No._____

In the Supreme Court of the United States

MICHAEL DEWINE, IN HIS OFFICIAL CAPACITY AS
OHIO ATTORNEY GENERAL, AND
JON HUSTED, IN HIS OFFICIAL CAPACITY
AS OHIO SECRETARY OF STATE,

Applicants,

v.

OHIO STATE CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, *ET AL.*,

Respondents.

ON APPLICATION FOR STAY FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EMERGENCY APPLICATION FOR STAY

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Ohio Secretary of State Jon Husted and Ohio Attorney General Michael DeWine ("Ohio" or "State") respectfully seek to stay the injunction issued below, which adds days to Ohio's early-voting calendar starting September 30, even though Ohio's voting options for the November election are among the Nation's most expansive. The injunction is wrong in finding that the Constitution and Section 2 of the Voting Rights Act require this change, and inequitable in making the change so late.

INTRODUCTION

Ohio is a national leader in making voting easy. It offers early in-person voting ("early voting") at boards of election on 22 of 28 days before Election Day. Doc.41-3, Trende Decl., PageID#1019. In New York, New Jersey, Pennsylvania, Virginia, and some 13 other States, by comparison, early voting is available *only* on one day—Election Day. *Id.* Among all States, the median number of early-voting days is 11. *Id.*, PageID#1024. Ohio is open for early voting on two Saturdays and one Sunday. Doc.61-13, Directive 2014-17, PageID#2933-34. Twenty-eight States offer *no* early voting on weekends; only nine offer early voting on a Sunday. Doc.41-3, Trende Decl., PageID#1025. All told, Ohio offers more early-voting options than 41 other States and the District of Columbia. *Id.*, PageID#1022, 1024.

While Ohio remains at the forefront of the early-voting expansion, the district court in this case held that the Constitution and Section 2 of the Voting Rights Act require much more. On September 4, it entered an injunction ordering Ohio: (1) to

allow for same-day voting and registration; (2) to allow early voting for 35 days rather than 28; (3) to add another Sunday of early voting; (4) to include more early-voting hours past 5 p.m.; (5) to permit boards of election in Ohio's 88 counties to set non-uniform hours above its floor; and (6) to consider new legislation "consistent" with the order. *See* Doc.72, Order, PageID#5917-18. At all stages, Ohio has sought to stay this injunction. It sought a stay in the district court, but was rebuffed. A Sixth Circuit panel initially denied a stay and then affirmed the merits on September 24. Panel Op. 14-46. While Ohio filed for en banc review that same day, it respectfully files this stay *now* to give this Court time to review the request.

Turning to the stay factors, the Court would grant review of this case because similar suits are percolating throughout the country with conflicting outcomes. Ironically, it might be the fact that Ohio offers one of the most expansive early-voting schedules that has led it to reach this Court first. But circuit courts have fast-tracked other challenges. In the Seventh, a district court enjoined Wisconsin's voter-identification law based on the same types of claims. *Frank v. Walker*, __ F. Supp. 2d __, 2014 WL 1775432, at *34 (E.D. Wis. April 29, 2014). A Seventh Circuit panel stayed that injunction (a stay whose result is inconsistent with the panel decision). *Frank v. Walker*, 2014 WL 4494153, at *1 (7th Cir. Sept. 12, 2014). The plaintiffs petitioned for en banc review. In the Fourth, a district court *rejected* a similar request that would have required North Carolina to permit same-day registration and voting and additional early-voting days. *See N.C. State Conference*

of the NAACP v. McCrory, 997 F. Supp. 2d 322, 344-65, 370-75 (M.D.N.C. 2014). The plaintiffs appealed, and the Fourth Circuit heard arguments on September 25.

In addition to finding this case cert-worthy, the Court would reverse the constitutional and statutory analysis underlying the injunction. As for the Constitution, the injunction upends settled equal-protection precedent by declaring a neutral regulation facially invalid based on its racially disparate *impact*—without a finding of discriminatory *intent*. The injunction thus treats the Constitution's *implicit* "right to vote" as requiring greater scrutiny of neutral voting laws for their racial impacts than the *explicit* provision that bans racial voting discrimination—the Fifteenth Amendment. Whether or not express race-based decisionmaking in the voting context would *survive* constitutional scrutiny, *cf. Miller v. Johnson*, 515 U.S. 900, 913 (1995), it surely does not *violate* the Constitution for a State to adopt a neutral voting regulation in a race-neutral way, *cf. Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (Kennedy, J., op.).

As for Section 2, the injunction can only be explained in one of two equally misguided ways. On one hand, if the injunction followed this Court's cases, it would have compared Ohio's present early-voting schedule (if anything) to the early-voting schedule that "*ought to be*" in the abstract. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000). But a finding that Ohio violated that "should be" standard calls into question *both* the 41 other state schedules that are less generous than Ohio's, *and* the Nation's historic practice of voting only on an Election Day. On the other hand, if the injunction sidestepped these results by measuring Ohio's present

schedule against its *previous* one, it applied Section 2 as if it were Section 5. But this Court has repeatedly said that Section 2 does not subject a State's voting *changes* to federal review, and that such old-to-new comparisons are reserved for Section 5. *See Holder v. Hall*, 512 U.S. 874, 884 (1994) (Kennedy, J., op.). The injunction thus interprets Section 2 to require intrusive retrogression rules for *all 50* States less than two years after this Court struck down Section 5's retrogression rules for *certain covered* States. *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

In sum, Ohio respectfully asks that the federal courts permit it to implement the early-voting schedule its democratically elected representatives chose and for which its voters and elections officials have prepared for over six months.

JURISDICTION

This Court has jurisdiction to enter a stay of the district court's injunction or to grant certiorari and vacate the injunction. Certiorari may issue to review a case "before or after" judgment. *See* 28 U.S.C. §§ 1254(1), 2101(e). And the Court may stay the judgment in any case where that judgment would be subject to certiorari review. 28 U.S.C. § 2101(f). The Sixth Circuit had interlocutory jurisdiction over the district court's injunction. *See* 28 U.S.C. §§ 1292(a)(1), 1331.

STATEMENT

A. Ohio Introduced Early Absentee Voting After The 2004 Election And Has Repeatedly Modified The Procedures Since Then.

Historically, Ohioans could vote absentee only if they fell into a covered category. Ohio Rev. Code § 3509.02(A)(1)-(8) (2004). A five-day overlap existed

between when absentee ballots were available (35 days before the election) and when registration ended (30 days before it). *See id.* § 3509.01; 3503.06 (2004).

In 2005, Ohio changed its laws to permit *universal* early absentee voting for all voters. Doc.41-7, 2005 Ohio Laws File 40, PageID#1135-42. Ohio's 88 boards of elections set their own times during which voters could cast early absentee ballots in person (as opposed to by mail). Doc.41-9, Damschroder Decl., PageID#1169. This non-uniform policy continued in 2008 and 2010. *Id.* Most counties allowed voters to cast early in-person ballots only during business hours and for four hours on the Saturday before the election. *Id.* To eliminate this "patchwork of policies" for the 2012 election, Ohio's Secretary of State set uniform *statewide* hours for early in-person absentee voting. Doc.41-13, Directive 2012-35, PageID#1233-35.

In 2013, the Ohio Association of Elections Officials ("OAEO"), a bipartisan organization representing Ohio's boards of elections, recommended two changes: (1) eliminating the week of overlapping registration and absentee voting, and (2) setting a new schedule for all Ohio counties with uniform times for early voting. Doc.41-19, OAEO Rep., PageID#1258-59. Ohio adopted these changes. The legislature passed a statute (the "Statute") changing the start of Ohio's early voting so that it began the first day *after* the close of the registration. *See* Ohio Rev. Code § 3509.01(B)(2)-(3). The same month, the Secretary established uniform times for early in-person absentee voting. Doc.41-16, Directive 2014-06, PageID#1245-47. In June, to comply with the constitutional ruling in *Obama for America v. Husted*, 2014 WL 2611316 (S.D. Ohio June 11, 2014), the Secretary issued a revised

directive (the "Directive") including additional days closer to Election Day for early in-person voting. Doc.41-22, Directive 2014-17, PageID#1281-83.

B. Plaintiffs Sued In May, Waited Two Months To Seek An Injunction, And Obtained That Relief In September.

Plaintiffs—the Ohio State Conference for the National Association for the Advancement of Colored People, League of Women Voters of Ohio, Bethel African Methodist Episcopal Church, Omega Baptist Church, College Hill Community Church Presbyterian, U.S.A., A Philip Randolph Institute, and Darryl Fairchild—sued on May 1, 2014, over two months after Ohio's early-voting calendar was set. They alleged violations of the Equal Protection Clause and of Section 2. Doc.1, Compl., PageID#29-32. Plaintiffs waited two months more to seek an injunction replacing Ohio's voting calendar with a court-ordered calendar starting a week earlier and adding Sunday and evening hours. Doc.17, Motion, PageID#92-153.

The court found that Plaintiffs likely would succeed on both claims. For equal protection, it measured the impact of Ohio's changes on African-American, low-income, and homeless voters. *Id.*, PageID#5896-97. The court conceded that the changes might not "actually reduce voter turnout," but said that "a reduction in the total time available" for early voting "will burden those groups that use" it, and that the burden was "significant although not severe." *Id.*, PageID#5897-5900. It found that mail-in voting "ameliorates" the burden, but not enough, because "African-Americans, lower-income individuals, and the homeless are distrustful of the mail and/or voting by mail or would prefer to vote in person for unrelated reasons." *Id.*, PageID#5901. The court rejected all justifications for the schedule,

acknowledging the costs of extra hours, but concluding that "nothing in the record establish[es] what the total cost" is statewide or that these costs could not be "managed." *Id.*, PageID#5905.

For Section 2, the court focused on "a comparison between past and current" early-voting schedules under the "totality of the circumstances." *Id.*, PageID#5909. It again noted "that individual voters may simply choose to vote at other times" with turnout unaffected, but said that Section 2 "is not necessarily about voter turnout but about opportunity to participate in the political process compared to other groups." *Id.*, PageID#5914.

The court analyzed the equitable factors in a few sentences. It dismissed the counties' costs as not "unmanageable," and ignored the presumption against last-minute election changes. *Id.*, PageID#5915.

Turning to the remedy, the court ordered early voting to start on September 30—35, not 28—days before Election Day. *Id.*, PageID#5917. It ordered evening hours in certain weeks and voting on Sunday, October 26. *Id.*, PageID#5918. The court next ordered the Secretary of State to abandon uniformity, prohibiting him from "preventing individual county Boards of Election" from adding more hours. *Id.* Finally, the court "charged" Ohio's General Assembly to enact laws consistent with its order. *Id.*

Ohio appealed. Doc.73, Notice, PageID#5919. The following week, the district court denied its stay request. Doc.82, Order, PageID#5993.

C. Ohio Obtained Expedited Review In The Sixth Circuit, And Its Petition For En Banc Rehearing Remains There.

In the Sixth Circuit, Ohio filed motions to expedite the appeal and to temporarily stay the injunction pending appeal. The Sixth Circuit granted the motion to expedite. 6th Cir. Doc.19-2, Order; 6th Cir. Doc.20, Briefing Schedule. But it denied Ohio's motion for stay. *See* 6th Cir. Doc.22-1, Op.

On September 24, the panel affirmed on the merits, accepting the equal-protection and Section 2 rationales. Panel Op. 17-44. As for equal protection, the panel endorsed the notion that burdens on *early absentee voting* implicate heightened scrutiny under the right to vote. *Id.* at 17-20. It also interpreted *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), to permit facial invalidation of voting regulations based on alleged disparate impacts. Panel Op. 20-24. As for Section 2, the panel held that the changes from Ohio's old schedule to its new one violated the statute because they "will disproportionately burden African American voters." *Id.* at 37. It identified the benchmark against which to compare Ohio's schedule as: "how do minorities fare in their ability 'to participate in the political process' *as compared to other groups of voters*." Panel Op. 39. It then said that the "cutting" of hours from old to new harmed African-American voters. *Id.*

Within hours of the panel decision, Ohio petitioned for emergency en banc review. It waits for a decision from the full Sixth Circuit on that petition.

ARGUMENT

While Ohio seeks to exhaust its Sixth Circuit options, it files this application *now* because the court-ordered voting schedule begins next Tuesday, and it wants to

ensure that the Court has as much time as it can to consider its request. If the Sixth Circuit does not rule on the en banc petition before then, Ohio requests a stay pending its decision, or, in the alternative, a stay pending certiorari before judgment. If the Sixth Circuit resolves the petition against Ohio, Ohio requests a stay pending its filing of a petition for certiorari.

Whatever the procedural posture, the relevant stay "factors" are largely the same. "[A]n applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (stay pending certiorari); *see also San Diegans For Mt. Soledad Nat'l. War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (internal quotation marks omitted) (Kennedy, J., in chambers) (stay pending appeal); *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (stay pending appeal); *Mikutaitis v. United States*, 478 U.S. 1306, 1308 (1986) (Stevens, J., in chambers) (stay pending certiorari before judgment with petition for rehearing en-banc pending).

Ohio meets these standards. A strong likelihood exists that this Court would both grant certiorari and reverse the equal-protection analysis underlying the injunction. *See* Part I. An equally strong likelihood exists that this Court would both grant certiorari and reverse the Section 2 analysis underlying the injunction. *See* Part II. And the State would suffer irreparable harm if it could not enforce its elected representatives' voting schedule. *See* Part III.

I. THE COURT SHOULD GRANT A STAY BECAUSE A STRONG LIKELIHOOD EXISTS THAT IT WOULD BOTH GRANT CERTIORARI AND REVERSE THE EQUAL-PROTECTION HOLDING SUPPORTING THE INJUNCTION.

All agree that Ohio's early-voting schedule is a "generally applicable, nondiscriminatory voting regulation." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). It allows *all* "qualified elector[s] [to] vote by absent voter's ballots." Ohio Rev. Code § 3509.02(A). *All* early-voting voters have multiple choices: vote early at boards, vote at home and mail the ballot, or vote at home and return the ballot to the board (or to an after-hours drop box). Doc.41-9, Damschroder Decl., PageID#1165-66. *All* early voters may vote after registration closes. Ohio Rev. Code § 3509.01(B)(3). And *all* early voters have equal times to vote before Election Day. Doc.41-22, Directive 2014-17, PageID#1282-83.

The panel's holding that this neutral schedule violates equal protection drastically reduces the requirements for proving the unconstitutionality of neutral laws. Panel Op. 14-30. Its holding matches the right to vote's requirement that a law *burden* voting rights (while discarding its requirement that this burden be assessed against *all* voters for facial challenges) with equal protection's requirement that a law have a disparate impact on a *subset* of voters (while discarding its requirement of discriminatory *intent*). By doing so, the injunction conflicts with right-to-vote cases, *Crawford*, 553 U.S. at 203 (Stevens, J., plurality), and with equal-protection cases, *Washington v. Davis*, 426 U.S. 229, 248 (1976).

Indeed, the conflict with this Court's cases is made plain by the decision's direct conflict with *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004) (Posner, J.). *Griffin* rejected the argument that "working mothers" had a right to absentee

ballots. *Id.* at 1129. The court found it "obvious that a federal court is not going to decree weekend voting, multi-day voting, all-mail voting, or Internet voting." *Id.* at 1130. The panel decision here decreed two methods (multi-day and weekend voting) that *Griffin* found "obvious" could *not* be required. The panel relegated *Griffin* to a footnote, noting that the court had "nothing more than a complaint before it." Panel Op. 23 & n.5. But the very fact that *Griffin* threw the case out under the more demanding *motion-to-dismiss* standards underscores that the panel's legal holding here is far-reaching.

A. The Injunction Conflicts With The Court's Equal-Protection Cases Because It Is Based *Solely* On A Disparate Impact.

While the panel decision is based on "equal protection," the panel did not engage in normal equal-protection review. Panel Op. 14-30. Under equal protection, it is not enough to show that a neutral law has a "disproportionate impact" on a class of individuals. *Davis*, 426 U.S. at 239. Rather, "[p]roof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). And by "intent" or "purpose," the Court means "more than intent as volition or intent as awareness of consequences"; it means "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part '*because of*,' not merely '*in spite of*,' its adverse effects upon [that] identifiable [class]." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphases added); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001).

Neither the district court nor the panel claimed to meet this standard. To be sure, they accepted as a fact that the changes to Ohio's early-voting schedule disparately affected "African American, lower-income, and homeless voters." Panel Op. 19; *see* Doc.72, Order, PageID#5897. But Plaintiffs offered no argument that Ohio adopted its generous schedule "'because of,' not merely 'in spite of,' its adverse effects" on those groups. *Feeney*, 442 U.S. at 279. So the district court made no finding that Ohio acted with discriminatory intent. Doc.72, Order, PageID#5897-5907. And the panel even suggested that this was unnecessary, indicating that "the Equal Protection Clause can be triggered by either disparate treatment or *burdens*." Panel Op. 20 n.4 (emphasis added). This violates black-letter law.

B. The Injunction Conflicts With The Court's Right-To-Vote Cases Because It Is Based On Alleged Special Burdens On Only Some Voters And On An Alleged Right To Vote Early.

While calling the claim "equal protection," the panel, in substance, applied this Court's right-to-vote standards from *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). These standards apply a "fundamental rights" analysis to neutral voting laws, one more similar to substantive due process than equal protection. They ask whether the law unconstitutionally "burdens" the right to vote, not whether the law discriminates against some voters. The level of scrutiny "depends upon the extent to which [the] challenged regulation burdens" that right. *Burdick*, 504 U.S. at 434.

The more severe the burden, the more rigorous the scrutiny. At one end, strict scrutiny applies to laws that impose "severe" burdens. *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). In the middle sit laws imposing burdens that, while not

severe, are more than minimal. For these, courts balance "the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted). At the other end, rational-basis review governs laws that impose minimal burdens. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969); *cf. Lyng v. Castillo*, 477 U.S. 635, 638-39 (1986).

The panel decision is unjustifiable under these right-to-vote standards. Indeed, it conflicts with three separate principles. *First*, it finds that alleged burdens on *absentee* voting trigger heightened scrutiny. *Second*, it finds that alleged burdens only on *certain* groups suffice to *facially* invalidate Ohio's schedule. *Third*, its weighing of burdens to justifications engages in strict scrutiny.

1. The panel decision's application of heightened scrutiny conflicts with this Court's cases holding that the right to vote does not include a right to vote absentee.

The panel decision conflicts with the Court's cases holding that the right to vote has never included the "right to receive absentee ballots." *McDonald*, 394 U.S. at 807. Rational-basis review applies to denials of absentee ballots unless challengers can show that the State prohibits them from voting any other way. *Id.* at 807-09. Even when a college student and flight attendant alleged that their educational and work plans required them to travel out-of-state on Election Day, such burdens on personal schedules did not trigger heightened scrutiny. *Fidell v. Bd. of Elections of N.Y.*, 343 F. Supp. 913, 915 (E.D.N.Y.), *aff'd* 409 U.S. 972 (1972); *Prigmore v. Renfro*, 356 F. Supp. 427, 432 (N.D. Ala.), *aff'd* 410 U.S. 919 (1972); *see*

Hicks v. Miranda, 422 U.S. 332, 344 (1975) (summary affirmances are merits decisions). Instead, laws trigger higher scrutiny *only if* a refusal to grant the challengers an absentee ballot "absolutely prohibits [them] from voting," *Goosby v. Osser*, 409 U.S. 512, 521 (1973); *see O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).

These cases control here. The panel decision did not say that Ohio's many voting options would paradoxically "absolutely prohibit" voters from voting. *Goosby*, 409 U.S. at 521; *see* Panel Op. 18. Indeed, the district court found it "impossible to predict" whether the voters who voted at times Ohio eliminated would "not now vote during a different time." Doc.72, Order, PageID#5897. Those voters could still vote early in person on 19 weekdays between 8 a.m. and 5 p.m. (but 8-2 on the Monday before the election). Doc.41-22, Directive 2014-17, PageID#1282-83. Or they could vote in person on two Saturdays and a Sunday. *See id.* And if travel is inconvenient, they could vote by mail. Doc.41-9, Damschroder Decl., PageID#1166. Finally, they could vote on Election Day between 6:30 a.m. and 7:30 p.m. Ohio Rev. Code § 3501.32(A).

The panel instead departed from rational-basis review on the ground that the *Anderson-Burdick* framework for burdens on the right to *vote* had overruled *McDonald*'s conclusion that rational-basis review applies to burdens on the right to vote *absentee*. Panel Op. 18. This has two flaws. One, as this Court has said time and again, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls." *Rodriguez de Quijas v.*

Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). Two, the cases are easily reconcilable. As the Sixth Circuit just recognized, rational-basis review applies *within* the *Anderson/Burdick* framework to laws that only *minimally* burden the right to vote. *See Green Party of Tenn. v. Hargett*, 2014 WL 4116483, at *8 (6th Cir. Aug. 22, 2014); *see also Lyng*, 477 U.S. at 638-39 (noting that a law must substantially interfere with fundamental right to receive heightened scrutiny). *McDonald* makes clear that burdens on *early absentee* voting trigger only rational-basis review within *Anderson-Burdick* unless the burdens also absolutely prohibit the voter from voting in any other way.

For its part, the district court departed from rational-basis review on the ground that Ohio's decision to allow for "broad" absentee voting prohibits it from "capriciously chang[ing] or implement[ing] that system in a manner that disproportionately burdens the right to vote of certain groups of voters." Doc.72, Order, PageID#5896-97. This claim that heightened scrutiny applied because Ohio adopted "broad" early-voting access turns a virtue into a vice. Doc.72, Order, PageID#5896. As *McDonald* noted: "Ironically, it is Illinois' willingness to go further than many States in extending the absentee voting privileges . . . that has provided [the challengers] with a basis for arguing that the provisions seem to operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise." *Id.* at 810-11. Rather than apply heightened scrutiny, however, the Court commended Illinois for its "laudable state policy of absentee coverage." *Id.* Ohio's early-voting regime is light-years beyond the Illinois

law applauded by *McDonald* in 1969 and, indeed, beyond some 41 States in 2014. Doc.41-3, Trende Decl., PageID#1024. Ohio's expansive schedule should have been lauded by the courts, not used as their ground for applying heightened scrutiny.

2. The panel decision's facial invalidation of Ohio's early-voting schedule conflicts with the Court's cases limiting that relief to broad burdens on the entire class of voters.

The injunction conflicts with this Court's decisions measuring the size of the burden in *facial* challenges. In facial attacks like this one, the Court "consider[s] only the statute's broad application to all [the State's] voters." *Crawford*, 553 U.S. at 202-03 (Stevens, J., op.). In *Crawford*, for example, a three-Justice plurality upheld Indiana's photo-ID law because the State's fraud-prevention interests outweighed the "inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph." 553 U.S. at 189-198 (Stevens, J., op.). While the plurality conceded that the law might place a "heavier burden" "on a limited number of persons," such a limited burden was insufficient to invalidate the law in its entirety. *Id.* at 199-203. "A facial challenge must fail," the plurality noted, "where the statute has a 'plainly legitimate sweep.'" *Id.* at 202 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (other internal quotation marks omitted). Any such limited burden could only be litigated down the road in an as-applied challenge. *Id.* at 203.

The injunction conflicts with this rule. Nowhere did the panel find that Ohio's expansive early-voting options burden the right to vote of the State's voters. Rather, the panel could find only that the schedule would place alleged *special* burdens on African-Americans, low-income individuals, and the homeless. Panel

Op. 19. Its analysis thus reads like a textbook equal-protection case for a facially neutral law that has a disparate impact—but without the key equal-protection ingredient of intentional discrimination.

The panel agreed that it relied *only* on burdens on certain groups. Panel Op. 20-24. But it said that Justice Stevens's plurality in *Crawford* allowed for such an analysis because it rested entirely on the absence of evidence about burdens on *any subset* of voters. Panel Op. 23. If that were correct, Justice Stevens would not have needed to say that, even "assuming" "unjustified burdens on some voters," the remedy would not be facial invalidation. *Crawford*, 553 U.S. at 203. The panel *never* discusses the facial-challenge portion of his opinion. It thus turned a blind eye to the plurality's key discussion, and correspondingly to the "plainly legitimate sweep" of Ohio's schedule. *Id.* at 202 (internal quotation marks omitted).

Regardless, the panel's use of disparate-impact analysis along *racial* lines was suspect. If the *implicit* "right to vote" prohibited neutral voting regulations because of a disparate impact on African-Americans, it would provide *more* constitutional scrutiny than the *explicit* protection against race discrimination in voting. The Fifteenth Amendment says the right to vote "shall not be denied or abridged" "on account of race," U.S. Const. art. XV, § 1, and requires *intentional* discrimination, *City of Mobile v. Bolden*, 446 U.S. 55, 61-63 (1980) (plurality). It would be odd to interpret an implied provision that does not address racial classifications as requiring greater scrutiny against racial classifications than the express provision that does so. *Cf. Conn v. Gabbert*, 526 U.S. 286, 293 (1999)

(noting that when a provision of the Constitution "'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and 'not the more generalized notion of substantive due process'" (citation omitted)).

Not only that, this reading of the right to vote could create a Constitution at war with itself. For this Court has held that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). A requirement that a State set its days and hours for early voting based on racial classifications could trigger that scrutiny. Perhaps such race-based decisionmaking in setting voting regulations, if one of many factors, could *survive* such scrutiny. *Cf. Grutter v. Bollinger*, 539 U.S. 306 (2003). But it does not *violate* the Constitution for a State to adopt a neutral schedule in a race-neutral way. *Cf. Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

3. The panel decision's balancing of burdens to justifications cannot be squared with this Court's cases.

The panel decision also contradicts this Court's precedents instructing how to measure the burden's size and how to scrutinize the state interest. As for the burden, the panel endorsed the district court's view that Ohio's regulations place a "significant" burden on the rights of the identified voters. Panel Op. 23. But, when measuring a burden's size, this Court does not analyze a provision in a vacuum; it asks whether the entire regime *overall* burdens voting rights. For example, when

evaluating a law that prohibited "write-in" votes, this Court measured the entire system, holding that it "provide[d] for easy access to the ballot" for candidates, and so the write-in ban was only a "limited" burden. *Burdick*, 504 U.S. at 436-37; *Crawford*, 553 U.S. at 197-98 (Stevens, J., op.) (provisional ballot provided "adequate remedy" for not having photo ID). The panel's analysis conflicts with this holding. It endorsed the idea that "voting by mail may not be a suitable alternative" for some voters. Panel Op. 20. But the inability to vote in a *preferred* way is not a burden. And using the mail (or dropping a ballot off at an after-hours drop box) is no greater a burden than "the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph." *Crawford*, 553 U.S. at 198 (Stevens, J., op.).

The panel's approach further ducked this Court's teaching when it treated the question of whether Ohio's regulations constitute a burden as a *fact* subject to clearly erroneous review. *See* Panel Op. at 23 n.6. Although historical facts might bear on whether a regulation is a burden, the ultimate *question* of burden or what level of scrutiny it triggers is a legal one. That is why *Crawford* took "judicial notice" of certain facts and observed that any burden there would be "mitigated" by other options for casting a ballot. 553 U.S. at 199 (Stevens, J., op.); *see Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394 (5th Cir. 2013) (reversing district court's preliminary injunction grounded in State's lack of evidence justifying state interest) (Jones, J.); *cf. Ornelas v. United States.*, 517 U.S. 690, 697 (1996) (holding that

treating probable cause and reasonable suspicion as legal questions is "necessary if appellate courts are to maintain control of, and to clarify, the legal principles").

The panel also misread this Court's precedents by making the State *justify* its schedule, asking whether the State could show that the injunction "would actually be burdensome." Panel Op. 28. But this Court has "never required a State to make a particularized showing of [harms] . . . prior to the imposition of reasonable restrictions on ballot access." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986). Nor does it "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). Thus, *Crawford* credited Indiana's desire to reduce election fraud even though the record contained "no evidence of any such fraud actually occurring in Indiana," and even though Indiana's "own negligence" contributed to the problem. 553 U.S. at 194, 196 (Stevens, J., op.). And *Munro* upheld Washington's interest in limiting ballot access to prevent voter confusion even after accepting that "'Washington's political history evidences no voter confusion from ballot overcrowding.'" 479 U.S. at 194 (citation omitted).

In light of these precedents, the view that the State did not "explain" why it "could not" implement the injunction inverts the relevant burdens. All told, the panel took a "why not" approach to restructuring state law, asking only if it was possible for the State to do more. That would invalidate most laws. After all, a State *could* allow voting without ID or *could* have shorter registration deadlines.

Crawford, 553 U.S. 181; *Marston v. Lewis*, 410 U.S. 679 (1973). For an injunction about democracy, the panel is surely suspicious of the democratic process.

II. THE COURT SHOULD GRANT A STAY BECAUSE A STRONG LIKELIHOOD EXISTS THAT IT WOULD GRANT CERTIORARI AND REVERSE THE SECTION 2 HOLDING SUPPORTING THE INJUNCTION.

The injunction fares no better under Section 2. That provision originally mirrored the Fifteenth Amendment by requiring *intentional* discrimination. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (plurality). In 1982, however, Congress amended it to adopt a "results" test: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 52 U.S.C. § 10301(a) (renumbered from 42 U.S.C §1973(a)).

To hold that Ohio's early-voting schedule "resulted" in the "abridgment" of African-Americans' right to vote, the panel decision found that African-Americans use early in-person voting more than others, and thus that Ohio's change to its *current* schedule from allegedly more expansive *prior* schedules disparately affected those voters. Panel Op. 37-38; *see also* Doc. 72, Order, PageID#5912-15. Its reasoning conflicts with this Court's cases in several ways. *First*, the panel offers no analysis on what the *objective benchmark* should be against which to compare Ohio's early-voting schedule. *Second*, it relies on an old-to-new comparison reserved for Section 5. *Third*, it jumps immediately to the totality of circumstances. *Fourth*, it overlooks the big picture. *Fifth*, it ignores relevant canons of construction.

A. The Panel Decision Conflicts With This Court's Cases Requiring Plaintiffs To Identify An Objective "Benchmark" Against Which To Measure The Challenged State Practice.

The panel decision conflicts with the Court's many cases requiring an *objective* benchmark under Section 2. A court assessing whether a voting practice "results" in the "abridgement" of the right to vote must "find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." *Holder v. Hall*, 512 U.S. 874, 880 (1994) (Kennedy, J., op.). The panel called the benchmark "straightforward" here: comparing how "minorities fare in their ability 'to participate in the political process' as *compared to other groups of voters*." Panel Op. 39. That was no benchmark at all.

"It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to *compare the practice*." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("*Bossier II*") (emphasis added). In other words, the *challenged* state practice must be compared to another *hypothetical* practice; the comparison is not between (as the panel claimed) one *racial group* and another *racial group*. In many cases, "the benchmark for comparison" will be "obvious." *Holder*, 512 U.S. at 880 (Kennedy, J., op.). When, for example, a requirement imposes a *burden* on the right to vote—such as an anti-single shot rule, literacy test, or poll tax—the comparator (or "benchmark") will be a voting system *without* that voting burden. *See id.* at 880-81.

For other practices, however, the benchmark will be far from obvious. In *Holder*, for example, challengers brought a Section 2 claim against a county's choice to have a single commissioner. Plaintiffs sought to compare that choice to a

"hypothetical five-member commission" that they said would allow minorities to elect one commissioner. *Id.* at 881. That was not a valid benchmark for the size of a governing body. The plurality found "no *principled reason* why one size should be picked over another as the benchmark for comparison." *Id.* at 881 (emphasis added). Thus, the challengers could not state a claim because "there [was] no objective and workable standard for choosing a reasonable benchmark." *Id.* at 881. Instead, the choice "was 'inherently standardless.'" *Id.* at 885 (citation omitted).

The panel decision conflicts with *Holder*. It provided no "principled reason" why a certain amount of early voting in Ohio should be picked over a different amount. *Id.* at 881. The choice of the amount of early voting in this case is just as "'inherently standardless'" as the choice of the size of government in *Holder*. *Id.* at 885 (citation omitted). Indeed, even assuming that African-Americans participate in early-voting opportunities more than whites, Doc.72, Order, PageID#5912, Ohio's early-voting schedule would *benefit* African-Americans compared to most alternative benchmarks. Ohio's schedule, for example, exceeds 41 other States' schedules. Doc.41-3, Trende Decl., PageID#1021. If any of these schedules were the "benchmark," Plaintiffs' claim would fail at the outset.

Nor can a preferred "schedule" provide an *objective* alternative. The "ever more" standard has no limit. Within a fixed timeframe, it could be four or five Saturdays or Sundays, with evenings up to midnight. And when the *beginning* of the voting period is challenged, the hypotheticals are unlimited (or limited only by the candidate-registration deadlines months earlier, and perhaps those, too, should

move). Here, as in *Holder*, "[o]ne gets the sense that [Plaintiffs] and the United States have chosen a benchmark for the sake of having a benchmark." 512 U.S. at 882 (Kennedy, J., op.). But "it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place." *Id.* Ohio would comply with Section 2 under any *reasonable* benchmark. Because Plaintiffs have not shown that the hypothetical choice is anything but standardless, the choice should not be made—at least not at this emergency stage. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (plaintiffs bear burden of proof under Section 2).

B. The Panel Decision Conflicts With This Court's Cases Refusing To Incorporate Section 5's Retrogression Test Into Section 2.

While the panel decision claimed that the "benchmark" was a comparison of African-Americans to other racial groups, Panel Op. 39, it went right on to use Ohio's *old schedule* as the benchmark (precisely because a comparison of voting *practices* has to be undertaken). The panel noted that "cutting" certain days and hours from Ohio's old schedule to its new schedule disparately impacted African-Americans. *Id.* By relying on this old-to-new comparison, the decision conflicts with this Court's cases distinguishing the *objective* benchmark in Section 2 from the *past-practices* benchmark in Section 5.

Section 2 prohibits all States from "impos[ing] or apply[ing]" a voting practice (whether established or new) that "results" in the "denial or abridgement of the right . . . to vote on account of race." 52 U.S.C § 10301(a). Section 5, by contrast, requires covered States to submit voting-practice *changes* to preclearance in which the States must show that a change "neither has the purpose nor will have the

effect of denying or abridging the right to vote on account of race." 52 U.S.C. § 10304(a) (renumbered from 42 U.S.C. § 1973c(a)). This different language shows the different scopes. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

The sections "differ in structure, purpose and application," *Holder*, 512 U.S. at 883 (Kennedy, J., op.), and "impose very different duties upon the States," *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997) ("*Bossier I*"). Section 5 "uniquely deal[s] only and specifically with *changes* in voting procedures." *Bossier II*, 528 U.S. at 334. Under Section 5, therefore, "[t]he baseline for comparison is present by definition; it is the existing status." *Holder*, 512 U.S. at 883 (Kennedy, J., op.); *Bossier II*, 528 U.S. at 334.

