

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

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

AMICUS BRIEF OF THE OHIO SENATE DEMOCRATIC CAUCUS AND THE OHIO HOUSE DEMOCRATIC CAUCUS OPPOSING DEFENDANT OHIO ATTORNEY GENERAL MIKE DEWINE’S SUPPLEMENTAL MEMORANDUM CONTRA PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION OR ANY AMICUS BRIEF OF THE OHIO GENERAL ASSEMBLY

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IDENTITY AND INTEREST OF AMICUS

The proposed *Amici*, the Ohio Senate Democratic Caucus and the Ohio House Democratic Caucus, including Senate Minority Leader Joe Schiavoni, Senate Assistant Minority Leader Charleta Tavares, Senate Minority Whip Edna Brown, Senate Assistant Minority Whip Lou Gentile, Senate Minority Finance Chair Tom Sawyer, Senator Capri Cafaro, Senator Eric Kearney, Senator Michael Skindell, Senator Nina Turner, House Minority Leader Tracy Maxwell Heard, House Assistant Minority Leader Debbie Phillips, House Minority Whip Mike Ashford, House Assistant Minority Whip Dan Ramos, House Finance Ranking Member Vernon Sykes, Representative Nickie J. Antonio, Representative Nick Barborak, Representative Heather Bishoff, Representative Kevin Boyce, Representative Barbara Boyd, Representative Armond Budish, Representative John Patrick Carney, Representative Nicholas J. Celebrezze, Representative Jack Cera, Representative Kathleen Clyde, Representative Michael F. Curtin, Representative Denise Driehaus, Representative Teresa Fedor, Representative Mike Foley, Representative Ronald V. Gerberry, Representative Robert F. Hagan, Representative Matt Lundy, Representative Dale Mallory, Representative Sean O'Brien, Representative John Patterson, Representative Connie Pillich, Representative Chris Redfern, Representative Alicia Reece, Representative John M. Rogers, Representative Michael Sheehy, Representative Stephen Slesnick, Representative Michael Stinziano, Representative Fred Strahorn, Representative Sandra Williams, and Representative Roland Winburn respectfully request leave to file the accompanying brief as *amici curiae* in opposition to the arguments of the Ohio General Assembly as accepted by the Court through either Defendant Ohio Attorney General Mike DeWine's Supplemental Memorandum Contra Plaintiffs' Motion for Preliminary Injunction or any amicus brief of the Ohio General Assembly ("AG/GA" when the argument is referenced).

Amici are the elected Senators representing nearly a third of Ohio's thirty-three Senate districts and nearly two-fifths of Ohio's ninety-nine House of Representatives districts. *Amici* themselves and their constituents are citizens of Ohio and therefore have a substantial interest in the constitutionality of Ohio's election system. Ohio Const. § 15.07 (requiring all state officeholders to take an oath to uphold the United States Constitution, the Ohio Constitution and the duties of their office).

As legislators *Amici* have both: an ongoing interest in the constitutional standards applied to state election regulation and administration and have a duty to protect and promote the exercise of the right to vote. National Voter Registration Act, 42 U.S.C. § 1973gg(a).

Amici, in representing all citizens within their districts, have a substantial interest in early voting as they represent registered voters and voters who have voted during the period wherein a voter can register to vote and vote at the same time. Senate *Amici* represent 64.25% of the African American voting age population in the state of Ohio.¹ An Ohio Apportionment Plan for 2012-2022, p. 63 (Ex. 1). Democratic members of the Ohio House of Representatives, of which *Amici* make up a substantial proportion, represent 80.51% of the African American voting age population in Ohio. Ohio Apportionment Plan for 2012-2022, 60-62 (Ex. 1). These populations rely heavily on early voting to ensure access to the ballot.

