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

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*,	:	
Plaintiffs,	:	Case No. 2:06-CV-00896
v.	:	JUDGE ALGENON L. MARBLEY
JON HUSTED, in his official capacity as Secretary of the State of Ohio, *et al.*,	:	
Defendants.	:	

DEFENDANTS' POST-TRIAL BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CASES (CONTINUED) **PAGE(S)**

CASES (CONTINUED) **PAGE(S)**

STATUTES **PAGE(S)**

STATUTES (CONTINUED) **PAGE(S)**

STATUTES (CONTINUED) **PAGE(S)**

OTHER AUTHORITIES **PAGE(S)**

INTRODUCTION

During the course of three weeks of trial, this Court heard from 33 witnesses, including current and former state legislators, boards of elections officials, non-profit leaders, experts, and a high-ranking state elections official. Despite varied backgrounds, positions, and political affiliations, all of these witnesses share a sincere and passionate commitment to ensuring that voters in Ohio can cast a ballot and have that ballot counted. But their testimony also proved that reasonable minds can and do disagree about the best way to achieve that goal.

At bottom, it is precisely this type of reasonable disagreement about election law policy that drives this litigation. Plaintiffs disagree with some of the legislative choices the General Assembly made in passing S.B. 205 and S.B. 216. But to invalidate two duly enacted laws Plaintiffs must do far more than demonstrate that they or some of their witnesses would prefer different laws. They must satisfy the heavy burden of proving that the laws are unconstitutional or violate federal law. After issuing 73 subpoenas to 35 county boards of elections, collecting over 25,000 ballots, and presenting more than 4,000 exhibits, Plaintiffs fail to satisfy this burden.

To the contrary, as detailed in the proposed findings of fact and conclusions of law set forth below, the challenged laws represent reasonable, nondiscriminatory rules that made only minor changes to Ohio's absentee and provisional voting procedures and impose little burden on voters. Indeed, if anything, recent election data reflect that Ohio's ballot acceptance rates *improved* following implementation of the challenged laws in 2014. And these laws serve many legitimate interests, including registering unregistered voters, updating voter registration information, and, ultimately, making *more* votes count.

To be sure, after conducting a ballot-by-ballot audit of roughly 30 counties (accounting for more than 60 percent of the total votes from 2014 and 2015, *see* App'x F), Plaintiffs were able to demonstrate that some ballots were unfortunately rejected as a result of the addition of

two new required fields of information. The same can be said of any election regulation. But while the impact of those individual votes cannot and should not be diminished, courts have made clear that the States can constitutionally regulate elections. The validity of an elections regulation must be judged based on its *overall* impact on the election system. And on that question, the evidence Plaintiffs did *not* show tells the more accurate story. Plaintiffs did not show the hundreds of thousands of ballots *accepted* with the challenged laws in place. They did not highlight the hundreds of thousands of voters that satisfied the ordinary and widespread requirements of providing their birthdate and address. And they downplayed the tens of thousands of voters whose votes were rejected over the past decade because they were not registered to vote—voters who will benefit from the new system. For the factual and legal reasons set forth below and in Defendants' initial trial brief, doc. 583 (incorporated fully by reference here), the challenged laws comport with the United States Constitution and federal law and must be upheld.

PROPOSED FINDINGS OF FACT

I. Voting in Ohio.

1. Ohio has an expansive voting system that provides *all* voters numerous, non-burdensome voting opportunities. All Ohio voters receive three voting options: (1) in-person voting on Election Day; (2) no-excuse, in-person early absentee voting; and (3) no-excuse, mail-in early absentee voting. Vol. 10, 18:19-23 (Hood).

A. Election Day voting.

2. The longest-running form of voting in Ohio, and still the most used, is in-person voting on Election Day. Approximately 70% of votes cast in Ohio are cast on Election Day. **D25** at 199 ("The 2014 EAC Election Administration and Voting Survey Comprehensive Report," *U.S. Election Assistance Commission*); Vol. 11, 120:15-17 (Damschroder). Ohio's

polls on Election Day are open for thirteen hours, from 6:30 a.m. until 7:30 p.m. Ohio Rev. Code § 3501.32; Dir. 2015-29 § 1.04(B) (**D2**).