Not so under Section 2. "Retrogression is not the inquiry" for that provision. *Holder*, 512 U.S. at 884 (Kennedy, J., op.); *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard."). That is precisely why—unlike with Section 5's built-in baseline—a plaintiff in a Section 2 case "must postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Bossier I*, 520 U.S. at 480. That reasonable alternative benchmark is what the "right to vote *ought to be*" as an abstract matter. *Bossier II*, 528 U.S. at 334; *see Holder*, 512 U.S. at 880 (Kennedy, J., op.) (noting that the benchmark gives the courts "an idea in mind of how hard it *should be* for minority voters to elect their preferred candidates under an *acceptable* system" (emphases added; internal quotation marks omitted)).

In sum, *Holder*, *Bossier I*, *Bossier II*, and *Georgia* show that the benchmark is not the *old* number of early-voting options but a *hypothetical* number that Ohio "ought" to have. *Bossier II*, 528 U.S. at 334. Whatever that hypothetical number is, Ohio's *generous* schedule necessarily exceeds it. After all, it exceeds the schedule of 41 other States. At the least, Plaintiffs' claim fails because their reliance on past practices shows they have not carried their burden at this stage to identify a proper benchmark for comparison. *See Holder*, 512 U.S. at 881-82 (Kennedy, J., op.).

C. The Panel Decision Conflicts With The Court's Cases Requiring A Benchmark *Before* The Totality Of The Circumstances.

The panel decision justified its retrogression approach to Section 2 by noting that past practices may be relevant "as part of the 'totality of the circumstances' inquiry." Panel Op. 40. But this *immediate* jump to the totalities departs from the two-step approach this Court's vote-dilution cases require for redistricting plans.

In those cases, the Court has adopted three factors to determine whether an objective *benchmark* exists against which to measure a redistricting plan. *See Bartlett*, 556 U.S. at 12 (Kennedy, J., op.). These factors must be met *before* reaching the totalities. The Court has said that a plaintiff must "*initially* establish" the factors, *Bossier I*, 520 U.S. at 479-80 (emphasis added), referring to them as "preconditions" (emphasis on "pre"), *Holder*, 512 U.S. at 880 (Kennedy, J., op.). "*[O]nly* when a party has established [the preconditions] does a court proceed to analyze whether a violation has occurred based on *the totality of the circumstances*." *Bartlett*, 556 U.S. at 11-12 (Kennedy, J., op.) (emphases added). At that *later* stage, of course, one of the boundless factors may well be historical practices (as the panel

notes, Panel Op. 41). *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006) ("*LULAC*"). But courts *never* reach that step if the plaintiffs do not meet the preconditions. Without the initial baseline showing, "there neither has been a wrong nor can be a remedy." *Growe v. Emison*, 507 U.S. 25, 41 (1993).

Indeed, in the vote-dilution context, this Court criticized a district court for doing precisely what the panel decision did here—"proceed[ing] directly to the 'totality of circumstances' test" without satisfying Section 2's preconditions. *Id.* at 38. *Growe* held that the preconditions are necessary both "to establish that the minority has the potential to elect a representative of its own choice" (i.e., that an objective alternative plan exists) and "that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population" (i.e., that a disparate impact exists from the current plan as compared to that alternative). *Id.* at 40.

The panel rejected all of these principles from this Court's cases on the mere factual ground that these cases involved vote-dilution claims. Panel Op. 38 & n.10. Bu this is a distinction without a difference—certainly not one justified in the text of the statute (which does not have a separate section for "vote dilution") or the Court's cases (which have asserted general principles). For example, *Bossier II* said a benchmark requirement was necessary for all "voting practice[s]," not just for redistricting plans. 528 U.S. at 334. And *Holder* said that "[r]etrogression is not the inquiry" under Section 2; it did not make an exception for early-voting challenges under Section 2. 512 U.S. at 884 (Kennedy, J., op.). In sum, the panel

decision's effort to cloak mistaken retrogression in the "totalities" does not make it any less mistaken retrogression.

D. The Panel Decision Conflicts With This Court's Cases Requiring A Statute To Be Interpreted In Its Broader Context.

Disregarding the far-reaching results of its reading for this Nation, the panel said both that Ohio failed to cite a case indicating that it "must *necessarily* consider the practices of other states with regard to [early] voting," and that "Section 2 does not direct courts to compare opportunities across States." Panel Op. 42. But this Court has repeatedly said that "reasonable statutory interpretation must account for . . . 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation omitted). It is inconceivable that the Congress that enacted the amendment to Section 2 in 1982 intended to outlaw Ohio's expansive schedule. Early absentee voting, or "convenience voting," barely existed when the Act was amended in 1982. By the early 1990s, only about 7% of votes across all States were cast by any early absentee voting. *See* Burden, Canon, Mayer, and Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform,* 58 Am. J. of Pol. Sci. 95, 96 (2014).

Yet the panel's view would mean that Congress, when amending Section 2, immediately outlawed *all 50 States*' voting regimes because *none* offered the expansive early-voting schedule Ohio offers today. This Court has repeatedly rejected interpretations that would lead to such unrealistic results. Last Term, it rejected a reading of the Clean Air Act that gave the EPA "extravagant statutory power over the national economy," power the agency admitted "would render the

statute 'unrecognizable to the Congress that designed' it." *Util. Air*, 134 S. Ct. at 2444 (citation omitted). Similarly, the Court rejected the Food, Drug, and Cosmetic Act's application to cigarettes because the result would have required the FDA to ban smoking. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000).

This approach applies to Section 2. Circuits have held that Section 2 does not reach felon-disenfranchisement laws partially because those laws were "a well-known and accepted part of the voting landscape" in 1982. *Simmons v. Galvin*, 575 F.3d 24, 40 (1st Cir. 2009); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005). It is equally implausible to think that Congress meant to ban the well-established rule that voting occurs on an Election Day, not an Election Month. Other courts have recognized the "'dramatic and far-reaching effects'" of the panel decision's view. *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 351 (M.D.N.C. 2014) (citation omitted). If, for example, North Carolina's departure from same-day registration violated Section 2, it would have "plac[ed] the laws of at least 36 other States which do not offer [that same-day option] in jeopardy." *Id.* And Florida's reduction to eight early-voting days could prove problematic for States that lacked *any* early voting. *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1254 (M.D. Fla. 2012). These cases pale in comparison to this one—given that Ohio's early-voting schedule falls within the top ten of States.

E. The Panel Decision Conflicts With This Court's Cases Applying Relevant Canons Of Construction.

Finally, the panel decision conflicts with this Court's cases relying on statutory canons of construction, both generally and when interpreting Section 2

specifically. The panel said that Section 2 unambiguously covered *any* voting standard, practice, or procedure. Panel Op. 34-35. True enough. But the question here is whether Ohio's early-voting schedule "results" in an "abridgement" of the right to vote on account of race. Room for interpretation exists within Section 2's broad language, which is sufficiently opaque to trigger two canons of construction.

Canon of Constitutional Avoidance. This Court has invoked the canon of constitutional avoidance when interpreting the Voting Rights Act. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-05 (2009). The Court, for example, read Section 2 to require the "majority-minority rule" in the redistricting context to "avoid[] serious constitutional concerns under the Equal Protection Clause" from a less demanding objective baseline. *Bartlett*, 556 U.S. at 21 (Kennedy, J., op.); *see LULAC*, 548 U.S. at 446 (Kennedy, J., op.).

The Court's concern that it "must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions" applies in this context. *Bartlett*, 556 U.S. at 18 (Kennedy, J., op.). For example, the district court's conclusion that "African Americans" as a class "are distrustful of the mail" makes that very type of race-based prediction. Doc.72, Order, PageID#5901. That broad finding would necessarily invalidate those state election laws that require voting to take place *only by mail*. Doc.41-3, Trende Decl., PageID#1020. And it is belied by Cuyahoga County's own *amicus* brief, which asserts that 30.9% of African-Americans cast votes by mail in 2010. *See* Sixth Circuit Doc.36, Ex. 3, Cuyahoga Cnty. *Amicus* Br., Salling Decl., Ex. B at 6.

More broadly, if Ohio's expansive voting options were read to violate Section 2, it would raise the question whether that *broad* application were consistent with Congress's "power to enforce [the Fifteenth Amendment] by appropriate legislation." U.S. Const. amend. XV, § 2. Under its enforcement power, Congress may "enact so-called prophylactic legislation that proscribes facially constitutional conduct." *Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 727-28 (2003). But such laws must have "congruence and proportionality" between the harm remedied and means employed, *City of Boerne v. Flores,* 521 U.S. 507, 520 (1997), and respond to a history of *actual* constitutional violations, *Garrett,* 531 U.S. at 368.

Just as no evidence existed that the States set their voting age at 18 to discriminate against African-Americans, *Oregon v. Mitchell,* 400 U.S. 112, 130 (1970) (Black, J., op.), *superseded by* U.S. Const. amend. XXVI, no evidence exists that States expanded into early voting to discriminate against African-Americans. *Cf. Johnson*, 405 F.3d at 1229-32 & nn.33-34. Indeed, the Congress that amended Section 2 in 1982 expressly indicated that it need *not* provide a detailed history of discrimination to support the amendment's expansion given that, even with that expansion, Section 2 was still "less intrusive on state functions" than Section 5. S. Rep. No. 97-417, at 42 (1982) (internal quotation marks omitted). If Congress thought Section 2 did not raise a constitutional question because it was less intrusive on state functions, the Court should interpret Section 2 to be less intrusive on state functions so as not to raise a constitutional question.

Federalism. The Court has also noted that our constitutional structure requires Congress to include a clear statement if it intends to take away traditional state powers. "Among the background principles of construction that [the Court's] cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). Under this clear-statement rule, "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). State law, of course, has long governed elections, so when a "federal statute concerns congressional regulation of elections . . . a court must not lightly infer a congressional directive to negate the States' otherwise proper exercise of their sovereign power." *Arizona v. Inter Tribal Council of Ariz., Inc.,* 133 S. Ct. 2247, 2261 (2013) (Kennedy, J., concurring in part and concurring in the judgment).

Here, there is no doubt that the Voting Rights Act significantly changed the federal-state balance (and for good reason given the "rampant" discrimination arising at the time). *Nw. Austin*, 557 U.S. at 201. But, as it was enacted under the Fourteenth Amendment rather than the Elections Clause, *see Inter Tribal*, 133 S. Ct. at 2256-57, the Voting Rights Act leaves courts with the "starting presumption that Congress does not intend to supplant state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 654 (1995). And Congress, through Section 2, did not convey the required clear statement to micromanage Ohio's calendar. *Johnson*, 405 F.3d at 1232 n.35.

Not only that, through *other* legislation, Congress conveyed the *opposite* intent. For one, Congress told the States that they should have *one* Election Day for federal officials. *See* 2 U.S.C. §§ 1, 7 (senators and representatives); 3 U.S.C. § 1 (president). If Congress wanted States to enact an Election Month instead, it would have said so. For another, the National Voter Registration Act blessed state registration *deadlines* 30 days before Election Day. 52 U.S.C. § 20507(a) (renumbered from 42 U.S.C. § 1973gg-6(a)(1)(D)). Because "this statute was passed 11 years after the amendment to Section 2, it is difficult to conclude that Congress intended that a State's adoption of a registration cut-off before Election Day would constitute a violation of Section 2." *McCrory*, 997 F. Supp. 2d at 352. The clear-statement rule requires resolving any doubt about Section 2 against the injunction.

* * * *

To sum up, the injunction rests on a reading of Section 2 that is incompatible with this Court's cases. It sidesteps the critical question whether an objective benchmark exists in the early-voting context by both engaging in a mistaken retrogression analysis and wrongly jumping immediately to the totality of the circumstances. And it reaches a far-reaching conclusion that would invalidate the way most States vote and that is inconsistent with well-used canons of construction. But the Court need not answer what the proper test is *now*. At bottom, the narrowest way to resolve this case is to find that Plaintiffs have not met *their burden* to identify an objective early-voting benchmark. *Holder*, 512 U.S. at 881-82

(Kennedy, J., op.). That allows the Court to leave for another day whether such a benchmark exists or what it should be.

III. OHIO WILL SUFFER IRREPARABLE HARM ABSENT A STAY AND THE BALANCE OF EQUITIES TIP AGAINST THIS LAST-MINUTE ELECTION INJUNCTION.

Even if the merits were closer, the Court should issue a stay because the Ohio's irreparable injury and the overall equities should have barred the injunction.

Irreparable Injury. Ohio faces irreparable harm absent a stay. "'[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.'" *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (granting stay) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Suspending Ohio's law is more significant here as "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Shelby Cnty.*, 133 S. Ct. at 2623 (internal quotation marks omitted).

Balance of Equities. The balance of the equities supports Ohio. *See Hollingsworth*, 558 U.S. at 190. Plaintiffs' delay created the current appellate time crunch. Ohio's early-voting schedule was set in February. Plaintiffs took two months to sue, and another two to seek an injunction. That delay consumed over half the available time to determine the schedule's validity, leading to a September 4 injunction ordering Ohio to move up its start-date to that very month. Meanwhile, Plaintiffs have not shown that the injunction is the difference between voting or not voting. The district court conceded that "it [was] impossible to predict whether voters who have voted during [the earliest week] in past elections would

not now vote." Doc.72, Order, PageID#5897. Still the court found irreparable harm in a restriction of "the fundamental right to vote" based on the inconvenience of voting at another time. *Id.* Even if voting inconvenience were relevant to the merits, it did not justify injunctive relief.

On the other side, the injunction is unfair to elections officials and the public. Officials have been planning all year for a different calendar. Officials must now go back to processing registrations during early voting. They must be open nights and weekends. To staff those times, they must work more overtime or hire and train temporary staff. Those counties and their taxpayers must come up with the money for all that. The district court recognized budget concerns, admitting that a county might face a 20% increase in costs for temporary workers, but said that the record did not show these costs were unmanageable. Doc.72, Order, PageID#5905.

As for the public, this Court has rejected last-minute election changes because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). Indeed, Plaintiffs *admit* that such changes can cause confusion, but, in their view, that favors the district court's *September* order over the law that was in place *all year*. Doc.81, Resp., PageID#5986. And they even suggest this should lead to no appellate review at all. *See* Sixth Circuit Doc.16, Opp., at 3-4. *Purcell* should not be read this way.

To be sure, *Purcell* did reverse a late election injunction entered by a circuit court, after a district court declined to enjoin state law. But that does not support

reading *Purcell* as being about district-court deference—even when a district court *upends* an election law at the last minute—rather than establishing a presumption against *any* last-minute injunctions. In *Purcell*, deference to the district court and a preference for state law ran together, as the district court there wisely declined to interfere with an election at the last-minute. Furthermore, *Purcell* recognized that a court faced with an late injunction request should weigh "considerations specific to election cases and *its own institutional procedures*." 549 U.S. at 4 (emphasis added). It said that an appellate court might properly "give[] some weight to the possibility that the nonprevailing parties would want to seek en banc review." *Id.* at 5. That should be even more true at the trial level where no appellate review has occurred at all. In other words, if it is too late for an appellate court's *decision*, it should be too late for a district court's *injunction*.

Reading *Purcell* as *favoring* appellate retention of last-minute injunctions provides the wrong incentives. Ohio's reading encourages parties and courts to resolve election issues early. But if *Purcell* not only allows late injunctions, but also insulates them from appellate review, others have an incentive to secure an injunction at the last minute. Indeed, Ohio's experience teaches why, "[a]s a general rule, last-minute injunctions changing election procedures are strongly disfavored." *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012). The Sixth Circuit has had to repeatedly reverse last-minute injunctions. *See id.*; *Ne. Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir.2006); *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th

Cir. 2004); *Nader v. Blackwell*, 230 F.3d 833, 834-35 (6th Cir. 2000). And this Court, too, has repeatedly addressed Ohio's last-minute election issues. *See Brunner v. Ohio Republican Party*, 555 U.S. 5, 5 (2008); *Spencer v. Pugh*, 543 U.S. 1301, 1302-03 (2004) (Stevens, J., in chambers).

Purcell's presumption against last-minute changes comports with the Court's older tradition, too, as it has long rejected late election changes even in the face of constitutional violations. In one case, the Court refused to "require Ohio" to put a candidate on the ballot because the election was too close. *Williams v. Rhodes*, 393 U.S. 23, 35 (1968). In another, it praised the restraint of a district court "in declining to stay the impending primary election" to afford time for a considered remedy. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). Here, where the legal theory at issue is deeply flawed—or indisputably path-breaking—the Court should do no less, and let Ohio's election proceed as *Ohio* planned.

IV. IN THE ALTERNATIVE, THE COURT SHOULD TREAT THE APPLICATION AS A PETITION FOR CERTIORARI, GRANT THE PETITION, AND REVERSE.

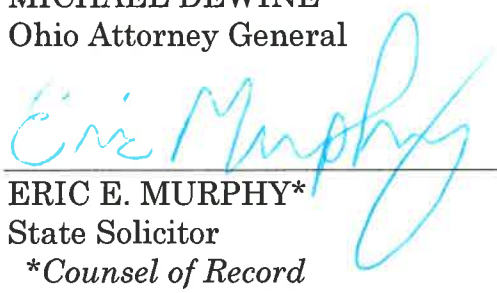
The same reasons that justify a stay justify an outright reversal. In the alternative, therefore, the Court could treat this application as a petition for certiorari (or certiorari before judgment), grant the petition, and vacate the injunction. That is precisely what it did in *Purcell* when it reversed a last-minute injunction. *See* 549 U.S. at 2.

CONCLUSION

The Court should stay the injunction pending certiorari or grant certiorari and vacate the injunction.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



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No. _____

In the Supreme Court of the United States

MICHAEL DEWINE, IN HIS OFFICIAL CAPACITY AS
OHIO ATTORNEY GENERAL, AND
JON HUSTED, IN HIS OFFICIAL CAPACITY
AS OHIO SECRETARY OF STATE,

Applicants,

v.

OHIO STATE CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, *ET AL.*,

Respondents.

ON APPLICATION FOR STAY FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

I, Eric E. Murphy, counsel of record for Applicants, hereby declare the EMERGENCY APPLICATION FOR STAY was served upon the following counsel for Respondents:

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 14a0246p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE et al.,

Plaintiffs-Appellees,

v.

JON HUSTED, in his official capacity as Ohio Secretary of State; MIKE DEWINE, in his official capacity as Ohio Attorney General;

Defendants-Appellants.

No. 14-3877

Appeal from the United States District Court
for the Southern District of Ohio at Columbus
No. 2:14-cv-00404—Peter C. Economus, District Judge.

Decided and Filed: September 24, 2014

Before: KEITH, MOORE, and CLAY, Circuit Judges.

COUNSEL

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OPINION

KAREN NELSON MOORE, Circuit Judge. Defendants Jon Husted, the Ohio Secretary of State, and Mike DeWine, the Ohio Attorney General, appeal from the district court's order granting Plaintiffs' motion for a preliminary injunction. The district court enjoined the enforcement of Senate Bill 238 ("SB 238") and Secretary of State Directive 2014-17, and ordered the restoration of additional early in-person ("EIP") voting hours as set forth below on the basis that SB 238 and Directive 2014-17 violate the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act of 1965. For the reasons set forth below, we **AFFIRM** the district court's judgment granting the preliminary injunction.

I. BACKGROUND

A. Procedural History

Plaintiffs, Ohio State Conference of the National Association for the Advancement of Colored People et al. ("NAACP"), filed a complaint in the United States District Court for the Southern District of Ohio on May 1, 2014, pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1973 challenging the constitutionality and legality of SB 238 and Directive 2014-17. In their complaint for declaratory and injunctive relief, Plaintiffs allege that SB 238 and Directive 2014-06 (now Directive 2014-17) (1) violate the Equal Protection Clause of the Fourteenth Amendment by burdening the fundamental right to vote; and (2) violate Section 2 of the Voting Rights Act of 1965 by disproportionately burdening African American voters' ability to participate effectively in the political process.

On June 30, 2014, Plaintiffs moved for a preliminary injunction to "enjoin the enforcement of . . . Senate Bill 238 . . . and require Defendant Husted to set uniform and suitable in-person early voting hours for all eligible voters that includes multiple Sundays and weekday evening hours." R. 17 (Pls.' Mot. Prelim. Inj. at 61) (Page ID #152). Following a hearing on August 11, 2014, the district court granted Plaintiffs' motion for a preliminary injunction on

September 4, 2014. R. 72 (D. Ct. Op. and Order at 70) (Page ID #5917). The district court's order provided as follows:

> That the State of Ohio and the Secretary Husted are enjoined from enforcing and implementing SB 238's amendments to § 3509.01 of the Ohio Revised Code reducing the EIP voting period from 35 days before an election to the period beginning the day following the close of voter registration;
>
> That, for purposes of the 2014 general election, the EIP voting period shall consist of the 35 days prior to the election as was the case [prior] to SB 238's enactment;
>
> That, for the 2014 general election, Defendant Secretary Husted shall require all Ohio county Boards of Election to set uniform and suitable EIP voting hours, in addition to those currently established by Directive 2014-17, for the following days:
>
> - Tuesday, September 30, 2014 through Friday, October 3, 2014;
> - Monday, October 6, 2014;
> - Evening voting hours between Monday, October 20, 2014 and Friday, October, 24, 2014, and between Monday, October 27, 2014 and Friday, October 31, 2014. Provided, that in setting such hours, Husted must, in good faith, take into consideration the Court's findings and legal conclusions regarding the impact of a lack of evening voting hours on the protected classes of voters discussed in this Memorandum Opinion and Order; and
> - Sunday, October 26, 2014; and
>
> That Defendant Secretary Husted is enjoined from preventing individual county Boards of Election from adopting, by a majority vote of their members and in accordance with the procedures established by Ohio election law, EIP voting hours in addition to those specified above and in Directive 2014-17.
>
> Further, all issues regarding and pertaining to future elections are deferred and reserved for consideration on the motion for a permanent injunction. In the interim, the Ohio General [A]ssembly is charged with the responsibility of passing legislation consistent with this Memorandum Opinion and Order. . . .

Id. at 70–71 (Page ID #5917–18) (footnote omitted).

Defendants timely appealed the district court's order granting a preliminary injunction to Plaintiffs and moved this court to expedite that appeal. After the district court denied Defendants' motion for a stay of that order, Defendants moved this court to stay the order pending appeal. We granted Defendants' motion to expedite the appeal on September 11, 2014, and denied their motion for a stay of the order granting a preliminary injunction to Plaintiffs on September 12, 2014.

The Ohio General Assembly ("General Assembly") filed a motion with the district court on July 11, 2014 to intervene in this case, which the district court denied on July 30. On August 1, the General Assembly filed a notice of appeal of that decision, which appeal is pending under case number 14-3756.

After the district court granted Plaintiffs' motion for a preliminary injunction and after Defendants filed their notice of appeal in the instant case (appeal number 14-3877), the district court granted the General Assembly's renewed motion to intervene, stating that the motion was granted "for the purpose of appeal only." R. 75 (D. Ct. Order Granting General Assembly's Intervention for Appeal) (Page ID #5954). The General Assembly then filed a notice of appeal that is docketed as appeal number 14-3881. The General Assembly has filed a brief in appeal 14-3881. It has also filed a motion to file a brief *instanter* in 14-3877, which included an accompanying brief supporting Defendants' appeal in this case. We do not address in this appeal whether the district court's intervention decisions were proper, and we do not resolve appeals numbers 14-3756 and 14-3881. Nevertheless, we consider the arguments the General Assembly presented in the brief filed in 14-3881 as if it were filed as an amicus curiae brief in this case. Moreover, we also consider the arguments presented by amici curiae United States and Cuyahoga County in briefs filed in this case.

B. Factual Background

Ohio established early in-person voting largely in response to well-documented problems in administering the 2004 general election. As we explained in *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012), "[d]uring that election, Ohio voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day." *Id.* at 426. In *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008), we summarized the problems the League of Women Voters of Ohio reported voters faced as follows:

> Voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines. Voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others. At least one polling place, voting was not completed until 4:00 a.m. on the day following election day. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from

> standing in line. Poll workers received inadequate training, causing them to provide incorrect instructions and leading to the discounting of votes. In some counties, poll workers misdirected voters to the wrong polling place, forcing them to attempt to vote multiple times and delaying them by up to six hours.

Id. at 477–78. In sum, many voters in the 2004 general election were effectively disenfranchised and unable to vote.

In 2005, the Ohio General Assembly passed Substitute House Bill 234 to remedy these problems. 2005 Ohio Laws 40 (Sub. H.B. 234). HB 234 instituted no-fault early voting, eliminating the requirement that Ohio voters had to provide an excuse for not being able to vote on Election Day in order to vote early. Early voting is done via an "absentee ballot," which may be cast either early in-person ("EIP") at the voter's Board of Elections' ("BOE") designated voting location or by mailing the ballot to the BOE. Ohio Rev. Code § 3509.05(A). Each county has one BOE, which is permitted to operate only one location for EIP voting. *Id.* § 3501.10(C). Under the 2005 early-voting scheme, the BOEs were required to make absentee ballots available for voters—either for EIP voting or by mail voting—no later than 35 days before the election. *Id.* § 3509.01(B)(2) (2014) (as amended Feb. 25, 2014). Ohio law requires voters to be registered at least 30 days prior to an election. Ohio Const. § 5.01; Ohio Rev. Code § 3503.01(A). Therefore, Ohio voters could register and vote on the same day for a five-day period that Plaintiffs refer to as "Golden Week."

Until 2012, Ohio law gave each of the BOEs for Ohio's eighty-eight counties the discretion to set their own EIP voting hours. R. 62 (Parties' Statement Undisputed Facts ¶ 6) (Page ID #3307). Thus, for the 2008 and 2010 elections each BOE set its own EIP voting hours. *Id.* Several counties, including six counties with the highest African American populations in Ohio, offered early voting during the evenings and on multiple Sundays. *Id.* ¶ 8 (Page ID #3307); R. 65-3 (2010 Early Voting Days & Times) (Page ID #4576–84); R. 72 (D. Ct. Op. and Order at 9) (Page ID #5856).

On August 15, 2012, Secretary Husted issued Directive 2012-35, which established uniform EIP voting hours for all BOEs for the 2012 general election. R. 62 (Parties' Statement Undisputed Facts ¶ 15 (Page ID #3308). Directive 2012-35 eliminated all weekend EIP voting hours. R. 18-34 (Directive 2012-35) (Page ID #527–28). It did provide for some evening EIP

voting hours on ten weekdays in the last two weeks before Election Day. *Id.* Directive 2012-35 was challenged in separate litigation as violating the Equal Protection Clause because it allowed only military voters to vote EIP during the last three days before the election. In *Obama for America*, we upheld the district court's issuance of a preliminary injunction enjoining the enforcement of the Directive regarding the last three days of EIP voting before the election; under the preliminary injunction local BOEs had discretion to set EIP voting hours for those days so long as those hours applied to all voters, not just military voters. 697 F.3d at 437.

In the 2008, 2010, and 2012 elections, many Ohio voters took advantage of early voting. As we noted in *Obama for America*, in 2008 "approximately 1.7 million Ohioans cast their ballots before election day, amounting to 20.7% of registered voters and 29.7% of the total votes cast. . . . In 2010, approximately 1 million Ohioans voted early, and 17.8% of them chose to cast their ballots in person." 697 F.3d at 426. In the 2012 election, roughly 32% of Ohioans voted early. R. 18-1 (Smith Rep. at 6) (Page ID #167). Thousands of voters also registered or updated their registration and voted during Golden Week. R. 62 (Parties' Statement Undisputed Facts ¶¶ 10, 14) (Page ID #3308).

The General Assembly passed SB 238 on February 19, 2014, and it went into effect on June 1, 2014. SB 238 amended the Ohio Code to make the first permitted day of early voting the day after the close of voter registration. Ohio Rev. Code § 3509.01(B)(2)–(3). Thus, SB 238 reduces the total number of EIP voting days by eliminating Golden Week. SB 238 largely mirrored the recommendations in a report by the Ohio Association of Election Officials ("OAEO"). R. 18-33 (OAEO Rep.) (Page ID #521–26).

On February 25, 2014, Secretary Husted issued Directive 2014-06, which set EIP voting hours for the 2014 primary and general elections. For the general elections, the Directive did not include EIP voting hours for the following times: (1) the Sunday and Monday immediately before Election Day; (2) Tuesday, September 30th through Monday, October 6th, the last day for voter registration (Golden Week); (3) Saturday, October 11th, Sunday, October 19th, or Sunday, October 26th; and (4) evening EIP voting hours after 5 p.m. on all weekdays or after 4 p.m. on Saturday, October 25th and Saturday, November 1st. R. 18-36 (Directive 2014-06 at 2) (Page ID #531).

On June 11, 2014, however, the U.S. District Court for the Southern District of Ohio issued a permanent injunction in *Obama for America*. No. 2:12-CV-636, 2014 WL 2611316 (S.D. Ohio June 11, 2014). The district court "require[d] Secretary of State Husted to set uniform and suitable in-person early voting hours for all eligible voters for the three days preceding all future elections." *Id.* at *5. No party appealed this final judgment.

To comply with the permanent injunction, Secretary Husted issued Directive 2014-17 on June 17, 2014. R. 18-37 (Directive 2014-17) (Page ID #532–33). Directive 2014-17 sets uniform EIP voting hours for all future elections in three categories: (1) Presidential General Elections; (2) Presidential Primary Elections and Gubernatorial General Elections; and (3) Regular Municipal Elections, Primary Elections, and Special Elections. *Id.* As required by the permanent injunction, Directive 2014-17 restores EIP voting hours for the Gubernatorial General Elections (the only election relevant to the 2014 general election) on the Sunday and Monday immediately prior to Election Day on November 4, 2014. *Id.* at 2 (Page ID #533). In all other respects Directive 2014-17 sets the same EIP voting hours that Directive 2014-06 set for the Gubernatorial General Election. *Id.*

II. DISCUSSION

A. Standard of Review

"[F]our factors . . . must [be] balance[d] when considering a motion for preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (internal quotation marks omitted). "We review a district court's grant of a preliminary injunction for an abuse of discretion." *Obama for America*, 697 F.3d at 428. However, we review de novo the district court's legal conclusions, and we review its factual findings for clear error. *Id.* Thus, "[t]he district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *McNeilly v. Land*, 684 F.3d 611, 614 (6th Cir. 2012) (internal quotation marks omitted). Moreover, "the 'determination of

whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed de novo.'" *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014) (quoting *Bays v. City of Fairborn,* 668 F.3d 814, 819 (6th Cir. 2012)).

B. The District Court's Factual Findings Are Not Clearly Erroneous

The district court analyzed the record evidence and made a number of factual findings in granting Plaintiffs' motion for a preliminary injunction. In particular, the district court's opinion carefully considered the conclusions of Plaintiffs' four expert witnesses (Smith, Roscigno, Burden, and Gronke) and Defendants' three expert witnesses (Trende, McCarty, and Brunell). *See* R. 72 (D. Ct. Op. and Order at 26–45) (Page ID #5873–92). After assessing each, the district court credited Smith's conclusion that, based on his statistical analysis, African Americans will be disproportionately and negatively affected by the reductions in early voting in SB 238 and Directive 2014-17. *Id*. at 44–45 (Page ID #5891–92). The district court also accepted Roscigno's "undisputed" findings that disparities in employment and in residential, transportation, and childcare options between African American and white voters significantly increased the cost of casting a vote for African American voters. *Id*. at 45 (Page ID #5892). The district court then relied on Smith's statistical findings and conclusions in its Equal Protection analysis, and it relied on both Smith's and Roscigno's findings in its Voting Rights Act analysis.

Defendants have not challenged the admissibility of any of Plaintiffs' experts' conclusions under *Daubert*, either at the district court or on appeal. *See Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579 (1993). Indeed, Defendants' brief makes little mention of the district court's factual findings or its decision to credit the conclusions of Plaintiffs' experts. Thus, whether or not the district court properly considered these expert findings is not before us. In any event, while they do not dispute Roscigno's, Burden's, or Gronke's conclusions, to the extent Defendants and the General Assembly believe the district court improperly credited Smith's findings over the conclusions offered by Defendants' experts, they are mistaken.

We review a district court's factual findings for clear error. *Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 627 (6th Cir. 2013). "When reviewing for clear error, we cannot substitute our judgment for that of the lower court but rather must uphold the lower court's account of the evidence if it 'is plausible in light of the record viewed in its entirety.'" *Pledger v. United States*,

236 F.3d 315, 320 (6th Cir. 2000) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)). We will thus reverse the district court's interpretation of the evidence "'only where we are left with a definite and firm conviction that [the district court] committed a clear error of judgment.'" *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 528 (6th Cir. 2008) (quoting *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 781 (6th Cir. 2002)). Consequently, "[i]f the district court interprets the evidence in a manner consistent with the record, we are required to uphold its decision even if we would have reached the opposite conclusion." *United States v. Darwich*, 337 F.3d 645, 663 (6th Cir. 2003).

Defendants and the General Assembly are unable to show that the district court clearly erred by crediting Smith's statistical conclusions. First, contrary to the General Assembly's claim, the record does not support a finding that the district court erred because Smith's conclusions are based on faulty data. General Assembly Br. at 48–51. The district court recognized at the outset of its analysis "that some significant limitations exist regarding the available election data," including different election management systems and policies for tabulating absentee votes among the counties, which made statewide comparisons difficult. R. 72 (D. Ct. Op. and Order at 26–27) (Page ID #5873–74). Indeed, Smith suggested as much in his expert reports. R. 18-1 (Smith Rep. at 12) (Page ID #173); 53-11 (Smith Rebuttal Rep. at 1–2, 25) (Page ID #1628–29, 1652).