Upon discovering that The Ohio General Assembly moved to intervene in this case *Amici* agreed to file this brief to expose a contrasting view by members of the Ohio Senate and House of Representatives. Not a single member of the Democratic Caucus in either house of the General Assembly voted in favor of SB 238. The Ohio Senate Journal, November 20, 2013, 1357

¹ This figure was calculated by taking the official percentages from the apportionment plan of African American Voting Age Population per district and determining the raw number for Districts 9, 11, 15, 21, 23, 25, 28, 30, 32, and 33. Those districts comprise the ten districts that *Amici* represent. Those raw numbers were aggregated and divided by the population of the state of Ohio in order to retrieve the percentage of 64.25.

(“Senate Journal 11/20/13”) (Ex. 2) and The Ohio House of Representatives Journal, February 19, 2014, 1705 (“House Journal 2/19/14”) (Ex. 3). *Amici’s* view as members of the Ohio Senate and House is that SB 238 unconstitutionally impacts our constituents and represents a policy of suppressing rather than encouraging voting. Additionally, the reasons supplied by AG/GA are insufficient to justify the disparate impact on the minority populations of our constituents. Granting preliminary injunction in this instance would specifically protect those citizens against suffering irreparable harm of being disenfranchised in voting.

Amici have had a continuing and substantial interest in election law and in setting policy to make voting more accessible. Currently, Senate *Amici* have introduced three bills during this General Assembly that would improve access to the ballot: SB 20, SB 100, and SB 146. Gongwer Status Sheets (Ex. 16). As of this filing, none have received a first hearing. *Id.* House *Amici* have also introduced three bills that would improve ballot access: HB 13, HB 78, and HB 214. *Id.* Only one of the bills has received any hearings before stalling in committee last year. *Id.* *Amici* have also been heavily involved in voting issues and bringing awareness to voting issues and some *Amici* previously filed amicus briefs with the Sixth Circuit Court of Appeals in *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012) and the United States Supreme Court in *Husted v. Obama for America*, 133 S.Ct. 497 (2012).

Amici support Plaintiffs’ arguments and presented facts on the equal protection violation, the Voting Rights Act Section 2 violation and the standard for receipt of a preliminary injunction. *Amici* also support the arguments and presented facts of amicus curiae County of Cuyahoga and from the Statement of Interest of the United States of America. In further support of Plaintiffs’ position, *Amici* present information on the equal protection claim from the unique

perspective of legislative members of the Ohio General Assembly whose perspectives are not represented by and run contrary to the briefing by AG/GA.

The undersigned attorneys authored this Amicus Brief, and no other party or their counsel contributed or will contribute any funds towards its preparation.

ARGUMENT

AG/GA's arguments are based upon a substantial distortion of fact. Any assertion that the process involved with SB 238 was bipartisan and without controversy is false and riddled with error. Additionally, AG/GA's legal analysis fails when applied against the law. The removal of all same-day registration and voting options through SB 238 and the restricted early voting hours under Directive 2014-17 are an unjustified significant burden on voters under *Anderson/Burdick* and cannot survive. The purported reasons put forward by AG/GA are logically untenable, unsupported by evidence, and in general cannot justify the burden on voters. Amici support the Plaintiff's remedy yet also propose an alternative for the Court.

A. AG/GA's selective memory attempts to imply SB 238 was uncontroversial and uncontested, but that assertion is false.

AG/GA's implication that the process involved with SB 238 was bipartisan and without controversy is false. The factual basis of AG/GA's memorandum does not tell the whole story of SB 238 and is riddled with substantial and substantive errors. SB 238 was introduced and passed out of the Senate within eight days – an unusually rapid timeline. It had its first committee hearing on the afternoon of November 19, 2013, followed by its second hearing the very next morning on November 20th, 2013. *See* Minutes of Senate Government Oversight & Reform Committee, November 19, 2013(“Minutes Nov 19”) (Ex. 4) and Minutes of Senate Government Oversight & Reform Committee, November 20, 2013(“Minutes Nov 20”) (Ex. 5). On that day, November 20th, it was reported out of committee on a party line vote and was placed on the floor

of the Senate where it was voted out of the Senate on a party line vote: 23-10. *See* Senate Journal 11/20/13 (Ex. 2). Senate *Amici* all voted against SB 238.