3. Election Day voters must provide their name, current address, and proof of identity. Dir. 2015-29 § 1.04(B). Unlike many States, Ohio does not require voters to present a government-issued photo identification to vote. Instead, Ohio takes a more lenient approach. Vol. 10, 65:3-13 (Hood) (noting the Ohio ID requirements are "a fairly low bar…similar to those laid out in HAVA"). Under Ohio law, all of the following qualify as acceptable identification: the voter's driver's license or state identification number; government-issued photo identification; a current (last twelve months) utility bill; a current bank statement; a current government check; a current paycheck; or any other current government document (*e.g.*, license renewals, fishing license, court papers) displaying the voter's name and address. Ohio Rev. Code § 3505.18(A)(1).

B. Provisional voting.

4. Under Ohio law, no voter who attempts to cast a ballot on Election Day is turned away. Even when circumstances arise that raise questions about the voter's eligibility, voters are permitted to cast a provisional ballot. *See* Vol. 4, 53:22-54:6 (Anthony); Vol. 10 186:21-187:2, 207:10-15 (Poland).

5. Provisional voting is a method to try to count additional votes, giving voters a second chance to demonstrate eligibility. Vol. 1, 272:12-16 (Bloom) ("If they were registered somewhere else in the State, it gives them an opportunity for a second chance to change their address, to update their registration, and vote in the new precinct where they're actually living."); Vol. 11, 124:23-125:2 (Damschroder) ("A provisional ballot is essentially a second chance ballot that allows a voter who, for whatever reason…can't cast a regular ballot, they can still cast a ballot at that time."); Vol. 10, 20:19-20. (Hood) ("[P]rovisional ballots are a fail-safe.").

6. The vast majority of provisional ballots are cast on Election Day. *See* Vol. 4, 54:7-9 (Anthony); Vol. 10, 187:17-18 (Poland); Vol. 11, 45:7-9 (Terry); Vol. 11, 126:8-11 (Damschroder). Under limited circumstances, however, a voter may also cast an early provisional ballot at his or her board of elections during the early absentee voting period. Dir. 2015-28 § 1.01(C) (**D2**); Vol. 10, 187:12-16 (Poland); Vol. 11, 125:22-126:7 (Damschroder).

7. When a voter casts a provisional ballot, the voter must also complete a provisional ballot affirmation statement. Ohio Rev. Code § 3505.181(B); **D55** (SOS Form 12-B); **D67** (provisional ballot envelope). This affirmation form gives provisional voters the opportunity to supply information demonstrating their eligibility (and helps election officials to locate them in voter databases).

8. Provisional voters are given a notice prescribed by the Secretary that provides the voter with a hotline number to call to check on the status of their ballot. Vol. 10, 191:22-192:4 (Poland). If a provisional voter does not have identification, the notice also instructs them how to provide that notice within seven days. Vol. 4, 88:7-13 (Anthony).

C. Absentee voting.

9. In addition to Election Day voting, Ohio also offers expansive absentee voting opportunities. Any eligible voter in the State of Ohio is eligible to vote absentee, either in person or by mail. Dir. 2015-27; Vol. 11, 127:19-128:9 (Damschroder).

10. Voters can track the status of their absentee ballots by calling the board of elections or using the board's website. Vol. 10, 220:6-12 (Poland).

1. Early in-person absentee voting.

11. Beginning four weeks before an election, Ohioans may begin voting early at their boards (or at a separate designated early-voting location). *See* Ohio Rev. Code §§ 3509.01(B)(3), 3501.10(C). For the 2016 general election, Ohio will offer twenty-three days

of early in-person voting spread over a twenty-nine day period. **D32** (2016 early voting calendar for all counties); *see also* **D33** (Doc. 111-1, *Ohio NAACP v. Husted*, Case No. 2:14-cv-404 (S.D. Ohio 2014) (settlement agreement between various parties, including the Ohio NAACP and Secretary Husted)).

12. During these twenty-three early voting days, Ohio will offer all of its voters: 207 in-person voting hours before Election Day; 39 early voting hours after 5 p.m. or on weekends; and 24 weekend early voting hours (two Saturdays and two Sundays). **D32**.