Recognizing these limitations, Smith utilized several techniques based on entirely different statistical methods and data sources to determine whether the propensity of African Americans to cast EIP ballots in Ohio is greater than whites. *See* 53-11 (Smith Supp. Rep. at 1–2, 25) (Page ID #1628–29, 1652). In particular, Smith utilized a "triangulation" method, which relied on data from the U.S. Census Bureau, Ohio, and county Boards of Elections, and included three different "standard ecological inference techniques" to analyze voting trends in the 2010 midterm and 2012 presidential elections. *Id*. at 1 (Page ID #1628). Then, in a separate analysis, Smith examined data from the Current Population Voting and Registration Supplement to determine whether African American voters in Ohio were disproportionately more likely to cast EIP ballots in the 2012 and 2008 elections based on this data. *Id.* at 1–2 (Page ID #1628–29). As the district court found, by varying degrees, each of these examinations supports Smith's

conclusion that African American voters in Ohio utilize EIP voting at higher rates than white voters in recent elections.[1]

Smith then supplemented his findings by citing additional studies indicating that African American and indigent voters utilized early voting more than white and affluent voters and would be negatively impacted by restrictions on early voting. *See, e.g.*, R. 18-1 (Smith Rep. at 7, 17, 29–30) (Page ID #168, 178, 190–91); R. 72 (D. Ct. Op. and Order at 45–46) (Page ID #5892–93). These findings are further supported by expert reports submitted by Gronke and Burden and studies attached to Plaintiffs' briefing to the district court.[2] *See* R. 72 (D. Ct. Op. and Order at 45–46) (Page ID #5892–93); 53-5 (Gronke Rep. at 6–12) (Page ID #1563–69) (noting research indicating that African Americans disproportionately use early voting in many states and shortening the early-vote period negatively impacted turnout among African Americans); R. 53-4 (Burden Rep. at 3) (Page ID #1555) (citing research noting that "restrictions on early voting in Florida finds that it deterred participation of black voters"). Although, standing alone, any one analysis may not have proven dispositive, when reading them together and as properly supported by other record evidence, the district court did not clearly err by crediting Smith's analysis despite the possibility of flaws in the data.

Second, for the same reason, limitations in Smith's analysis of the 2010 election do not demonstrate that the district court clearly erred by relying on Smith's findings. General

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[1]The General Assembly argues that the district court clearly erred because it relied on Smith to find that African American voters used EIP voting at "far greater rates" than white voters in Ohio, but Smith himself never made such a claim. General Assembly Br. at 46–48. Although it is true that Smith never used the phrase "*far* greater rate," *see, e.g.*, R. 18-1 (Smith Rep. at 17) (Page ID #178) (finding African Americans used EIP at a "greater rate" than whites), he did conclude that in the 2012 election African Americans used EIP voting at a "much higher" rate than white voters and characterized his findings as "dramatic." *Id*. He further noted the "strong empirical evidence" showing that African Americans cast EIP absentee ballots more than whites and do so on the days eliminated by SB 238 and Directive 2014-06. *Id*. at 4 (Page ID #165). Based on this, and the additional evidence the district court relied on to support its findings, the district court did not clearly err in its characterization of Smith's conclusions.

[2]Presumably due to the expedited nature of the proceedings, both parties relied on evidence in the form of reports by experts and studies cited therein to support their respective positions. *See* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2949 (3d ed. 2001) ("[I]nasmuch as the grant of a preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had."); *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) ("Given [its] limited purpose, 'a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.'") (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)); *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (concluding "that hearsay evidence may be considered by a district court in determining whether to grant a preliminary injunction").

Assembly Br. at 51–52. Defendants cite the 2010 analysis to show that the early-voting days that were eliminated were among the days with the lowest African American voting rates. Appellants Br. at 56. And it is true that Smith's 2010 analysis considered only data from five of eighty-eight Ohio counties. But, here, it is Defendants who attempt to cherry-pick the findings. Again, Smith's analysis of the 2010 mid-term election was one of a number of studies cited by the district court in support of its conclusion that African Americans would be disproportionately impacted by restrictions in EIP voting. Moreover, the five counties analyzed by Smith in his findings based on the 2010 election make up one-third of Ohio's population and nearly seventy-three percent of all African Americans living in Ohio, and the findings overall indicate that African Americans participated in EIP at a higher rate than white voters *in these counties*. R. 18-1 (Smith Rep. at 10) (Page ID #171); R. 53-11 (Smith Rebuttal Rep. at 22) (Page ID #1649). Thus, the 2010 analysis is certainly relevant to whether African American voters utilized early voting more than white voters, and the district court properly considered this finding along with the other evidence in the record in reaching its conclusion.

Third, the General Assembly's suggestion that Smith's analyses relating to the 2012 and 2008 elections are not probative here because these were presidential elections and the 2014 election is an off-year election is not well-taken. General Assembly Br. at 52–53. Plaintiffs' complaint does not limit its challenge to the 2014 midterm elections. *See* R. 1 (Complaint) (Page ID #1). Indeed, SB 238 is the law in Ohio and will apply to all elections moving forward, and nothing in the record suggests that the restrictions on early voting in Directive 2014-17 will be limited to the 2014 election. In fact, Directive 2014-17 expressly applies to "Presidential General Elections." R. 18-37 (Directive 2014-17 at 1) (Page ID #532). Thus, any attempt to diminish the probative value of Smith's 2012 and 2008 election analyses for this reason has no merit. Similarly, attempts to disregard voter turnout among African Americans in the 2012 and 2008 elections because African American voters were targeted by an African American presidential candidate are equally meritless. General Assembly Br. at 53. The suggestion is that African American voters in Ohio—a "battleground" state, central to any presidential candidate's chance of winning an election—will not be as heavily targeted in future elections. *Id*. But this claim is both unsupported by record evidence and, given the continued importance of Ohio in national elections, contrary to common sense. *See* R. 41-3 (Trende Rep. at 31) (Page ID #1041)

(noting that African American voter turnout has risen in Ohio and the United States as a whole since 2004); *see also Florida v. United States*, 885 F. Supp. 2d 299, 326 (D.D.C. 2012) ("[W]e cannot ignore elections in which minority candidates make breakthroughs in winning elected office on the assumption that future elections will revert to the status quo.").

Fourth, Defendants and the General Assembly suggest that the district court should not have credited Smith's analysis because Defendants' expert, Sean Trende, performed a statistical analysis that produced different results. *See* Appellants Br. at 56; General Assembly Br. at 52. While we acknowledge that a *Daubert* issue is not before us, it remains true that district courts play the role of "gatekeeper" and are charged "with evaluating the relevance and reliability of proffered expert testimony with heighted care." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 295 (6th Cir. 2007). For this reason, we generally defer to the district court's decision to credit one expert over another. *In re Scrap Metal*, 527 F.3d at 528 (recognizing the deference afforded a district court's assessment of expert testimony). Moreover, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

Here, Trende analyzed EIP turnout from the 2010 elections and found that, contrary to Smith's conclusion, "it is difficult to conclude that early voting enhances African-American turnout." R. 41-3 (Trende Rep. at 42) (Page ID #1052). He acknowledged, however, that the "strength of the relationship tested depends on the judgment call that is made about the different variables." *Id*. Indeed, Trende asserted that much of his analysis—as was undoubtedly the case for Smith's analysis—reflected judgment calls that could "reasonably be argued either way." *Id*. at 34 (Page ID #1044). The district court's decision in assessing the evidence to then credit Smith's findings—an academic in the area of electoral processes and election issues, R. 18-1 (Smith Rep. at 2–3) (Page ID #163–64)—and the judgment calls inherent in the same, over Trende's—an elections analyst for the political website RealClearPolitics, who apparently has not conducted a peer-reviewed analysis similar to the one at issue here, R. 41-3 (Trende Rep. at 3) (Page ID #1013); R. 53-6 (7/30/14 Trende Dep. at 281) (Page ID #1576)—is afforded deference. *In re Scrap Metal*, 527 F.3d at 528. Given this, along with the multiple methods and

data sources used by Smith and other record evidence corroborating his findings, we conclude that the district court did not clearly err by crediting Smith's findings over Trende's.

Finally, the General Assembly's claim that the district court erred because Smith's methodology is flawed also fails. The General Assembly asserts that Smith's findings are unreliable because factors other than race *could* explain the results of Smith's census block analysis of the 2012 election, General Assembly Br. at 54–55; however, no evidence is offered supporting this. Moreover, the other record evidence suggesting that African American voters utilize EIP voting at higher rates than white voters indicates that race, rather than some other variable, helps explain Smith's findings in his 2012 census block analysis. At the least, the district court did not clearly err in so finding. *See Surles*, 474 F.3d at 295 (noting the "broad discretion" district courts possess to assess the reliability of expert findings); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) ("[M]ere 'weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility.'") (quoting *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993)).

Similarly, Defendants' expert, Dr. Nolan McCarty, and Smith quibble over whether Smith should have conducted his census block analysis at the county level rather than the precinct level—McCarty claims the results are more accurate at the county level while Smith asserts that "aggregat[ing] up . . . dramatically worsens the problem of aggregation bias." *Compare* R. 53-11 (Smith Rebuttal Rep. at 5–6) (Page ID # 1632–33), *with* General Assembly Br. at 55–56. And the General Assembly claims that the district court gave too much weight to the "direction of the relationship" between African American voters and EIP voting in the 2012 and 2010 analyses and ignored the "degree of the relationship," which it claims is small. General Assembly Br. at 56–57. But neither argument supports reversal—again, given the other record evidence supporting Smith's conclusion and the deference afforded the district court, the district court's position is plausible based on the record as a whole, and so there is no clear error. *King v. Zamiara*, 680 F.3d 686, 694 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 985 (2013) ("If the district court's account is 'plausible in light of the record viewed in its entirety, the court of appeals may not reverse.'") (quoting *Anderson*, 470 U.S. at 574).

Consequently, Defendants and the General Assembly have failed to show that the district court clearly erred in crediting Smith's statistical conclusions.

C. Equal Protection Clause Claim

The right to vote is a "fundamental" right. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979)). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Moreover, "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000); *League of Women Voters of Ohio*, 548 F.3d at 476 (quoting the same). Two aspects of "the manner of its exercise" warrant special attention: "[t]he Equal Protection Clause applies when a state *either* classifies voters in disparate ways *or places restrictions on the right to vote*." *Obama for America*, 697 F.3d at 428 (emphasis added) (internal citations omitted).

Of course, "the Constitution provides that States may prescribe "'[t]he Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections." *Burdick*, 504 U.S. at 433; *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012). And practically, "there must be a 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." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

"When equal protection challenges ask us to resolve these competing interests, we calibrate the equal protection standard to '[t]he precise character of the state's action and the nature of the burden on voters.'" *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 592 (quoting *Obama for America,* 697 F.3d at 428). State regulations that do not treat similarly situated voters differently *and* do not burden the fundamental right to vote are assessed through rational basis review. *Obama for America,* 697 F.3d at 429; *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 592. On the other end of the spectrum, strict scrutiny applies to state regulations that impose "severe"

burdens on the fundamental right to vote. *Obama for America,* 697 F.3d at 429 (citing *Harper*, 383 U.S. at 670, and *Burdick,* 504 U.S. at 434).

"For the majority of cases falling between these extremes, we apply the 'flexible' *Anderson-Burdick* balancing test." *Ne. Ohio Coal. for the Homeless*, 696 F.3d at 592 (quoting *Obama for America,* 697 F.3d at 429). The *Anderson-Burdick* test provides as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" 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."

Burdick, 504 U.S. at 434 (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983)). "There is no 'litmus test' to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and 'make the "hard judgment" that our adversary system demands.'" *Obama for America*, 697 F.3d at 429 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (Stevens, J., announcing the judgment of the Court)). Even a minimal burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (quoting *Norman v. Reed,* 502 U.S. 279, 288–89 (1992)).

The district court "characterize[d] the overall degree of burden on voting imposed by SB 238 and Directive 2014-17 as significant although not severe." R. 72 (D. Ct. Op. and Order at 53) (Page ID #5900). Focusing on SB 238, the district court found that its elimination of "Golden Week" burdened African American and low-income voters in two ways. *Id.* at 50 (Page ID #5897). First, SB 238 in conjunction with Directive 2014-17 reduced the overall number of EIP voting days from 35 to 28 days. The district court noted evidence in the record that 67,408 Ohioans voted in 2008 during Golden Week; 26,230 did so in 2010; and 89,224 voters did so in 2012. *Id.* The district court also credited statistical and survey analysis by Plaintiffs' expert Smith that African American voters in Ohio have higher EIP voting rates than white voters, and that African American voters in the 2008, 2010, and 2012 elections "disproportionately cast EIP absentee ballots on days that would have been eliminated by SB 238 and Directive 2014-06." R.

72 (D. Ct. Op. and Order at 32, 50) (Page ID #5879, 5897); R. 18-1 (Smith Rep. at 31) (Page ID #192). The district court cited four other statistical studies in the record on racial early-voting patterns in Ohio that it found supported Smith's conclusions. *Id.* at 45–46 (Page ID #5892–93).

Second, the district court concluded that the elimination of Golden Week "burdens the voting rights of lower income and homeless individuals" because the record reflected that such individuals "move frequently" as well as "lack access to transportation," which combine to make it harder for such individuals to maintain accurate registration. R. 72 (D. Ct. Op. and Order at 51) (Page ID #5898). Thus, the ability to register and vote on the same day "can make the difference between being able to exercise the fundamental right to vote and not being able to do so." *Id.* The court pointed to evidence in the record that 12,842 voters used Golden Week to register or update their registration and vote in 2008; 1,651 voters did so in 2010; and 5,844 voters did so in 2012. *Id.*

Turning to Directive 2014-17, the district court found that it burdened African American and lower-income voters by eliminating all evening voting hours for non-presidential elections and by providing only one Sunday of EIP voting, the Sunday before Election Day. *Id.* at 51–53 (Page ID #5898–5900). The district court noted that the record reflected that lower-income voters are "more likely to rely on public transportation and work wage-based jobs wherein they are less likely" to be able to vote between 8 a.m. and 5 p.m. at the one early-voting location permitted in each county, which might be a great distance away. *Id.* at 53 (Page ID #5900). Regarding the elimination of all but one Sunday of EIP voting, the court pointed to evidence in the record that since the instatement of EIP voting, African Americans have come to rely on Sunday voting through "Souls to the Polls initiatives," in which churches have leveraged the transportation they already provide to and from church to bring voters to EIP voting locations. *Id.* at 52 (Page ID #5899). Souls to the Polls organizers reported that, during the one permitted day of Sunday voting during the 2012 general election, there were long lines of mainly African American voters. *Id.* While the district court acknowledged that Souls to the Polls organizers could switch to the two Saturdays that are still designated EIP voting days under Directive 2014-17, the court concluded that this would still impose "some burden" because churches are already organized to provide transportation on Sundays. *Id.* at 53 (Page ID #5900).

Therefore, because the district court found that the burden imposed on Plaintiffs was "significant," it proceeded to apply the *Anderson-Burdick* test to SB 238 and Directive 2014-17. R. 72 (D. Ct. Op. and Order at 55) (Page ID #5902).

Defendants argue that rational basis review, rather than the *Anderson-Burdick* test, is the proper standard of review for two reasons. First, they argue that "[t]he 'right to vote' has never included the 'right to receive absentee ballots.'" Appellants Br. at 18 (quoting *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969)). Second, Defendants argue that when a facially neutral voting law is at issue, as SB 238 and Directive 2014-17 are, the Supreme Court in *Crawford* held that *Anderson-Burdick* applies only if the law "severely burdens the right to vote of the *general* class of state voters." *Id.* at 19. Otherwise, Defendants assert that traditional Equal Protection Clause principles govern—which require proof of discriminatory intent—and Plaintiffs have not established that either SB 238 or Directive 2014-17 was adopted with discriminatory intent. *Id.* at 19, 27. Finally, if *Anderson-Burdick* review does apply, Defendants argue that the district court improperly determined that the burden imposed on voters represented by Plaintiffs is "significant." *Id*. at 31.

1. The District Court Properly Applied *Anderson-Burdick* Review

We addressed Defendants' first argument regarding *McDonald* in *Obama for America*. 697 F.3d 423. In *McDonald*, the Supreme Court did not apply rational basis review to the challenged Illinois statute allowing only certain categories of voters to receive absentee ballots solely because absentee ballots were at issue. Rather,

> *[t]he McDonald plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting. See O'Brien v. Skinner,* 414 U.S. 524, 529 (1974) ("Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof."); *Goosby v. Osser,* 409 U.S. 512, 520–22 [(1973)] (finding that *McDonald* itself suggested a different result if plaintiffs had presented evidence that the state was effectively preventing them from voting).

Obama for America, 697 F.3d at 431 (emphasis added).

Thus, in *Obama for America*, we held that the district court properly applied the *Anderson-Burdick* balancing test, rather than rational basis review, to evaluate whether the

challenged Directive's elimination of early in-person voting for the three days immediately preceding Election Day violated the Equal Protection Clause. *Id*. Unlike the plaintiffs in *McDonald*, we noted that "Plaintiffs introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." *Id.* This evidence included "statistical studies that estimated approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and that these voters are disproportionately 'women, older, and of lower income and education attainment,'" groups which the plaintiffs represented. *Id.* (internal citation omitted). The defendants in that case also argued that the plaintiffs would not actually be precluded from voting as required by *McDonald* because they had "ample" other means of voting, including by mail, voting EIP at other times, or on Election Day. *Id.* However, we held not clearly erroneous the district court's conclusion that early voters would not be able to exercise their right to vote in person because the challenged Directive also eliminated all evening and weekend hours of EIP voting, times during which early voters would likely have voted in the past because they tend to have lower incomes and less education than election day voters. *Id.*

We did not read *McDonald* to require proof that there was *no* possibility that the plaintiffs would find a way to adjust and vote through the remaining options. We acknowledged that the challenged law "does not absolutely prohibit early voters from voting," but focused on the evidence in the record that the plaintiffs' "ability to cast a ballot is impeded by Ohio's statutory scheme." *Id.* at 433. To the extent that *McDonald* spoke in terms of "precluding" an individual from voting, which might imply the necessity of such proof, we note that *McDonald* was decided before the development of the *Anderson-Burdick* test. Thus, the *McDonald* Court applied a two-tier test for evaluating restrictions on the right to vote, rational basis review for no burdens and strict scrutiny for "severe" burdens, a threshold that more clearly invites consideration of "preclusion." However, as noted above, that two-tier test has evolved into the *Anderson-Burdick* framework, under which burdens that fall between those two extremes can still be found to violate the Equal Protection Clause. In more recent cases, the Supreme Court has not required absolute certainty in predicting how many voters would be prevented from voting by laws that impose burdens on the right to vote. *See, e.g.*, *Crawford*, 553 U.S. at 221 (Souter, J., dissenting) (stating that "Petitioners, to be sure, failed to nail down precisely how

great the cohort of discouraged and totally deterred voters will be, but empirical precision beyond the foregoing numbers has never been demanded for raising a voting-rights claim." and citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 461–62 (2008) (Roberts, C. J., concurring) ("Nothing in my analysis requires the parties to produce studies regarding voter perceptions on this score"); *Dunn v. Blumstein*, 405 U.S. 330, 335 n.5 (1972) ("[I]t would be difficult to determine precisely how many would-be voters throughout the country cannot vote because of durational residence requirements."); and *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (taking account of "the obvious likelihood" that candidate filing fees would "fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs")). Thus, in this case the district court properly held that whether voters might adjust to vote during a different time in EIP voting such that overall turnout might not be affected "is not determinative of the Equal Protection analysis." R. 72 (D. Ct. Op. and Order at 50) (Page ID #5897).[3]

Like the plaintiffs in *Obama for America*, Plaintiffs in this case presented ample evidence that African American, lower-income, and homeless voters disproportionately have used in past elections the EIP voting times that Directive 2014-17 and SB 238 eliminated, and that the number of individuals who had previously voted during these periods was not insignificant. For example, the number of voters in Golden Week alone ranged from 26,230 in 2010 to 89,224 in 2012. R. 72 (D. Ct. Op. and Order at 50) (Page ID #5897). And the regulations at issue in the case reduce the overall time for EIP voting more than the three days that had been eliminated in *Obama for America*. Moreover, unlike the plaintiffs in *Obama for America*, Plaintiffs also presented evidence to show that voting by mail is not actually a viable "alternative means of access to the ballot" for the groups they represent. *Cf. Obama for America*, 697 F.3d at 440

[3]In a relatively recent case, the Second Circuit considered a claim that a New York statute allowing absentee voting for all elections except elections for political party county committees violated the First Amendment by impermissibly burdening New York citizens' right to vote. *Price v. New York State Bd. of Elections*, 540 F.3d 101, 103-04 (2d Cir. 2008). The district court had analyzed the statute under rational basis review, citing *McDonald*, but the Second Circuit held that the law should have been analyzed under the *Anderson-Burdick* balancing test. *Id. at* 108-09 ("The defendants assert that pure rational basis review should be utilized in this case in reviewing the constitutionality of Election Law § 7–122. They are incorrect. Under *Burdick*'s 'flexible standard,' the court must actually 'weigh' the burdens imposed on the plaintiff against 'the precise interests put forward by the State,' and the court must take 'into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.'") (internal citation omitted) (quoting *Anderson,* 460 U.S. at 789).

(White, J., concurring) (noting that the study in the record "*did not consider the extent to which these voters would or could avail themselves of other voting options, either by mail ballot or in-person absentee ballot at other times, or in-person voting on election day*.") (emphasis added). The district court noted that "the record is undisputed that African Americans, lower-income individuals, and the homeless are distrustful of the mail and/or voting by mail." R. 72 (D. Ct. Op. and Order at 54) (Page ID #5901). Additionally, the district court considered the fact that "[t]he associated costs and more complex mechanics of voting by mail, coupled with other information in the record concerning the enumerated groups including homelessness, lower educational attainment, more limited financial resources, reliance on public transportation, and transience" to bolster its conclusion that "voting by mail may not be a suitable alternative for many voters." *Id.* The record also reflected that lower-income voters, because of their reliance on public transportation and higher likelihood of working in wage-based jobs, would face substantial difficulties in voting between 8 a.m. and 5 p.m. *Id.* at 53 (Page ID #5900). Under *Obama for America*, then, the district court properly concluded that Plaintiffs had presented sufficient evidence that the groups they represent are in fact significantly burdened by Directive 2014-17 and SB 238 such that *McDonald*'s rational basis standard does not apply.[4]

2. *Crawford* Does Not Foreclose Applying *Anderson-Burdick* Review

In *Northeast Ohio Coalition for the Homeless*, we squarely addressed the applicability of *Anderson-Burdick* to facially neutral restrictions on voting. 696 F.3d 580. The State defendant in that case argued that the challenged practice—"Ohio's automatic disqualification rule for wrong-precinct ballots"—"treats all voters equally and therefore does not involve any

[4]To the extent that the district court relied on Judge White's concurrence in *Obama for America* and *Bush v. Gore* as a separate rationale for its decision, *see id.* at 49–50 (Page ID #5896–97), we first note that that analysis is not necessary to our holding that the district court properly did not apply *McDonald*'s rational basis standard of review. At the same time, we do think the broader context in which Ohio statutorily imposed EIP voting—as a remedial measure to address such long lines for voting in 2004 that many voters simply gave up trying to vote—is relevant as additional evidence suggesting that voters whom Plaintiffs represent may not in fact easily adjust to voting on Election Day if SB 238 and Directive 2014-17 were to remain in effect. Moreover, while *Bush v. Gore* did involve disparate treatment, rather than burdens on the fundamental right to vote, we nonetheless find its motivating principle instructive in the present case given that the Equal Protection Clause can be triggered by either disparate treatment or burdens. That is, "[h]aving once granted the right to vote on equal terms"—such as expanding early voting opportunities—"the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another"—for example, by making it substantially harder for certain groups to vote than others. *Bush v. Gore*, 531 U.S. at 104–05.

classification that could violate the equal protection standard." *Id.* at 592 (internal quotation marks omitted). In responding to this argument, we explained that

> [T]he State overlooks the fact that a clear majority of the Supreme Court in *Crawford* applied some form of *Burdick*'s burden-measuring equal protection standard to Indiana's facially neutral voter-identification requirement. *See* 553 U.S. at 189–91 (Stevens, J., announcing the judgment of the Court), 204 (Scalia, J., joined by Alito and Thomas, JJ., concurring in the judgment) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick*. . . ."), 211 (Souter, J., dissenting).

Id. Because the plaintiffs in that case had "'demonstrated that their right to vote is . . . burdened by Ohio's law that rejects wrong-precinct ballots regardless of poll-worker error," we held that "[t]he *Anderson-Burdick* standard . . . applies." *Id.* (quoting *Obama for America,* 697 F.3d at 430); *see also Obama for America*, 697 F.3d at 428–29 (stating that the "[t]he Equal Protection Clause applies when a state *either* classifies voters in disparate ways *or places restrictions on the right to vote*") (emphasis added) (internal citations omitted). However, as the plaintiffs in *Northeast Ohio Coalition for the Homeless* asserted that the law at issue created a burden on provisional voters generally, rather than on a subclass of provisional voters, we did not address Defendants' more specific argument here that *Anderson-Burdick* requires a showing of a burden on voters generally.

Contrary to Defendants' assertion, a majority of the Court in *Crawford* did *not* expressly hold that a challenger must demonstrate that a voting restriction burdens voters generally in order to trigger scrutiny under *Anderson-Burdick*. The opinion authored by Justice Stevens announcing the judgment of the Court, which gained only two other votes, did not explicitly reject the petitioners' argument that the middle level of scrutiny under the *Anderson-Burdick* balancing test could be triggered by evidence of burdens on a subgroup of voters, instead of all voters; rather, the Court held that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Crawford*, 553 U.S. at 200; *see also id.* at 202 ("In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on *any class of voters*.") (emphasis added) (citation omitted). Thus, Justice Stevens weighed the evidence of minimal burdens of the

law on voters generally, the vast majority of whom had IDs, and found that burden justified by the state's interests. *Id.* at 202. In contrast, Justice Scalia's concurrence, which two other Justices joined, expressly would have required the plaintiffs to demonstrate that voters *generally* were burdened for the *Anderson-Burdick* balancing test to apply. *Id.* at 205–06 (Scalia, J., concurring). Justice Scalia cited decisions of the Court outside of the elections context holding that a generally applicable law does not violate the Equal Protection Clause when it merely disproportionately burdens a subgroup of people absent evidence of discriminatory intent. *Id.* at 207–08. Justice Souter's dissent, joined by Justice Ginsburg, assumed that *Anderson-Burdick* balancing could be triggered by burdens on subgroups, and disagreed with Justice Stevens that the petitioners had not presented sufficient evidence of a more than minimal burden on the subgroup of voters they represented. *Id.* at 237 (Souter, J., dissenting).

Thus, a majority of the justices in *Crawford* either did not expressly reject or in fact endorsed the idea that a burden on only a subgroup of voters could trigger balancing review under *Anderson-Burdick*. Alternatively, as the narrowest basis of the judgment of the Court, Justice Stevens's opinion may be viewed as "the holding of the Court" given the "fragmented" *Crawford* opinions. *See, e.g.*, *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotation marks omitted). Both Justice Stevens and Justice Scalia held that the Indiana law was constitutional, but Justice Scalia reached further and held that challengers to a voting restriction must show that it burdens voters generally. Thus, Justice Stevens's opinion is narrower. *See Frank v. Walker*, --- F. Supp. 2d ----, No. 11-CV-01128, 2014 WL 1775432, at *4 (E.D. Wis. Apr. 29, 2014) (holding that Justice Stevens's opinion in *Crawford* is the narrower ground for the opinion under *Marks*). Finally, it is worth noting that in *Anderson*, the Supreme Court in fact assessed the burden imposed by the challenged law by looking to its impact on a subgroup of voters. *Anderson*, 460 U.S. at 792 (holding that "[i]t is clear, then, that the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters," specifically Anderson's supporters, but not assessing whether the deadline burdens *all* voters).

Therefore, that Plaintiffs presented evidence only of SB 238 and Directive 2014-17's burdens on African American, lower-income, and homeless voters does not automatically mean that only rational basis review or standard Equal Protection Clause analysis applies. *Crawford* merely stands for the proposition that Plaintiffs must present more evidence than the petitioners did in that case to show that the subgroups of voters they represent are more than minimally burdened.

As discussed previously, Plaintiffs presented extensive statistical, survey, and anecdotal evidence that SB 238 and Directive 2014-17 will disproportionately burden the ability of African American, lower-income, and homeless individuals to vote. The petitioners in *Crawford* had not presented any evidence in the record that even estimated the number of individuals who lacked identification cards. *Crawford*, 553 U.S. at 200. Nor did the affidavits or depositions in the record of lower-income individuals or elderly voters in *Crawford* substantiate that they in fact faced difficulties in obtaining identification cards. *Id.* at 201. In contrast, Plaintiffs here presented statistical and survey evidence that indicated that thousands of individuals whom they represent had voted in past elections during the times that have been eliminated by SB 238 and Directive 2014-17, as well as numerous depositions, affidavits, and expert testimony documenting that the groups Plaintiffs represent have relied on the eliminated EIP voting times and would face difficulties in voting without them.[5]

In sum, we hold that the district court's characterization of the overall burden imposed by SB 238 and Directive 2014-17 as significant, but not severe, was not clearly erroneous given the extensive evidence in the record of the burdens African American, lower-income, and homeless voters will face in voting, absent the times eliminated by SB 238 and Directive 2014-17.[6] It

[5]The other cases Defendants cite as supporting its argument that the burdens in this case are not significant are easily distinguishable. The Seventh Circuit considered the claim of "working mothers" seeking the right to vote absentee in *Griffin v. Roupas* with nothing more than a complaint before it because of the procedural posture of the case. 385 F.3d 1128 (7th Cir. 2004). The plaintiffs in *Common Cause/Georgia v. Billups* "failed to identify a single individual who would be unable to vote because of the Georgia statute or who would face an undue burden to obtain a free voter identification card." 554 F.3d 1340, 1354 (11th Cir. 2009). Of course, the best comparison to the present case for evaluating burdens is *Obama for America*, and as we discussed above, Plaintiffs in this case presented even more evidence than the plaintiffs in that case did to substantiate their claim that the voting rights of groups they represent are in fact significantly burdened by SB 238 and Directive 2014-17.

[6]Defendants assert in their Reply Brief that "Plaintiffs identify no case that treats the ultimate finding of whether a burden is severe (and subject to strict scrutiny), significant (and subject to intermediate scrutiny), or minimal (and subject to rational-basis review) as one appropriate for fact-finding." Appellants Reply Br. at 6. In fact, in *Obama for America*, we did precisely that:

therefore properly applied the *Anderson-Burdick* balancing test. We next turn to the district court's evaluation of Defendants' asserted justifications for SB 238 and Directive 2014-17.

3. The State's Justifications Do Not Outweigh the Significant Burden on Voters

Once a court has determined that a law burdens voters, under *Anderson-Burdick* those burdens must be weighed 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 plaintiff's rights." *Anderson*, 460 U.S. at 789 (emphasis added). Put differently, the state must articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth. *See Obama for America*, 697 F.3d at 433–34 (assessing under *Anderson-Burdick* whether the state had presented actual evidence to support the justifications it provided for the challenged law).

Before even articulating these interests, Defendants appear to argue that we held in *Obama for America* that a law such as SB 238 or Directive 2014-17 would automatically survive this scrutiny of state interests. Appellants Br. at 21 (quoting our statement in *Obama for America*, 697 F.3d at 433–34, that "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.'"). That statement, of course, was not central to our holding in that case and does not control the present case. Moreover, the quoted language in that sentence is in fact from *Burdick*. 504 U.S. at 434 (stating that "when [a regulation] imposes only 'reasonable, nondiscriminatory restrictions' upon [voting rights], the State's important regulatory interests are generally sufficient to justify the restrictions") (quoting *Anderson,* 460 U.S. at 788). The key in that statement is the word

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> The State argues that the burden on non-military voters is slight because they have "ample" other means to cast their ballots, including by requesting and mailing an absentee ballot, voting in person prior to the final weekend before Election Day, or on Election Day itself. However, the district court concluded that because early voters have disproportionately lower incomes and less education than election day voters, and because all evening and weekend voting hours prior to the final weekend were eliminated by Directive 2012–35, "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." *Based on the evidence in the record, this conclusion was not clearly erroneous.*

Obama for America, 697 F.3d at 431 (emphasis added) (internal citation omitted).

generally; the *Burdick* Court was merely making clear that not all restrictions on voting will be struck down simply because they impose any kind of burden, as states do have the power to regulate elections generally. *Burdick* itself involved a nondiscriminatory restriction on write-in voting, and the Court still probed the state's asserted justifications for the restriction in the manner required by *Anderson*. *Burdick*, 504 U.S. at 434. Indeed, in a more recent case, the Supreme Court has tied this statement's applicability to situations in which the burden imposed is *modest*. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 452 (2008) ("If a statute imposes *only modest burdens*, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures.") (emphasis added) (quoting *Anderson*, 460 U.S. at 788).

We also note that how Ohio's early-voting system compares to that of other states is not relevant under the *Anderson-Burdick* balancing test. The test directs courts to weigh the burdens imposed on voters in a particular state against the justifications that that state has proffered for the challenged law or practice that imposes those burdens. Early voting does not necessarily play the same role in all jurisdictions in ensuring that certain groups of voters are actually able to vote. Thus, the same law may impose a significant burden in one state and only a minimal burden in another. Similarly, a particular state may have stronger justifications for a law that burdens voters than other states with the same law.

Thus, we will examine in turn each of Defendants' asserted justifications—preventing voter fraud and containing costs for SB 238, and uniformity for Directive 2014-17—under the *Anderson-Burdick* balancing framework.

i. Fraud

Regarding SB 238, Defendants argue that it is necessary as a measure to reduce fraud arising from same-day registration and voting during Golden Week. Appellants Br. at 26; General Assembly Br. at 38. Defendants point to the testimony by the OAEO Director that the "'registration deadline' exists so officials 'can confirm that a voter is who they say they are before they cast a ballot.'" *Id.* at 26 (citing R. 54-4 (Keeran Decl. at 7) (Page ID #1851)). Defendants assert that "[w]hen the deadline is later than the start of voting, votes might be counted even though cast 'by people who fraudulently registered during this period, because the

election officials could not confirm their registration status before Election Day.'" *Id.* The Ohio General Assembly points to declarations of individual county election officials that "historically voter fraud was most likely to occur during Golden Week," R. 68-2 (Ward Decl. ¶ 4) (Page ID #5123), or that it is difficult to verify an individual's residence when someone registers and votes on the same day, R. 68-3 (Cuckler Decl. ¶ 9) (Page ID #5511), or that some individuals were able to cast absentee ballots in one county and then register and cast an EIP Ballot during Golden Week in another county, *id.* ¶ 8 (Page ID #5510–11). They argue that the *Crawford* Court considered similar evidence regarding fraud to hold that the state's interest in that case was sufficiently important to outweigh burdens on voters. Finally, the General Assembly argues that the district court "trivialized or ignored this unrefuted evidence" and improperly substituted its own judgment about how fraud from absentee voting could be "best" handled. General Assembly Br. at 41.