Over the two hearings within the less than twenty-four hours where the Senate Government Oversight & Reform Committee heard testimony on SB 238, thirteen people provided testimony. *See* Minutes Nov 19 (Ex. 4) and Minutes Nov 20 (Ex. 5). Of the twelve people who offered either written or spoken testimony in those hearings, only one, Sponsor Senator LaRose testified as a Proponent. *Id.* Three witnesses testified as an Interested Party, including Carrie Davis from the Ohio League of Women Voters (now a plaintiff in this case), but the remaining eight witnesses - an overwhelming majority - testified in opposition to the bill. *Id.*

AG/GA asserts no amendments were offered by *Amici* during the committee and floor process. That is true. However, AG/GA's implication that there was no opposition based upon that fact is false. The suggestion in AG/GA's statement of facts is that Democrats neither fought SB 238 nor tried to improve it. However, the court should not consider SB 238 in a vacuum.

At the time of consideration before the Senate, there were multiple other election law bills being debated and voted upon. *Amici* offered significant amendments to other bills: SB 200, 205 and 216. Declaration of Joe Schiavoni, ¶ 7 ("Schiavoni Declaration") (Ex. 6). SB 216, for example, received four hearings and ample testimony and was voted on the floor of the Senate the same day as SB 238. *See* Minutes Nov 20 (Ex. 5) and Senate Journal 11/20/13 (Ex. 2). Just in committee, members of the Senate Democratic Caucus offered eight amendments which were all tabled. Minutes Nov 20 (Ex. 5).

However, in a caucus meeting around when SB 238 was introduced, Senate *Amici* discussed possible amendment strategy in relation to the bill. Schiavoni Decl., ¶ 6 (Ex. 6). *Amici* agreed that the bill as a whole was so unitary and toxic to the franchise of voting that it was

unsalvageable. *Id.* It was obvious that the only purpose of the bill was to reduce opportunities to vote by eliminating “Golden Week” and not part of an attempt to make the system better. (*Id.* and SB 238 (Ex. 7). The result of that discussion was an agreement to either offer an amendment to completely strip SB 238 of its operative features or to offer no amendments and vote against the bill. Schiavoni Decl., ¶ 6 (Ex. 6). During the floor debate though amendments were not offered Sen. Gentile moved to re-refer the bill to committee for further work, but ultimately the bill passed with *Amici* voting unanimously against SB 238, 23-10. Senate Journal 11/20/13, 1356-1357 (Ex. 2).

In the Ohio House of Representatives, the process of passing SB 238 was not much different than in the Senate, but the refusal of the majority to listen to the chorus of opposing voices stretched over a longer period of time. There were five committee hearings between Dec. 3, 2013 and Feb. 11, 2014. Clyde Decl., ¶ 6 (Ex. 15). Repeated claims were made by the Chairman of the House Policy and Legislative Oversight committee that he would be open to working in a bipartisan manner on amendments. Clyde Decl., ¶ 7 (Ex. 15). Democratic Ranking Member of the committee, Ronald V. Gerberry, met personally with the Chairman to discuss the bill. *Id.* However, Chairman Dovilla made no accommodations to address the concerns repeatedly raised by Democrats, thirteen Opponent witnesses, and two Interested Party witnesses that SB 238 solved no problem and would largely impact those voters who already found it difficult to access their right to vote. *Id.* SB 238 is a simple bill. It did one thing: slashed six or seven days of early voting. There was no amendment that would improve early voting in this one-trick bill. Still, Representative Kathleen Clyde did offer one amendment to expand online voter registration to all voters. Clyde Declaration ¶ 9 (Ex. 15). That amendment was tabled on a party line vote. *Id.*

