 (State cannot "use[] cost as if it were a silver bullet. Any change from the status quo necessarily involves some cost."). Indeed, the amicus brief submitted by Cuyahoga County (ECF No. 28) once again "allay[s] concerns about the financial hardship that early voting might cause," *OFA II*, 697 F.3d at 433, and the State again fails to account for how early voting actually *helps* relieve burdens on local Boards of Elections, *see id.*; (*see also* Ex. 11 ¶ 33; Ex. 13 ¶ 31). Notably, Defendants raise *no* cost-based justifications with respect to the elimination of evening and Sunday voting hours.

Lastly, OGA puts forward a potpourri of interests that SB 238 purportedly satisfies, such as decreasing the costs of campaigns and protecting early voters from "buyer's regret." (Brunell at 4.) Defendants cite no evidence in support of their claim about campaign costs, which is unsurprising because none exists (Ex. 54 ¶ 20); and consistent research demonstrates that early voters are in fact generally among the "more informed" voters unlikely to change their minds at the last minute (*id.* ¶ 19). In any event, such vague, paternalistic interests were roundly rejected in *Anderson*. *See* 460 U.S. at 796-98. Because "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues . . . [,] [a] State's claim that it is enhancing the ability of its citizenry to make wise decisions . . . must be viewed with some skepticism." *Id.* at 797, 798.

III. PLAINTIFFS ARE LIKELY TO SUCCEED UNDER SECTION 2 OF THE VOTING RIGHTS ACT

Plaintiffs are also likely to succeed under Section 2 of the Voting Rights Act. Defendants do not dispute the accuracy of multiple indicators that, when taken together, demonstrate that

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difficulty implementing SDR in the past. Ockerman's testimony about cost and efficiency is also vague and imprecise. (Defs.' Ex. R.)

African Americans disproportionately rely on early voting. *See, e.g.*, *Stewart*, 444 F.3d at 878. Defendants do not dispute *any* of the vast socioeconomic disparities Dr. Roscigno found in Ohio, which make the very voting opportunities being stripped away the ones that are most needed by African Americans. *See, e.g.*, *id.* at 879. When viewed in light of the undisputed presence of numerous other factors bearing upon minority political exclusion in Ohio, Plaintiffs are thus likely to succeed in demonstrating that SB 238 and the 2014 Directives "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Id.* (internal quotations omitted).

A. The Elimination of Same-Day Registration and Specific Early Voting Times Interact With Social and Historical Factors to Impose Disparate Burdens on African-American Voters

The facts establish that the challenged early voting cutbacks will disproportionately burden African-American voters due to two separate and independent reasons: (i) African Americans have disproportionately relied on early voting; and (ii) among the pool of early voters, African Americans will face heavier burdens attempting to adjust to the elimination of the forms of early voting at issue in this case due to severe socioeconomic disparities.

First, "[African-American] voters will be disproportionately affected by the changes in early voting procedures because they disproportionately use early in-person voting." *Florida v. United States*, 885 F. Supp. 2d 299, 322 (D.D.C. 2012). Although Defendants' experts question some portions of the analysis conducted by Plaintiffs' expert Dr. Smith, they do not dispute five other studies cited by Plaintiffs, or the Census Bureau data cited in Dr. Smith's report, all of which *together* indicate that African Americans disproportionately use early voting in Ohio, including the particular forms of early voting that have been eliminated. (Pls.' Mot. at 21-27.)

Even with respect to Dr. Smith's analysis, the bulk of the criticisms leveled by Defendants' experts boils down to the unremarkable assertion that relying solely on any *one*

mode of analysis employed in Dr. Smith's report is insufficient to conclusively demonstrate that African Americans disproportionately rely on early voting. (Brunell at 5; McCarty at 6.) But that is precisely why Dr. Smith relied upon *multiple* methods in his report. (Dr. Smith Rebuttal Declaration dated July 30, 2014 (Ex. 60) at 2, 25.) For example, Defendants' experts question Dr. Smith's reliance on a homogeneous area analysis (Brunell at 5-6, McCarty at 7) (though a *majority* of Ohio's census blocks are homogeneous (Ex. 60 at 15) and Dr. Brunell *himself recommended just such an analysis* in early voting litigation in South Dakota (Ex. 61 at 2)),[8] but that is precisely why Dr. Smith also relied on a regression analysis of *all census blocks* in Ohio, which revealed that even within heterogeneous areas, larger African-American populations are associated with increased early voting usage. (Ex. 60 at 3-4); *see Stewart*, 444 F.3d at 879 (approving of regression analysis to estimate disparate impact). Like a game of whack-a-mole, Dr. McCarty next suggests that reliance on a regression analysis *alone* is insufficient (McCarty at 3), but again, that is why Dr. Smith relies on *other* methods in his report (Ex. 60 at 14). For the same reason, Dr. McCarty's critique about relying on the method of bounds analysis *alone* (McCarty at 8) is also inapposite (Ex. 60 at 16).[9]