Weighing the state's asserted interest in preventing voter fraud against the significant burden the elimination of Golden Week places on Plaintiffs, we conclude that Defendants have not met their burden to establish that their interests outweigh these burdens. To be sure, "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford*, 553 U.S. at 196. This does not mean, however, that the State can, by merely asserting an interest in preventing voter fraud, establish that that interest outweighs a significant burden on voters. Defendants did not provide more than a handful of actual examples of voter fraud, and their general testimony regarding the difficulties of verifying voter registration before counting ballots did not clearly pertain to problems with Golden Week *specifically*. The district court properly identified that the specific concern Defendants expressed regarding voter fraud—that the vote of an EIP voter would be counted before his or her registration could be verified—was not logically linked to concerns with voting and registering on the same day, but rather "has more to do with the registration process and verification of absentee ballots" generally. R. 72 (D. Ct. Op. and Order at 56) (Page ID #5903). The court explained that, since Ohio law requires that officials segregate absentee ballots and not count them until registration is verified, *see, e.g.*, R. 53-10 (Directive 2012-36) (Page ID #1625–26); R. 58-16 (Clyde Dec. ¶ 16) (Page ID #2169), there is no reason to

think that the registration of voters who registered and voted on the same day during Golden Week would be any harder to verify than an individual who registered on the last permissible day and then voted the next day, or for that matter than someone who voted very close to the election. R. 72 (D. Ct. Op. and Order at 56) (Page ID #5903). Defendants did not explain why it is harder to segregate and count later the absentee ballots of individuals who vote and register on the same day as opposed to segregating absentee ballots that are returned a different way, particularly given that officials would have at least 30 days to verify the registration of those who register and vote during Golden Week. Thus, the district court properly concluded that Defendants did not meet their burden of explaining why eliminating Golden Week serves to prevent a "precise" problem of voter fraud in a way that is "necessary" to burden the voters Plaintiffs' represent, as opposed to a measure that might more directly target the asserted problem without burdening voters. *Anderson*, 460 U.S. at 789.[7]

Moreover, the General Assembly's argument that *Crawford* suggests it sufficiently met its burden to demonstrate that its interest in fraud prevention outweighs the significant burden on Plaintiffs is misplaced. The *Crawford* Court did not hold that scattered historical examples of voter fraud necessarily establish a sufficient state interest to overcome *any* burden imposed on voters; given the simply minimal burden that the petitioners had shown on voters in that case, the Court essentially only engaged in a rational basis review of the state's asserted interest in preventing voter fraud, not the more piercing scrutiny that a greater burden would require under *Anderson-Burdick*. *Crawford*, 553 U.S. at 194–96, 202. Here, in contrast, the district court concluded that the burden on Plaintiffs was significant. Thus, its more searching review of Defendants' asserted justification in preventing voter fraud was warranted.

[7]While we do not find that other states' electoral laws and practices are relevant to our assessment of the constitutionality or legality of SB 238 and Directive 2014-17, we note that Defendants' own expert Professor McCarty reported that "Ohio is quite an outlier" with regard to its registration deadline. R. 67-1 (McCarty Rebuttal Rep. at 22) (Page ID #5088). He continues that "[i]n every state except New Mexico, a voter can register and vote within 15 days of the election. In most cases, this can be accomplished within a week of the election. Ohio and New Mexico are apples to these oranges." *Id.* Thus, other states do not appear to be overly concerned with voter fraud arising from allowing voters to register even closer to Election Day than Ohio allows.

ii. Cost

Defendants next argue that SB 238 and Directive 2014-17 are necessary as cost containment measures. They argue that increasing EIP voting would "increase the costs and administrative burdens" on Election Boards, such as requiring additional staff. Appellants Br. at 25. Defendants also assert that they determined the days and times to eliminate strategically so as "to be more efficient with our tax payer dollars" because "[a] relatively smaller proportion of voters . . . voted during the times Ohio eliminated, compared to the times it kept." *Id.* at 25. The Ohio General Assembly adds that the district court improperly dismissed the specific cost estimates of retaining EIP voting provided by several local election officials simply because they "lack[ed] a frame of reference" and ignored less easily quantifiable burdens of Election Boards "having to divert manpower" away from other tasks to administering EIP voting. General Assembly Br. at 45. They argue that they did not need to show that they could not handle the costs of the old system, as the district court suggested. *Id.*

We also conclude that Defendants' asserted interest in reducing costs does not adequately justify the burdens SB 238 and Directive 2014-17 place on voters. In *Obama for America*, we held that the State's asserted interest in reducing costs and administrative burdens did not justify the burdens on voters because there was "no evidence that local boards of elections have struggled to cope with early voting in the past, no evidence that they may struggle to do so during the November 2012 election," and because at least one local board, Cuyahoga County, said it had budgeted for EIP voting. 697 F.3d at 433–34. Our focus on whether local boards would "struggle" to handle costs in *Obama for America* makes clear that it is not enough merely to assert that a restriction on voting saves costs. Arguably *some* cost-saving rationale could be identified in most voting restrictions. Rather, where more than minimal burdens on voters are established, the State must demonstrate that such costs would actually be burdensome.

The district court thus properly concluded that Defendants had not demonstrated that they would "struggle" with the costs of maintaining EIP voting. While Defendants presented specific cost estimates from a handful of election boards for reinstating Golden Week, the district court properly noted that those figures "lack[ed] a frame of reference" in that Defendants did not indicate whether or how those costs would be burdensome overall. R. 72 (D. Ct. Op. and Order

at 57) (Page ID #5904). Cuyahoga County again filed an amicus brief saying it had already budgeted money for Golden Week and the additional weekend voting days for the 2014 election. R. 28 (Am. Cur. Br. Cuyahoga Cnty. at 8–9) (Page ID #600–01). Nor did Defendants present specific estimates of the costs of maintaining the eliminated days of weekend voting. The district court also pointed to evidence in the record that election boards are required by law to be open during Golden Week, and only five of the eighty-eight counties statewide ran EIP voting at sites other than their regular offices during the 2008 and 2010 elections. R. 72 (D. Ct. Op. and Order at 59) (Page ID #5906). Thus, the court reasonably concluded that most election boards would not have to bear substantial extra costs associated with maintaining an offsite location for that period. *Id.* Moreover, like the State in *Obama for America*, Defendants did not present evidence that the old EIP voting schedule, which included Golden Week and weekend voting, "created undue or burdensome costs." *Id.* at 58 (Page ID #5905).

iii. Uniformity

Finally, regarding Directive 2014-17, Defendants justify it as necessary to promote uniformity. Appellants Br. at 24. Defendants argue that "uniformity makes it easier for the State to educate voters about election days and hours." *Id.* It also ensures fairness by making sure that all voters can vote during the same times across counties. *Id.* And Defendants argue it reduces litigation risks by ensuring equal treatment of voters. *Id.*

Again, we conclude this asserted interest fails to outweigh the burdens on Plaintiffs. Defendants present only an abstract interest in uniformity that is not tied to the necessity of SB 238 and Directive 2014-17 specifically. Uniformity can be important to make voter education easier, but Defendants do not explain why a uniform EIP voting schedule could not also include Golden Week and the other eliminated EIP voting times. As the district court explained, "uniformity, standing alone," is not an interest important enough to significantly burden Plaintiffs' ability to vote. R. 72 (D. Ct. Op. and Order at 60) (Page ID #5907); *see also Obama for America*, 697 F.3d at 442 (White, J., concurring) ("The desire for uniformity has little to do with the elimination of all weekend and after-hours in-person voting. Defendants offer no explanation for curtailing hours other than on the final weekend, and uniformity without some underlying reason for the chosen rule is not a justification in and of itself. Nor is there a showing

that eliminating all weekend and after-hours voting will in fact produce uniform access, as opposed to uniform hours.").

In sum, because we have concluded that none of the interests put forth by Defendants sufficiently justify the significant burden that the district court found SB 238 and Directive 2014-17 place on the voters whom Plaintiffs represent, we find that Plaintiffs are likely to succeed on their Equal Protection Clause claim.

D. Voting Rights Act Section 2 Claim

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973,[8] provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973(a). In 1982, Congress amended the Voting Rights Act to make clear that "Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Instead, a plaintiff need show only that the challenged action or requirement has a discriminatory effect on members of a protected group." *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002); *see also Mixon v. Ohio*, 193 F.3d 389, 407 (6th Cir. 1999) ("Section 2 of the Voting Rights Act requires only a showing of discriminatory effect."). Section 2(b) sets out the test for determining whether a challenged practice violates Section 2(a):

> A violation of subsection (a) of this section is established if, based on the totality of 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).

[8]The Voting Rights Act recently was transferred to 52 U.S.C. § 10301 et seq. We use its prior placement at 42 U.S.C. § 1973 for the purposes of this opinion.

In *Thornburg v. Gingles*, the Supreme Court endorsed nine factors, first listed in the Senate Judiciary Committee report for the 1982 amendments to Section 2 (referred to as the "Senate factors"), as relevant to assessing "the totality of the circumstances" in Section 2(b):

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

478 U.S. 30, 36–37 (1986) (quoting S. REP. NO. 97-417 at 28–29). The Court added, however, that the Senate Report makes clear that "this list of typical factors is neither comprehensive nor exclusive" and that "'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Id.* at 45 (quoting S. REP. at 29).

In finding that Plaintiffs are likely to succeed on their Section 2 claim, the district court first pointed to evidence in the record of a discriminatory effect on African American voters—

that the EIP voting hours and days eliminated by SB 238 and Directive 2014-17 would "disproportionately impact African American voters resulting in less opportunity to participate in the political process than other voters." R. 72 (D. Ct. Op. and Order at 61) (Page ID #5908). The court pointed to the statistical evidence that African Americans use EIP voting at higher rates than others; to the expert testimony of Professor Roscigno and other evidence in the record that African Americans "tend to disproportionately make up the groups that benefit the most from same-day registration: the poor and the homeless"; that the provision of only one Sunday of EIP voting "burdens the voting rights of African Americans by arbitrarily limiting Souls to the Polls voting initiatives"; and that, because African Americans are more likely to be of lower-socioeconomic status, they "tend to work hourly jobs and can find it difficult to find time to vote during normal business hours." *Id.* at 65–66 (Page ID #5912–13).

The district court also credited the testimony of Professor Roscigno as establishing Senate factors one, two, three, five, six, seven, and nine such that "SB 238 and Directive 2014-17 interact with the historical and social conditions facing African Americans in Ohio to reduce the opportunity to participate in the political process relative to other groups of voters." R. 72 (D. Ct. Op. and Order at 65) (Page ID #5912). While again conceding that Plaintiffs had not established that voter turnout would necessarily be decreased overall, the district court explained that "by its plain terms, § 2 is not necessarily about voter turnout but about opportunity to participate in the political process compared to other groups." *Id.* at 67 (Page ID #5914). And Plaintiffs had, the district court concluded, "demonstrated a strong likelihood of establishing that the combined effects of SB 238 and Directive 2014-17 result in fewer *opportunities* for African Americans to participate in the electoral process." *Id.* at 68 (Page ID #5915) (emphasis in original).

Defendants make four arguments as to why the district court's analysis is incorrect. First, they argue that the district court improperly used the EIP voting system as it existed before SB 238 and Directive 2014-17 as its benchmark against which to measure the discriminatory effect on African American voters. Appellants Br. at 39. In so doing, Defendants assert, the district court used a "retrogression" standard, which is permissible only under Section 5 of the Voting Rights Act. *Id.* at 39–42. Second, Defendants contend that the canon of constitutional avoidance

and federalism counsel in favor of not reading Section 2 to reach changes to early-voting systems at all. *Id.* at 44. Third, Defendants argue that the district court "should not have looked at [the Senate] factors *at all* to resolve this vote-denial claim." *Id.* at 53 (emphasis in original). Finally, focusing on the 2010 election data, Defendants contend that "Plaintiffs' own evidence shows that it cannot prove causation." *Id.* at 55.

1. The Test for a Section 2 Vote Denial Claim

Section 2 applies to any discriminatory "standard, practice, or procedure . . . which results in a *denial* or *abridgement*" of the right to vote. 42 U.S.C. § 1973(a) (emphasis added). Abridgement's "core meaning is 'shorten,'" *Reno v. Bossier Parish School Bd. ("Bossier II")*, 528 U.S. 320, 333–34 (2000), or "[t]o reduce or diminish," Black's Law Dictionary (9th ed. 2009). Similarly, Section 2(b) directs courts to consider whether members of a protected class have "*less* opportunity" to exercise their right to vote than other groups of voters, not simply whether protected voters only have no opportunity to vote. 42 U.S.C. § 1973(b) (emphasis added). In other words, Section 2 applies to any "standard, practice, or procedure" that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting. *Cf. Gingles*, 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution."); S. REP. NO. 97-417 at 30 ("Section 2 remains the major statutory prohibition of all voting rights discrimination.").

Courts have therefore found a range of "standard[s], practice[s], or procedure[s]" that make it harder, but not necessarily impossible, for eligible voters to vote to fall within Section 2. *See, e.g.*, *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom. Mississippi State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (restrictions on voter registration opportunities); *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (location of polling places); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982) (same); *Brooks v. Gant*, No. Civ. 12-5003, 2012 WL 4482984 (D.S.D. Sept. 27, 2012) (number and location of early voting sites); *Harris v. Graddick*, 615 F. Supp. 239 (M.D. Ala. 1985) (number of minority poll officials).

Thus, Plaintiffs' claim that SB 238 and Directive 2014-17 disproportionately place burdens on African American voters that make it harder for them to exercise their right to vote

than other groups of voters is encompassed within Section 2. It does not matter that Plaintiffs do not argue that they are completely prevented from voting.

We also find unconvincing Defendants' argument that Section 2 does not cover challenges to early-voting systems, or that the canon of constitutional avoidance or federalism concerns compel such a conclusion. We first note that Defendants have raised these arguments for the first time on appeal. Generally, arguments raised for the first time on appeal are forfeited. *See, e.g.*, *Armstrong v. City of Melvindale*, 432 F.3d 695, 700 (6th Cir. 2006) ("[T]he failure to present an issue to the district court forfeits the right to have the argument addressed on appeal."). Nevertheless, we briefly address both arguments for the sake of completeness.

As discussed above, the plain language of Section 2 does not exempt early-voting systems from its coverage. Section 2 applies to *any* discriminatory "standard, practice, or procedure . . . which results in a denial or abridgement" of the right to vote. 42 U.S.C. § 1973(a). It does not specify that certain "standard[s], practice[s], or procedure[s]" are included within its scope and others excluded. The Voting Rights Act contains a similarly broad definition of the right to vote:

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

42 U.S.C. § 1973*l*(c)(1). This definition specifically notes that the right to vote "includ[es], but [is] not limited to," the specified examples. *Id.*

Nor has any court held that the Voting Rights Act does not apply to early-voting systems. The Supreme Court has in fact held that the Voting Rights Act should be interpreted broadly:

> Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." *South Carolina v. Katzenbach,* 383 U.S. 301, 315 (1966). In *Allen v. State Board of Elections,* 393 U.S. 544, 567 (1969), *we said that the Act should be interpreted in a manner that provides "the broadest possible scope" in combating racial discrimination*.

Chisom v. Roemer, 501 U.S. 380, 403–04 (1991) (emphasis added) (internal citations omitted). *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005), in which the Eleventh Circuit held that the Voting Rights Act does not apply to felon disenfranchisement laws, is easily distinguishable because the court determined that the Fourteenth Amendment in fact permits such laws and that the "Senate and House reports" for the Voting Rights Act "strongly suggest . . . that Congress did not intend Section 2 of the Voting Rights Act to cover felon disenfranchisement provisions." *Id.* at 1228–29, 1232–33. Defendants do not point to a textual basis in the Fourteenth Amendment or specific statements in the legislative history of the Voting Rights Act that would compel a similar conclusion here.

Regarding Defendants' federalism arguments, we find Congress's statement in Section 2 that it applies to any discriminatory "standard, practice, or procedure" provides a sufficiently clear statement of its intention to change the federal-state balance to encompass a "standard, practice, or procedure" related to early voting if it produces discriminatory results in a way prohibited by Section 2. "Congress considered the [results] test of [Section 2] 'necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights.'" *Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (quoting S. REP. NO. 97-417 at 27). The Supreme Court has elsewhere repeatedly held that "the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282 (1999). Finally, we note that the plain text of the National Voter Registration Act does not contain a clear statement to the opposite effect; it specifically states that "[n]othing in this chapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965." 52 U.S.C. § 20510(d)(2).

Turning to the case law on Section 2, then, we note that the vast majority of cases have concerned a different kind of claim—vote dilution. Vote dilution claims involve challenges to methods of electing representatives—like redistricting or at-large districts—as having the effect of diminishing minorities' voting strength. Unsurprisingly, then, the case law has developed to suit the particular challenges of vote dilution claims. A clear test for Section 2 vote denial claims—generally used to refer to any claim that is not a vote dilution claim—has yet to emerge. *See, e.g.*, Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579,

595 (2013) ("[T]he legal contours of vote denial claims remain woefully underdeveloped as compared to vote dilution claims.").

We read the text of Section 2 and the limited relevant case law as requiring proof of two elements for a vote denial claim. First, as the text of Section 2(b) indicates, the challenged "standard, practice, or procedure" must impose a discriminatory burden on members of a protected class, meaning that members of the protected class "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(a)–(b). Second, the Supreme Court has indicated that that burden must in part be caused by or linked to "social and historical conditions" that have or currently produce discrimination against members of the protected class.[9] *Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that 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."). In assessing both elements, courts should consider "the totality of circumstances." 42 U.S.C. § 1973(b).

Despite Defendants' assertions to the contrary, we see no reason why the Senate factors cannot be considered in assessing the "totality of the circumstances" in a vote denial claim, particularly with regard to the second element. While the Court has noted that the Senate Report indicates that "the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims," neither the Report nor the Court suggested that the factors can be considered *only* in vote dilution claims. *Gingles*, 478 U.S. at 45. And several of the few Circuit court decisions to address vote denial claims have expressly stated that the Senate factors are relevant to vote denial claims. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 405–06 (9th Cir.

[9]In the few cases considering vote denial claims, this second factor has often been expressed as a "causation" requirement, or through statements that a plaintiff cannot establish a Section 2 violation merely by showing a disproportionate impact or burden. *See, e.g.*, *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (stating that a violation of Section 2 cannot be proved only by "a bare statistical showing of disproportionate impact on a racial minority") (emphasis omitted); *Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310 (3d Cir. 1994) ("[T]he Supreme Court recognized that there must be some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote."); *Wesley v. Collins*, 791 F.2d 1255, 1260–61 (6th Cir. 1986) ("It is well-settled, however, that a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act. Rather, such a showing merely directs the court's inquiry into the interaction of the challenged legislation 'with those historical, social and political factors generally probative of dilution.'") (quoting *Gingles v. Edmisten*, 590 F. Supp. 345, 354 (E.D.N.C. 1984)).

2012) (en banc) (considering the Senate factors in evaluating a Section 2 challenge to Arizona's voter ID law), *aff'd on other grounds sub nom. Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247 (2013); *Johnson*, 405 F.3d at 1227 n.26 (explaining that, in a vote denial claim, "courts consider a non-exclusive list of objective factors (the 'Senate factors') detailed in a Senate Report accompanying the 1982 amendments" as part of evaluating whether, under the "totality of the circumstances," "the political processes . . . are not equally open to participation by [members of a protected class]"); *Smith*, 109 F.3d at 596 n.8 ("Appellants suggest that the 'Senate factors' apply only to 'vote dilution' claims. To the contrary, the 'totality of the circumstances' test established in § 2(b) was initially applied *only* in 'vote denial' claims such as this.").

We find Senate factors one, three, five, and nine particularly relevant to a vote denial claim in that they specifically focus on how historical or current patterns of discrimination "hinder [minorities'] ability to participate effectively in the political process." *Gingles*, 478 U.S. at 37 (quoting Senate factor five). All of the factors, however can still provide helpful background context to minorities' overall ability to engage effectively on an equal basis with other voters in the political process.

2. Assessment of Plaintiffs' Section 2 Claim

We conclude that the district court properly found that Plaintiffs are likely to succeed on their Section 2 claim. Plaintiffs demonstrated that SB 238 and Directive 2014-17 will disproportionately burden African American voters and that this burden means that they will have a harder time voting than other members of the electorate. As previously discussed in Sections II and III, the district court did not clearly err in crediting the statistical and survey analysis of Plaintiffs' expert Smith and other studies in the record as demonstrating that African Americans vote EIP at higher rates than other groups, including on the eliminated EIP voting days. Nor did the district court clearly err in considering data from the elections in 2008, 2010, and 2012 in reaching this conclusion, rather than focusing solely on 2010 as Defendants' causation argument implicitly urges. Defendants' argument that Plaintiffs did not establish causation is therefore without merit. And the fact that African Americans are more likely to be of lower-socioeconomic status in Ohio—as Professor Roscigno's undisputed report establishes—

and both distrust voting by mail and face obstacles doing so, means that the remaining EIP voting times are not sufficient to ensure African Americans have a truly equal opportunity to vote as other groups of voters. More specifically, African Americans are more likely to vote on Sundays through the Souls to the Polls initiatives because of the free transportation church groups can provide. Lower-income individuals face difficulties in voting during the day because they are more likely to work in hourly-wage jobs with little flexibility. Lower-income individuals, often because they are more likely to move and/or have difficulty accessing transportation, also most need same-day registration. R. 18-2 (Roscigno Rep. at 16–19) (Page ID #266–69). Thus, the disproportionate burdens SB 238 and Directive 2014-17 place on African Americans, combined with their lower-socioeconomic status in Ohio, operate to give African American voters "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).

Defendants' argument that the district court failed to identify an objective benchmark against which to assess the burdens SB 238 and Directive 2014-17 place on African American voters is unpersuasive. The case law Defendants cite on the need for objective benchmarks involve vote dilution claims. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 876 (1994) ("This case presents the question whether the size of a governing authority is subject to a vote dilution challenge under § 2 of the Voting Rights Act"); *Bossier II*, 528 U.S. 320 (considering whether Section 5 prohibits preclearance of a dilutive, but nonretrogressive redistricting plan).[10] A vote dilution claim requires courts to make the difficult judgment of whether a challenged practice impermissibly dilutes minorities' voting strength, or whether minorities' lack of electoral success in fact simply stems from "mere . . . political defeat at the polls." *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). Thus, determining what an undiluted benchmark should be can be challenging, particularly because Section 2 expressly states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b).

[10]Defendants' discussion of the necessity of establishing "preconditions" before assessing the "totality of circumstances" similarly comes from vote dilution cases. *See* Appellants Reply Br. at 17–19. The "preconditions" referenced in *Growe v. Emison*, 507 U.S. 25, 41 (1993), for example, refer to three requirements the Supreme Court set forth in *Gingles* that apply to vote dilution claims *only*. *Gingles*, 478 U.S. at 50–51.

In contrast, Section 2 vote denial claims inherently provide a clear, workable benchmark. Again, under Section 2(b), the relevant inquiry is whether minority voters "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). The benchmark is thus quite straightforward—under the challenged law or practice, how do minorities fare in their ability "to participate in the political process" *as compared to other groups of voters*?

Thus, the district court properly assessed whether, under the system established by SB 238 and Directive 2014-17, African American voters would have less opportunity than other Ohio voters to cast their ballots. The disproportionate impact on African American voters as compared to white voters of cutting Sunday and evening EIP voting as well as Golden Week is clearly relevant to this inquiry. So, too, is the relative ability of African American voters to vote through the remaining options available under SB 238 and Directive 2014-17.

Turning to the second element of a Section 2 vote denial claim, the district court also properly found that Plaintiffs had sufficiently demonstrated that the disproportionate burdens SB 238 and Directive 2014-17 place on African Americans are in part caused by or linked to "social and historical conditions" of discrimination. Professor Roscigno's undisputed report regarding Senate factor five is particularly on point. He explained that African Americans in Ohio tend to be of lower-socioeconomic status because of "stark and persistent racial inequalities . . . [in] work, housing, education and health," inequalities that stem from "both historical and contemporary discriminatory practices." R. 18-2 (Roscigno Rep. at 3) (Page ID #253). As support, Professor Roscigno pointed to "[s]ubstantial bodies of social science research . . . [that] investigate the root causes of . . . occupational inequalities, often concluding that contemporary institutional practices and discrimination play a significant role, especially when the disparities are as large as they are in Ohio." *Id.* at 7 (Page ID #257). "Racial occupational inequalities are easily linked to racial disparities in, for instance, family income and poverty status as well as residential and schooling options and racial health disparities." *Id.* at 10 (Page ID #260). As previously discussed, African Americans' lower-socioeconomic status in turn plays a key role in explaining why the disproportionate impact of SB 238 and Directive 2014-17 burdens African Americans' voting opportunities.

The remaining Senate factors considered by the district court support its finding that the burdens SB 238 and Directive 2014-17 place on African American voters are in part caused by or linked to "social and historical conditions" that have produced or currently produce discrimination against African Americans in Ohio. Given that Plaintiffs' claim focuses on reductions in voting opportunities, past and current discrimination linked to the electoral system itself is relevant. Professor Roscigno's report demonstrated that, per Senate factor one, historically "[o]fficial voting-related discrimination against racial/ethnic minorities was a cornerstone in Ohio." *Id.* at 26 (Page ID #276). More recently, Ohio has implemented "voting practices that suppress minority political participation," such as poll watchers and voter ID laws—practices that fall within the ambit of Senate factor three. *Id.* at 28–30 (Page ID #278–80). Under Senate factor nine, it is also relevant that, as explained in the Equal Protection Clause analysis, the policy justifications for SB 238 and Directive 2014-17 are "tenuous." *Gingles*, 478 U.S. at 37. The evidence Professor Roscigno provided regarding Senate factors two, six, and seven—while not as clearly linked to Plaintiffs' claim—further contextualizes the role race still plays in Ohio elections.

The district court did not improperly engage in a retrogression analysis in considering the opportunities available to African Americans to vote EIP under the prior law as part of the "totality of circumstances" inquiry. To be sure, Congress intended—and the Court has read—Section 2 and Section 5 not to have exactly the same scope. Procedurally, Section 5 requires that covered states obtain preclearance from the Attorney General or the District Court for the District of Columbia before they change a voting "qualification, prerequisite, standard, practice, or procedure." 42 U.S.C. § 1973c. Section 2 applies to all states and includes no preclearance requirement. "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). In other words, "§ 5 prevents nothing but backsliding," whereas Section 2 is aimed at combatting "discrimination more generally." *Bossier II*, 528 U.S. at 334–35.

At the same time, however, no case explicitly holds that prior laws or practices cannot be considered in the Section 2 "totality of circumstances" analysis. The Supreme Court has in fact

found a Section 2 violation under the "totality of circumstances" in part based on changes to the electoral system. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006) (noting that "[t]he *changes* to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive") (emphasis added). Neither does the legislative history of Section 2 indicate that prior laws or practices cannot factor into the analysis. The Senate Report to the 1982 amendments states only that "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." S. REP. NO. 97-417 at 68 n.224 (1982) (emphasis added). Oxford English Dictionary defines "merely" as "entirely . . . only (what is referred to) and nothing more." 9 Oxford English Dictionary 629 (2d ed. 1989). In other words, the Report simply establishes that challengers cannot show a Section 2 violation *only* on the basis of retrogressive effects. Indeed, Senate factor nine in fact invites comparison to prior laws. The Senate Report explains that, in assessing the "tenuous[ness]" of policy justification for the challenged law or procedure, the fact that "the *procedure markedly departs from past practices* or from practices elsewhere in the jurisdiction . . . bears on the fairness of its impact." S. REP. NO. 97-417 at 239 n.117 (emphasis added).

Moreover, the Supreme Court has made clear that "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). Both Section 2 and Section 5 speak to "abridgement." 42 U.S.C. § 1973(a) (Section 2) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or *abridgement* of the right of any citizen of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.") (emphasis added); *id.* § 1973c(b) (Section 5) ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or *abridges* the right to vote within the meaning of subsection (a) of this section.") (emphasis added). Abridgement "necessarily entails a comparison." *Bossier II*, 528 U.S. at 333–34.

Rather, what is distinct between a Section 5 analysis and a Section 2 analysis is the role that prior law plays in the comparison. The retrogression analysis under Section 5 involves comparing voting opportunities enjoyed by minorities under the status quo as compared to voting opportunities minorities would have under the electoral system if the proposed change is implemented. The focus is *solely* on voting opportunities enjoyed by minorities, and whether those opportunities would be reduced under the proposed law. In contrast, under the Section 2 analysis, the focus is whether minorities enjoy less opportunity to vote as *compared to other voters*. The fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is therefore relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters.

As discussed above, Plaintiffs have not asserted that SB 238 and Directive 2014-17 burden their right to vote merely because they take away EIP voting times that used to exist under prior law. Rather, they have presented evidence that the eliminated EIP voting times are those that African Americans disproportionately use, and that racial inequalities in socioeconomic status and other factors make it much more difficult for African Americans to vote at the remaining times or through the other methods now available under the status quo *as compared to other groups.*[11] Thus, the district court did not improperly engage in a retrogressive analysis.

Finally, we find unpersuasive Defendants' claim that our decision would have far-reaching implications beyond Ohio. Defendants fail to cite any Supreme Court or Sixth Circuit authority to support their argument that we must *necessarily* consider the practices of other states with regard to EIP voting.

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[11]For example, *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1251 (M.D. Fla. 2012), one of the cases Defendants cite in their retrogression argument, *see* Appellants Br. at 42, is in fact distinguishable from the present case on this basis. The district court denied the plaintiffs' motion for a preliminary injunction enjoining the enforcement of a Florida statute reducing the number of early voting days from twelve to fourteen under prior law to eight days for the 2012 election on the basis that it violated Section 2. *Brown*, 895 F. Supp. 2d at 1255. The district court noted that while the reduction in days could have a discriminatory impact, other elements of the statute—such as a provision allowing county election officials to increase the number of voting hours on any given day, which could mean that more morning and evening hours would be available than what existed previously, and that the statute increased Sunday early voting opportunities for the state as a whole—meant that the plaintiffs had not provided enough evidence that minority voters on the whole would have less opportunity to vote than other groups of voters. *Id.* at 1252–55.

In fact, the text of Section 2 and Supreme Court decisions indicate that the *opposite* is true. The text of Section 2 directs courts to examine whether the political processes "*in the State or political subdivision* are not equally open to participation by members of a [protected] class . . . in that its members have less opportunity *than other members of the electorate* to participate." 42 U.S.C. § 1973(b) (emphasis added). The focus is on the internal processes of a single State or political subdivision and the opportunities enjoyed by that particular electorate. The text of Section 2 does not direct courts to compare opportunities across States. The Supreme Court has likewise characterized the determination of whether a practice violates Section 2 as "an intensely *local* appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (emphasis added) (internal quotation marks omitted). The Court explained that "the [Senate] Committee determined that 'the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality,"' and on a 'functional' view of the political process." *Id.* (quoting S. REP. NO. 97-417 at 30) (internal citations omitted). "This determination is *peculiarly dependent upon the facts of each case*." *Id.* (emphasis added) (quoting *Rogers v. Lodge*, 458 U.S. 613, 621 (1982)). *See also Holder*, 512 U.S. at 881–82 ("It makes little sense to say . . . that the sole commissioner system should be subject to a [Section 2] dilution challenge if it is rare—but immune if it is common.") (Kennedy, J.); *Gonzalez*, 677 F.3d at 406 ("Because a § 2 analysis requires the district court to engage in a 'searching practical evaluation of the 'past and present reality,' *Gingles*, 478 U.S. at 45, . . . a district court's examination in such a case is 'intensely fact-based and localized,' *Salt River*, 109 F.3d at 591.").

Defendants tell us that the Court's statement in *Gingles* is not relevant because the Court was considering a vote dilution claim, rather than a vote denial claim like that at issue here. Appellants Br. at 52. But they provide no explanation as to *why* that distinction matters or why assessments of early voting systems do not likewise require an intensely localized assessment of their impact on African American voters.

Ohio faced unique problems in administering the 2004 elections. The General Assembly introduced early voting in 2005 largely to remedy those problems. In the nearly ten years since, EIP voting has come to play a special role in Ohio in ensuring that African Americans have an

equal opportunity to participate in the political process that is not necessarily true elsewhere. There is no reason to think our decision here compels any conclusion about the early-voting practices in other states, which do not necessarily share Ohio's particular circumstances.

In sum, we conclude that Plaintiffs are likely to succeed on their Section 2 of the Voting Rights Act claim.

E. The Remaining Preliminary Injunction Factors

"When 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.'" *Obama for America*, 697 F.3d at 436 (quoting *Jones v. Caruso,* 569 F.3d 258, 265 (6th Cir. 2009)). Although we have concluded that Plaintiffs are likely to succeed on their Equal Protection Clause claim and their Section 2 of the Voting Rights Act claim, we still consider the remaining three preliminary injunction factors.

First, we conclude that Plaintiffs have established that they will suffer irreparable harm absent an injunction. "When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *Id.* (internal citations omitted).

Regarding the final two factors, we conclude that the issuance of the injunction would not cause substantial harm to others and that the public interest weighs in its favor. The significant burden on the ability to vote of the voters Plaintiffs represent outweighs any burden on Defendants, who have failed to demonstrate that BOEs would not be able to administer the extra days and evening hours of EIP voting required by the preliminary injunction, a schedule BOEs had previously administered in past elections. As we explained in *Obama for America*:

> While states have "a strong interest in their ability to enforce state election law requirements," *Hunter* [*v. Hamilton Cnty. Bd. of Elections,* 635 F.3d 219, 244 (6th Cir. 2011)], the public has a "strong interest in exercising the 'fundamental political right' to vote." *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006) (quoting *Dunn,* 405 U.S. at 336). "That interest is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful." *Hunter,* 635 F.3d at 244. The public interest therefore favors permitting as many qualified voters to vote as possible.

Obama for America, 697 F.3d at 436–37. We have previously rejected Defendants' argument that upholding the preliminary injunction risks confusing voters. *Ohio State Conference of N.A.A.C.P. v. Husted*, No. 14-3877, 2014 WL 4494938, at *5 (6th Cir. Sept. 12, 2014). Regarding Defendants' laches argument, we "review[] a district court's resolution of a laches question for an abuse of discretion." *Chirco v. Crosswinds Communities, Inc.*, 474 F.3d 227, 231 (6th Cir. 2007) (internal quotation marks omitted). Defendants have not explained how Plaintiffs could have more quickly produced the voluminous record evidence in this case in support of their motion for a preliminary injunction, nor have Defendants produced any evidence that Plaintiffs purposefully delayed. We therefore find that the district court did not abuse its discretion in determining that Defendants "ha[d] not shown . . . a lack of diligence" by Plaintiffs to move promptly for a preliminary injunction. R. 72 (D. Ct. Op. and Order at 6) (Page ID #5853).