As in the Senate, SB 238 was not moving through the House in a vacuum. Other bills changing election standards bills were moving simultaneously. One of those bills, SB 205, had much room for improvement and the Chairman set the amendment submission deadline and vote for the same days respectively as for SB 238. Clyde Decl., ¶ 8 (Ex. 15). Again, the chairman said he would work with the minority party, but when it came time to consider and accept amendments to SB 205, all nine offered by the Democrats were either tabled after only cursory consideration or ruled out of order for not being submitted one full week ahead of the committee vote. *Id.* Further emphasizing the lack of cooperation, majority party committee members held a press conference ridiculing the minority members for submitting their amendments to SB 238 and SB 205 on time two minutes before the deadline – the deadline that was one week before the committee vote. *Id.*

On the Ohio House floor, the process of passing SB 238 was even worse than in committee. Many Democratic members were left standing waiting to speak on the bill when the Speaker Pro Tempore moved the previous question and the Speaker called for a vote on the bill over the loud objections of Democratic members of the House. Clyde Decl., ¶ 11 (Ex. 15). Two amendments designed to mitigate the impact of the early voting cuts of SB 238 had been submitted to the House Clerk and circulated to all of the House members, so all members were aware when they voted on the bill that they were ignoring the amendments. Clyde Decl., ¶ 12 (Ex. 15). One of the amendments would have required the Secretary of State to study the impact of early voting cuts on racial minorities. The other would have permitted multiple early voting locations in counties with such a need for them. *Id.* On February 21, 2014, Democratic Senate and House members submitted for printing in the House Journal protest letters along with copies of the amendments they had planned to offer on the floor. *See* Clyde Decl., ¶ 14 (Ex. 15), Senate

Journal 2/19/14, 1576-77 (Ex. 14) and House Journal 2/24/14, 1712-1716 (Ex. 18). Democratic House and Senate members also sent a letter to Governor John Kasich alerting him to the fact that the impact of SB 238's early voting cuts would fall disproportionately on minority voters. Clyde Declaration ¶ 13 (Ex. 15). The Governor signed the bill later that day. *Id.*

AG/GA argue that some current Democratic House members previously supported cuts to Golden Week in HB 260 and in SB 8 during the 128th General Assembly, either as members of the House or in another capacity. AG/GA fail to provide necessary context with their misleading assertions. Publicly available documents show those two bills contained much more than just one provision cutting Golden Week. With respect to HB 260, Democratic members of the House included reduced early voting as part of a much larger elections reform bill with many positive changes for voters. Clyde Decl., ¶ 15 (Ex. 15). *See* also Sponsor Testimony for HB 260 of Representatives Heard and Stewart Included by Defendant Attorney General as Tab 4 of Exhibit 4, Doc. 54). This happened only after extensive negotiations during which Republican legislators obsessed over slashing Golden Week. Clyde Decl., ¶ 15 (Ex. 15).

B. Under the *Anderson/Burdick* balancing test, the burden on the affected group of voters must be evaluated to determine its severity and in this case the burden is significant.

Removal of all same-day registration and voting options through SB 238 and the restricted early voting hours under Directive 2014-17 are a significant burden on voters.

The balancing test established in *Anderson* requires a court to consider the nature and size of the injury, identify and evaluate the state interests in the regulation, and determine “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983). Applying this standard in *Burdick*, this Court found “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to

which a challenged regulation burdens . . . rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). It is not sufficient that a regulation does not prohibit the right to vote, it remains unconstitutional if it is shown that “burdened voters have few alternate means of access to the ballot.” *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (citing *Burdick*, 504 U.S. at 436-437).

The Sixth Circuit noted both allocation and exercise of the franchise must be protected and that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (“*OFA I*”) (internal citations omitted, quoting *Bush v. Gore*, 531 U.S. 98, 104-05). The facially neutral drafting of SB 238 and Directive 2014-17 do not exempt them from the *Anderson/Burdick* analysis. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) (“[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.”) (Internal citations omitted).