Second, the undisputed facts conclusively demonstrate that, among the pool of early voters, African Americans will face heavier burdens attempting to adjust to the elimination of the

[8] Indeed, homogeneous area analysis is commonly used in Section 2 litigation. *See Clarke v. City of Cincinnati*, C-1-92-278, 1993 WL 761489, at *8 (S.D. Ohio July 8, 1993) ("homogeneous precinct analysis . . . [is an] accepted method[] of analyzing racial voting patterns"), *aff'd*, 40 F.3d 807 (6th Cir. 1994); *Mallory v. Ohio*, 38 F. Supp. 2d 525, 538 (S.D. Ohio 1997) (acknowledging homogeneous precinct analysis as a "legally accepted method[]"), *aff'd*, 173 F.3d 377 (6th Cir. 1999).

[9] Defendants oddly suggest that Dr. Smith's regression analysis was *too precise* and should have been more generalized to examine larger geographic areas such as census *precincts* (*see* Brunell at 6) or entire *counties* (McCarty at 4-5). But long-standing academic research has shown that such analyses of larger geographic areas are *less* accurate. (Ex. 60 at 5-7.) Dr. Brunell faults Dr. Smith for not incorporating the restoration of the final weekend into his initial analysis (which had been largely completed before that restoration), but newly-run numbers confirm that a disparate impact persists. (*Id.* at 11-12.) The remaining criticisms concerning each of the analyses are similarly unfounded. (*Id.* at 3-5, 8-10, 15-22.)

forms of early voting at issue in this case. (Pls.' Mot. at 30-31.) Defendants' experts do not dispute that African Americans have a greater need for SDR because of higher moving rates and lower educational attainment. (*Id.* at 33.) They do not dispute that African Americans have lower incomes and tend to have occupations from which it is more difficult to take time off of work during regular business hours, or that African Americans have greater difficulties arranging for childcare and securing transportation. (*Id.* at 31-32.)[10] These socioeconomic factors alone demonstrate that African Americans will bear the brunt of these cutbacks. *Cf. Texas v. Holder*, 888 F. Supp. 2d 113, 138-41 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2886 (2013). Yet they, along with a host of other undisputed factors bearing upon minority political exclusion in Ohio (Pls.' Mot. at 34-38), also illustrate how the cutbacks "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters." *Stewart*, 444 F.3d at 879 (internal quotations omitted).[11]

B. Plaintiffs Have Established Causation

Defendants argue that the early voting cutbacks cannot be challenged under Section 2 because they do not cause a categorical "denial of a right to vote." (Defs.' Br. at 19-20.) But Section 2 also prohibits the "abridgement" of the right to vote, 42 U.S.C. § 1973(a), which Black's Law Dictionary (9th ed. 2009) defines as "[t]o reduce or diminish." *See Stewart*, 444 F.3d at 877 (implicitly rejecting suggestion that only total denial of a right to vote is actionable). Thus, Plaintiffs are not required to show that a challenged voting restriction makes it *impossible*

[10] Defendants crow about Dr. Roscigno's supposed "admissions" to a series of questions posed during his seven-hour deposition (Defs.' Br. at 27-28), but as was exhaustively demonstrated during Plaintiffs' examination of Dr. Roscigno (*see* Ex. 62 at 124:22-152:24, 157:20-159:14), all of Defendants' questions were about subject matters completely different from the principal question he was asked to research: the vast socioeconomic disparities that exist in Ohio.

[11] Contrary to Defendants' contentions (Defs.' Br. at 23-24), no *Gingles* preconditions must be met because Plaintiffs do not allege vote dilution arising from redistricting or similar practices. *See, e.g.*, *Stewart*, 444 F.3d at 877-79 (not requiring *Gingles* preconditions in challenge to punchcard technology).

to vote, only that it makes it disproportionately *more burdensome* to vote, resulting in "less opportunity" to "participate in the political process." 42 U.S.C. § 1973(b). *See Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If . . . a county permitted voter registration for only three hours one day a week, and that made it *more difficult* for blacks to register than whites, blacks would have less opportunity 'to participate in the political process' than whites." (emphasis shifted)); (*see, e.g.*, Pls.' Mot. at 33 n.25 (citing cases)). Indeed, if this Court were to adopt Defendants' impossibility standard, a literacy test would not violate Section 2 because it is not "impossible" to teach an illiterate person to read.