F. The District Court's Remedy

Defendants suggest in one paragraph in their brief on appeal that the district court's preliminary injunction itself might violate the Equal Protection Clause by allowing BOEs to set EIP voting hours in addition to those set forth in the preliminary injunction order and Directive 2014-17 because BOEs might set unequal EIP voting hours. Appellants Br. at 28–29. This argument appears to implicate issues of state law that have not been fully developed on appeal. The Ohio Revised Code authorizes BOEs to set their own EIP voting hours. Ohio Rev. Code §§ 3501.10(b), 3501.11. The district court's order expressly ties its remedy to what is already permitted under Ohio law: "Secretary Husted is enjoined from preventing individual county Boards of Election from adopting, *by a majority vote of their members and in accordance with the procedures established by Ohio election law*," additional EIP voting hours. R. 72 (D. Ct. Op. and Order at 71) (Page ID #5918) (emphasis added). Neither party has directly addressed Secretary Husted's authority to impose uniform EIP voting hours despite the provisions of the Ohio Revised Code that appear to vest discretion in BOEs to set their own hours. *Id.* at 4 (Page ID #5851). At this stage in the litigation, with only days until early voting is set to begin, and having found that all four factors weigh in favor of granting Plaintiffs a preliminary injunction, we do not address this argument at this time.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment granting a preliminary injunction.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-3877

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE et al.,
Plaintiffs - Appellees,

v.

JON HUSTED, in his official capacity as Ohio Secretary of State; MIKE DEWINE, in his official capacity as Ohio Attorney General,
Defendants - Appellants.

Before: KEITH, MOORE, and CLAY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's order granting a preliminary injunction is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 14-3877

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 12, 2014
DEBORAH S. HUNT, Clerk

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE et al.,

Plaintiffs-Appellants,

v.

JON HUSTED et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: KEITH, MOORE, and CLAY, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. On September 9, 2014, Defendants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine moved the district court to stay its September 4, 2014 order granting a preliminary injunction (the "Order") to Plaintiffs Ohio State Conference of the National Association for the Advancement of Colored People et al. ("NAACP") pending resolution of this matter on appeal. Plaintiffs filed a response opposing the motion for a stay on September 10, 2014. The district court denied the motion for a stay on September 10, 2014. R. 82 (Dist. Ct. Order Den. Stay at 4-5) (Page ID #5992-93).

On September 11, 2014, Defendants requested this court to issue an order staying "any *immediate* commands" of the district court's order granting a preliminary injunction "that could possibly require action before this Court can resolve the appeal." Defs. Mot. for Stay, Mem. in Supp. at 1. Plaintiffs filed a response opposing the motion on September 12, 2014. For the

reasons set forth in this Order, we **DENY** Defendants' motion for a stay of the order pending appeal.

I. BACKGROUND

The district court's September 4, 2014 order granting a preliminary injunction provided as follows:

> That the State of Ohio and the Secretary Husted are enjoined from enforcing and implementing SB 238's amendments to § 3509.01 of the Ohio Revised Code reducing the EIP [early in person] voting period from 35 days before an election to the period beginning the day following the close of voter registration;
>
> That, for purposes of the 2014 general election, the EIP voting period shall consist of the 35 days prior to the election as was the case subsequent to SB 238's enactment;
>
> That, for the 2014 general election, Defendant Secretary Husted shall require all Ohio county Boards of Election to set uniform and suitable EIP voting hours, in addition to those currently established by Directive 2014-17, for the following days:
>
> - Tuesday, September 30, 2014 through Friday, October 3, 2014;
> - Monday, October 6, 2014;
> - Evening voting hours between Monday, October 20, 2014 and Friday, October, 24, 2014, and between Monday, October 27, 2014 and Friday, October 31, 2014. Provided, that in setting such hours, Husted must, in good faith, take into consideration the Court's findings and legal conclusions regarding the impact of a lack of evening voting hours on the protected classes of voters discussed in this Memorandum Opinion and Order; and
> - Sunday, October 26, 2014; and
>
> That Defendant Secretary Husted is enjoined from preventing individual county Boards of Election from adopting, by a majority vote of their members and in accordance with the procedures established by Ohio election law, EIP voting hours in addition to those specified above and in Directive 2014-17.
>
> Further, all issues regarding and pertaining to future elections are deferred and reserved for consideration on the motion for a permanent injunction. In the

> interim, the Ohio General [A]ssembly is charged with the responsibility of passing legislation consistent with this Memorandum Opinion and Order. . . .

R. 72 (Dist. Ct. Order at 70-71) (Page ID #5917-18) (footnote omitted). The district court denied the Defendants' motion for a stay of its order granting a preliminary injunction to Plaintiffs on the grounds that Defendants had failed to make a strong showing that they are likely to succeed on the merits and that they had not demonstrated irreparable injury absent a stay. R. 82 (Dist. Ct. Order Den. Stay at 3-5) (Page ID #5991-93). The district court noted that Defendants had not argued that implementing the extra Sundays and evening hours of EIP voting was "beyond their capacity" and had not "demonstrated that the Boards cannot manage the additional costs incurred by Golden Week, as they were capable of doing prior to June of 2014." *Id.* at 5 (Page ID #5993). At the same time, the district court credited Plaintiffs' argument that, "[a]t this point, a stay would only increase the 'flip-flopping' of EIP voting schedule changes, resulting in greater public confusion." *Id.*

Defendants also have appealed the district court's order granting a preliminary injunction to Plaintiffs and have filed a motion with this court to expedite that appeal. Defs. Mot. to Expedite Appeal. We granted the Defendants' motion to expedite the appeal on September 11, 2014.

II. THE STANDARD

Under Supreme Court precedent, "'[a] stay is not a matter of right,'" but is rather "'an exercise of judicial discretion'" that requires examining "'the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian R. Co. v. United States*,

272 U.S. 658, 672-73 (1926)). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34.

Four factors must be considered in deciding whether to issue a stay: "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "[T]he first two factors . . . are the most critical." *Id.*

III. EVALUATION OF THE FOUR FACTORS

Regarding the first factor, Defendants do not address whether they are "likely to succeed on the merits" of their appeal in their Memorandum in Support of their Motion for a Stay. However, Defendants do address this factor in their Memorandum in Support of their Motion to Expedite Appeal. Defendants argue that the district court's decision is "based on an expansive theory." Defs. Mot. to Expedite Appeal, Mem. in Supp. at 10. They identify two primary issues: (1) that the district court improperly applied a "retrogression" analysis used in Section 5 cases under the Voting Rights Act ("VRA") to hold that Defendants had violated Section 2 of the VRA, and (2) that the district court ordered that "in the name of equal protection that . . . some counties must be allowed to have *non-equal* hours greater than other counties." *Id.* at 11-12. Defendants do not cite legal authority to substantiate these claims. In contrast, Plaintiffs have cited numerous Sixth Circuit cases to argue that the district court correctly held that they are likely to prevail on their Voting Rights Act and Equal Protection Clause claims. Pls. Mot. Opp'n Stay, Mem. in Supp. at 3-6.

As to the remaining factors, Defendants articulate three principal harms that they argue will result absent a stay. First, Defendants argue that failing to grant a stay will harm voters by increasing public confusion through "ever-changing election rules." Defs. Mot. for Stay, Mem. in Supp. at 3. Without a stay, Defendants argue that they might have to officially change the rules for the 2014 elections twice, once to comply with the district court's injunction and potentially another time if the injunction is overturned on appeal. *Id.* "With a stay, there is at most only one change to the status quo (and possibly none)." *Id.* Defendants assert that preventing "harmful confusion" through "repeated changes to election rules right before an election" is a "common belief shared by Plaintiffs, the State, and the district court." *Id.* at 2.

Second, Defendants assert generally that "[l]ate changes to election procedures also harm the 'strong public interest in smooth and effective administration of the voting laws.'" *Id.* at 4 (citation omitted). In recognition of this harm, Defendants argue that this court has stayed injunctions against election laws granted close to elections "with some regularity in federal-election years." *Id.* In their Memorandum in Support of their Motion to Expedite Appeal, Defendants also assert that "the changes county Boards will have to undergo to meet the Order's demands . . . will require additional time and money." Defs. Mot. to Expedite Appeal, Mem. in Supp. at 13.

Finally, Defendants argue that absent a stay, communications between the Secretary and Boards of Election ("Boards") may be chilled, whereas "[a] stay keeps those channels of communication open." Defs. Mot. for Stay, Mem. in Supp. at 5. Defendants point to their experience in the early-voting case from 2012, *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012). When the Secretary of State issued a Directive to the Boards in an attempt to comply

with the district court's preliminary injunction in that case, those communications "spawned collateral litigation about whether the Directive was faithful to the injunction even while the appeal of that injunction proceeded on a fast track." Defs. Mot. for Stay, Mem. in Supp. at 5. These events, Defendants argue, "show that, without a stay, the Secretary is discouraged from communicating with the boards of election for fear of his communications leading to collateral litigation." *Id.*

Plaintiffs respond that first, Defendants have not sufficiently demonstrated that they will be irreparably harmed absent a stay. They argue that, "[o]ver the past eight years, Defendants have conducted elections involving these practices which have merely been continued by the district court for one more election." Pls. Mot. Opp'n Stay, Mem. in Supp. at 7. They contend that Defendants have "failed" to "demonstrate how providing these specific voting opportunities has been unduly burdensome." *Id.*

Second, Plaintiffs argue that granting the stay will harm them and the public by *increasing* voter confusion and potentially forcing them quickly to re-start an already compressed voter-outreach campaign. While Defendants may not have officially communicated to the public the Order's changes to EIP voting rules, "[a]fter the injunction was issued," Plaintiffs argue, "the media widely reported it and advocates reasonably expected the injunction to be followed and began publicizing the restoration of these longstanding voting opportunities." *Id.* at 9. Thus, informally the status quo has already changed, and staying the injunction now would risk three potential changes in the EIP voting schedule, once from the injunction, another from the stay, and potentially a third if the injunction is affirmed after being stayed on appeal. Moreover, "a stay would call to a halt the expectations of voters, and preparations of voting

advocates, for the specific early voting opportunities that tens of thousands of Ohio voters have come to rely upon over the last eight years." *Id.* at 7. Plaintiffs also argue that "a stay would threaten the implementation of same-day registration on September 30 should Plaintiffs prevail on appeal," which may be merely days before that date. *Id.* at 8. Further, "it would leave a mere *handful* of business days for Boards of Elections to receive a directive from the Secretary of State restoring the voting hours; create a plan to implement the restored hours; and find, hire and train qualified individuals to staff the restored hours." *Id.*

On balance, we find that Defendants have failed to meet their heavy burden of demonstrating that a stay is warranted. While Defendants did assert some problems they identify in the district court's legal conclusions, at this preliminary stage we cannot say that Defendants have carried their burden to make a "*strong* showing that [they are] likely to succeed on the merits." *Nken*, 556 U.S. at 434 (emphasis added). Moreover, Defendants did not carry their burden to demonstrate that they will suffer more than a mere "possibility" of irreparable harm. *Id.* While they have articulated a general concern that failure to stay the Order would harm the "strong public interest in smooth and effective administration of the voting laws" and would "require additional time and money," they have not argued that the Secretary or the Boards are not equipped financially or organizationally to administer the EIP voting schedule imposed by the Order. Rather, Defendants argue that not staying the Order risks chilling interim communications between the Secretary and Boards because Plaintiffs may challenge the sufficiency or propriety of such communications in court. We find it hard to credit Defendants' contention that the Secretary would actually cease all communications with the Boards and thereby risk a last-minute scramble to ensure proper compliance with the Order if it is upheld on

appeal, a strategy that would seem contrary to Defendants' asserted interest in the "smooth and effective administration of the voting laws." We assume that Defendants will comply in good faith with the Order pending our review on appeal.

In contrast, Plaintiffs have demonstrated that they and the public will likely suffer significant harm if the stay is granted. We are not persuaded by Defendants' limited focus on the potential number of times the EIP voting rules *officially* might have to be changed. Plaintiffs convincingly argue that informally, the Order's contents already have been disseminated to the public. Staying the Order would only add to the confusion among the public, thereby adversely affecting voter turnout during EIP voting if the Order is ultimately affirmed on appeal. Moreover, if the stay were to be granted, but the Order is later affirmed on appeal, Plaintiffs would be put in the position of trying to communicate yet another change in EIP voting and conduct a voter outreach and organization campaign in a timeframe potentially as short as a matter of days before EIP voting begins on September 30. In contrast, if the stay is denied and the Order were to be reversed on appeal, Defendants have not made a convincing case that this would impose undue burdens.

For the foregoing reasons, we hold that Defendants have failed to demonstrate that the circumstances warrant a stay. We **DENY** Defendants' motion for a stay pending appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs,

v.

JON HUSTED, et al.,

Defendants.

Case No. 2:14-cv-404

Judge Peter C. Economus

Magistrate Judge Norah McCann King

ORDER

On September 9, 2014, Defendants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine moved this Court to stay its September 4, 2014 order granting a preliminary injunction (the "Order") pending resolution of this matter on appeal. (Dkt. 80.) Following an expedited briefing schedule, Plaintiffs filed a response on September 10, 2014. For the reasons that follow, Defendants' motion for a stay is **DENIED**. (Dkt. 80.)

I. Background

The Court's September 4, 2014 Order granting a preliminary injunction stated as follows:

> That the State of Ohio and the Secretary Husted are enjoined from enforcing and implementing SB 238's amendments to § 3509.01 of the Ohio Revised Code reducing the EIP [early in person] voting period from 35 days before an election to the period beginning the day following the close of voter registration;
>
> That, for purposes of the 2014 general election, the EIP voting period shall consist of the 35 days prior to the election as was the case subsequent to SB 238's enactment;
>
> That, for the 2014 general election, Defendant Secretary Husted shall require all Ohio county Boards of Election to set uniform and suitable EIP voting hours, in addition to those currently established by Directive 2014-17, for the following days:
>
> - Tuesday, September 30, 2014 through Friday, October 3, 2014;

> - Monday, October 6, 2014;
>
> - Evening voting hours between Monday, October 20, 2014 and Friday, October, 24, 2014, and between Monday, October 27, 2014 and Friday, October 31, 2014. Provided, that in setting such hours, Husted must, in good faith, take into consideration the Court's findings and legal conclusions regarding the impact of a lack of evening voting hours on the protected classes of voters discussed in this Memorandum Opinion and Order; and
>
> - Sunday, October 26, 2014; and
>
> That Defendant Secretary Husted is enjoined from preventing individual county Boards of Election from adopting, by a majority vote of their members and in accordance with the procedures established by Ohio election law, EIP voting hours in addition to those specified above and in Directive 2014-17.
>
> Further, all issues regarding and pertaining to future elections are deferred and reserved for consideration on the motion for a permanent injunction. In the interim, the Ohio General assembly is charged with the responsibility of passing legislation consistent with this Memorandum Opinion and Order. . . .

(Order, Dkt. 72 at 70–71 (citation and footnote omitted).) Defendants appealed the Order on September 5, 2014. (Dkt. 73.) They now seek a stay of that Order; specifically, they request:

> an order suspending the preliminary injunction issued by this Court on September 4, 2014, or in the alternative, an order delaying the issuance of a directive to county Boards of Elections based on this Court's decision, to avoid voter confusion while the appeal is pending.

(Dkt. 80.)

II. Standard of Review

"A stay is not a matter of right," but is rather "an exercise of judicial discretion." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (citations and internal quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that

discretion." *Id.* at 433–34 (citations omitted). In exercising that discretion, a court considers four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Summit Cnty. Democratic Cent. and Exec. Comm. v. Blackwell*, 388 F.3d 547, 550 (6th Cir. 2004) (citation omitted).

Of these four factors, the first two—likelihood of success on the merits of the appeal and irreparable injury to the appealing party—are the most critical. *Nken*, 556 U.S. at 434. While "a movant need not always establish a high probability of success on the merits," *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citation omitted), the movant "must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted," *Family Trust Found. of Ky., Inc. v. Ky. Judicial Conduct Comm'n*, 388 F.3d 224, 227 (6th Cir. 2004) (citation omitted). As the Sixth Circuit emphasized, "the demonstration of a mere 'possibility' of success on the merits is not sufficient, and renders the test meaningless." *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (citation omitted).

III. Analysis

As for the first factor, Defendants dedicate a large portion of their brief to arguing that they are likely to prevail on appeal. (Dkt. 80 at 6–11.) This Court has already fully considered all of Defendants' legal arguments regarding the merits. For the reasons set forth in the Order,

the Court finds that Defendants are not likely to succeed on the merits. This factor therefore weighs against a stay.

As for the remaining factors, Defendants argue that the preliminary injunction granted in the Order threatens to irreparably harm Defendants, the county Boards of Elections ("Boards"), and the Ohio electorate. (Dkt. 80 at 3.) Specifically, Defendants state that "[p]lanning and budgeting for this election cycle is already well underway," the Boards "will have difficulty logistically accommodating the Court's Order, and many Boards do not have the funds set aside for the expanded [EIP voting] calendar." (*Id.* at 5.) Defendants state that Defendant Husted will be harmed without a stay because his "office will need to address and manage the likely confusion across the State as a result of the Order." (*Id.* at 5–6.) According to Defendant Husted, he "will . . . need to send a new Directive to the Boards and, if the decision is overturned, yet another Directive re-setting the EIP voting hours and days." (*Id.* at 6.) More importantly, he states that this "will cause enormous harm to the public, who will not be certain of the availability of EIP voting." (*Id.*) Defendants contend that a stay "does no harm to Plaintiffs," who "will also want a final, definitive EIP voting schedule, in order to accurately inform their constituencies and make plans to provide access to EIP voting opportunities." (*Id.*)

Contrary to Defendants' position, Plaintiffs assert that a stay would increase confusion regarding the EIP voting schedule, noting that the Order was immediately publicized. "A stay would cause delay and confusion among voter organizations and advocates, and other members of the public who have begun fervently publicizing and preparing for the commencement of the same-day registration period less than three weeks away on September 30." (Dkt. 81 at 2.) "As an immediate result of [the Order], voters and voter advocates sprang to action to prepare for the reinstituted early voting opportunities, including the rapidly approaching same-day registration

period, because Ohio voters and those who assist them require notice and lead-time in order to make use of such opportunities." (*Id.*)

The Court finds that Defendants have failed to demonstrate irreparable injury absent a stay. At this point, a stay would only increase the "flip-flopping" of EIP voting schedule changes, resulting in greater public confusion. Defendants' arguments ignore the fact that many members of the public are already aware of the Order, which received some attention in the media, and that, according to Plaintiffs, voter advocates are already preparing for the reinstituted early voting opportunities. Further, as Plaintiffs point out, "[a]t no point . . . have Defendants . . . argued that implementing Sunday or evening voting, as several counties have successfully implemented in the past without incident, was beyond their capacity." (Dkt. 81 at 3.) Nor have Defendants demonstrated that the Boards cannot manage the additional costs incurred by Golden Week, as they were capable of doing prior to June of 2014.[1] Finally, as this Court stated in another case, the Court is "aware of Defendant Husted's historical reliance on directives to explain all sorts of election-related issues," and "is unconvinced that he will not be able to communicate any further changes with sufficient clarity." Order Denying Motion for Stay at 5, *Obama for America et al v. Husted et al*, No. 2:12-cv-636, Dkt. 60 (S.D. Ohio, Sept. 12, 2012).

Because Defendants have not demonstrated that the circumstances justify a stay, their motion is **DENIED**. (Dkt. 80.)

IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

[1] As the Court noted in the Order, Golden Week existed until June 1, 2014. Until that time, "the Boards were required to provide absentee ballots for most voters for either EIP voting or mail-in voting starting on the 35th day before an election." (Dkt. 72 at 2 (citing Ohio Rev. Code § 3509.01(B)(2) (2014) (as amended Feb. 25, 2014)).)

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

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs,

v.

JON HUSTED, et al.,

Defendants.

Case No. 2:14-cv-404

Judge Peter C. Economus

Magistrate Judge Norah McCann King

MEMORANDUM OPINION AND ORDER

Presently pending before the Court is the Plaintiffs' Motion for a Preliminary Injunction (Doc. 17). For the reasons that follow, the motion is **GRANTED** and the Court issues the preliminary injunctive relief specified herein.

I.

Plaintiffs the Ohio State Conference of the National Association for the Advancement of Colored People; the League of Women Voters of Ohio; the Bethel African Methodist Episcopal Church; Omega Baptist Church; College Hill Community Church Presbyterian, U.S.A.; the A. Philip Randolph Institute; and Darryl Fairchild bring the instant action challenging the impact of a recent amendment to the Ohio Revised Code and directives issued by Ohio Secretary of State Jon Husted to Ohio's early in-person voting ("EIP voting") scheme under the Fourteenth Amendment to the Constitution of the United States and Section 2 of the Voting Rights Act of 1965. The Defendants include Secretary Husted and Ohio Attorney General Mike DeWine, both sued in their official capacities.

The Ohio General Assembly enacted the EIP voting scheme in 2005 as a result of the problems, including long lines and wait times, faced by voters during the 2004 presidential

election. The scheme permits all voters to vote by absentee ballot either by mail or in person without having to provide an acceptable excuse as previously required for absentee voting. OHIO REV. CODE. § 3509.02(A).[1] Each county Board of Elections ("Board") is permitted to establish only one location for EIP voting. *See* OHIO REV. CODE § 3501.10(C). Prior to June 1, 2014, the Boards were required to provide absentee ballots for most voters for either EIP voting or mail-in voting starting on the 35th day before an election. *Id.* § 3509.01(B)(2) (2014) (as amended Feb. 25, 2014). As Ohio law requires citizens to be registered only thirty days prior to an election in order to be eligible to vote, OHIO CONST. § 5.01; OHIO REV. CODE § 3503.01(A), prior to June 2014, a several day period existed wherein a citizen could register to vote and cast a ballot on the same day. The Plaintiffs refer to this period as "Golden Week."

On November 13, 2013, the Ohio Senate introduced Senate Bill 238 ("SB 238"), which was subsequently passed by the Ohio House of Representatives and Senate on February 19, 2014, and signed into law by Ohio Governor John Kasich on February 21st. SB 238 amended subsection 3509.01(B) to read in part that, "[f]or all voters who are applying to vote absent voter's ballots in person, ballots shall be printed and ready for use beginning on the first day after the close of voter registration before the election." OHIO REV. CODE § 3509.01(B)(3). This amendment, which the Plaintiffs now challenge, eliminates Golden Week and reduces the available days for EIP voting from 35 to 28. It became effective June 1, 2014. SB 238's amendments thus apply to the 2014 general election, which is scheduled for Tuesday, November 4, 2014. Races to be contested during the election include those for Governor, Attorney General, Treasurer, Auditor, seats for the United States House of Representatives, and seats in the General Assembly.

[1] Prior to 2005, a voter needed a statutorily approved "excuse" to vote absentee. Possible excuses included being over age 62, having a physical disability or infirmity, or being out of his or her home county on Election Day. (Parties' Joint Statement of Undisputed Facts ¶ 4, Doc. 62 (citing OHIO REV. CODE § 3509.02(A)(1)–(8) (2004).)

The Plaintiffs also challenge recent directives issued by Secretary Husted setting uniform EIP voting hours for the entire state for future elections. On February, 25, 2014, Secretary Husted issued Directive 2014-06, which set hours for the 2014 primary and general elections but did not include EIP voting hours for the Sunday and Monday immediately preceding Election Day. (Pls. Ex. 36, Doc. 18-36.) Directive 2014-06 also did not include EIP voting hours for: Tuesday, September 30, 2014 through Monday, October 6th (days that could have been used for EIP voting but for the operation of SB 238[2]); Saturday, October 11th; Sunday, October 12th; Monday, October 13th (Columbus Day); Saturday, October 18th; Sunday, October 19th; and Sunday, October 26th. (Pls. Ex. 36, Doc. 18-36.) Moreover, Directive 2014-06 does not include evening EIP voting hours on any day, instead setting typical hours of 8 a.m. to 5 p.m. for all weekdays and 8 a.m. to 4 p.m. for Saturday, October 25th and Saturday, November 1st. (Pls. Ex. 36, Doc. 18-36.)

On June 11, 2014, this Court issued a permanent injunction in *Obama for America et al. v. Husted et al.*, 2:12-cv-636, requiring Husted to restore EIP voting on the three days preceding all future elections and to set uniform voting hours for those days. *Obama for Am. v. Husted*, Case No. 2:12-cv-636, Doc. 90 at 2 (S.D. Ohio June 11, 2014). As a result, Secretary Husted issued Directive 2014-17, which superseded Directive 2014-06. (Pls. Ex. 37, Doc. 18-37.) Directive 2014-17 is apparently intended to set uniform EIP voting hours for all future elections and includes three categories of elections: (A) Presidential General Elections; (B) Presidential Primary Elections and Gubernatorial General Elections; and (C) Regular Municipal Elections, Primary Elections, and Special Elections. (*See* Pls. Ex. 37, Doc. 18-37.) The section covering Gubernatorial General Elections, which would include the 2014 General Election, sets identical EIP voting hours as Directive 2014-06 when applied to the 2014 voting season except that it adds

[2] October 6, 2014 is the final day of voter registration for the 2014 general election.

voting hours on Sunday, November 2nd and Monday, November 3rd as required by the permanent injunction in *Obama for America*. (Pls. Ex. 37, Doc. 18-37.)

Aside from the permanent injunction, which applies only to the final three days of early voting, Secretary Husted's legal authority for requiring the individual Boards to adhere to uniform EIP voting hours is unclear as no Ohio statute requires uniform EIP voting hours throughout the state. Further, the Ohio Revised Code vests the Boards with general authority to set their own business hours, providing that:

> The board of elections in each county shall keep its offices, or one or more of its branch registration offices, open for the performance of its duties until nine p.m. on the last day of registration before a general or primary election. At all other times during each week, the board shall keep its offices and rooms open for a period of time that the board considers necessary for the performance of its duties.

OHIO REV. CODE § 3501.10(B). Each Board is comprised of four members, and the Secretary of State is given the final authority to resolve tie votes or disagreements within individual Boards. *Id.* § 3501.11(X). However, the Plaintiffs in neither *Obama for America* nor the instant case have directly challenged Secretary Husted's practice in attempting to set uniform voting hours, which began with the 2012 Presidential Election. (*See* Parties' Joint Statement of Undisputed Facts ¶¶ 15, 17, Doc. 62 at 3.)

On May 1, 2014, the Plaintiffs filed their complaint stating claims under the Equal Protection Clause and Section 2 of the Voting Rights Act of 1965. The Plaintiffs generally assert that SB 238's amendments to Ohio election law and the current EIP voting schedule established by Directive 2014-06 (now 2014-17) impermissibly burden the right to vote of various groups including African Americans, lower income individuals, and the homeless. Specifically, the Plaintiffs argue that the voting opportunities for members of these groups are disproportionately impacted by the elimination of Golden Week, the lack of evening voting hours during the EIP

voting period,[3] and the lack of EIP voting opportunities on any Sunday during the voting period except for the last Sunday before an election.

On June 30, 2014, the Plaintiffs moved for a preliminary injunction enjoining the enforcement of SB 238 and requiring Secretary Husted "to set uniform and suitable in-person early-voting hours for all eligible voters that includes multiple Sundays and weekday evening hours." (Doc. 17 at 61.) Following the completion of briefing and a hearing held on August 11, 2014, that motion is now ripe for consideration. In deciding the motion, the Court has duly considered: the briefs, authorities, and evidence submitted by the Parties; their arguments at the hearing; the briefs and exhibits submitted by Amici Curiae the Ohio General Assembly, Cuyahoga County, Ohio, and the Ohio Senate Democratic Caucus and the Ohio House Democratic Caucus; and the statement of interest of the United States.

II.

As an initial matter, Secretary Husted argues that the Plaintiffs' motion is barred by laches, pointing out that they filed the motion 98 days before early voting is to begin, 125 days after Directive 2014-06 was issued, and 60 days after they filed their complaint. Secretary Husted acknowledges that the Plaintiffs provided notice in their complaint that they intended to seek a preliminary injunction, but argues that the delay in filing the motion greatly prejudices the Defendants because they will have to conduct unnecessarily expedited discovery. He asserts that the "Defendants have been forced to respond to the Plaintiffs' 51-page motion and hundreds of pages of exhibits and reports in just three weeks and two days." (Response, Doc. 41 at 48–50.)

"It is well established that in election-related matters, extreme diligence and promptness are required. When a party fails to exercise diligence in seeking extraordinary relief in an

[3] The Court notes that Directive 2014-17 does provide for evening hours during the third and fourth weeks of EIP voting for presidential general elections. (Pls. Ex. 37 at 1, Doc. 18-37.)

election-related matter, laches may bar the claim." *McClafferty v. Portage Count Bd. of Elections*, 661 F. Supp. 2d 826, 839 (N.D. Ohio 2009) (internal citations and quotation marks omitted). "Laches is the 'negligent and unintentional failure to protect one's rights,'" and "[t]he doctrine is rooted in the notion that 'those who sleep on their rights lose them.'" *Id.* at 840 (citations omitted). "To invoke . . . laches, a party must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Ford Motor Co. v. Catalanotte*, 342 F.3d 543, 550 (6th Cir. 2003) (citation and internal quotation marks omitted).

The Court finds that Secretary Husted has not shown such a lack of diligence. While the Defendants have been forced to respond quickly to a 51-page motion and voluminous exhibits, Defendant Husted does not demonstrate how such extensive materials should have been produced sooner by the Plaintiffs. The Court therefore rejects Secretary Husted's argument regarding laches.

III.

The Court will now summarize the evidence submitted by the Parties and Amici Curiae and its factual findings. The Court will first discuss EIP voting opportunities as they existed during the 2008, 2010, and 2012 elections. Second, the Court will discuss the origins of and asserted justifications for SB 238 and Secretary Husted's directives. Third, the Court will briefly discuss overall voting opportunities available to voters during the 2014 general election and the mechanics of voting by mail. Finally, the Court will consider the anecdotal and statistical evidence, including the opinions of the Parties' experts, either supporting or refuting the Plaintiffs' position that the combined effects of SB 238 and Directive 2014-17 disproportionately burden the voting rights of certain groups of Ohio voters.

A. EIP Voting During the 2008, 2010, 2012 General Elections

As noted in Section I *supra*, prior to the 2012 election, each Board exercised its discretion to set EIP voting hours and days. (Parties' Joint Statement of Undisputed Facts ¶ 6, Doc. 62 at 2.) In the event that a Board reached a tie vote on voting hours, the Secretary of State broke such ties in favor of the Board's normal business hours. (Parties' Joint Statement of Undisputed Facts ¶ 6, Doc. 62 at 2.) As a result, the 2008 and 2010 elections presented a patchwork of available EIP voting days and hours throughout the State, especially with regard to the availability of weekend and evening voting hours.

In the 2008 election, seven of Ohio's 88 counties held EIP voting hours on the Sunday before the election, but not all were open for the same hours. (Parties' Joint Statement of Undisputed Facts ¶ 7, Doc. 62 at 2.) During that election six counties—Cuyahoga, Franklin, Summit, Lucas, Trumbull, and Montgomery—allowed EIP voting on more than one Sunday during the EIP voting period, but, again, all were not open for the same hours. (Parties' Joint Statement of Undisputed Facts ¶ 8, Doc. 62 at 2.) Further, Cuyahoga, Franklin, Hamilton, Summit, Greene, Delaware, Richland, Darke, Geauga, Montgomery, Harrison, Highland, Jackson, Lorain, Pickaway, Portage, and Trumbull Counties held voting hours on more than two Saturdays. (Parties' Joint Statement of Undisputed Facts ¶ 9, Doc. 62 at 2.) The record also indicates that, during the 2008 election, eight counties—Franklin, Greene, Hamilton, Highland, Jackson, Pickaway, Summit, and Trumbull—offered some weekday evening EIP voting hours in addition to being open until 9 p.m. on the last day of registration.[4] (Doc. 65-2.) Finally, 67,408 voters cast in-person ballots during the first week of EIP voting, and 12,842 voters registered or updated their registration and voted at the same time. (Parties' Joint Statement of Undisputed

[4] Pursuant to Ohio law, the Boards are required to remain open until 9 p.m. on the last day of registration. OHIO REV. CODE § 3501.10(B).

Facts ¶ 10, Doc. 62 at 3.)

Turning to the 2010 election, which like the upcoming general election included the race for Governor but not President, five counties held EIP voting hours on the Sunday before the election, but all were not open for the same hours. (Parties' Joint Statement of Undisputed Facts ¶ 11, Doc. 62 at 3.) Richland, Lorain, Geauga, Butler, Hamilton, Summit, and Greene Counties held EIP voting hours on more than two Saturdays. (Parties' Joint Statement of Undisputed Facts ¶ 12, Doc. 62 at 3.) Additionally, 13 counties—Butler, Cuyahoga, Franklin, Greene, Hamilton, Henry, Highland, Lucas, Medina, Montgomery, Pickaway, Summit, and Lorain—held EIP voting past 5 p.m. on at least one day other than the last day of registration. (Parties' Joint Statement of Undisputed Facts ¶ 13, Doc. 62 at 3; Doc. 65-3 at 5 (Lorain County).) During the 2010 election, 26,230 voters cast in-person ballots during the first week of the EIP voting period, and 1,651 voters registered to vote or updated their registration.[5] (Parties' Joint Statement of Undisputed Facts ¶ 14, Doc. 62 at 3.)

A key issue in this case is the impact of SB 238 and Secretary Husted's directives on African American voters. According to evidence submitted by the Plaintiffs, African Americans make up 13.4% of Ohio's population. (Doc. 18-9 at 1.) The majority live in urban areas, with nearly 4 out of 10 living in the cities of Columbus (Franklin County), Cleveland (Cuyahoga County), and Cincinnati (Hamilton County). (*Id.*) As of the 2010 census, the Ohio counties with the highest population of African Americans are, in order, Cuyahoga, Franklin, Hamilton, Montgomery, Lucas, Summit, and Mahoning. (*Id.*) These counties also have the highest percentage of African Americans when measured in proportion to total population. (Doc. 18-9 at

[5] Voter turnout is generally greater for Presidential elections than non-Presidential elections. (Parties' Joint Statement of Undisputed Facts ¶ 18, Doc. 62 at 4.).