The partisan nature of the change further supports a substantive review and balance of Ohio’s recent election law revisions. “[P]articularly where voting restrictions have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition.” *OFA II*, 697 F.3d at 436, citing *Clingman v. Beaver*, 544 U.S. 581, 603 (2005). As discussed *infra* the enactment process for SB 238 was lacking in bipartisan cooperation or full development of a legislative record.

Further, the General Assembly was made aware by testimony during the rushed debate on SB 238 that the change would burden low-income and minority voters. This undercuts any assertion that the law is a simple non-discriminatory regulation. Mike Brickner, testifying on

behalf of the ACLU of Ohio noted that the elimination of voting and registration “needlessly complicates the voting process” for individuals who it could most benefit including those with disabilities, those with inflexible work schedules, and new voters. Brickner Testimony, 1 (Ex. 8). Andre Washington, of the A. Phillip Randolph Institute noted in Senate testimony: “There are also so many people in our state who greatly benefit from using Golden Week to Register and Vote during the five days that SB 238 would eliminate.” Mr. Washington also noted that the reduction of early voting hours without justification is considered by his members to be voter suppression. Washington Testimony (Ex. 9). Estelle Rogers of Project Vote noted in written testimony, “SB 238 will affect the same constituencies that are already underrepresented in the electorate, low income and minority citizens.” Rogers Testimony, 1 (Ex. 10). Brian Davis, of the Northeast Ohio Coalition for the Homeless in his testimony reflected upon the long troubled history of voting rights for the homeless in Ohio and stated: “The 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. . . . From previous election experiences, we see these new voting laws will result in long lines in minority and low income neighborhoods.” B. Davis, 1-2 (Ex. 11). Pastor Dale Snyder testified that 72% of his community lives in poverty and that Golden Week “makes voting accessible to our senior citizens, single parents, college students, the poor and working poor who may not have the privilege of early voting during business hours.” Snyder Testimony, 2 (Ex. 13).

AG/GA tries to argue through evidence that there are few repeat users of same-day registration minimizing the need for this option at the beginning of early voting. This assertion is belied by the continued embrace of this option by Ohio voters who may from year to year be different in name, but are the same in need for voting options. The burden of these regulations

falls upon an unknown but identifiable group of voters. *See Ne. Ohio Coal. for Homeless*, 696 F.3d at 587, (using equal protection analysis on a “discrete class of voters” falling within the disputed regulation). In *Crawford v. Marion County Election Bd.*, Justice Stevens states that the Petitioners asked the Court “to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State’s broad interests in protecting election integrity.” 553 U.S. 181, 200.

For these reasons and those asserted by Plaintiffs and Amicus Cuyahoga County the burden on voters due to the enactment of SB 238 and Directive 2014-17 is significant and, for such a burden to be permitted under the *Anderson/Burdick* balancing test such a it must be justified as necessary to achieve a precise state interest.

C. SB 238 and Directive 2014-06 cannot stand because no logically or factually defensible “particularized” reason exists that can justify the burden.

The reasons put forward by AG/GA are logically untenable, unsupported by evidence, and in general cannot justify the burden on voters. Given the significant burden on the right to vote the state must identify “precise” interests and show that the regulation is “necessary” to achieve said interest. *Burdick*, 504 U.S. at 434. The facially neutral drafting of SB 238 and Directive 2014-06 do not exempt them from the *Anderson/Burdick* analysis. *See Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) (“[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.”) (Internal citations omitted). “It is a violation of equal protection requirements when voting restrictions burden the right to vote without justification.” *League of Women Voters v. Brunner*, 548 F.3d 463, 478 (2008).

The General Assembly provides three reasons for the elimination of the week of same-day registration option: 1) an attempt to fight fraud or the impression thereof 2) a generalized

assertion of an administrative burden created by additional early voting and 3) a desire to limit campaign expenditures through decreasing the window for casting a ballot. In addition, the Secretary asserts a state interest in uniformity. These reasons are untenable and cannot justify the serious burden on the right to vote embodied in the recent changes.

1. There is no evidence in the record or in the General Assembly's brief that the changes will reduce fraud—in large part because there is no fraud to be reduced.