Defendants cite *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) and various out-of-circuit cases, but those cases simply establish that any racial disparities must be directly caused by the challenged voting restriction's interaction with social and historical circumstances, not something else.[12] Those cases are a stark contrast to this case, where the elimination of SDR and the dramatic reduction of after-hours voting, operating within a context of discrimination and socioeconomic inequalities, directly make it harder for African Americans to vote.

C. Plaintiffs' Section 2 Claim Properly Examines the Impact of SB 238 and the 2014 Directives

Defendants argue that Plaintiffs' Section 2 analysis is too much like Section 5's "retrogression" standard, which, rather than comparing relative burdens of a practice on minority and white voters as Section 2 requires, compares the impact of a new voting practice with a pre-

[12] For example, in *Wesley*, the Sixth Circuit upheld a felon disenfranchisement law notwithstanding a disproportionate impact because it was felons' "conscious decision to commit a criminal act for which they assume the risks of detention and punishment," not the law, that directly caused the burdens at issue. 791 F.2d 1255, 1262 (6th Cir. 1986); *see also Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1990) (cause of underrepresentation on school board was not appointive process, but minorities' decision not to seek school board seats); *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 313-14 (3d Cir. 1994) (cause of minorities being purged from voter rolls was not statute purging registered voters who had not voted in two years, but voters' decision not to vote within two years). Causation was not established in *Gonzalez v. Arizona*, 677 F.3d 383, 407 (9th Cir. 2012), only because the plaintiffs failed to show disparate impact at all, which is not the case here.

existing one. (Defs.' Br. at 16-17.) But it is wholly unremarkable that "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). While Section 5 "deal[s] only and specifically with *changes* in voting procedures," *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000), Section 2 permits challenges "*not only* [to] changes [to the status quo]" but also to the status quo itself, *id.* (emphasis added). Here, Plaintiffs' Section 2 claim challenges several changes to the status quo, when all counties had SDR and weekday evening hours, and when counties representing over 78% of Ohio's African-American population had multiple Sundays. (Pls.' Mot. at 41.) African Americans disproportionately relied on such opportunities and now they cannot. Whether that inquiry happens to overlap with any "retrogression" analysis in a Section 5 action is irrelevant.[13]

Defendants next argue that there is no benchmark against which to compare the impact of the challenged cutbacks under the Section 2 analysis. (Defs.' Br. at 24-25.) But such a formal comparison is only necessary in a vote *dilution* claim, which generally involves the comparison of different redistricting plans. Contrast this with a vote *denial* claim like the one here, which challenges the State's imposition of new restrictions on voting that disproportionately burden

[13] Indeed, *Brown v. Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012), on which Defendants rely (Defs.' Br. at 18), involved a Section 2 challenge to changes in Florida's early voting laws but relied heavily on factual findings made in a parallel Section 5 suit, such as the fact that "changes to the early voting laws disproportionately affect minority voters because minority voters disproportionately use early voting," *id.* at 1251. No Section 2 violation was found in *Brown*, but only because Florida's early voting changes resulted in no net reduction in the *total* number of early voting hours available. *See id.* at 1254-55. In fact, the *Brown* court upheld changes to Florida's early voting laws in part because Florida *increased* "the overall number of weekend voting hours." *Id.* at 1253. (Contrary to Defendants' erroneous assertion that Florida had only a "single day of EIP weekend voting" in 2012 (Defs.' Br. at 18), Florida actually had *three* mandatory weekend early voting days in 2012, an increase from two required weekend days in 2008, *see id.* at 1239 (chart comparing early voting in 2008 and 2012).) *Brown* stands in stark contrast to the situation here, where there has been a dramatic reduction in the *total* amount of early voting hours, and an outright elimination of evening hours, several weekend hours, and SDR, thus imposing disproportionate burdens on African-American voters. *Brown* therefore supports a finding of a Section 2 violation in this case, and also demonstrates that the inferences drawn by Dr. McCarty from Dr. Smith's Florida study (McCarty at 13-14) are inapposite to Ohio (Ex. 54 ¶¶ 24-26).

minorities.[14] And, even if such a benchmark were necessary, the facts of this case provide one: the pre-existing methods of registration and voting that have been eliminated. Unlike in *Holder v. Hall*, 512 U.S. 874 (1994), where the plaintiffs challenged a county's "failure" to replace the only form of government the county ever had with something entirely new and different, *id.* at 882, here, Plaintiffs do not demand something new or hypothetical. Instead, Plaintiffs challenge the lawfulness of a recent change to voting laws whose "effect . . . can be evaluated by comparing the system with that rule to a system without that rule." *Id.* at 880-81.[15]

Plaintiffs are therefore likely to succeed under Section 2 of the Voting Rights Act.