1.)[6]

The Plaintiffs argue that the limitations on Sunday voting opportunities imposed by Directive 2014-17 will burden the African-American voting phenomenon known as "Souls to the Polls," wherein African Americans have purportedly voted in person in large numbers following Sunday church services during the EIP voting period. The Defendants point out that, during the 2008 and 2010 elections, only a handful of Ohio's 88 counties offered EIP voting on Sundays. (Damschroder Dec. ¶¶ 36–37, Doc. 41-9 at 7.) However, the record reflects that the counties that did so include the very counties with the highest African American populations in the State. (Parties' Joint Statement of Undisputed Facts ¶ 8, Doc. 62 at 2 (Cuyahoga, Franklin, Lucas, Montgomery, Summit, and Trumbull Counties were open on more than one Sunday in 2008); Doc. 65-3 (Cuyahoga, Franklin, Lucas, Montgomery, and Summit Counties held Sunday voting in 2010); Doc. 18-9 at 1 (population statistics).)

Also at issue in this case is the impact on certain groups of voters of Directive 2014-17's lack of weekday evening voting hours during the EIP voting period. For purposes of this Memorandum Opinion and Order, the Court defines evening hours as voting hours after 5 p.m. The Court notes that during the 2010 election, the 13 counties offering some weekday evening EIP voting hours in addition to being open until 9 p.m. on the last day of registration included Cuyahoga, Franklin, Hamilton, Lucas, Montgomery, and Summit; the six Ohio counties with the largest African American populations. (Doc. 65-3 (voting hours); Doc. 18-9 (population statistics).)

As stated in Part I *supra*, for the 2012 Presidential Election, Secretary Husted set uniform hours for EIP voting to be followed by all Boards. Directives 2012-35 (applicable to all but the

[6] African Americans make up 30.9% of Cuyahoga County's population; 27% of Hamilton County's population; 23.1% of Franklin County's population; 22.3% of Montgomery County's population; 20.9% of Lucas County's population; 17% of Mahoning County's population; and 15.7% of Summit County's population. (Doc. 18-9 at 1.)

final three days of the EIP voting period) and 2012-50 established the following schedule during the five weeks of the period: on the first week, 8 a.m. to 5 p.m. on Tuesday through Friday; on the second week, on which Monday was Columbus Day, 8 a.m. to 9 p.m. on Tuesday (the last day of voter registration) and 8 a.m. to 5 p.m. on Wednesday through Friday; on the third week, 8 a.m. to 5 p.m. on Monday through Friday; on the fourth week, 8 a.m. to 7 p.m. on Monday through Friday; on the fifth week, 8 a.m. to 7 p.m. on Monday through Thursday, 8 a.m. to 6 p.m. on Friday, and 8 a.m. to 2 p.m. on Saturday; and on the week of Election Day, 1 p.m. to 5 p.m. on Sunday and 8 a.m. to 2 p.m. on Monday. (Docs. 18-34, 18-35.) Thus, the 2012 EIP voting period included only one Saturday and one Sunday of voting but ten days with evening voting hours not counting the second Tuesday of the period, which was the last day of registration. According to evidence submitted by the Defendants, during Golden Week before the 2012 election, 89,224 voters voted in person and 5,844 voters registered and voted on the same day. (Levenson Dec. 7/30/2014 ¶ 52, Doc. 53-3 at 3.)

B. SB 238 and Directive 2014-17

The EIP voting period schedule resulting from SB 238 and Directive 2014-17 largely mirrors recommendations made by the Ohio Association of Election Officials ("OAEO") in a report titled "Report and Recommendations for Absentee Voting Reform." (*See* Doc. 41-19.) The background section of the report states that:

> In 2010, the [OAEO] began exploring possible ways to reform our absentee voting statutes by commissioning a task force of six members from different political parties and different sized counties. In 2012, the Task Force was reconstituted to include eight members, four from each political party, with adequate representation from small, medium and large counties. This Task Force made a series of recommendations that were amended and passed by our bi-partisan legislative committee. The amended recommendations were then ratified by the trustees of the OAEO. Our board of trustees is comprised of 20 members, equal numbers of Republicans and Democrats, equal numbers of board members and staff, and representative of different sized counties.

(*Id.* at 2.) According to the report, "the courts have recently held that equal protection issues arise when absentee voters are treated differently. Thus, the association entered into discussions with the ultimate goal of creating uniform rules for absentee voters across the state." (*Id.*) The report's recommendations regarding EIP voting are to "[s]tandardize hours of early in-person absentee voting from county to county," "[d]ifferentiate between the various types of elections," and "[t]reat early in-person absentee voters the same as Election Day voters rather than the same as mail-in absentee voters." (*Id.* at 3.) The report then goes on to propose standard hours for three categories of elections that are very similar to those adopted by Secretary Husted in Directive 2014-17. (*See Id.* at 4.) Finally, with regard to Golden Week, the report states that "OAEO feels that the overall time frame should be shortened to eliminate 'Golden Week[.]'" (*Id.* at 4.)

The justifications behind the OAEO's recommendation to eliminate Golden Week were explained by Aaron Ockerman, Executive Director of the OAEO in testimony before the Senate State Government Oversight and Reform Committee. Concerning the overall reduction in EIP voting days, Ockerman testified that:

> While we understand that reducing the number of days of absentee voting may not be "politically correct," my members are not concerned about the politics of this proposal, but rather the policy reasons it makes sense. First, Ohio is an outlier in the days it allows for absentee voting to be conducted. Some states do not allow any in-person voting, while most allow 10 or 15 days of in-person voting. Those states that do allow in-person early voting presumably understand and accept what Ohio's election officials also recognize to be true; absentee voting is a good thing, if reasonable parameters are put in place.

(Doc. 41-20 at 2–3.) According to Ockerman, "despite [the convenience of Ohio's EIP voting scheme], our voter turnout numbers have dropped not risen, while the cost of administering elections has skyrocketed." (*Id.* at 3.) Thus, "reasonably shorten[ing] the period for casting

absentee ballots" would provide a way for Boards to "continue to be ultra-customer friendly and reduce lines on Election Day while being more efficient with our tax payer [sic] dollars." (*Id.* at 4.)

Regarding the elimination of Golden Week, Ockerman testified that:

> A second reason for shortening the absentee voting period is to close what has come to be known as "Golden Week[.]" . . . While this unique confluence of laws has existed on the books for some time, it was greatly exacerbated when Ohio moved to no-fault absentee voting. Ohio law does not allow for this activity known as "same day registration" to occur on Election Day and a statewide ballot attempt to allow for this was resoundingly rejected by voters when it was put before them. 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 conversations with election officials who have had votes count 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.
>
> People from both political parties who led reform efforts in 2009 and 2010 understood that this was an issue. Bills sponsored by members of both parties passed their respective chambers with provisions to remedy this included.

(Doc. 41-20 at 4–5.)

The record contains other testimony offered in support of SB 238. Chris Long, President of the Ohio Christian Alliance, testified that the creation of Golden Week was a legislative oversight and that the "obvious problem was that no time was allowed to vet the registration of the voter." (Young Dec. Ex. 1, Doc. 54-3 at 5–6.) Dana Walch, Deputy Director of the Franklin County Board, testified that eliminating Golden Week would help to prevent fraud because, "[u]nder the current scenario, boards of elections must go through a lengthy process of holding a 'Golden Week' ballot until we gain confirmation that the newly registered person truly is who

they say they are." (*Id.* at Ex. 2; Doc. 54-3 at 8, 9.) Mary Siegel, one of the founders of the Ohio Voter Integrity Project also testified that Golden Week should be eliminated because of the potential for fraud—citing the case of a voter named "The God Devine Refinement Allah" who apparently registered and remained a registered voter (but did not cast a ballot) in Hamilton County between October 3, 2012 and October 2013. (*Id.* at Ex. 3; Doc. 54-3 at 12–13.) Ronald Koehler, former Deputy Director, then Director, of the Summit County Board, testified that during Golden Week, only few voters voted, which served as a drain on resources. (*Id.* at Ex. 4; Doc. 54-3 at 15.) He also suggested that eliminating Golden Week would help reduce voter fraud. (*See id.*) Finally, Senator Frank LaRose testified that "[s]ame day registration and voting has created a situation where boards of elections do not have adequate time to properly verify a registration application." (Keeran Dec. Ex. 2; Doc. 54-4 at 10.)

Brian Davis, Director of Community Organizing for the Northeast Ohio Coalition for the Homeless, was among those testifying before the Ohio House of Representatives in opposition to SB 238. According to Davis, "[t]he value of Golden week is that those who struggle with identification can register and vote at the same time, and the Board of Elections has 30 days to verify if this individual is a legitimate voter in Ohio." (Doc. 18-31 at 1–2, 4.) Davis further testified that:

> Allowing 35 days to vote and that overlap with Golden Week allows low income people to participate. Very low income citizens move their primary residence a great deal, and since the housing crisis swept the United States, this has only exacerbated the displacement of low income residents. Homeless people have an especially difficult time proving their residency since most of the acceptable forms of identification are tied to where you live.

(Doc. 18-31 at 2.)

Additionally, Secretary Husted submitted the declaration of Dana Walch. According to Walch, "[i]n general, expanding absentee voting requires additional funding because expanding

the number of days the Board is open drives up costs. We have to provide for the extra staffing, extra security, facility costs, etc. Expanding hours has the same effect, that is, more hours means more money." (Walch Dec. ¶ 8, Doc. 41-18 at 3.) Walch also stated that Franklin County's early-voting center employed a staff of between 50 to 70 people during the 2012 election. (*Id.* at ¶ 13, Doc. 41-18 at 4.) Similarly, Matthew Damschroder, Deputy Assistant Secretary of State and State Elections Director, and former director of the Franklin County Board, states that:

> In order to facilitate additional evening and weekend in person absentee voting, boards of elections must ensure adequate staffing during those hours. This can be burdensome and costly for boards that are already operating under tight budgetary restrictions. In addition, these staff cannot complete other necessary tasks while tending to in person absentee voters.

(Damschroder Dec. ¶ 34, Doc. 41-9 at 2, 7.) According to Koehler, the elimination of Golden Week "will save [Boards] 20% of the cost of extra temporary workers, since they will be working four weeks instead of five." (Young Dec. Ex. 4; Doc. 54-3 at 15.)

As exhibits to its brief, Amicus Curiae the Ohio General Assembly has submitted several declarations, including those of Alex Triantafilou, Timothy Ward, and Mark Munroe. According to Triantafilou, a member of the Hamilton County Board, the reinstatement of Golden Week for the 2014 election would likely "cost the Board an estimated $8,000 to $12,000 in staffing costs alone." (Triantafilou Dec. ¶¶ 1, 10, Doc. 68-4 at 1, 3.) Ward, Director of the Madison County Board, states that if Golden Week is reinstated, it will cost the Board at least $933.20, which the Board has not budgeted. (Ward Dec. ¶¶ 1, 12, Doc. 68-2 at 1, 5.) Ward also states that increased hours during the 2012 election resulted in overtime costs of $5,027.36. (*Id.* at ¶ 15 , Doc. 68-2 at 6.) Munroe, Chairman of the Mahoning County Board, estimates that reinstating Golden Week during the 2014 election season would cost approximately $3,490.88. (Munroe Dec. ¶¶ 1, 3, Doc. 68-5 at 1.)

The Ohio Revised Code requires election officials to verify absentee ballots before they are counted. For instance, an absentee ballot may not be counted if the signature on the ballot's identification envelope does not match the signature appearing on a voter's registration card. OHIO REV. CODE §§ 3509.06(D)(1), 3509.07(B), 3509.09(C)(1). Further, Husted's Directive 2012-36 provided procedures used during the 2012 election for ensuring that EIP votes cast during Golden Week would be properly counted. Pursuant to this directive, if "the [registration] application is complete and valid, the Board must permit such voters to cast an absent voter's ballot following the board's normal in person absentee voting procedures" and "the Board must segregate the ballots from all others cast by voters who were previously qualified electors of the county prior to applying for an absent voter's ballot." (Doc. 53-10 at 1.) Then, the Board is required to send a voter acknowledgement card to the voter's address by non-forwardable mail on the same day that the voter had registered and voted. (*Id.* at 2.) If the card is not returned to the Board as undeliverable, the registration is presumably deemed valid. (*See id.* at 2.)

C. Voting Opportunities During the 2014 General Election and Voting by Mail

On Election Day 2014, the polls will be open for voting between 6:30 a.m. and 7:30 p.m. (Parties' Joint Statement of Undisputed Facts ¶ 25, Doc. 62 at 4.) Further, Ohio voters wishing to vote absentee during the election may do so by (1) requesting an absentee ballot and returning it by mail or in person during the 28 days before Election Day, or by returning the ballot in person on Election Day, or (2) voting in-person during the 28 day period on the days and during the hours established by Directive 2014-17. (Parties' Joint Statement of Undisputed Facts ¶ 26, Doc. 62 at 4.) Voters were permitted to request absentee ballots for the coming election beginning on January 1, 2014. (Parties' Joint Statement of Undisputed Facts ¶ 26, Doc. 62 at 4.)

The Ohio Revised Code does not distinguish between the application process for

obtaining an absentee ballot in person or by mail. Pursuant to § 3509.03, the application must include the following information:

> (A) The elector's name;
>
> (B) The elector's signature;
>
> (C) The address at which the elector is registered to vote;
>
> (D) The elector's date of birth;
>
> (E) One of the following:
>
> > (1) The elector's driver's license number;
> >
> > (2) The last four digits of the elector's social security number;
> >
> > (3) A copy of the elector's current and valid photo identification, a copy of a military identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of voter registration mailed by a board of elections under section 3503.19 of the Revised Code, that shows the name and address of the elector.
>
> (F) A statement identifying the election for which absent voter's ballots are requested;
>
> (G) A statement that the person requesting the ballots is a qualified elector;
>
> (H) If the request is for primary election ballots, the elector's party affiliation;
>
> (I) If the elector desires ballots to be mailed to the elector, the address to which those ballots shall be mailed.

OHIO REV. CODE. § 3509.03. If the director of elections determines that the application contains all required information, the director is required either to deliver the absentee ballot to the voter or to mail the absentee ballot, as applicable. *Id.* § 3509.04(B). If the director determines that the application is missing required information, the director shall "promptly" notify the voter of what additional information is required. *Id.* § 3509.04(A). The Boards are prohibited from providing postage for the return of an absentee ballot application or for the return of an absentee ballot

itself. OHIO REV. CODE §§ 3509.03 ("A board of elections that mails an absent voter's ballot application to an elector under this section shall not prepay the return postage for that application."); 3509.04 ("A board of elections that mails or otherwise delivers absent voter's ballots to an elector under this section shall not prepay the return postage for those ballots.").

D. Evidence of the Potential Impact of SB 238 and Directive 2014-17

1. Plaintiffs' Testimonial Evidence

The Plaintiffs have submitted various declarations in support of their motion for a preliminary injunction, including those of Ray Wood, Carrie Davis, Dale Snyder, Plaintiff Darryl Fairchild, Jamie Simpson, Robert E. Jones, Delores Freeman, David Morgan, Gerald Cooper, Joseph Copeland, Shawn Braxton, Jack Frech, Josh Spring, Erik Crew, Georgine Getty, Glorianne Leck, and Mark Freeman.

Ray Wood, who is African American, is president of the NAACP's Toledo Chapter and was involved in "get-out-the-vote efforts" in 2008, 2010, and 2012. (Wood Dec. ¶¶ 2, 8, 12–13, 15, Doc. 18-10 at 1–2.) According to Wood, while transportation to the polls was provided on Saturdays in the get-out-the-vote efforts he was involved with in Toledo, Sundays were a bigger focus:

> Traditionally, in the Toledo African-American community, Sunday has always been the day of the week when everyone gets together. Many older and elderly African Americans simply do not leave the house all week except on Sundays. Many generations of African Americans get together for church, and then gather together for the Sunday meal.

(*Id.* at ¶ 24, Doc. 18-10 at 3.) Wood states that "Sunday was a focal point also because many churches already provide transportation to take people to church, and carpools are also arranged so that everyone is together." Wood reported that he personally observed long lines of African Americans waiting to vote on Sundays during the 2008 early-voting period. (*Id.* at ¶¶ 25–26,

Doc. 18-10 at 4.)

According to Wood, voting by mail is "not acceptable" to many African Americans he has spoken with because they do not believe their votes will be counted—rather, "[w]hen they go to a machine, they can actually feel like their vote is counted." (Wood Dec. ¶ 30, Doc. 18-10 at 4.) In 2008, when multiple Sundays were available for voting in Lucas County, it was much easier to coordinate the Souls to the Polls efforts among the 80 to 90 churches involved; in 2012, with only one Sunday of voting, Wood felt "a lot more pressure." (*Id.* at ¶ 32, Doc. 18-10 at 5.) Wood also states that evening voting hours are important, as many people who work hourly wage jobs simply cannot vote during lunch breaks or before work in the morning. (*Id.* at ¶ 33, Doc. 18-10 at 5.)

Regarding Golden Week, Wood states that the NAACP provided transportation to the polls so that people could register and vote on the same day, and that efforts were made in lower income areas to raise awareness of the possibility. (Wood Dec. ¶ 34–35, Doc. 18-10 at 5.) Further, Wood states that people in the African-American community in Toledo move frequently, especially since the 2008 recession. (*Id.* at ¶ 36, Doc. 18-10 at 5–6.)

Carrie Davis is the Executive Director of Plaintiff, the League of Women Voters of Ohio, which directs voter education efforts toward individuals under 25, women, and racial and ethnic minorities, many of whom also tend to be lower-income and working-class. (Davis Dec. June 24, 2014 ¶¶ 2, 11, Doc. 18-11 at 1, 3.) According to Davis, women will be negatively impacted by reductions in non-traditional voting times, as they are likely to have family caretaking responsibilities. (*Id.* at ¶ 42, Doc. 18-11 at 11.)

Dale Snyder has been the Senior Pastor at Plaintiff Bethel African Methodist Episcopal Church ("Bethel AME") in Columbus since 2007. (Snyder Dec. ¶ 4, Doc. 18-12 at 1.) The

church's congregation is predominantly African American and it is located in a predominantly African-American neighborhood with very high rates of poverty. (*Id.* at ¶¶ 10–11, Doc. 18-12 at 2–3.) The church believes strongly in encouraging African Americans in its community to vote and has engaged in get-out-the-vote efforts, including registering voters during Golden Week and Souls to the Polls. (*See id.* at ¶¶ 14, 17, 18, Doc. 18-12 at 2.)

Plaintiff Darryl Fairchild is an ordained Elder in the United Methodist Church and a community organizer who has been involved with get-out-the-vote efforts and work with lower-income populations and persons with disabilities in Dayton, which is located in Montgomery County. (Fairchild Dec. ¶¶ 2, 4–10, Doc. 18-13 at 1.) He states that multiple Sundays are important to people from lower-income backgrounds because they "often have irregular working hours" and "have less stable and more unpredictable lives." (*Id.* at ¶ 22, Doc. 18-13 at 4.) He also states that "multiple Sundays are also important for people with disabilities" because "[t]here are some days when a person with a disability wakes up and doesn't have the energy to move, or there might be something else wrong physically," so "they need multiple Sundays in case something goes wrong on that day." (*Id.* at ¶ 23, Doc. 18-13 at 5.)

Jamie Simpson is a member of Plaintiff Omega Baptist Church in Dayton, often speaks to students in predominantly African-American high schools about the importance of voting, and has worked on the church's Souls to the Polls efforts. (Simpson Dec. ¶¶ 6–7, 10, Doc. 18-14 at 1–2.) She states that she "[doesn't] know how we will continue to coordinate transportation without Sunday voting." (*Id.* at ¶ 20, Doc. 18-14 at 3.) As for voting by mail, she states that "many people in my community are scared to vote by mail and are very apprehensive about it," "can be confused by the [unfamiliar] forms," and "do not believe that their vote will be counted if they vote by mail." She states that she "encountered many people who were apprehensive

about voting by mail who[m] I drove to the polls." (*Id.* at ¶ 26, Doc. 18-14 at 4.)

Robert E. Jones served as a pastor at Plaintiff College Hill Community Church Presbyterian, U.S.A. ("College Hill") until his retirement in March 2014. (Jones Dec. ¶¶ 6–7, Doc. 18-15 at 2.) College Hill "advocates for issues that relate to social and economic justice" and "has taken part in efforts to encourage early voting and helped transport voters to the polling place during early voting periods." (*Id.* at ¶ 13, Doc. 18-15 at 3.) He states that, "[i]f Sunday voting is eliminated, we will lose voters," and that it was easier "to take people to the polls on Sunday because many churches already have drivers [who] take people to the Sunday service." (*Id.* at ¶ 17, 19, Doc. 18-15 at 4.)

Delores Freeman is the President of the Youngstown Chapter of Plaintiff the A. Philip Randolph Institute ("APRI") and treasurer of the Greater Youngstown Community Mobilization Coalition, a group "consist[ing] of about 16 organizations committed to increasing political awareness and assisting individuals in exercising their right to vote." (Delores Freeman Dec. ¶¶ 8–9, Doc. 18-16 at 1–2.) The APRI Youngstown Chapter has been involved in get-out-the-vote efforts for about five or six years. (*Id.* at ¶ 10, Doc. 18-16 at 2.) During the early-voting period, these efforts involved driving voters to the polls, and during the 2012 election and 2014 primary election, most of the people who requested rides were African American. (*Id.* at ¶¶ 19, 21, Doc. 18-16 at 3.) During the 2004 Election, Freeman witnessed voters leave polling places without having voted due to long lines. (*Id.* at ¶¶ 27–30, Doc. 18-16 at 4.)

David Morgan has been a member of the Trumbull County Chapter of the APRI for over 40 years and is a past President of the APRI in Ohio. (Morgan Dec. ¶¶ 6–8, Doc. 18-17 at 1.) According to Morgan, the APRI Trumbull County chapter has a long history of involvement with get-out-the-vote efforts, and individuals who have registered to vote and been provided

transportation to the polls have been predominately African American. (*Id.* at ¶¶ 9, 17, Doc. 18-17 at 1, 3.)

Gerald A. Cooper is the pastor at Dayton's Wayman Chapel African Methodist Episcopal Church, which is predominantly African American. (Cooper Dec. ¶¶ 3–4, Doc. 18-19 at 1.) The church participates in get-out-the-vote efforts and he encourages his congregation to vote and to vote early, and emphasizes the importance of Golden Week. (*Id.* at ¶¶ 5–7, Doc. 18-19 at 1–2.) He states that "[o]ne Sunday for Souls to the Polls is not enough for people in my community" due to inflexible work schedules; he also predicts that a single Souls to the Polls day "will also pose a logistical challenge" due to "many variables including the number of people to take, how long the lines are and when to leave the polls to get back in time for another group." (*Id.* at ¶¶ 10–11, Doc. 18-19 at 3.)

Joseph Copeland has served as the Associate Minister of The Greater New Hope Missionary Baptist Church in Cincinnati for 20 years and helped coordinate Souls to the Polls efforts in the Cincinnati area in 2011 and 2012. (Copeland Dec. ¶¶ 3–5, Doc. 18-20 at 1.) In 2012, the efforts involved 12 to 15 churches, 80% of which were African American. (*Id.* at ¶ 5, Doc. 18-20 at 1.)

Shawn Braxton is the Pastor at New Life Cathedral in East Cleveland and has worked with African-American churches on get-out-the-vote efforts for approximately four years. (Braxton Dec. ¶¶ 4–5, Doc. 18-21 at 1.) These efforts included Souls to the Polls and helping voters vote during evening voting hours. (*Id.* at ¶ 6, Doc. 18-21 at 1.)

Jack Frech has been the Director of the Athens County Department of Job & Family Services for over 30 years. (Frech Dec. ¶ 1, Doc. 18-22 at 1.) His department serves "the poor and working-class families and individuals in Athens County," and is required to provide voter

registration opportunities for its clients. (*Id.* at ¶¶ 4, 9, Doc. 18-22 at 1–2.) According to Frech, his department's clients overwhelmingly register to vote when given the opportunity to do so in person, but almost never do so when given the opportunity over the telephone or by mail as "day-to-day life is chaotic and focused on survival. Taking the time to fill out a voter registration form and then finding transportation to get to a post office is simply not going to happen for many of our clients." (*Id.* at ¶¶ 11–13, Doc. 18-22 at 2–3.) Further, many of Frech's clients are distrustful of government and the mail, and are fearful that filling out a form or failing to fill out a form and send it in the mail could lead to a denial of benefits. (*See id.* at ¶¶ 14–16, Doc. 18-22 at 3.) Frech declares that, "[a]lthough we are in a sparsely populated, rural county, the poor people in our county need these evening[] and Sunday voting opportunities just as much as the poor in more populated counties need them." (*Id.* at ¶ 32, Doc. 18-22 at 6.)

Josh Spring is the Executive Director of the Greater Cincinnati Coalition for the Homeless ("GCCH"). (Spring Dec. ¶ 6, Doc. 18-23 at 2.) The population served by GCHC in Cincinnati is disproportionately African American, and one study suggested that 66% of Cincinnati homeless are African American, although, according to Spring, the study likely underestimates that percentage. (*Id.* at ¶ 11, Doc. 18-23 at 3–4.)

Erik Crew is employed by the Ohio Justice & Policy Center and has been involved in helping people register and vote during Golden Week. (Crew Dec. ¶¶ 4, 6, Doc. 18-24 at 1–2.) According to Crew, the people experiencing homelessness taken to register and vote during the 2008 Golden Week were predominantly African American. (*See id.* at ¶ 20; Doc. 18-24 at 4.)

Georgine Getty is the former Executive Director of the GCCH. (Getty Dec. ¶ 3, Doc. 18-25 at 1.)

Glorianne Leck was a precinct committee member working at the Wick Park polling

place in Youngstown during the 2004 election. (Leck Dec. ¶ 5, Doc. 18-26 at 1.) She states that approximately 51% of the voters at the polling place were African American, and she personally observed individuals leave the voting line without voting because of the length of the wait. (*Id.* at ¶¶ 5, 7, 9, Doc. 18-26 at 1–2.)

Mark Freeman is the former superintendent of the Shaker Heights City School District in the Cleveland Area. (Mark Freeman Dec. ¶ 1, Doc. 18-27 at 1.) He personally witnessed the long voting lines at facilities owned by the school district during the 2004 election, and estimates that between a quarter to a third of those standing in the long lines were African American. (*See* Mark Freeman Dec. ¶¶ 2–9, Doc. 18-27 at 1.)

The remaining relevant testimony of the declarants regarding Golden Week, Souls to the Polls, weekend voting hours, evening voting hours, voting by mail, the difficulties generally encountered by lower-income voters, and the effects of EIP voting in Ohio is summarized below:

Golden Week:

- It is Davis' understanding that same-day registration is effective and boosts voter participation among lower-income voters; same-day registration is also important to people who frequently move. (Davis Dec. June 24, 2014 ¶¶ 24, 26, Doc. 18-11 at 6.)

- Golden Week is important to lower income people who are more transient; lower income people also tend to have lower education and are unaware of requirements for updating registration, or registration deadlines. (Fairchild Dec. ¶ 12, Doc. 18-13 at 3.)

- According to Snyder, Golden Week is important to people in Bethel AME's neighborhood because they are typically very transient and voter registrations need to be updated whenever a voter moves. (*See* Snyder Dec. ¶ 17, Doc. 18-12 at 2.)

- In each of 2010 and 2011, Fairchild helped about 25 to 40 first-time student voters to register and vote on the same day during Golden Week. (Fairchild Dec. ¶¶ 16–17, Doc. 18-13 at 3.)

- Registration and voting on the same day is important because it is a one step process for people who "spend their days looking for housing, jobs, social services,

and meeting with caseworkers." (Spring Dec. ¶ 21, Doc. 18-23 at 6.)

- According to Crew, "[b]eing able to register and vote at the same time was especially helpful for people experiencing homelessness because of their more transient lifestyle, where their address might change frequently or they may have no address at all. Such individuals need to update their registration frequently." (Crew Dec. ¶ 14, Doc. 18-24 at 3; *see also* Getty Dec. ¶ 15, Doc. 18-25 at 3.)

Souls to the Polls/Weekend Voting:

- Many people can vote in person only during the weekends. (Davis Dec. June 24, 2014 ¶ 34, Doc. 18-11 at 9.)

- The League of Women Voters of Ohio believes that the limited weekend voting schedule established by Directive 2014-17 for the 2014 general election will result in very long lines during weekend voting. (Davis Dec. June 24, 2014 ¶ 35, Doc. 18-11 at 9.)

- "'Souls to the Polls' is important to the African Americans in [Snyder's] congregation and community. It is a way for family members across 2 and 3 generations to vote together. As we take bus rides to the polls, we share the stories of the sacrifices that people have made to give us the right to vote. We share with the younger generation of voters what Jim Crow was like. We sing freedom songs on the way to the polls. It is a sense of pride and honor that most of our young people don't get to experience living here in America. Many of our young people are discouraged and won't participate in the electoral process unless older generations encourage them." (Snyder Dec. ¶ 24, Doc. 18-12 at 5; *see also* Jones Dec. ¶ 18, Doc. 18-15 at 4 ("Sunday voting has become a communal event").)

- "'Souls to the Polls' [has been] critical to helping African Americans in [Snyder's] congregation and community to vote. Many of them cannot vote during regular business hours because they cannot get off of work"; without Souls to the Polls, many people around Bethel AME and poor neighborhoods would not be able to exercise their right to vote because of lack of transportation, babysitting, and lack of information. (Snyder Dec. ¶¶ 20, 22, Doc. 18-12 at 4.)

- Snyder saw long lines of predominantly African American voters on the only Sunday of early voting before the 2012 election. (*See* Snyder Dec. ¶ 21, Doc. 18-12 at 4; *see also* Simpson Dec. ¶ 17, Doc. 18-14 at 3 (long lines in Montgomery County); Copeland Dec. ¶ 8, Doc. 18-20 at 2 (long lines in Hamilton County).)

- Fairchild observed very long voting lines on the final Sunday before the 2008 election when a high number of African Americans voted; in 2010, he was involved with efforts that provided transportation to the polls on Sundays during the early-voting period for hundreds of voters. (Fairchild Dec. ¶¶ 19–20, Doc. 18-13 at 4.)

- Because there can be only one location for EIP voting per county and because Sunday hours are usually limited, lines for Sunday voting can be long. (Morgan Dec. ¶ 21, Doc. 18-17 at 3; *see also* Cooper Dec. ¶¶ 10–11, Doc. 18-19 at 3 (one Sunday of early voting is not enough).)

Evening Voting Hours:

- Lack of evening voting hours can impact the ability of working-class individuals to vote. (Davis Dec. June 24, 2014 ¶ 37, Doc. 18-11 at 10; Fairchild Dec. ¶ 26, Doc. 18-13 at 5.)

- Evening voting hours have helped members of Snyder's congregation vote who work during the day and who cannot use vacation or sick time to vote. (*See* Snyder Dec. ¶ 27, Doc. 18-12 at 5*; see also* Freeman Dec. ¶ 24, Doc. 18-16 at 3.)

- In Fairchild's experience, during the early-voting period, workers at the Montgomery County Board would be processing absentee ballots after hours even when no in-person voting was allowed for that evening. (Fairchild Dec. ¶ 28, Doc. 18-13 at 6.)

Voting By Mail:

- Some voters do not trust voting by mail. (Davis Dec. June 24, 2014 ¶ 30, Doc. 18-11 at 8; Delores Freeman Dec. ¶ 26, Doc. 18-16 at 4; Copeland Dec. ¶ 14, Doc. 18-20 at 2; Spring Dec. ¶ 24, Doc. 18-23 at 6–7 (voters experiencing homelessness).)

- "Some [voters] take pride in going to the booth and pulling the lever" and "for some, as in the African-American community, [voting] is a cultural tradition because it is a right that was fought hard for and they want to experience it in person." (Davis Dec. June 24, 2014 ¶ 30, Doc. 18-11 at 8; *see also* Morgan Dec. ¶ 25, Doc. 18-17 at 4.)

- According to Davis, Senate Bill 205 prohibits prepaid postage for ballots and requires all fields on the ballot envelope to be completed. (Davis Dec. June 24, 2014 ¶ 31, Doc. 18-11 at 8.)

- According to Fairchild, "[m]any of the people from lower-income backgrounds that I've worked with do not trust voting by mail. Even organizers do not encourage it because it is a multi-step process where you must find postage, mail-in an absentee ballot request, then find postage again, and mail in the absentee ballot. Lower-income people with less educational attainment are often living chaotic lives and are often unable to understand this process." (Fairchild Dec. ¶ 29, Doc. 18-13 at 6.)

- According to Braxton, "'Vote-by-Mail' is not a sufficient alternative to [EIP] voting. First, most of the people I interact with regularly do not even pay their bills by mail anymore, so many people overlook traditional mail as a means to cast their

vote since it is not a traditional medium for voting. And, second, minority communities I have worked with distrust the vote-by-mail system and want to see their ballots actually processed." (Braxton Dec. ¶ 15, Doc. 18-21 at 2–3.)

Difficulties Encountered by Lower Income Voters:

- According to Davis, "many working-class people in Ohio rely on public transportation," and use of public transportation to get to polling places can entail a large time commitment; "this time commitment is usually compounded with other concerns working-class people face and manage daily, including family obligations, work and health care." (Davis Dec. June 24, 2014 ¶ 27, Doc. 18-11 at 7; *see also* Braxton Dec. ¶ 12, Doc. 18-21 at 2.)

- Long voting lines can present challenges to voters with health problems, those relying on others for transportation, and those with family obligations. (Davis Dec. June 24, 2014 ¶ 36, Doc. 18-11 at 9–10.)

- Cuts in early-voting opportunities negatively impact those with lower education because they may not learn of the changes. (Davis Dec. June 24, 2014 ¶ 40, Doc. 18-11 at 10–11.)

Effects of EIP Voting in Ohio:

- "[D]ue to early voting, counties do not need as many precincts on Election Day and are consolidating precincts"; "these changes can benefit [Boards] and save them money and resources." (Davis Dec. June 24, 2014 ¶ 33, Doc. 18-11 at 9; *see also* Fairchild Dec. ¶ 31, Doc. 18-13 at 6–7.)

