

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

OHIO STATE CONFERENCE OF THE	:	
NATIONAL ASSOCIATION FOR THE	:	
ADVANCEMENT OF COLORED PEOPLE, et al.,	:	Case No. 2:14-cv-00404
	:	
Plaintiffs,	:	
	:	Judge Peter C. Economus
v.	:	
	:	Magistrate Judge Norah McCann
JON HUSTED, et al.,	:	King
	:	
Defendants.	:	<u>RULE 26(A)(2)(B) EXPERT</u>
	:	<u>REBUTTAL DECLARATION OF</u>
	:	<u>BARRY C. BURDEN, PhD</u>
	:	

Background and Experience

1. My name is Barry C. Burden. I am a Professor of Political Science at the University of Wisconsin-Madison. I earned my bachelors degree in political science at Wittenberg University and earned my Ph.D. at The Ohio State University in 1998. From 1999 to 2006 I was a faculty member in the Department of Government at Harvard University. I have been a full professor at the University of Wisconsin-Madison since 2006. A copy of my curriculum vitae is attached. I am being compensated \$250 per hour for my effort.
2. My expertise lies generally in American politics with a focus on elections and voting, public opinion, representation, partisanship, and research methodology. I teach courses on these topics at both the undergraduate and graduate levels. I am author of the book *Personal Roots of Representation* (Princeton University Press), co-author of *Why Americans Split Their Tickets* (University of Michigan Press), and co-editor of *The Measure of American Elections* (Cambridge University Press). I have also published articles in respected peer-reviewed scholarly journals including the *American Political Science Review*, *American Journal of Political Science*, *Electoral Studies*, *Public Opinion Quarterly*, *Legislative Studies Quarterly*, *Public Administration Review*, *Election Law Journal*, and *Political Analysis*. I serve on the editorial boards of *Electoral Studies* and *Election Law Journal*. I am a member of the American Political Science Association and been active in the profession, giving presentations at many conferences, universities, and community group meetings. My research has been supported by grants won from sources including the Pew Charitable Trusts, National Science Foundation, and Dirksen Congressional Center.

3. I have a particular expertise in elections and election administration. I am co-founder of the Election Administration Project at the University of Wisconsin-Madison. This collaboration has produced research on election administration around the country. I have testified before election officials in Wisconsin and the bipartisan Presidential Commission on Election Administration. I co-conducted the first independent evaluation of the Electronic Registration Information Center (ERIC), an initiative launched by seven states to modernize voter registration systems. I serve or have served as an expert witness in federal election law cases in North Carolina, Texas, and Wisconsin.

Purpose of This Report

4. I was asked by plaintiffs in this case to respond to expert reports by professor Thomas Brunell,¹ professor Nolan McCarty,² and Sean Trende.³ Each of these reports refers to a journal article in which three coauthors and I examined how various state election laws influenced voter turnout in the 2004 and 2008 presidential elections.⁴ Our most striking finding – which is highlighted in each of the three expert reports – is that the availability of early voting in a state decreases overall turnout. This would seem to make the article highly informative in this case because the plaintiffs seek to prevent the elimination of same day registration and restrictions on early voting in Ohio. However, I believe that inferring these effects from the analysis in our article is a mistake.

Applicability of the Article to This Case

5. There are four crucial aspects about our analysis that Brunell, McCarty, and Trende fail to represent adequately in their reports. Awareness of these facts makes clear that our study is not especially relevant to this case.
6. First, our study does not address the specific and unique circumstances of Ohio. In our study, we define “early voting” as any option allowing a person to vote without an excuse before election day.⁵ This simple indicator encompasses a wide variety of absentee voting and in-person early voting practices. Given the limited focus of a page-limited journal article, we did not examine some potentially meaningful differences in these laws across the states such as where early voting locations were located and what evening and weekend hours were offered. It would thus 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. This is

¹ “Declaration of Thomas Brunell, Ph.D.” Exhibit F. July 18, 2014.