2. Early mail-in absentee voting.

13. In addition to early in-person voting, Ohio offers all voters no-excuse mail-in absentee voting. Ohio Rev. Code § 3509.05. Since 2012, the Secretary has voluntarily mailed absentee ballot applications statewide for even-year general elections to (i) every registered, active voter, and (ii) every registered voter who cast a ballot in one of the past two federal general elections. *See* **D35** (Dir. 2014-15 (detailing 2014 statewide mailing)); Vol. 11, 129:7-16 (Damschroder) ("And in federal general elections, the Secretary mails an absentee ballot application to virtually every registered voter in the State of Ohio."). Ohio will again mail unsolicited absentee ballot applications statewide for the 2016 presidential general election. Vol. 2, 189:5-8 (Burke) ("I'm glad that the State is mailing out the absentee ballot applications for this November's election because it reduces the lines at polling places, and that helps – it helps the voter and it helps the Board in getting the election done.").

14. These options offer voters flexibility and convenience. The entire absentee voting experience can take place in one visit to a board. It can also be accomplished at home, with a trip to the mail box. Voters can even combine mail-in and in-person methods. Vol. 10, 207:18-208:18 (Poland) ("Q. So a voter can kind of mix and match the methods; is that fair? A. Yes."). For example, a voter can apply for an absentee ballot through the mail, mark the ballot in the

comfort of his or her own home, and then return the ballot (or have a family member return it) to the board. *See* Ohio Rev. Code § 3509.05(A); *see also* Vol. 2, 147:7-22 (Perlatti). Or a voter can apply for an absentee ballot in-person, take the ballot home, and mail it back to the board. *Id.*; *see also* Vol. 2, 147:7-22 (Perlatti); Vol. 10, 207:18-208:18 (Poland) ("[I]f a voter appears in person, requests a ballot and asks to take it with them, they can – they can do that."). Ohio voters get to weigh any potential advantages and disadvantages of a particular voting method and choose their preferred option. And *every registered Ohio voter* receives these options.

15. Voters are not required to present a photo ID to cast an absentee ballot, whether in person or by mail. Instead, voters can present any of the forms of identification acceptable for voting on Election Day, or they can simply provide the last four digits of their social security number. Ohio Rev. Code § 3509.03; Dir. 2015-27. The ability to use the last four digits of a social security number is particularly beneficial for homeless voters for whom it may be difficult to obtain government-issued photo identification. Vol. 7, 67:15-22 (Davis); Vol. 7, 46:18-20 (Strasser) ("Q. And being able to use the last four digits of their Social Security number as an identification is fairly simple? A. It is."). As Brian Davis, the Executive Director for NEOCH testified at trial (and stated previously in declarations submitted in this matter), in his experience, almost *all* homeless voters have a social security number. Vol. 7, 67:23-68:3; *see also* Vol. 7, 46:15-17 (Strasser) (former Executive Director of Plaintiff CCH noting the same).

16. In light of these opportunities and lenient identification requirements, Plaintiffs in this litigation concede that absentee voting in Ohio is "easy and convenient": **D63** (Ohio Dems (@OHDems), Twitter Post, Feb. 16, 2016).

17. Similarly, Plaintiff NEOCH advised both homeless organizations and homeless voters that absentee voting in Ohio is easy for homeless voters. Vol. 7, 73:15-74:2, 78:17-19

(Davis) ("Q. And it also says early in-person voting at the Board of Elections is easy and quick; is that correct? A. That's correct."); *see also* **D66** at PL000672, 675 (NEOCH websites); **P-1686**. Importantly, NEOCH communicated this message even during the 2014 Election, after S.B. 205 and S.B. 216 were implemented and after initiating this lawsuit challenging these laws. Vol. 7, 78:20-80:3 (Davis); Vol. 7, 43:15-44:6 (Strasser) (Plaintiff CCH noting the same).

II. The challenged laws resulted from ongoing efforts to improve Ohio elections.

18. The broad and varied voting opportunities and procedures that currently exist under Ohio law are the result of more than a decade of efforts by legislators, boards of elections, and state elections officials to continuously evaluate and improve Ohio's voting systems. S.B. 205 and S.B. 216 were introduced as part of this process and in the spirit of ongoing reform.