2. Expert Opinions and Other Statistical Evidence

Before discussing the report of Plaintiffs' statistical expert, Dr. Daniel A. Smith, the Court notes that some significant limitations exist regarding the available election data. Ohio's 88 county Boards use five different election management software systems and adopt their own policies for using these systems to track election data. (Damschroder Dec. ¶ 18, Doc. 41-9 at 4.) Thus, statistics of when absentee votes are cast or whether a voter cast an EIP vote or actually voted by mail, may possibly not be consistently tabulated from county to county making county to county comparisons or statewide totaling difficult. Further, statistics such as when votes are actually counted during the early-voting period may not be accurate at all. As an example, when

an absentee ballot requested in person is taken home but returned by mail, some counties may count that as an EIP vote, while others may count it as an absentee vote by mail. (*Id.*) Conversely, an absentee vote requested by mail and returned in person may be counted differently by different counties. (*Id.*) As another example, counties vary on whether they count an EIP vote as recorded on the date it is cast versus the date on which the registration is verified. (*Id.*)

Furthermore, statistics from Franklin County suggest that voters do not consistently cast ballots during the same portion of the EIP voting period from election to election. For instance, "of the 8,534 in person absentee voters during 'golden week' in 2008, only 259 (or 3.35%) voted in person during 'golden week' in 2012." (Damschroder Dec. ¶ 39, Doc. 41-9 at 7.) Further, "only 61 electors in Franklin County [ ] voted in person absentee during 'golden week' in each of the last three federal general elections (2008, 2010, and 2012)." (*Id.*) Of the 15,432 Franklin County EIP voters during the last five days prior to the 2008 election, only 2,326 voted during the last five days before the 2012 election. (*Id.*)

a. Plaintiffs' Expert, Dr. Daniel A. Smith

Plaintiffs' primary expert, Dr. Daniel A. Smith, Professor of Political Science and University of Florida Research Professor, is a nationally renowned expert on electoral processes and the effect of political institutions on political behavior. He has extensive research, consulting, and academic experience in his field and has been widely cited, including by the U.S. Supreme Court. (Smith Report, Doc. 18-1 at 2.) He submitted an expert report titled "Analysis of Effects of Senate Bill 238 and Directive 2014-06 On Early In-Person (EIP) Absentee Voting By Blacks and Whites in Ohio" (Doc. 18-1) and an expert rebuttal declaration (Doc. 53-11), and the record contains his deposition taken on August 1, 2014 (Doc. 64-3).

Plaintiffs' counsel asked Smith "to assess whether reductions in EIP absentee voting resulting from the passage of [SB 238] in 2014 and Secretary of State Jon Husted's Directive 2014-06 are likely to have differential effects on black and white voters in Ohio." Because the Smith Report "was largely written prior to June 11, 2014, when the court ordered Secretary Husted to set uniform hours including the last two days of the early voting period," its "analysis therefore includes the last two days of the early voting period." (Smith Report, Doc. 18-1 at 1, n.1.)[7]

Drawing on public data sources and using standard statistical methods, Smith concludes that:

> there is strong empirical evidence in Ohio that a greater proportion of blacks not only cast EIP absentee ballots than whites but do so on early voting days that have been eliminated by SB 238 and Directive 2014-06. As such, blacks in Ohio will likely be disproportionately and negatively affected in 2014 by the reduction in EIP absentee voting days caused by SB 238 and Directive 2014-06.

(Smith Report, Doc. 18-1 at 4.)

Smith compares usage of EIP voting by African-American Ohioans to white Ohioans in the 2010 midterm and 2012 presidential elections. For his analysis of the 2012 election, Smith includes data from 84 of Ohio's 88 counties; for the 2010 election, he includes data from the five most populous counties: Cuyahoga, Franklin, Hamilton, Montgomery, and Summit. (Smith Report, Doc. 18-1 at 7, 10, App'x A 1.) He had insufficient time to include more complete data because the "considerable heterogeneity across the state's 88 [Boards] with respect to their data collection, data formatting, and public access, mak[e] the collection and subsequent analysis of EIP absentee voting records fairly arduous." (*Id.* at App'x A 1.) Defendants' expert argues that these five counties "are so unrepresentative of the state in terms of several factors such as racial

[7] Smith's Rebuttal Report restores these days, finding that the results are consistent with his original report. (Smith Rebuttal, Doc. 53-11 at 12–14.)

composition, partisanship, urban density, [that he does] . . . not believe that inferences from the 2010 data about the effects of SB 238 and Directive 2014-06 statewide are valid." (McCarty Report, Doc. 41-4 at 3, n.1.) Nonetheless, Smith argues, and the Court agrees, that the findings from these five counties, which account for over one-third of the state's population and nearly 73% of Ohio's African-American population, are highly probative. (Smith Report, Doc. 18-1 at 10; Smith Rebuttal, Doc. 53-11 at 23.) Because Ohio does not record voters' races, Smith "use[d] U.S. Census data to determine the geographic breakdown of the Ohio voting age population ['VAP'], by race, at the census block level—the smallest geographic unit for which the Census Bureau reports data." (Smith Report, Doc. 18-1 at 12.)

Smith "[uses] a combination of aggregate-level and individual-level data, . . . rely[ing] on three standard ecological inference techniques to draw inferences about the EIP absentee voting rates of blacks and whites in Ohio." (Smith Rebuttal, Doc. 53-11 at 2.) He asserts that "[e]ach of these methods is sound and appropriate," and his "findings across these different methods are consistent, reinforcing their validity and reliability." (*Id.*)

Bivariate correlation. Smith first examines the bivariate correlation between the percentage of the African-American VAP in a particular census block to the percentage of EIP votes cast in that block. (Smith Report, Doc. 18-1 at 13.) Smith found that, the greater the percentage of the African-American VAP, the greater the percentage of EIP votes that were cast. (*Id.* at 13–15, Fig. 1 (2012 election), 22–23, Fig. 7 (2010 election).) The same is true of votes cast on the eliminated days. (*Id.* at 15–16, Fig. 2, 23–24, Fig. 8.)

Homogeneous area analysis. In the 2012 election, looking at only racially homogeneous census blocks, that is, census blocks comprised either entirely of African Americans or entirely of whites, Smith found that "the rate of EIP absentee ballots cast in 100% black census blocks

was more than twice the comparable rate in 100% white census blocks." (Smith Report, Doc. 18-1 at 17–18, Fig. 3.) "[I]n homogenous black census blocks, roughly one in five voters . . . cast an EIP absentee ballot," while "fewer than one in 10 votes cast by voters living in 100% white census blocks . . . was an EIP absentee ballot." (*Id.*) Finally, "in homogenous black census blocks, the rate [of EIP absentee ballots] was two to four times the rate in homogenous white census blocks during the first week of early voting." (*Id.*)

As for the 2010 election, Smith found that, in racially homogeneous census blocks, the EIP absentee voting rate was higher in black census blocks than in white census blocks on nearly every day of EIP absentee voting, and "blacks . . . were more likely than comparable whites to utilize EIP absentee voting." (Smith Report, Doc. 18-1 at 24–25, Fig. 9.) "Specifically, the EIP absentee voting rate in 100% black census blocks was roughly four times the comparable rate in completely homogeneous white census blocks." (*Id.* at 25.)

Method of bounds analysis applied to nearly homogenous census blocks. According to Smith, "[a] limitation of homogeneous area analysis is that the observed behavior in such areas ... may not be identical to rates in racially heterogeneous census blocks." (Smith Report, Doc. 18-1 at 18.) To address this possibility, Smith also analyzed *nearly* homogeneous census blocks, defined as census blocks which are at least 90% all-black or all-white. (*Id.* at 18–19.) Smith explains that, "when applied to nearly homogeneous black census blocks," the "method of bounds" analysis "specifies both a minimum and a maximum possible black EIP absentee voting rate." (*Id.* at 19.)

Applying this method, Smith found that "EIP absentee voting rates in nearly homogeneous black census blocks were consistently higher than those in nearly homogeneous white census blocks" in the 2012 election. (Smith Report, Doc. 18-1 at 19–20, Fig. 4.)

Examining votes cast only on days that would have been eliminated had SB 238 and Directive 2014-06 been in effect for the 2012 election, Smith found that "nearly homogenous black census blocks had greater rates of EIP absentee voting than nearly homogenous white census blocks." (*Id.* at 21, Fig. 5.)

Smith also found that "EIP absentee voting rates in nearly homogenous black census blocks were higher than comparable EIP absentee voting rates in nearly homogeneous white census blocks in the 2010 General Election." (Smith Report, Doc. 18-1 at 26, Fig. 10.) Looking at votes cast only on days that would have been eliminated had SB 238 and Directive 2014-06 been in effect for the 2010 election, Smith found that "census blocks with at least 98% black VAP had higher EIP absentee voting rates than comparable white census blocks"; however, "[a]s the bounds characterizing near racial homogeneity are relaxed, the true values of black and white EIP absentee voting on [those days] . . . become more difficult to distinguish." (*Id.* at 27–28, Fig 11.)

Current Population Survey. Smith also examines data from the Current Population Survey Voting and Registration Supplement ("CPS"), which is conducted during election years by the U.S. Census Bureau and the U.S. Bureau of Labor Statistics and is "one of the most accurate among all election surveys." (Smith Report, Doc. 18-1 at 28 n.31 (citation omitted).) Smith concludes that the CPS data "provides additional evidence that black voters in Ohio were disproportionately more likely to cast EIP absentee ballots in the 2012 and 2008 General Elections." (*Id.* at 28–29.) Specifically:

> [I]n the 2012 General Election, 19.55% of blacks reported voting EIP absentee ballots in Ohio, whereas 8.91% of whites in the state reported they voted EIP absentee ballots. The statistically significant results indicate that black voters were more likely to cast EIP absentee ballots in the 2012 General Election than white voters. Similarly, according to the 2008 CPS November Supplement, 19.88% of blacks reported casting EIP absentee ballots in Ohio, whereas 6.18% of

> whites reported doing so. Again, the results are statistically significant, indicating that blacks were more likely than whites to cast EIP absentee ballots in the 2008 General Election. These individual-level findings bolster the homogeneous area and method of bounds analyses previously discussed.

(*Id.* at 31.)

Overall, Smith concludes:

> The foregoing analysis using public data and employing standard social science methods indicates that blacks in Ohio have higher EIP absentee voting rates than whites, and that in the two most recent General Elections, blacks disproportionately cast EIP absentee ballots on days that would have been eliminated under SB 238 and Directive 2014-06. In addition, individual-level CPS data indicate that blacks in Ohio relied more heavily on EIP absentee voting than whites in the 2008 and 2012 General Elections. Overall, my findings provide strong empirical evidence that in future elections voting age blacks residing in Ohio will be disproportionately affected by the reductions in EIP absentee voting.

(Smith Report, Doc. 18-1 at 31.)

b. Plaintiffs' Expert, Professor Vincent Roscigno, Ph.D.

Professor Vincent Roscigno, Ph.D., a Distinguished Professor of Arts & Sciences in Sociology at The Ohio State University, has extensive academic experience and research expertise on the topics of "social inequality, its persistence within and across a host of institutional domains, and the mechanisms underlying it including discrimination."[8] (Roscigno Report, Doc. 18-2 at 4.) He submitted an expert report titled "Racial Inequality, Racial Politics and the Implications of Recent Voting Restrictions in Ohio: Analyses of Senate Factors One, Two, Three, Five, Six and Seven of the Voting Rights Act; Expert Report Submitted on Behalf of Plaintiffs in NAACP v. Husted" (Doc. 18-2), and the record contains his deposition taken on July 10, 2014 (Doc. 41-23).

[8] While Defendants call Roscigno "a sociologist with no meaningful experience in election law," they apparently do not dispute his findings regarding the disparities faced by African American Ohioans. (Response, Doc. 41 at 36.)

Roscigno's report "provides an overview of the historical and contemporary status of racial/ethnic minorities in the state of Ohio" focusing on Senate Factors One, Two, Three, Five, Six, and Seven.[9] (Roscigno Report, Doc. 18-2 at 3.)

Senate Factor Five. Focusing on "the extent to which minority group members [specifically African-Americans] bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process," Roscigno describes "stark and persistent racial inequalities . . . [in] work, housing, education and health" with roots "in both historical and contemporary discriminatory practices." (Roscigno Report, Doc. 18-2 at 3.) He states that these inequalities "create unique and compelling resource, transportation, time and informational disadvantages" as to voting and opines that "[r]ecently instituted voting restrictions will have a further disparate, negative impact on minority but also poorer, working class, and aging populations in Ohio and their capacities to vote." (*Id.* at 3.)

Specifically, Roscigno states that "African Americans . . . face entrenched, persistent and quite profound disadvantages when it comes to employment and returns to employment." (Roscigno Report, Doc. 18-2 at 5.) While these inequalities "are partially explained by a long history of racial exclusion, educational segregation, and their consequences," "[c]ontemporary research makes very clear" that these inequalities "continue to be driven by segregation, the relegation of minority employees to lower return and more precarious jobs and ongoing minority vulnerability to discrimination in hiring, firing, promotion, demotion and harassment." (*Id.* at 5.)

Drawing on data from the 2012 American Communities Survey of the U.S. Census ("ACS"), Roscigno states that "Whites (32%) are significantly overrepresented relative to

[9] The "Senate Factors," cited by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986), are discussed more fully in Section IV.A.2 *infra*.

African Americans (19%) in upper-tier positions in the professional, managerial and financial occupational ranks, where job security, flexibility, benefits and rewards are significantly higher," and "African Americans (29%) are more likely than Whites (22%) to work in service and sales related occupations and, to a lesser extent, in administrative and office support positions." (Roscigno Report, Doc. 18-2 at 5–6.) This data is somewhat parallel to data from 2012 reports from the Equal Employment Opportunity Commission, which shows that approximately 31.7% of White Ohioans and 13% of African Americans "held top positions in the upper echelons of the occupational hierarchy (executives, managers and professionals)," and "36.2% of African Americans versus 23.1% of whites" held "lower-rung service and sales work positions—positions with significantly lower earnings and benefits, less autonomy and scheduling flexibility, more likely to pay hourly wages rather than a salary, and with more volatility in terms of job security." (*Id.* at 7.)

Roscigno states that "[s]ubstantial bodies of social science research . . . often conclud[e] that contemporary institutional practices and discrimination play a significant role [in causing these inequalities], especially when the disparities are as large as they are in Ohio." (Roscigno Report, Doc. 18-2 at 7.) Research shows that "there continues to be significant 'minority vulnerability' in the course of employer decisionmaking," impacting minority hiring, promotion, demotion, and firing in significant ways." (*Id.* at 8.) "Such analyses typically statistically control for important background attributes such as education, experience and skill levels in order to capture the extent to which explicitly racialized processes are likely occurring." (*Id.*)

Racial occupational inequalities are linked to disparities in income, poverty status, residential and schooling options, and health status. (Roscigno Report, Doc. 18-2 at 10.) Job

scheduling and flexibility have a direct impact on voting and its barriers, and other disparities affect cost calculations regarding voting and the barriers to voting. (*Id.*)

Roscigno states that substantial residential segregation exists in Ohio; in fact, Cleveland, Cincinnati, and Columbus are among the most segregated cities in the nation. (Roscigno Report, Doc. 18-2 at 10–11.) According to ACS data, 72.8% of white households in Ohio and 38.5% of African American households are homeowners rather than renters. "It is within low-end rental markets than one finds high levels of residential mobility and instability," and 21.6% of African Americans compared to 12.9% of whites reported a residential move over the prior year. (*Id.* at 12.)

Roscigno finds that this residential segregation is caused by the financial implications of employment inequalities as well as continuing discriminatory practices by realtors, landlords, and lending and insurance institutions. (Roscigno Report, Doc. 18-2 at 12–15.) Consequences include limited access to employment, increased segregation of schools, "neighborhood instability, limited institutional supports, heightened criminal victimization and declines in overall trust in neighbors, institutions and politics." (*Id.* at 15.)

According to Roscigno, these disparities have "specific and direct consequences for voting." (Roscigno Report, Doc. 18-2 at 16.) First, they result in disparate access to transportation. According to ACS data, African American Ohioans have an average of 1.2 vehicles per household, compared to 2.2 vehicles for whites, and are about three times as likely to rely on public transportation or walk to work. (*Id.*) Second, "African Americans in Ohio are disparately located in non-salaried, lower-paying jobs where it is much more difficult to take time off to vote during regular business hours." (*Id.* at 17.) Third, the inequalities make it more difficult to arrange childcare during the day. According to ACS data, "72% [of] African

American households in Ohio are single parent families with at least one child under eighteen years old compared to 25% of White households." (*Id.* at 18.)

Senate Factors One and Three. Noting that Senate factors one and three overlap, Roscigno considers them together. Examining "the history of official voting-related discrimination in the state," he states that "[o]fficial voting-related discrimination against racial/ethnic minorities was a cornerstone in Ohio from the very outset of its establishment as a state," considering that the state constitution originally limited voting rights to only white males. (Roscigno Report, Doc. 18-2 at 26.)

As for "the extent to which the state . . . has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group," Roscigno states that "there are other and much more recent voting practices and changes with implications for discrimination against minority voters in the state." (Roscigno Report, Doc. 18-2 at 28.) He asserts that poll watchers during the 2012 election disparately targeted "certain, high minority concentrated areas and greater residential mobility or non-clarity regarding permanent addresses." (*Id.*) He also cites changes to early-voting days and hours as well as the recent passage of voter identification laws in states with high minority populations and higher minority and low-income voter turnout in 2008. (*Id.*)

Senate Factor Two. As to whether voting in the jurisdiction remains or is "racially polarized," Roscigno cites exit poll data showing that dramatically polarized voting in the 2008 and 2012 presidential elections and substantial polarization in the 2004 election. (Roscigno Report, Doc. 18-2 at 32.) Specifically, in 2012 and 2008, respectively, approximately 41% and 46% of white voters and 96% and 97% of African American voters voted for Barack Obama. In 2004, approximately 44% of white voters voted for John Kerry versus 84% of African American

voters. (*Id.*) Roscigno cites other examples of racially polarized voting in the 2008 Democratic Primary election, the 2010 gubernatorial election, and the 2010 and 2012 elections for Senate. (*Id.* at 33–34.)

Senate Factor Six. Considering whether there continue to be "overt or subtle racial appeals" in the electoral process, Roscigno suggests that the explicit racial appeals of the past have been mostly replaced by "more subtle, race-laden messages—messages that draw on more general stereotypes (e.g., minority criminality or welfare dependency) in an effort to motivate white voters in a particular direction." (Roscigno Report, Doc. 18-2 at 34.) He cites a 2010 campaign for State Treasurer that portrayed an African American opponent as corrupt and connected to Muslim mosques and those of Arab descent. (*Id.* at 35.) Another example is a television commercial "displaying a shouting African American woman in inner city Cleveland alongside mostly other African Americans, claiming that Obama gave her a phone." (*Id.* at 36.)

He also notes that "explicitly racial appeals . . . became apparent among at least some portion of the white electorate," citing a shirt at a rally for Mitt Romney which read, "PUT THE WHITE BACK IN THE WHITE HOUSE," as well as a highly publicized article titled "America Needs a White Republican President." (Roscigno Report, Doc. 18-2 at 35–36.) Roscigno asserts that such examples "suggest a political climate in Ohio that remains somewhat tolerant of explicit race politics." (*Id.* at 36.)

Roscigno cites as an example of intimidation of African American and Hispanic voters the placement of 60 billboards reading "VOTER FRAUD IS A FELONY!" in disproportionately African and low income neighborhoods of Columbus and in predominantly African American and Latino neighborhoods in Cleveland. (Roscigno Report, Doc. 18-2 at 37.)

Finally, Roscigno quotes two politicians discussing early voting. First, "[i]n August 2012, Doug Preisse, the Republican Party Chairman of Franklin County, in a campaign supporting cutbacks to Ohio's early voting program, stated [in an e-mail to a reporter] 'I guess I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter turnout machine.'" (Roscigno Report, Doc. 18-2 at 38.) Roscigno asserts that Preisse's "willingness to admit to the need to suppress African-American votes in a written e-mail again illustrates the tolerance for racial appeals in Ohio." (*Id.*) Second, during a February 2014 discussion about early voting in the House Policy and Legislative Oversight Committee, State Representative Matt Huffman stated, "'There's that group of people who say, 'I'm only voting if someone drives me down after church on Sunday.' . . . Really? Is that the person we need to cater to when we're making public policy about elections?'" (*Id.*)

Senate Factor Seven. As for "the extent to which members of the minority group have been elected to public office," Roscigno states that "Ohio has made significant progress" in that its U.S. congressional representation underrepresents its African American population only by a small margin. (Roscigno Report, Doc. 18-2 at 38.) However, African Americans are significantly underrepresented, "both historically and contemporarily, in the most important, visible and influential elected state posts." (*Id.* at 38–39.)

c. Defendants' Expert, Sean P. Trende

Sean P. Trende, the Senior Elections Analyst for RealClearPolitics, is an "expert in the fields of psephology, voter behavior, voter turnout, polling, and United States demographic trends and political history." (Trende Declaration, Doc. 41-3 at 3, 5.) He has "studied and written extensively about demographic trends in the country, exit poll data at the state and federal level, public opinion polling, and voter turnout and voting behavior" and states that "[t]he overarching purpose of [his] writings . . . is to try to convey more rigorous statistical

understandings of elections than is typically found in journalistic coverage of elections to a lay audience." (*Id.* at 6.) Trende submitted a Declaration (Doc. 41-3), and the record contains his deposition taken on July 29, 2014 (Doc. 64-1) as well as a deposition taken on June 6, 2014 in separate litigation (Doc. 53-6).

Trende's declaration examines how the challenged reductions in Ohio's voting schedule fit into the national context, whether those changes are expected to decrease minority voter turnout, and whether the apparent disparate usage of early voting by African Americans in the 2008 and 2012 elections are expected to continue. (Trende Declaration, Doc. 41-3 at 3.)

Trende states that "Ohio maintains one of the most expansive systems of early voting in the country," with an early-voting period twice the national median. Ohio is among a minority of states with weekend voting hours and only about a dozen states with Sunday voting hours. Trende states that "a large majority of United States jurisdictions" do not offer same day voter registration. (Trende Declaration, Doc. 41-3 at 4–4, 8–21.)

Trende concludes that, even assuming that African American Ohioans disproportionately use early voting, "there is little evidence that these voters would fail to adjust their behavior ... and vote during the 22 days of early voting remaining (or on Election Day)." Trende asserts that "the data suggest that this is exactly what occurred in states that did not have these sorts of laws in place." (Trende Declaration, Doc. 41-3 at 4.)

Comparing voting trends in and outside Ohio, Trende concludes that "African-American participation was up more-or-less across-the-board in 2008 and 2012, regardless of the amount of early voting a state offered," and was largely a function of exogenous forces including the historic nature of the Obama candidacy. Trende asserts that "the fact that African-American participation in early voting in 2010 was down substantially, and was statistically

indistinguishable from non-Hispanic white participation makes it difficult to draw any firm conclusions about whether the apparent racial disparity in usage of early voting in presidential elections is permanent or transitory." (Trende Declaration, Doc. 41-3 at 4, 22–33.)

Trende presents a multi-state data analysis evaluating the effects of the number of days of early voting on African-American voter turnout, and finds that "it is difficult to conclude that early voting enhances African-American turnout, however measured." (Trende Declaration, Doc. 41-3 at 33–40.) He states that a recent study concluded that "early voting does not actually make voting easier" because "[a] voter still has to make a trip to the voting booth." (*Id.* at 5.) "Moreover, by diluting the effect of mobilization efforts and the social experience of Election Day, early voting might even reduce turnout on balance." (*Id.* at 5, 43–44.) Trende conceded at a deposition in separate litigation, however, that he was "aware of a scholarly consensus that same-day registration increases turnout." (Trende Dep., June 6, 2014, Doc. 53-6 at 252:24-253:1.)

d. Defendants' Expert, Dr. Nolan McCarty

Dr. Nolan McCarty, the Susan Dod Brown Professor of Politics and Public Affairs and the chair of the Politics Department at Princeton University, is widely published on the effects of electoral rules on legislative partisanship and polarization and is the co-author of a PhD-level textbook on the application of mathematical models in political science. (McCarty Response, Doc. 41-4 at 2.) McCarty submitted a Response to Expert Report of Daniel A. Smith (Doc. 41-4), and the record contains his deposition (Doc. 64-5). In his report, McCarty evaluates "the appropriateness of [Smith's] methodologies, the quality of [his] analysis, and the reasonableness of [his] inferences." (McCarty Response, Doc. 41-4 at 2.)

McCarty criticizes Smith's report for possible aggregation bias and asserts that Smith shows only a weak positive correlation between EIP voting rates and black VAP at the census

block level. McCarty finds a stronger negative correlation at higher levels of aggregation such as at county level. (McCarty Response, Doc. 41-4 at 15.) Smith responds that any possible aggregation bias is "dramatically worsen[ed]" by aggregating up from census block to county level. (Smith Rebuttal, Doc. 53-11 at 6.) Smith also provides two additional analyses, rerunning his regressions compensating for counties' different characteristics and then rerunning his regressions using data aggregated at the census tract level. Under both additional methods, Smith arrived at results consistent with his original report. (Smith Rebuttal, Doc. 53-11 at 9–10.)

McCarty argues that Smith's analysis of homogenous and nearly homogenous census blocks "omit information about thousands of Ohio voters and therefore may not provide a reasonable estimate the statewide racial discrepancy in EIP voting rates." (McCarty Response, Doc. 41-4 at 8, 9, 15.)

He also suggests that Smith misapplied the method of bounds analysis to nearly homogenous census blocks by omitting information about how Smith estimated the total number of votes cast by white and African Americans in each census block. (McCarty Response, Doc. 41-4 at 8–10, 15.) Smith responds that McCarty provides no empirical evidence contradicting Smith's "implicit assumption . . . that turnout in the 2012 General Election in Ohio was taken as equivalent in homogenous and nearly homogenous black and white VAP census blocks." (Smith Rebuttal, Doc. 53-11 at 17.)

Finally, McCarty asserts that "the evidence shows that reductions in the window of EIP voting does not reduce turnout." (McCarty Response, Doc. 41-4 at 16.)

e. Defendants' Expert, Dr. Thomas Brunell

Dr. Thomas Brunell, Ph.D., Professor of Political Science at the University of Texas at Dallas, has published dozens of articles as well as a book titled, "Representation and Redistricting: Why Competitive Elections are Bad for America." (Brunell Declaration, Doc. 41-

5 at 3.) Brunell submitted a Declaration (Doc. 41-5), and the record contains his deposition (Doc. 64-2). Asked to respond to Smith's report, he finds that its usefulness is limited by several problems.

First, he states that Smith assumes the last Sunday and Monday before the election would not be early-voting days. (Brunell Declaration, Doc. 41-5 at 2.) This a problem is remedied by the analysis contained in Smith's Rebuttal Report, which confirmed his original findings, even after restoring the final Sunday and Monday of early voting. (Smith Rebuttal, Doc. 53-11 at 12–14.)

Second, Brunell suggests that voters may simply change their behavior to accommodate the elimination of some early-voting days, a suggestion that Smith does not purport to cover in his report. Finally, Brunell criticizes the limitations of Smith's data set, which includes only two elections, and only five counties as to one of those elections. (Brunell Declaration, Doc. 41-5 at 2.)

Brunell also cites recent research by Barry C. Burden and others for the proposition that early-voting opportunities actually reduce voter turnout. (Brunell Declaration, Doc. 41-5 at 3–4.)

Apparently either ignoring or disputing the various barriers to voting discussed by Roscigno, Brunell asserts that "[p]eople who want to vote will pay the costs of voting. These costs are usually quite low—register to vote and then cast a ballot (go to polls, send in absentee ballot, etc[.])." (Brunell Declaration, Doc. 41-5 at 6.)

f. Plaintiffs' Expert, Dr. Barry C. Burden

Dr. Barry C. Burden, Professor of Political Science at the University of Wisconsin-Madison, coauthored an article cited by Defendants' experts for the proposition that the availability of early voting decreases voter turnout. (Burden Declaration, Doc. 53-4 at 1–2.) Burden states that Defendants' experts fail to adequately represent four crucial aspects of his

article's analysis—aspects which "make[] clear that our study is not especially relevant to this case." (*Id.* at 2.)

First, Burden states that the "study does not address the specific and unique circumstances of Ohio," but rather "define[s] 'early voting' as any option allowing a person to vote without an excuse before election day." He states that "[i]t would ... be unwarranted to jump from the general pattern we observed to make strong claims about the effects of offering early voting in any particular jurisdiction ... because the precise form that early voting takes and how it interacts with other laws and demographics of the state are quite variable." (Burden Declaration, Doc. 53-4 at 2–3.)

Second, "the negative effect of early voting that [Burden et al.] observed holds only in states with early voting but without same day registration"; when a state offers both, "there is not a negative effect on turnout." (Burden Declaration, Doc. 53-4 at 3.)

"Third, our study did not analyze African Americans' response to early voting," but rather reflected behavior of the predominately white national electorate. Burden opines that "it is likely that effects of offering early voting would be different for non-whites who bring different demographic characteristics, skills, experiences to the election process." (Burden Declaration, Doc. 53-4 at 3.)

Finally, Burden asserts that "it is inappropriate to draw inferences from our study to situations where voting opportunities are removed" because his study examined introduction of "convenience voting" options, rather than removal of voting opportunities. (Burden Declaration, Doc. 53-4 at 4.)

g. Plaintiffs' Expert, Dr. Paul Gronke

Paul W. Gronke, Professor of Political Science at Reed College and Director of the Early Voting Information Center, was retained to evaluate whether Defendants' expert reports

"accurately cite the complete body of [his] scholarship regarding early voting and turnout and more broadly the state of academic research regarding early voting and voting behavior." (Gronke Declaration, Doc. 53-5 at 2–3.) He makes the following conclusions.

First, Gronke states that Defendants' expert reports frequently use the term "early voting" imprecisely and cite literature which does not distinguish between EIP voting and voting by mail. Gronke asserts that "the failure to distinguish between the two renders those materials of limited value in assessing the effect of early in-person voting." (Gronke Declaration, Doc. 53-5 at 3.)

Second, Defendants' expert reports cite literature based on data from 2008 or earlier, with most data from 2004 and earlier, and fail to account for significant changes in more recent history. (Gronke Declaration, Doc. 53-5 at 3–4.)

Third, Gronke reports that "[t]he literature concerning same-day registration consistently finds that same-day registration is associated with higher turnout." (Gronke Declaration, Doc. 53-5 at 4.)

Finally, he criticizes Defendants' expert reports' citations to literature concerning situations where early-voting opportunities are added, rather than eliminated. He opines that "[t]he difference is critical, because literature that specifically addresses situations where early voting opportunities have been removed suggests that removing such opportunities has had a negative effect on voters." (Gronke Declaration, Doc. 53-5 at 4.)

h. Analysis of Expert Evidence

While Smith's analysis necessarily relies on limited data, the Court finds his conclusions regarding disproportionate use of EIP voting by African American Ohioans to be well-supported. Smith's report has significant probative value and sufficiently demonstrates that African

Americans rely on EIP voting at far greater rates than whites in Ohio, including on the days and times eliminated by SB 238 and the 2014 Directives.

The Court accepts Roscigno's undisputed findings regarding employment disparities as well as significant disparities in residential, transportation, and childcare options; and concludes that these disparities significantly increase the cost of casting a vote.

i. Other Statistical Reports and Studies

In addition to the above expert opinions, the record contains other statistical reports and studies tending to support the conclusions of the Plaintiffs' experts, including the following:

First, a report analyzing racial early-voting patterns in Cuyahoga County during the 2008 presidential election estimated that, while white voters exercised the vote-by-mail option at greater rates than African Americans, African American voters were 26.6 times more likely to have utilized EIP voting during that election than white voters. "Despite accounting for a mere 28.6% of the estimated overall vote, African American voters cast an estimated 77.9% of all EIP ballots in Cuyahoga County in 2008." (RUSSELL WEAVER, PH.D & SONIA GILL, ESQ., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, EARLY VOTING PATTERNS BY RACE IN CUYAHOGA COUNTY, OHIO; A STATISTICAL ANALYSIS OF THE 2008 GENERAL ELECTION, October 2012, Doc. 18-8 at 14.) The report cautions that the results do not indicate that "Cuyahoga County minority voters necessarily will be precluded from voting because of the proposed [limitations to EIP voting]" but that "a reasonable interpretation of [the] results is that elimination opportunities to vote early in person effectively raises the cost of voting for many more African Americans than whites." (*Id.* at 6.)

Second, another analysis of 2008 EIP voting in Cuyahoga County concluded that "African-American, white, and Hispanic voters who used EIP voting had significantly lower

incomes than members of those same groups who voted on election day or by mail." (NORMAN ROBBINS & MARK SALLING, RACIAL AND ETHNIC PROPORTIONS OF EARLY IN-PERSON VOTERS IN CUYAHOGA COUNTY, GENERAL ELECTION 2008, AND IMPLICATIONS FOR 2012, *available at* http://urban.csuohio.edu/publications/center/northern_ohio_data_and_information_service/Racial_and_ethnic_proportions_of_early_in-person_voting.pdf, Doc. 18-6.)

Third, a report prepared by the Franklin County Board concluded that, during the 2008 election, "a disproportionately higher amount of African Americans utilized EIP voting," and "21% of all weekday EIP voting took place after 5pm." (DANIEL BRILL, FRANKLIN COUNTY BOARD OF ELECTIONS, 2008 EARLY IN-PERSON VOTING, Aug. 16, 2012, Doc. 18-5 at 2.)

Fourth, another report focusing on the 2010 election concluded that "early voters [including those voting by mail] were more likely than election-day voters to be women, older, and of lower income and education attainment." (RAY C. BLISS INSTITUTE OF APPLIED POLITICS, UNIVERSITY OF AKRON, A STUDY OF EARLY VOTING IN OHIO ELECTIONS, Doc. 18-3 at 1.)

IV.

Rule 65 of the Federal Rules of Civil Procedure authorizes the Court to grant preliminary injunctive relief. "A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). A district court is to consider the following four factors when deciding to issue a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *See Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d

219, 233 (6th Cir. 2011). "[T]he four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied." *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1992) (citation omitted). "These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *Id.*

A. Likelihood of Success on the Merits

Plaintiffs assert that they have demonstrated a strong likelihood of success on the merits of their first (Equal Protection) and third (Voting Rights Act) claims for relief. The Court will consider each of these claims in turn.

1. Equal Protection Claim

The Plaintiffs' Equal Protection challenge to SB 238 and Directive 2014-17 is brought pursuant to 42 U.S.C. § 1983. The Plaintiffs allege that the combined effects of these measures burden the right to vote of certain groups of voters in a manner not justified by the Defendants' asserted justifications.