² “Response to Expert Report of Daniel A. Smith.” Exhibit G. July 23, 2014.

³ “Declaration of Sean P. Trende.” Exhibit A. July 22, 2014.

⁴ Barry C. Burden, David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan (2014), “Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform,” *American Journal of Political Science* 58:95-109. McCarty cites the article as “forthcoming” although it appeared in January 2014.

⁵ We treat Oregon and Washington separately because those states relied exclusively or almost exclusively on vote-by-mail.

because the precise form that early voting takes and how it interacts with other laws and demographics of the state are quite variable.⁶

7. Second, our conclusions about early voting pertain only to situations where it is implemented by itself. That is, the negative effect of early voting that we observed holds only in states *with* early voting but *without* same day registration (SDR). When a state offers both early voting and SDR, there is not a negative effect on turnout. Indeed, we find that while each additional day of early voting has a small negative effect on turnout, *each additional day of SDR* has a positive effect on turnout.⁷ In our analysis Ohio was coded as a state having both early voting and SDR, because, from 2006 through 2012, Ohio maintained a one-week period of early voting and SDR. That period has now been eliminated.
8. Third, our study did not analyze African Americans' response to early voting. Because it was an analysis of the entire country, our study did not examine how election laws affected racial groups differentially. As a nationwide study, the analysis necessarily reflects behavior of the overall electorate. That electorate is predominately white. In the two presidential election years we examined, whites comprised the vast majority of the nation's voting eligible population.⁸ It would be possible for early voting to have different effects across demographic groups. Our estimates represent the effects for a typical person or county, both of which are anchored by whites. Given what we know from political science research, 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. Other reports presented in this case have already shown that black voters are more likely to use early voting in Ohio. In fact, recent research on restrictions on early voting in Florida finds that it deterred participation of black voters.⁹ This leads to my final point.

⁶ As a parallel example, consider our findings about the effects of election day registration (EDR). We find in general that offering EDR increases voter turnout, a result that has been demonstrated by several other studies. However, a more nuanced, book-length analysis of EDR practices across the states shows that the effects are bigger for first wave of states that adopted but less effective for states that adopted them later, in part because of the ways in which the later laws were implemented. See Michael J. Hanmer (2009), *Discount Voting: Voter Registration Reforms and Their Effects*, New York, NY: Cambridge University Press.

⁷ See Table 4 of Burden et al. (2014).

⁸ The exact percentages depend on which election is examined and how "white" is defined. For example, the Census Bureau's report on the 2008 election estimates that all whites comprised 82% of the Citizen Voting Age Population (CVAP) while the smaller group of non-Hispanic whites comprised 73% of the CVAP. These estimates are calculated from Table 2 in Thom File and Sarah Crissey, "Voting and Registration in the Election of November 2008," Current Population Reports P20-562RV, U.S. Census Bureau, Washington, DC.

⁹ Adam Glynn and Konstantin Kashin (2014), "Front-Door Difference-in-Difference Estimators," paper presented at the annual meeting of the Midwest Political Science Association, Chicago, IL. Paul Gronke and Charles Stewart III (2013), "Early Voting in Florida," paper presented at the annual meeting of the Midwest Political Science Association, Chicago, IL. Michael C. Herron and Daniel A. Smith (forthcoming), "Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election," *Political Research Quarterly*.