In its brief, the General Assembly puts forth as its main justification for SB 238's burden on voters' rights the already-discredited and still-false idea that election officials do not have time to verify the registration of a Golden Week voter before counting the voter's ballot. The General Assembly argues that same day registration and a lack of time for verification creates fraud or the appearance of fraud.² In fact, SB 238 does not change or increase the time allowed for verification of voter registrations. SB 238 does not change the practice of setting aside absentee ballots, including those cast early in person, and waiting to count them until the voter's registration is verified. There is no difference between a voter who registers on the final day of voter registration and later votes by mail and a voter who registers on the final day of registration and votes early in person on the same day. Both voters' registrations undergo the same registration verification process. *See* Clyde Declaration ¶ 16 (Ex. 15) and Directive 2012-36 (Ex. 19). The voter who votes by mail sends in her ballot and election officials set the ballot aside, verify the voter is registered, and then count it on Election Day. *Id.* The voter who votes during Golden Week has her ballot set aside until the voter registration verification process is performed, and the voter's ballot is counted on Election Day. *Id.* In both scenarios, the ballots are

² It is odd that the General Assembly does not assert an interest in battling actual and perceived voter suppression which also serve to undermine citizen confidence in the electoral process. Such an argument was presented in testimony: "Finally, [early voting] has improved voters' impression of good customer service. When voters are able to cast their ballot at a variety of times, either early or on Election Day, without long waits, that improves voter perceptions of the system working." C. Davis Testimony (Ex. 12).

not commingled with other ballots until the registrations are verified and the ballots are not tabulated until Election Day. *Id.*

Representative Kathleen Clyde, former director of the Franklin County Early Vote Center during the 2008 general election, questioned SB 238 bill sponsor, Senator Frank LaRose during committee. Clyde Declaration ¶ 16 (Ex. 15). Senator LaRose described “live ballots” being cast during Golden Week being commingled and unable to be retrieved and excluded if the voter’s registration turned out to be invalid. *Id.* Rep. Clyde pointed out to him that ballots cast during Golden Week, just like all absentee ballots, are not counted until Election Day after the registration of the voter is verified. *Id.* When confronted with this factual information about how ballots are actually processed, the bill sponsor, Sen. LaRose simply said that was not his understanding. *Id.* But the testimony of Franklin County Board of Elections Deputy Director Dana Walch supports the method of processing registrations and ballots that Rep. Clyde described. Walch Testimony (Ex. 20). *See* also Exhibit 6 Defendant Attorney General’s Supplemental Memorandum in Opposition, at ¶ 15 (Walch describes the registration verification process and though he notes the same-day registration option he does not indicate the process is different). Testimony by Ken Terry, Director of the Allen County Board of Elections and Cochairman of the Legislative Committee of the Ohio Association of Election Officials also supports Rep. Clyde’s description of how registrations and ballots are processed. Terry Testimony (Ex. 21). There is no support for Senator Frank LaRose’s assertion that early in person ballots are irretrievably commingled with other ballots as soon as they are cast. In fact, there is overwhelming proof that such ballots are held until the registration is verified and then counted on election day.

In addition to the on-the-ground reports by election officials of how registrations and ballots are processed, this process of verifying the voter's registration before counting the ballot is also required by state law. O.R.C. 3509.06 and 3509.07 require that absentee ballots only be counted after the voter's signature is confirmed to match the voter's registration signature, indicating that a valid registration for the voter is a necessary precondition to counting the voter's ballot.