The right to vote is a fundamental right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

"The Equal Protection Clause applies when a state either classifies voters in disparate ways, or places restrictions on the right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (internal citation omitted). As the Supreme Court has stated, "[i]n decision after decision, this Court has made clear 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). On the other hand, "as a practical matter, there must be a 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." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Sixth Circuit has described the appropriate standard for evaluating Equal Protection challenges within the voting context as follows:

> The precise character of the state's action and the nature of the burden on voters will determine the appropriate equal protection standard. *See Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004) ("The scrutiny test depends on the [regulation's] effect on [the plaintiff's] rights.").
>
> If a plaintiff alleges only that a state treated him or her differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–09, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969) (applying rational basis to a state statute that prohibited plaintiffs' access to absentee ballots where no burden on the right to vote was shown); *Biener*, 361 F.3d at 214–15 (applying rational basis where there was no showing of an "infringement on the fundamental right to vote"). On the other extreme, when a state's classification "severely" burdens the fundamental right to vote, as with poll taxes, strict scrutiny is the appropriate standard. *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *see also Harper*, 383 U.S. at 670, 86 S.Ct. 1079 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").
>
> Most cases fall in between these two extremes. When a plaintiff alleges that a state has burdened voting rights through the disparate treatment of voters, we review the claim using the "flexible standard" outlined *in Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). *See Hunter*, 635 F.3d at 238 (applying *Anderson–Burdick* balancing in an equal protection challenge to the counting of provisional ballots). Although *Anderson* and *Burdick* were both ballot-access cases, the Supreme Court has confirmed their vitality in a much broader range of voting rights contexts. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204, 128 S.Ct. 1610, 170 L.Ed.2d 574 (Scalia, J., concurring.) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in Burdick. . . . "). The *Burdick* Court stated the standard as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" 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."
>
> *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. 1564). This standard is sufficiently flexible to accommodate the complexities of state election regulations while also protecting the fundamental importance of the right to vote. There is no "litmus test" to separate valid from invalid voting regulations; courts must weigh the burden on voters against the state's asserted justifications and "make the 'hard judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190, 128 S.Ct. 1610 (Stevens, J., announcing the judgment of the Court).

Obama for Am., 697 F.3d at 428–29.

Accordingly, in determining whether the Plaintiffs have demonstrated a strong likelihood of success on the merits of their Equal Protection claim, the Court must first determine the appropriate standard for considering the impacts of SB 238 and Directive 2014-17 on voting in Ohio. The Defendants assert that the Court should apply a rational basis review, noting that Supreme Court has held that an individual does not have a constitutional right to vote absentee.[10] However in the Court's view, the Plaintiffs' Equal Protection claim is about more than the privilege to use an absentee ballot standing in a vacuum. Rather, the essence of their claim is the equal treatment of all voters within Ohio's EIP/absentee voting scheme. Having decided to enact a broad scheme of EIP/absentee voting, Ohio and Secretary Husted may not capriciously change or implement that system in a manner that disproportionately burdens the right to vote of certain groups of voters:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and

[10] *See McDonald*, 394 U.S. at 807–08.

disparate treatment, value one person's vote over that of another.

Bush v. Gore, 531 U.S. 98, 104–05 (2000). Further, the fact that no-fault absentee and EIP voting were established to remedy the problems faced by Ohioans during the 2004 election (problems that are in evidence before the Court), cannot be forgotten in considering changes to Ohio's voting system. As such, this case is about more than just the use of absentee ballots standing alone and a heightened form of scrutiny must apply.

The Plaintiffs allege that the voting schedule created by SB 238 and Directive 2014-17 burden the right to vote of African Americans, lower income individuals, and the homeless. SB 238 could possibly burden voters in two separate ways. First, it reduces the overall potential time for conducting EIP voting from 35 to 28 days. Second, it eliminates the potential for voting and registering on the same day. With regard to the reduction in days, the record reflects that in 2008, 67,408 voters cast their ballots during Golden Week; in 2010, 26,230 voters did so, and in 2012, 89,224 voters did so. Thus, the Plaintiffs have demonstrated that tens of thousands of voters have utilized Golden Week voting opportunities during past elections. Further, the Court has credited expert Daniel Smith's conclusion that African American voters in Ohio tend to utilize EIP voting at a greater rate than white voters. It is true that the statistical evidence before the Court cannot predict whether SB 238's reduction of the EIP voting period from 35 to 28 days will actually reduce voter turnout. In other words, it is impossible to predict whether voters who have voted during Golden Week in past elections would not now vote during a different time of the EIP voting period. However, turnout itself is not determinative of the Equal Protection analysis. Rather, the question is whether a burden has been imposed on the fundamental right to vote. Accordingly, it is reasonable to conclude that a reduction in the total time available for EIP voting will burden those groups that use EIP voting. As the Plaintiffs have demonstrated that

African American voters use EIP voting at higher rates than other segments of the population, the Court concludes that SB 238's reduction in the EIP voting period therefore burdens the voting rights of African Americans.

The Court likewise concludes that SB 238's elimination of Golden Week itself similarly burdens the voting rights of lower income and homeless individuals. The record reflects that in 2008, 12,842 voters utilized Golden Week to register or update their registration and vote; in 2010, 1,651 voters did so; and, in 2012, 5,844 voters did so. While these figures may be small in comparison to the millions of votes usually cast in Ohio elections, thousands of voters have utilized Golden Week during each of the last several elections. Additionally, the Plaintiffs' evidence paints a portrait illustrating the importance of Golden Week to those struggling on the margins of society. Such individuals are more likely to move frequently and lack access to transportation. Day to day life for such individuals can be chaotic and merely focused on survival. (*See* Frech Dec. ¶ 13, Doc. 18-22 at 2–3.) If a voter moves, he or she is required to update his or her voter registration. Lack of transportation means that travelling to the voting location can present its own hardships. For these reasons, the opportunity to register and vote at the same time during Golden Week is more than a mere convenience to poorer individuals and the homeless, it can make the difference between being able to exercise the fundamental right to vote and not being able to do so. Accordingly, the elimination of Golden Week burdens the right to vote.

The Plaintiffs argue that two aspects of Directive 2014-17 burden the voting rights of African American and lower-income voters—the Directive's complete lack of evening voting hours for non-presidential elections and the fact that only one Sunday of voting is available during the early-voting period. The record reflects that since EIP voting was first introduced

following the 2004 election, African Americans have taken advantage of the ability to vote on Sundays during the early-voting period through Souls to the Polls initiatives. Prior to the 2012 election, only a handful of Ohio counties held voting on any Sunday during the early-voting period, but those that did so, including those that offered multiple Sundays of voting, tended to be counties with high African-American populations. During the 2012 election, Sunday voting was possible in all counties, but only on the final Sunday before the election between the hours of 1 p.m. and 5 p.m. On that Sunday, those involved in coordinating Souls to the Polls efforts described long voting lines consisting largely of African-American voters.

The record also reflects that Souls to the Polls has developed into a civic component of African-American church life in Ohio, where community leaders raise awareness of voting and encourage and assist members of the community to vote. Sadly, African Americans in Ohio tend to be of lower socio-economic standing than other voters, and many of the churches conducting souls to the polls initiatives are located in poorer neighborhoods. For example, African Americans in Ohio have a median household income of $26,039 whereas the median household income overall for Ohio is $45,400. (Doc. 18-9 at 2.) Accordingly, it is significant that Souls to the Polls initiatives leverage church resources to provide transportation to voting locations to members of church congregations. Absent the use of transportation provided by the churches, many members of these communities could find it difficult to cast a vote as those in lower socio-economic groups tend to be more constrained in terms of transportation options. Given evidence of long lines occurring when only one Sunday with limited hours was available during the early-voting period, the Court holds that Directive 2014-17's limitation of Sunday voting to a single day with limited hours, burdens the voting rights of African Americans who have come to rely on Souls to the Polls initiatives.

The Court further holds that Directive 2014-17's lack of evening voting hours will burden lower-income voters. These voters are more likely to rely on public transportation and work wage-based jobs wherein they are less likely be able to find the time during lunch and other breaks to travel to polling location between the hours of 8 and 5. As previously stated, each county is permitted to operate only one early-voting location. As such, a given voter may be forced to travel a great distance to reach the single location. While public transportation may be available to reach the polling place, it may not be possible for lower income wage-earners to timely take advantage of that transportation.

The Court characterizes the overall degree of burden on voting imposed by SB 238 and Directive 2014-17 as significant although not severe. In so characterizing these burdens, the Court is mindful of the expansive nature of Ohio's early-voting system. For instance, as currently established, the 2014 early-voting period will allow for voting on the final two Saturdays of the early-voting period between 8 a.m. and 4 p.m. and the Court recognizes that it would be possible for Souls to the Polls initiatives to be conducted on those Saturdays. On the other hand, the record reflects that Sundays following church services are times when African Americans congregants are already gathered together in one place, a fact which has undoubtedly made transporting voters to the polls using church resources more efficient, especially considering that some of the churches also provide transportation to and from Sunday services. Thus, conducting Souls to the Polls efforts on a Saturday would impose some burden on the churches conducting such efforts as they would not be able to use their transportation resources as efficiently.

In determining that SB 238 and Directive 2014-17 significantly burden the right to vote of African Americans, the homeless, and lower-income individuals, the Court has also

considered the impact of the ability of all absentee voters in Ohio to vote by mail. According to the Defendants, because all voters can request an absentee ballot and vote entirely by mail, something that can be accomplished at any time and on any day and in a manner that all voters can equally take advantage of, any burden to the ability of the enumerated groups to partake in EIP voting is nullified. In other words, it does not matter that there may be fewer EIP voting opportunities because a ballot cast by mail is exactly the same as an absentee ballot cast in person. Defendants also note the different combinations that can be used in order to cast a ballot. For example, a voter can request an absentee ballot by mail and drop it off in person, sometimes to special ballot boxes that are accessible outside normal business hours.

While the presence of vote by mail undoubtedly ameliorates some of the burdens on voting imposed by SB 238 and Directive 2014-17, the record before the Court reflects that it cannot completely eliminate or lesson those burdens to the extent that they become less than significant. In this regard, the record is undisputed that African Americans, lower-income individuals, and the homeless are distrustful of the mail and/or voting by mail or would prefer to vote in person for unrelated reasons. Further, and perhaps more significantly, in reaching its conclusion, the Court also looks to the very mechanics of voting by mail, which consist of filling out an application requiring detailed information, paying postage, correctly filling out more detailed information when the ballot is received, and paying additional postage to return the ballot. The associated costs and more complex mechanics of voting by mail, coupled with other information in the record concerning the enumerated groups including homelessness, lower educational attainment, more limited financial resources, reliance on public transportation, and transience, indicate to the Court that voting by mail may not be a suitable alternative for many voters. While it is true that the application information that must be provided is the same

whether voting by mail or in person, it is easy to imagine how the process could become difficult if conducted entirely through mail, as with situations where a voter incorrectly fills out a form or does not understand what information is required. Finally, it is worth noting that SB 238 also reduced the overall period for voting by mail by the same amount as the time for EIP voting. *See* OHIO REV. CODE § 3509.01(B)(2) (absentee ballots for use for other than in-person voting to be ready the first day after the close of voter registration). Thus, under the current status quo, there is less time to accomplish voting by mail than there was under the previous rules.

Having determined that SB 238 and Directive 2014-17 combine to significantly burden the right to vote of the enumerated groups, the Court must now balance the burden imposed against the offered justifications for the measures as this case falls in between those presenting a severe burden to voting on the one extreme and no burden at all on the other. In doing so, the Court holds that the offered justifications fail to outweigh the burdens imposed. Accordingly, the Plaintiffs have demonstrated a substantial likelihood of success on the merits of their Equal Protection claim.

Turning first to SB 238, the Defendants put forth fraud prevention and cost as justifications for the elimination of Golden Week and reduction in the period for EIP voting. However, as explained below, neither of these justifications withstand careful evaluation. The Defendants attempt to justify the elimination of Golden Week as a means to prevent election fraud. In doing so, they cite, inter alia, the testimony of OAEO Executive Director Ockerman who testified prior to the passage of SB 238 that he was aware of the votes of fraudulently registered voters being counted because "election officials could not confirm their registration status before Election Day." (Doc. 41-20 at 4.)

As noted in Section III.B *supra*, Ohio law requires the registration of absentee voters to

be confirmed before their votes are officially counted. (*See* Clyde Dec. ¶ 16, Doc. 58-16 at 6; Damschroder Dec. ¶ 27, Doc. 41-9 at 6.) With that fact in mind, Ockerman's justification for eliminating Golden Week—that it could lead to situations where officials do not have time to verify voter registrations prior to Election Day—does not withstand logical scrutiny, but instead is perhaps better characterized as a justification for limiting the registration deadline itself to beyond 30 days before the election. This point is illustrated by the simple hypothetical of a voter (under the status quo imposed by SB 238) registering to vote 30 days before the election and then returning to his local Board to cast an EIP ballot on the 29th day before the election. The potential that that voter's registration could not be verified in time is nearly exactly the same as a voter who could previously register and vote on the 30th day before the election. In fact, if the potential for fraud is measured in relation to time before the election, that potential would increase as the election grew closer because less time remains to verify absentee voter registrations. In sum, the potential for fraud identified by Ockerman exists whether voters are allowed to register and vote on the same day or not, and is best combatted by election officials following the law and applicable procedures and not counting absentee votes prior to the proper verification of registration.

The same logical flaw regarding voter fraud also exists in the testimony of Chris Long, Dana Walch, Mary Siegel, Ronald Koehler, and Senator Frank LaRose. (*See* Young Dec. Exs. 1–4, Doc. 54-3; Keeran Dec. Ex. 2, Doc. 54-4.) Their testimony all indicates that fraud could result because of a failure to properly verify registration, when as illustrated above, that issue has more to do with the registration process and verification of absentee ballots and almost nothing to do with instances of registering and voting on the same day. (*See* Young Dec., Doc. 54-3.) The Court reaches the same conclusion regarding the issue of voters registering and attempting

to vote in multiple counties. (Cuckler Dec. ¶¶ 3–5, Doc. 68-3 at 1–2.) These issues can be resolved through proper verification of registrations, including through checking the Ohio voter registration database, and the potential for fraud has little to do with same-day registration if ballots cast during Golden Week are properly segregated pending verification.

The Defendants have also attempted to justify SB 238 as a cost-saving measure. (*See* Doc. 41-20 at 3 ("the cost of administering elections has skyrocketed").) With regard to the use of costs to justify burdens on the right to vote, the Sixth Circuit has stated, in a slightly different context:

> Ohio has used cost as if it were a silver bullet. Any change from the status quo necessarily involves some cost. The State has failed to put forth any evidence indicating that it cannot manage the costs and instead, the evidence indicates that the State has either budgeted for the transition from its own funds or through funds provided by the federal government. The mere fact that there is some cost involved does not make that factor compelling.

Stewart v. Blackwell, 444 F.3d 843, 869 (6th Cir. 2006).

As with voter fraud, the Court is not persuaded by the Defendants' attempts to justify SB 238 as a cost saving measure. In this regard, despite generalizations made by Damschroder, Ockerman, and Walch concerning the added costs of providing more voting days and hours, the record is generally lacking in specific evidence regarding the costs to Ohio counties of operating the early-voting system for 35 days. While Triantafilou, Ward, and Munroe have provided specific cost estimates for reinstating Golden Week ($8,000 to $12,000 in staffing costs alone for Hamilton County: $933.20 in added staffing costs for Madison County; $3,490.88 for Mahoning County), their figures are lacking a frame of reference. For instance, $12,000 could be significant to a Board budget of $100,000 but not necessarily to one of $1,000,000. Additionally, regarding Koehler's assertion that the elimination of Golden Week "will save [Boards] 20% of the cost of extra temporary workers, since they will be working four weeks

instead of five" (Young Dec. Ex. 4; Doc. 54-3 at 15), there is nothing in the record establishing what the total cost of temporary workers tends to be for counties throughout the state or demonstrating that the extra 20% presents added costs that cannot be managed by the counties.

Similarly, there is no evidence before the Court comparing costs of maintaining the 35-day early-voting period to the previous system or to the new status quo. *See Obama for Am.*, 697 F.3d 423 at 433 ("the State has shown 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"). While the elimination of Golden Week will certainly save the Boards money, the more appropriate question is whether the previous 35-day system that included Golden Week was financially unworkable for the Boards, and nothing in the record tends to demonstrate that the old system created undue or burdensome costs. To the contrary, Amicus Curiae Cuyahoga County represents that it has already budgeted money for Golden Week and days of weekend voting during the 2014 election. (*See* Doc. 28 at 8–9.)

In terms of costs of maintaining Golden Week, the Court notes that during the final week of voter registration, county Boards are presumably open during normal business hours to register voters and prepare for the upcoming election. Additionally, state law requires them to be open until 9 p.m. on the last day of registration. Further, while state law allows the Boards to conduct EIP voting at either their main offices or at a satellite location, see Ohio Rev. Code § 3501.10(C), the record indicates that during the 2008 election only five of 88 counties—Franklin, Hardin, Knox, Lucas, and Summit—held EIP voting at sites other than the regular Board offices. (*See* Doc. 65-2.) In 2010, only Hardin, Knox, Lucas, Summit, and Union counties utilized offsite, EIP voting locations. (*See* Doc. 65-3.) Franklin, Lucas, and Summit are among the largest counties in the state. (*See* Doc. 41-17.)

The facts that EIP voting during Golden Week would take place during times when Boards are already open for business and that only a few Boards have operated separate locations for EIP voting, undermine the Defendants' attempt to justify SB 238 on the basis of cost. Because the Boards are already open, there is little likelihood that overhead costs such as heating or cooling buildings would "skyrocket" as a result of the Boards being required to accept EIP votes during Golden Week. Further, given that so few Boards choose to operate separate locations during the early-voting period, there is less likelihood that particularly small counties would be exposed to substantial extra costs associated with operating a separate facility for an additional several days. While some cost must accompany additional voting times and hours, the record is lacking evidence tending to establish that those costs would generally place undue burdens on the finances of Ohio's counties.

Finally, the Defendants attempt to justify SB 238 as a means of limiting the cost of political campaigns. However, they have failed to produce any evidence that the elimination of several days of the early-voting period would have that effect.

Turning to Directive 2014-17, Secretary Husted's purported justification for requiring all Boards to set the same EIP voting days and hours is uniformity. While Directive 2014-17 imposes a uniform voting schedule throughout Ohio during the early-voting period, the Court has also determined that features of that schedule significantly burden the voting rights of certain groups of voters by prohibiting counties from offering evening voting hours and additional Sunday voting. As such, it is not the case that the uniformity imposed by Directive 2014-17 "ensures that all Ohioans will have the same opportunity to vote." (Doc. 41 at 47.) In other words, there is nothing in the record tending to establish why a uniform voting schedule could not include evening and additional Sunday voting hours. Further, Secretary Husted has offered

no explanation as to why uniformity, standing alone, should be considered an interest important enough to effectively make it harder for groups of citizens to vote. Nor has he cited any authority standing for that proposition.

The Court must now weigh the significant burdens placed on voting by SB 238 and Directive 2014-17 against the offered justifications. As stated above, the Court has found these justifications to be relatively hollow, and, in some cases, not necessarily supported by logic. Accordingly, while the burdens imposed on the voting rights of African Americans, lower income voters, and the homeless are not severe, it cannot be said that they are outweighed by the offered justifications. For instance, there is virtually nothing in the record tending to justify why a uniform voting schedule could not include evening voting hours and additional Sunday voting, especially considering that such voting opportunities have been successfully offered by individual counties in past elections. While the Defendants have frequently noted that Ohio's system of absentee voting is one of the most expansive in the entire Country, one of the touchstones of the Fourteenth Amendment's Equal Protection guarantee in the context of voting rights is that actions of a State must "avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000). Here, despite the expansiveness of Ohio's voting system, the weakness of the offered justifications supporting SB 238 and Directive 2014-17 render them essentially arbitrary action when viewed against the burdens they impose on groups of voters. Such action is prohibited by the Equal Protection Clause. Thus, the Court's conclusions regarding the Plaintiffs' Equal Protection claim are easily summarized as follows: SB 238 and Directive 2014-17 arbitrarily make it harder for certain groups of citizens to vote.

For the above-stated reasons, the Court concludes that the Plaintiffs have demonstrated a strong likelihood of success on the merits of their Equal Protection claim.

2. § 2 Claim

Plaintiffs also challenge SB 238 and the Secretary's directives under § 2 of the Voting Rights Act of 1965, 42. U.S.C. § 1973. Section 2, as amended, provides that:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

"Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Instead, a plaintiff need show only that the challenged action or requirement has a discriminatory effect on members of a protected group[.]" *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002). The Plaintiffs' § 2 theory is that SB 238's elimination of Golden Week and Directive 2014-17's lack of evening voting hours for the 2014 general election and lack of additional Sunday voting disproportionately impact African American voters resulting in less opportunity to participate in the political process than other voters.

The Voting Rights Act should be interpreted in "'a manner that provides the 'broadest possible scope' in combating racial discrimination.'" *Stewart*, 444 F.3d at 877 (quoting *Chisom*

v. Roemer, 501 U.S. 380, 403 (1991) (internal quotations omitted)). "The essence of a § 2 claim is that 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). Whether "the political processes are equally open depends upon a searching practical evaluation of the past and present reality." *Gingles*, 478 U.S. at 78 (quotations and citations omitted). Further, while the Defendants have sought to compare Ohio's voting scheme to those of other states, the evaluation of a § 2 claim "require[s] 'an intensely local appraisal of the design and impact' of the challenged electoral practice." *Stewart*, 444 F.3d at 878 (quoting *Gingles*, 478 U.S. at 78 (internal quotations omitted)).

The Defendants and Amicus Curiae the Ohio General Assembly argue that it is improper under a § 2 analysis for the Court to compare the schedule for EIP voting imposed by SB 238 and Directive 2014-17 to the voting opportunities from previous elections. According to the Defendants, such a comparison improperly grafts a § 5 "retrogression" analysis onto a § 2 claim. However, in the Court's view, a comparison between past and current EIP voting days and hours is relevant to the totality of the circumstances inquiry that the Court must conduct and to the ultimate question of whether the voting rights of African Americans in Ohio have been abridged by SB 238 and Directive 2014-17. As the Supreme Court has stated:

> The term "abridge["]—whose core meaning is 'shorten,' [ ]—necessarily entails a comparison. It makes no sense to suggest that a voting practice "abridges" the right to vote without some baseline with which to compare the practice. In § 5 preclearance proceedings—which uniquely deal only and specifically with *changes* in voting procedures—the baseline is the status quo that is proposed to be changed: If the change "abridges the right to vote" relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo*

> "results in [an] abridgement of the right to vote" or "abridge [s] [the right to vote]" relative to what the right to vote *ought to be*, the status quo itself must be changed.

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 333–34 (2000) (citation omitted).

In *Thornburg v. Gingles*, the Supreme Court cited the following factors relevant to § 2 claims:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> 8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> 9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles, 478 U.S. at 36–37. These factors had been identified by the Senate Judiciary Committee majority report accompanying the 1982 amendments to § 2. *See* S. REP. NO. 97-417,

at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07. The list of factors is "neither exclusive nor controlling." *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986). Regarding the ninth factor identified above, Senate Report also states:

> If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

S. REP. NO. 97-417, at 29 n.117, 1982 U.S.C.C.A.N. at 207.

The Court will now consider the evidence produced by the Plaintiffs to determine if they are likely to succeed in establishing that SB 238 and Directive 2014-17 interact with social and historical conditions to cause an inequality in the opportunities to vote afforded African-American voters in Ohio.

As described in detail in Part III.D.2.b *supra*, the report of Plaintiffs' expert, Professor Vincent Roscigno, examines Senate Factors 1, 2, 3, 5, 6, and 7. Regarding the fifth factor, Roscigno discusses "stark and persistent racial inequalities . . . [in] work, housing, education and health" with roots "in both historical and contemporary discriminatory practices." (Roscigno Report, Doc. 18-2 at 3.) According to Roscigno, "[s]ubstantial bodies of social science research ... often conclud[e] that contemporary institutional practices and discrimination play a significant role [in causing these inequalities], especially when the disparities are as large as they are in Ohio." (Roscigno Report, Doc. 18-2 at 7.) Further, racial occupational inequalities are linked to disparities in income, poverty status, residential and schooling options, and health status. (Roscigno Report, Doc. 18-2 at 10.) Job scheduling and flexibility have a direct impact on voting and its barriers, and other disparities affect cost calculations regarding voting and the barriers to voting. (*Id.*)

Regarding factors one and three, Roscigno determined that Ohio did have a history of official voting-related discrimination against racial minorities and that more recent voting practices and procedures, such as poll watchers disparately targeting areas with higher minority populations, enhance the opportunity for discrimination against minority groups. As to the second factor, he cites the polarized nature of recent elections in Ohio. For the sixth factor, he provides several examples of subtle or direct racial appeals that have occurred in Ohio during recent elections. Finally, for the seventh factor, he notes that African Americans are significantly underrepresented, "both historically and contemporarily, in the most important, visible and influential elected state posts." (*Id.* at 38–39.)

The Court looks to the these and other factors in concluding that SB 238 and Directive 2014-17 interact with the historical and social conditions facing African Americans in Ohio to reduce the opportunity to participate in the political process relative to other groups of voters. Accordingly, the Plaintiffs have demonstrated a strong likelihood of success on the merits of their § 2 claim.

The Court has already determined that SB 238's reduction of the early-voting period will burden the voting rights of African Americans because they use EIP voting at higher rates than other groups of voters. The elimination of Golden Week's same-day registration will also impact African Americans as the record and Professor Roscigno indicate that they tend to disproportionately make up the groups that benefit the most from same-day registration: the poor and the homeless. Similarly, the Court has previously discussed how the limitation to only one Sunday of voting during the early-voting period burdens the voting rights of African Americans by arbitrarily limiting Souls to the Polls voting initiatives. The lack of evening voting hours also burdens African Americans given that those of lower socio-economic standing tend to work

hourly jobs and can find it difficult to find time to vote during normal business hours.

The burdens created by SB 238 and Directive 2014-17 arise largely from the lower socio-economic standing of African Americans in Ohio, which, per the fifth factor, can be seen as resulting from past and current discrimination. The impact of fewer early-voting opportunities on the African American community was adequately summarized by Professor Roscigno as follows:

> 1) African Americans already have greater difficulty securing transportation and allowing enough time to travel to the one early voting site in the county. Current cutbacks will disproportionately exacerbate this difficulty by restricting the times that are available for them to make the trip and by decreasing the probability of carpooling options, since voting hour options have been increasingly restricted in the direction of "normal" working hours.
>
> 2) African Americans already have greater difficulty taking time off of work (usually unpaid) to vote, owing to occupational inequalities. The cutbacks will exacerbate that difficulty by eliminating evening hours and Sundays—times that were previously available if the voter was unable to take time off of work during the day.
>
> 3) African Americans are significantly more likely to be single parents and, owing to lower incomes and higher rates of poverty, experience a disparate burden in arranging for childcare in order to vote. The cutbacks exacerbate this difficulty by reducing flexibility and making it harder for such voters to perhaps find friends or relatives available to look after their children in times that are available and convenient to potential, alternative caregivers, such as evenings and Sundays.
>
> 4) Lastly, and layered on top of these impacts, patterns of work and residential inequality and discrimination have been shown to lead to a sense of powerlessness when it comes to political participation, efficacy and voice. That is, the inequalities about which I am speaking create a diminished sense of political efficacy and sense of possibility for poorer and minority voters.

(Roscigno Report, Doc. 18-2 at 19–20.)

The Court also considers the ninth factor identified by the Supreme Court to be particularly relevant to its determination that Plaintiffs have established a likely § 2 violation. In this regard, the Court noted in Part IV.A.1 *supra*, that the Defendants' offered justifications in support of SB 238 and Directive 2014-17 are relatively weak when subjected to careful

examination. As such, the policies underlying these measures can be described as tenuous at best. Further, both SB 238 and Directive 2014-17 depart markedly from past practices—SB 238 reduces the early-voting period by 20%, whereas Directive 2014-17 prevents individual counties from offering evening voting hours or additional Sunday voting hours during specified elections as they had previously done. These departures are especially significant given that Ohio EIP voting scheme was enacted in response to the issues encountered during the 2004 election.

The Defendants again point to the fact that a reduction in the overall period of voting does not necessarily mean that voter turnout will be reduced by SB 238 and Directive 2014-17. However, by its plain terms, § 2 is not necessarily about voter turnout but about opportunity to participate in the political process compared to other groups. Despite the fact that individual voters may simply choose to vote at other times during the current early-voting period, the socio-economic and other factors identified by the Plaintiffs coupled with the reductions to EIP voting caused by SB 238 and Directive 2014-17 result in fewer voting opportunities for African Americans than other groups of voters, as it will be more difficult for African Americans to vote during the days and hours currently scheduled than for members of other groups. Finally, for the same reasons discussed in Part IV.A.1 *supra*, the Court concludes that voting by mail does not eliminate or nullify the effects of SB 238 and Directive 2014-17 on the voting rights of African Americans.

In conclusion, the Plaintiffs have made the requisite connection required by § 2: African Americans in Ohio are more likely than other groups to utilize EIP voting in general and to rely on evening and Sunday voting hours. As such, given that Directive 2014-17 and SB 238 reduce the overall period for EIP voting, prohibit evening voting hours during the 2014 general election, and limit Sunday voting to a single day, the Court concludes that the Plaintiffs have

demonstrated a strong likelihood of establishing that the combined effects of SB 238 and Directive 2014-17 result in fewer *opportunities* for African Americans to participate in the electoral process. Plaintiffs have accordingly established a strong likelihood of success as to the merits of their § 2 claim.

B. Irreparable Injury

Having determined that the Plaintiffs have demonstrated a strong likelihood of success on the merits of their claims, the Court also finds that they will suffer irreparable injury in the absence of preliminary injunctive relief. *See Obama for Am.*, 697 F.3d at 436 ("A restriction on the fundamental right to vote [ ] constitutes irreparable injury.")

C. Harm to Third Parties

Regarding harm to third parties, there is some evidence in the record suggesting that the Boards have not budgeted resources to conduct a Golden Week during the 2014 general election season. However, as stated in Part IV.A.1 *supra*, nothing in the record suggests that additional costs incurred will be unmanageable for the Boards.

D. The Public Interest

The Court further finds that the public interest weighs in favor of a preliminary injunction. *See Obama for Am.*, 697 F.3d at 437 ("The public interest [ ] favors permitting as many qualified voters to vote as possible.")

E. Balance of Factors

The Court now must balance the appropriate factors to determine if preliminary injunctive relief is appropriate. The Court has found that the Plaintiffs have demonstrated a strong likelihood of success on the merits of their claims. "When 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." *Obama for Am.*, 697 F.3d at 436. The Court has further found that the Plaintiffs will be irreparably harmed absent injunctive relief, that the public interest supports such relief, and that the record does not show that third parties will be substantially harmed by such relief. Accordingly, the Plaintiffs have met their high burden in establishing that they are entitled to a preliminary injunction.

V.

A. Scope of Injunctive Relief

The Court now considers the appropriate scope of the preliminary injunctive relief it will award to the Plaintiffs, who have requested that the Court order Husted "to set uniform and suitable in-person early-voting hours for all eligible voters that includes multiple Sundays and weekday evening hours." (Doc. 17 at 61.) Regarding the purposes of a preliminary injunction, the Sixth Circuit has stated that:

> The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. If often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Stenberg v. Cheker Oil Co., 573 F.2d 921, 925 (6th Cir. 1978) (internal citations omitted). Therefore, the Court orders the preliminary relief described below with the purpose of preventing irreparable injury, in the form of infringement to their fundamental right to vote, to the Plaintiffs. The Court is also mindful of striking a balance between preserving the discretion of state officials to manage Ohio's elections and remedying the likely violations of the Constitution and Voting Rights Act that the Plaintiffs have identified.

B. Conclusion

Accordingly, for the reasons discussed above, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction (Doc. 17). The Court **DECLARES**:

That SB 238's amendments to § 3509.01 of the Ohio Revised Code reducing the EIP voting period from 35 days before an election to the period beginning the day following the close of voter registration are unconstitutional and in violation of § 2 of the Voting Rights Act of 1965, and are accordingly unenforceable; and

That Defendant Secretary Husted's Directives 2014-06 and 2014-17 are likewise unconstitutional and violative of § 2 of the Voting Rights Act of 1965 to the extent that they do not include evening voting hours and additional Sunday voting hours during the EIP voting period for the 2014 general election.

FURTHER, this Court **HEREBY ORDERS:**

That the State of Ohio and the Secretary Husted are enjoined from enforcing and implementing SB 238's amendments to § 3509.01 of the Ohio Revised Code reducing the EIP voting period from 35 days before an election to the period beginning the day following the close of voter registration;

That, for purposes of the 2014 general election, the EIP voting period shall consist of the 35 days prior to the election as was the case subsequent to SB 238's enactment;

That, for the 2014 general election, Defendant Secretary Husted shall require all Ohio county Boards of Election to set uniform and suitable EIP voting hours, in addition to those currently established by Directive 2014-17, for the following days:

- Tuesday, September 30, 2014 through Friday, October 3, 2014;
- Monday, October 6, 2014;

- Evening voting hours[11] between Monday, October 20, 2014 and Friday, October, 24, 2014, and between Monday, October 27, 2014 and Friday, October 31, 2014. Provided, that in setting such hours, Husted must, in good faith, take into consideration the Court's findings and legal conclusions regarding the impact of a lack of evening voting hours on the protected classes of voters discussed in this Memorandum Opinion and Order; and

- Sunday, October 26, 2014; and

That Defendant Secretary Husted is enjoined from preventing individual county Boards of Election from adopting, by a majority vote of their members and in accordance with the procedures established by Ohio election law, EIP voting hours in addition to those specified above and in Directive 2014-17.

Further, all issues regarding and pertaining to future elections are deferred and reserved for consideration on the motion for a permanent injunction. In the interim, the Ohio General assembly is charged with the responsibility of passing legislation consistent with this Memorandum Opinion and Order. *McGhee v. Granville Cnty.*, N.C., 860 F.2d 110, 115 (5th Cir. 1988) (proper to give appropriate legislative body the first opportunity to devise an acceptable remedial plan). Finally, the Court will hold an in-person status conference on Wednesday, December 3, 2014 at 2 p.m.

IT IS SO ORDERED.

/s/ Peter C. Economus
UNITED STATES DISTRICT JUDGE

[11] As stated in Section III.A. *supra*, the Court defines evening voting hours as hours after 5 p m.