9. Fourth, it is inappropriate to draw inferences from our study to situations where voting opportunities are removed. In our study, we examined how the *introduction* of a “convenience voting” option such as early voting or SDR affects turnout.¹⁰ In contrast, this litigation is about the *removal* of such options. Based on scholarly research that conceives of voting as a “habit,” I expect the removal of options being used by voters to have different effects than when they are introduced. Once a person becomes a voter, he or she tends to remain a regular voter, at least in major elections and as long as the process remains the same.¹¹ This is because the voting process displays “context stability” when it remains unchanged from one election to the next.¹² A successful voter has already figured out where, how, and when to register and where, how, and when to cast a ballot. If one of these parameters is altered, it disrupts the habit. Unsurprisingly, research has shown that voter participation is deterred when people move,¹³ when polling places are relocated¹⁴, when they are forced to vote by mail than in person¹⁵, when new registration requirements are imposed,¹⁶ and when they are drawn into new legislative districts.¹⁷ This case is not about whether Ohio should offer new convenience options for voters but whether it should be permitted to eliminate *existing* options that have been actively used by voters. As Trende quotes from our article, early voting is especially good at “retaining” existing voters (paragraph 161). Constricting early voting days and hours is thus likely to deter or dissuade existing voters from participating. McCarty’s conclusion that “their model predicts that the typical early voter is likely to switch to voting on election day if early voting were eliminated” (p. 12) is unwarranted. Our article does not examine how African American voters who already vote early and/or use SDR would change their behavior if those options were restricted.

¹⁰ As McCarty explains, we “find that states that *adopted* EIP voting between 2004 and 2008 witness a statistically significant drop in turnout” (p. 11, emphasis added).

¹¹ Alan S. Gerber, Donald P. Green, and Ron Shachar (2003), “Voting May Be Habit-Forming: Evidence from a Randomized Field Experiment,” *American Journal of Political Science* 47:540-50. Eric Plutzer (2002), “Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood,” *American Political Science Review* 96:41-56.

¹² John H. Aldrich, Jacob M. Montgomery, and Wendy Wood (2011), “Turnout as a Habit,” *Political Behavior* 33:535-63.

¹³ Peverill Squire, Raymond E. Wolfinger, and David P. Glass (1987), “Residential Mobility and Voter Turnout,” *American Political Science Review* 81:45-65. Richard J. Timpone (1998), “Structure, Behavior, and Voter Turnout in the United States,” *American Political Science Review* 92:145-58.

¹⁴ Henry E. Brady and John E. McNulty (2011), “Turnout Out to Vote: The Costs of Finding and Getting to the Polling Place,” *American Political Science Review* 105:1-20. John E. McNulty, Conor M. Dowling, and Margaret H. Ariotti (2009), “Driving Saints to Sin: How Increasing the Difficulty of Voting Dissuades Even the Most Motivated Voters,” *Political Analysis* 17:435-55. Moshe Haspel and H. Gibbs Knotts (2005), “Location, Location, Location: Precinct Placement and the Costs of Voting,” *Journal of Politics* 67:560-73.

¹⁵ Elizabeth Bergman and Philip A. Yates (2011), “Changing Election Methods: How Does Mandated Vote-By-Mail Affect Individual Registrants?,” *Election Law Journal* 10:115-27.

¹⁶ Barry C. Burden and Jacob R. Neihsel (2013), “Election Administration and the Pure Effect of Voter Registration on Turnout,” *Political Research Quarterly* 66:77-90.

¹⁷ Danny Hayes and Seth C. McKee (2009), “The Participatory Effects of Redistricting,” *American Journal of Political Science* 53:1006-23.

10. In summary, it is my considered opinion that references to our article do not inform the decision that must be made in this case in the ways that Brunell, McCarty, and Trendle assert. Our article merely concludes that the adoption of early voting generally has a small negative net effect on voter turnout, suggesting that it is not the panacea for low voter participation that many believe. However, this conclusion (1) does not address the specific and unique provisions in Ohio, (2) no longer holds when a state also offers same day registration, (3) is mostly a description of the white electorate's response to early voting, and (4) does not necessarily apply to the removal of early voting options, which are expected to operate differently.

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct to the best of my knowledge.

DATED this 29th Day of July, 2014

A handwritten signature in black ink that reads "Barry Burden". The signature is written in a cursive, flowing style.

Barry C. Burden, Ph.D.