The only testimony that contradicts the explanations by former election official Representative Clyde and current election officials Dana Walch and Ken Terry is that of Interested Party witness Aaron Ockerman, Executive Director of the Ohio Association of Election Officials ("OAE0").³ Clyde Declaration ¶ 17 (Ex. 15). Mr. Ockerman's statement that he was aware of invalid ballots being counted because of Golden Week is false. Mr. Ockerman admitted that it was false to an OAE0 member from the Cuyahoga County Board of Elections before delivering the testimony. *Id.* He admitted that he had only heard from one election official, Matt Damschroder, current Director of Elections in Secretary of State Husted's office, about one voter whose vote the Board of Elections had chosen to count in 2008 even though the registration verification process had not been completed. *Id.* Despite assuring the OAE0 member that he would correct the testimony, Mr. Ockerman submitted the testimony to the Ohio Senate committee with the false statement in. *Id.* Mr. Ockerman did not submit the same false testimony to the House of Representatives, and the members of the OAE0 who testified as Interested Parties for the organization did not present the same false story to the House committee.

³ AG/GA state that Mr. Ockerman testified in support of SB 238. In fact, Mr. Ockerman was merely an Interested Party witness and was not authorized by the OAE0 to be a Proponent witness. *See* Ockerman Testimony. Included by Defendant Attorney General as Tab 1 of Exhibit 4, Doc. 54

Testimony received by the legislature and cited by AG/GA does not point to any example of a same-day registrant and voter being investigated or prosecuted for fraud.

“Those who support S.B. 238 may point to concerns over possible voting irregularities, but there is almost no evidence to justify those fears. Ohio’s election officials have a robust system of checks and balances to ensure that those who simultaneously register and vote are properly vetted, just as any other voter would be.” Brickner Testimony, 2 (Ex. 8).

2. The changes will not reduce the administrative burden of elections but, rather, will shift the burden to other areas of election administration while increasing the burden on voters.

Given the needs of voters, the reduction in options will not only burden voters, but will shift administrative burdens to other aspects of election administration less designed to address voters’ needs. In addition to arguments brought forth by Plaintiffs, Amicus Cuyahoga County emphasizes the particular benefit of the 35-day voting period and the reduction in other election problems for its highly mobile population.

The General Assembly’s own evidence further supports this provision. Voters who are unable to register, update a registration, and vote during the first week of early voting are more likely to cast a provisional ballot either during early voting or on election day. *See* Affidavit of Matt Damschroder, ¶ 20. Included by Defendant Attorney General as Exhibit 5, Doc. 54 In addition to the risk of such a voter’s ballot being rejected for any number of hyper-technical reasons, provisional ballots are more time consuming and costly for election officials to process at every step.

Boards of Elections already must be open and staffed during the same-day registration week eliminated by SB 238—meaning minimal if any savings would actually be realized by boards. *See* Rogers Testimony, 2 (Ex. 10). Changes to adapt to the early voting structure over the last years will cause a further administrative burden related to the reduction of key early voting

opportunities. “Many BOEs have been able to consolidate polling places and precincts due to increased early voting turnout. This saves counties money that would be spent on more polling locations and poll workers.” C. Davis Testimony, 2 (Ex. 12).

Further, the reduced window for early voting does not change the deadline by which ballots must be ready for use. Military and overseas voters under both federal and state law are to be mailed ballots 45 days ahead of an election. *See* O.R.C. 3511.04. This accommodation is critical to the unique needs of military and overseas voters, but also shows Boards do in fact have ballots available a full 10 days prior to the beginning of the early vote period as it existed before SB 238 slashed it by a week.

3. Attempts to limit money in campaigns by reducing voting time is specious and of limited interest to the state.

Given the overall timeline of campaigns, it is unlikely any noticeable reduction of campaign spending will occur as a result of the 7 day reduction in early voting. First, as noted above ballots are mailed out starting 45 days before the election. Second, campaigns often engage in registration drives, and a variety of other early outreach to voters. Third, such a goal cannot rationally be linked to the elimination of Sunday and evening voting within the 28 days prior to the election ordered by Directive 2014-17 given that campaigns will be geared toward the early voting period regardless of the specific hours. There is no support for AG/GA’s assertion that a 6 or 7 day reduction in early voting, of minimal impact to campaigns, but great impact to voters will have any role in meeting this government interest.