A. S.B. 205 incorporated the lessons and experience of the first years of universal absentee voting.

1. Election reforms in 2005 dramatically expanded voting opportunities and convenience but also presented challenges.

19. In 2005, Ohio greatly expanded absentee and early voting options for its voters. At that time, Ohio implemented no-excuse absentee voting, including both early in-person and mail-in absentee voting. *See* Ohio Rev. Code §§ 3509.02, 3509.05. The broad shift to universal absentee voting in Ohio took place while current Secretary Husted was Speaker of the Ohio House of Representatives. **D6** (Sub. H.B. 234 (Ohio 2005)); *see also* 2d Supp. Compl. ¶ 61 (conceding that Republicans passed and signed the law that instituted universal absentee voting).

20. By implementing this dramatic change, Ohio became a national leader in voting opportunities. Indeed, even a decade later, more than a dozen States still do not offer anything more than Election Day voting. **D25** at 198-201. And even among those States that do offer absentee voting opportunities, Ohio's system ranks among the most substantial. *See Nat'l*

Conference of State Legislators (Mar. 24, 2016) available at http://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx.

21. As is true with any significant change, however, these election reforms resulted in some growing pains. In 2008, the first presidential election in which universal absentee voting was available, elections officials underestimated the number of voters who would take advantage of these opportunities. Vol. 11, 22:17-24 (Terry) ("The Court: Mr. Terry, what precipitated the formation of the 2010 task force? The Witness: The election of 2008, being overwhelming for us, us not knowing what that was going to be like…."). As a result, there were long lines at early voting locations and other problems administering absentee voting. Vol. 11, 21:3-22 (Terry) ("Administratively, it was very difficult to get the ballots counted in a timely manner on Election Day, just the storage of ballots, the flow of people coming into the office, you know, just not – just serving that many people, as opposed to the few people that were voting absentee previously.").

22. Additionally, discrepancies between the law regarding the fields that were required to be included on the absentee ballot *envelope* and the law regarding the information required to *count* the ballot created confusion for the boards as to which fields were required. For example, state law dictating the form of the absentee ballot ID envelope specifically required the inclusion of space for the voter's birthdate. Vol. 1, 116:2-11 (Clyde). This led some counties, including Franklin County, to believe that they were required to reject ballots that did not include this information, despite the fact that birthdate was not included among the prerequisites for counting a ballot. Vol. 11, 173:23-174:24 (Damschroder).

23. Between 2008 and 2012, boards of elections, elections officials, and legislators introduced a number of measures designed to address the problems that were revealed in the

2008 election and to improve generally the early voting system in Ohio. *See, e.g.*, Vol. 11, 22:17-23:14 (Terry) (describing "wanting to try to find a way to make it better for administering elections, and also better for the voters, so that, going forward, we didn't have the same kind of issues that we found in 2008."). For example, State Representative Kathleen Clyde recalled, after she joined the staff of the Ohio House in 2009, "a bipartisan effort at substantial election reform" during which she helped to "advis[e] the speaker as to the benefits of fixing some of our voting laws." Vol. 1, 31:9-23.

24. But significant differences in opinion emerged as elections leaders at all levels attempted to determine how best to reform the system. Some elections officials advocated giving the county boards more discretion to develop their own procedures and policies regarding absentee voting. *See* Vol. 2, 17:6-14 (McNair) (noting diversity of counties and his disagreement with uniformity principles). Other officials pushed for uniformity across the State. Vol. 11, 25:5-13 (Terry) (describing OAEO's position in favor of uniformity).

25. Some counties began mailing out absentee ballot applications to voters within their respective counties. Vol. 2, 18:14-21 (McNair); Vol. 7, 207:17-18 (Ward). Others lacked the resources to fund such mailings. Vol. 6, 189:22-190:2 (Turner).

26. Inter- and intra-county disagreements emerged regarding the hours during which early in-person voting could take place, resulting in disparities from county to county, and partisan tie votes that had to be broken, first by Secretary Brunner and then in 2012 by Secretary Husted. Vol. 11, 130:24-131:7 (Damschroder); Vol. 7, 207:18-19 (Ward); Vol. 11, 25:5-13 (Terry) ("The arguments that we saw were not Republican and Democrats arguing. It was small county versus big county, and the reason being, the association feels that having a uniform day and hour is valuable for absentee voting. And, so, finding a mix of days and hours that work for

both small counties and large counties was very difficult to come to the right balance to where the small counties aren't open too much and using too many taxpayer dollars, but the big counties had the flexibility for the number of voters that they, obviously, serve.")