IV. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

Having established a likelihood of success on the merits, Plaintiffs have also satisfied the remaining three preliminary injunction factors. "A restriction on the fundamental right to vote . . . constitutes irreparable injury." *OFA II*, 697 F.3d at 436. The balance of the equities also tips strongly in Plaintiffs' favor: Defendants rely entirely on declarations stating generically that allowing more early voting costs money (Defs.' Br. at 37-38), but they do not establish that "local boards will be *unable to cope with*" voting hours on multiple Sundays and weekday evening hours, which is nothing more than what has been "successfully done in past elections."

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[14] *See Holder v. Hall*, 512 U.S. 874, 880 (1994) ("in a *§ 2 vote dilution suit* . . . a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice") (emphasis added); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (same). By contrast, none of the Section 2 vote denial cases (*see, e.g.*, Pls.' Mot. at 33 n.25) formally evaluate alternative "benchmarks" but simply analyze whether a challenged practice imposed burdens disproportionately on minority voters, causing them to have "less opportunity than other members of the electorate to participate in the political process." 42 U.S.C. § 1973(b).

[15] Defendants again argue that the legality of early voting restrictions should depend on national averages, this time under Section 2. (Defs.' Br. at 28-29.) The Supreme Court has squarely rejected this argument. *See Holder*, 512 U.S. at 881-82 (1994) ("It makes little sense to say . . . that the sole commissioner system should be subject to a [Section 2] dilution challenge it if it is rare—but immune if it is common."); *see also Stewart*, 444 F.3d at 878 (Section 2 "require[s] an intensely local appraisal of the design and impact" of the electoral practice (internal quotation omitted)).

OFA II, 697 F.3d at 436 (emphasis added). Lastly, the public interest "favors permitting as many qualified voters to vote as possible." *Id.* at 437. Defendants emphasize the public's interest in "uniformity" (Defs.' Br. at 38), but fail to acknowledge that Plaintiffs' requested relief amply satisfies that standard.

Perhaps knowing that all the preliminary injunction factors turn against them, Defendants wildly accuse Plaintiffs of *intentionally* "deci[ding] to hold off filing the motion" for a preliminary injunction. (Defs.' Br. at 39-40.) But the "hundreds of pages of evidence [Plaintiffs] use to support the motion" (*id.* at 39) did not simply materialize overnight. Rather, they were compiled from dozens of witnesses over the course of several months, starting soon after the cutbacks were enacted in February 2014. And it was the State's decision to ram SB 238 through the legislature at unprecedented speed and Defendant Husted's decision to issue Directive 2014-06 in February 2014, when the OAEO report had been published as early as November 2013.[16] Even after gathering such voluminous evidence on a compressed timetable, Plaintiffs still filed their complaint and motion *before* the time of year the *OFA* plaintiffs filed their complaint and motion in 2012. (*See OFA*, No. 2:12-cv-636 (S.D. Ohio July 17, 2012), ECF Nos. 1, 2.) Defendants cry "prejudice" essentially because they find Plaintiffs' evidence too overwhelming, but the evidence is overwhelming precisely because the State chose to gratuitously burden the voting rights of *thousands* of Ohioans. What is more, Defendants fail to show why they cannot adequately respond within the same time period provided in 2012. Defendants accuse Plaintiffs of not disclosing the identity of Dr. Roscigno until they filed their motion, but *it was Defendants who wanted to postpone the parties' exchange of initial*

[16] *See* OAEO, Report and Recommendations for Absentee Voting Reform, *available at:* http://www.oaeo.us/report-and-recommendations-for-absentee-voting-reform/ (last visited July 28, 2014). Contrary to Defendants' suggestion, these combined cutbacks did not all occur in "back in 2012."

disclosures until the last day of June. (Ex. 64.) Defendants complain about having depositions "in multiple cities," but they rejected Plaintiffs' offer to fly an expert to a single city for their convenience. (Ex. 65.) That Defendants would essentially criticize Plaintiffs for unexpectedly amassing *too* much evidence of their voter suppression, in addition to their misleading attacks, only reveals their desperation and reinforces Plaintiffs' likelihood of success.

CONCLUSION

For the above reasons, Plaintiffs' motion for a preliminary injunction should be granted.

Dated this 30th day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Reply in Support of Plaintiffs' Motion for Preliminary Injunction was filed this 30th day of July, 2014 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

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