4. The Secretary of State’s purported interest in uniformity fails to justify the burdensome regulation.

Even accepting at face value the Secretary’s purported interest in uniformity, that interest is not sufficiently served by this restriction to justify the burden. Uniform scheduling is entirely

achievable in an early voting system that includes both a same-day registration period and evening and multiple-Sunday voting. Such a system was in place in Ohio in 2012 and the election was generally successful (though room for improvement always remains). Further, entirely focusing on a uniform schedule hurts another state interest prioritized by *Amici*: equal opportunity for voters. Plaintiffs emphasize this point when referencing the particular populations and transportation needs that differ among Ohio's 88 counties. Cuyahoga County further emphasizes this issue when advocating for the court to establish a minimum rather than prescribed set of hours.

D. *Amici* support the proposed remedy offered by Plaintiffs and further offer a balanced alternative.

Amici seek equal opportunity for voters to exercise their fundamental right to vote and would support the remedy proposed by Plaintiffs—restoration of the first week of early voting and a requirement that evenings and Sundays be ordered. *Amici* would cautiously endorse the remedy proposed by Cuyahoga County to increase county flexibility, but would ask the court to protect against the problems of 2012 where, prior to a uniform schedule order, ties were repeatedly broken in favor of fewer hours.

In addition, *Amici* propose a compromise position to the court. The court should order on its own or order the Secretary of State to set minimum default days and hours and also grant counties flexibility. Such a system would require hours similar to those sought by Plaintiffs unless bipartisan agreement existed that an alternative plan would best serve the voters in the county. A uniform schedule has not been found to be constitutionally or statutorily required.

A dual system has been proposed and endorsed by all Senate *Amici* in SB 20 (Turner) which has been pending without hearing since the beginning of this General Assembly.

SB 20 proposes the following structure for early in-person voting hours:

- The overall time frame for EIP voting shall be 35 days out from the election up to 2:00 p.m. on the Monday before the election.
- Default hours shall be as follows: For the first three weeks of EIP voting, 8 a.m. to 5 p.m. Monday through Friday except that on the last day of registration the hours shall be extended to 9 p.m. Beginning the third Monday before the election, the hours shall be 8 a.m. to 7 p.m. Monday-Friday and Saturday 8 a.m. to 5 p.m. and Sunday 12 p.m. to 8 p.m. Beginning the second Monday before the election, the Hours shall be Monday-Friday 8 a.m. to 9 p.m., Saturday 8 a.m. to 8 p.m., Sunday 12 p.m. to 8 p.m. On the final Monday before the election the hours shall be 8 a.m. to 2 p.m.
- A Board of Elections may alter these hours based on their individual facts and the needs of their electors by a vote of not less than 3 of their members, but in any case: all boards shall be open until 9 p.m. on the final day of registration, there shall be at minimum 30 hours per week on weekdays of EIP voting (with at least 10 of those hours occurring after 5 p.m.) throughout the 35 day period, a minimum of 8 Saturday and 4 Sunday hours shall be offered within the two weeks before the election, and all boards shall be open for voting from 8 a.m. until 2 p.m. on the Monday before the election.

SB 20, 212-213 (Ex. 17).

This or a similar structure would balance the differing needs of counties, provide for evening and weekend voting, and balance the complementary state interests of uniformity and equal access.

CONCLUSION

AG/GA arguments are divorced from the reality from whence they originated. The legislative process was rife with controversy and their reasons for enacting these new restrictions are indefensible. There is no evidence in the record that the changes will reduce fraud because there is no logically derivative fraud to be reduced. The attempted changes will shift the administrative burden to other areas of election administration while increasing the burden on voters, not eliminate it. Also, as a matter of law, attempts to limit money in campaigns by reducing voting time is specious and of limited interest to the state. Finally, the Secretary of State's purported interest in uniformity fails to justify the burdensome regulation.

For the foregoing reasons, the Court should grant the relief requested in Plaintiff's Motion for Preliminary Injunction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record via the Court's electronic filing system on August 1, 2014.

/s/ Constance M. Pillich

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