27. In 2012, Secretary Husted alleviated some of the disparities across counties by mailing absentee ballot applications *statewide* to all active voters in the State of Ohio—a step no prior Secretary had taken—and by mandating uniform hours for early in-person voting across the State of Ohio. Vol. 11, 129:7-13, 131:8-132:11 (Damschroder) ("[A]nd so the Secretary for the 2012 election set uniform hours by directive for the whole state."); Vol. 11, 24:22-25:13 (Terry) (noting that the biggest disagreement among the Ohio Association of Election Officials task forces were the days and hours for in-person absentee voting).

28. Nonetheless, last-minute litigation and changes to the law continued to create confusion for both voters and boards of elections. Vol. 11, 94:4-10 (Terry) ("But I remember there was a lot of lawsuits over the days and the hours that we had. And it changed, actually changed, several times, leading up to the election, as to when absentee voting would occur at the Boards of Elections."); Vol. 12, 61:9-24 (Damschroder).

2. The OAEO developed bipartisan recommendations for absentee voting reform to respond to these challenges.

29. Against this backdrop the Ohio Association of Election Officials, a bipartisan organization comprised of the members of Ohio's 88 county boards, as well as board directors and deputy directors, resolved to develop a comprehensive set of recommendations for improvements to the absentee voting procedures in Ohio. Vol. 11, 21:23-22:1 (Terry) (noting the formation of task forces to discuss absentee ballot procedures in 2010 and 2012).

30. The OAEO is led by its board of trustees, which is comprised of an equal number of Republicans and Democrats, and deliberately includes representatives from large-, small-, and

medium-sized counties. Vol. 7, 190:1-10 (Ward); Vol. 11, 19:17-25 (Terry); Vol. 4, 41:5-18 (Anthony) (describing himself as "active" in the bipartisan OAEO, and that the organization includes large and small counties).

31. The OAEO also has a bipartisan legislative committee that reviews proposed legislation, makes suggestions to the General Assembly, and works with the General Assembly to craft election laws. Vol. 7, 190:19-191:2 (Ward); Vol. 11, 20:13-19 (Terry); Vol. 1, 265:6-19 (Bloom). Susan Bloom, Democratic director of the Fairfield County Board of Elections and the current co-chair of the legislative committee, described the OAEO as "a group of individuals who have come together to educate, to watch legislation, to see how it will affect Boards of Elections and election officials and the voters so that we give the best service that we can give." Vol. 1, 264:23-265:5. She noted that the legislative committee's goal is to "work together to assist, when asked, legislators with items of interest to the election world, whether something would be beneficial to us, whether it would be beneficial to the voters, whether it would be judicious for us to really work to get legislation passed, to raise questions regarding something that is proposed that may, on the surface, look really good but might have other items that we need to look at as well." Vol. 1, 265:6-19.

32. During trial, the Court heard from two different members of the OAEO who were intimately involved in the OAEO's recommendations and advocacy related to the laws challenged in this case: Tim Ward and Ken Terry. Both Mr. Ward and Mr. Terry have served on the board of trustees and as co-chair of the legislative committee. Vol. 7, 190:13-17 (Ward); Vol. 11, 19:12-16 (Terry). Like the OAEO itself, these witnesses represented both parties—Mr. Ward is a Republican, (Vol. 7, 190:13-17), and Mr. Terry is a Democrat, (Vol. 11, 18:12-14). Despite their political differences, both witnesses offered similar testimony and perspectives

about the role of the OAEO in the passage of the challenged laws.

33. In 2010, the OAEO assembled a six-person bipartisan task force to develop a comprehensive recommendation in response to the widespread use of no-fault absentee voting in the 2008 general election. Vol. 7, 192:9-193:2 (Ward); Vol. 11, 22:2-23:20 (Terry). The 2010 task force aimed to use the learnings from the experience in 2008 to create a system that was better for voters and better for administering elections. Vol. 11, 22:17-23:4 (Terry).

34. Following the 2010 task force and the 2012 presidential election, the OAEO formed an eight-person task force in 2013 to again tackle problems persisting in no-fault absentee voting. Vol. 7, 193:3-20 (Ward); Vol. 11, 23:5-24:8 (Terry). The 2013 task force, much like the 2010 one before it, consisted of bipartisan election officials from a range of different sized counties (including Cuyahoga, Hamilton, and Montgomery Counties). Vol. 7, 193:14-20 (Ward). The goal of the 2013 task force was again to better serve voters through improved election administration processes. Vol. 7, 193:22-194:1 (Ward) ("To again – after the changes that were taking place, between 2010 and on, to look at those again and to advocate a better position to be able to make sure the voters were taken care of rather than the politics that we saw going on."); Vol. 11, 23:24-24:8 (Terry) ("[I]t was simply a way to try to find a system that could work to better serve voters in the administration…we felt we needed to try to get some kind of codified rules for absentee voting to make it better going forward.").

35. The eight-member task force met on multiple occasions, and ultimately developed a recommendation. Vol. 7, 194:2-21 (Ward) ("Q. And was the task force ultimately able to create a recommendation for some reforms with respect to absentee? A. After a long, drawn-out process, yes, we were. Q. And did everyone agree with every aspect of the recommendations that were created? A. Actually, nobody agreed, and that was the beauty of

it."). After much debate, negotiation, and comprise the recommendations stemming from the 2013 OAEO task force were issued to the full organization for adoption. **D62** (OAEO Report and Recommendations for Absentee Voting Reform).

36. After the 2013 OAEO task force issued its recommendations, they next went to the OAEO's legislative committee for review. Vol. 7, 194:8-21 (Ward); Vol. 11, 24:12-21 (Terry). Much like the task force, the bipartisan legislative committee extensively debated the recommendations. Vol. 7, 194:8-21 (Ward); Vol. 11, 24:12-21) (Terry) ("Then [the recommendations] came to the Legislative Committee for review, where there was a lot of review."). Once approved by the legislative committee, the recommendations went before the board of trustees for two intense days of further review. Vol. 7, 194:8-21 (Ward); Vol. 11, 24:12-21 (Terry) (noting that the recommendations before the trustees were "debated very heavily"). The bipartisan board of trustees ultimately approved the recommendations. Vol. 7, 194:8-21 (Ward) ("Nobody was happy with the – you know, with everything in there, but it was in the spirit of compromise, as well as to show the legislatures that Rs and Ds can work to arrive at good solutions."); Vol. 11, 24:12-21 (Terry).

37. As finally approved, the OAEO report included recommendations for uniform early voting hours, and a statewide mailing sent by the Secretary of State, rather than individual counties. **D62**.

38. Of particular relevance here, the OAEO also recommended that the mail-in absentee ballot envelope should require the same five fields that have long been required to register to vote and to apply for an absentee ballot: (1) name; (2) address; (3) date of birth; (4) valid form of ID; and (5) signature. *Id.* at 5. Although many components of the OAEO recommendations were achieved only after significant debate and compromise, the five-field

requirement was "very noncontroversial." Vol. 11, 24:22-25:4, 26:21-26:25 (Terry).

39. The OAEO also recommended that voters be afforded a chance to correct mistakes or omissions on the absentee ballot identification envelope. **D62**. At the time, the opportunity to cure an absentee ballot envelope existed only as a Secretary of State directive, risking future change. Vol. 7, 196:13-25 (Ward); Vol. 4, 75:12-14 (Anthony) (acknowledging, under Plaintiffs' questioning, that a Secretary of State directive could be rescinded).

40. The OAEO stated that these changes would "*bring clarity to what information is required to be filled out by mail-in absentee voters and provides them the opportunity to fix mistakes or omissions.*" **D62**.

41. The OAEO sent its recommendations to a number of decision makers, including the Secretary of State and the General Assembly. Vol. 7, 197:11-15 (Ward). In particular, the OAEO worked closely with the General Assembly, encouraging it to adopt the recommendations in proposed legislation. Vol. 7, 197:19-198:20, 201:9-16 (Ward) (noting that he and Mr. Terry both met with Senator Bill Seitz regarding S.B. 205 and S.B. 216); Vol. 11, 50:22-51:6 (Terry) (noting that he was involved in discussions with Senator Bill Seitz regarding the challenged provisions).

42. As a result of the OAEO's bipartisan efforts, many of these recommendations made their way into various legislation introduced by the Ohio General Assembly, including S.B. 205. Vol. 7, 197:16-18 (Ward); Vol. 11, 50:25-51:6 (Terry).

3. The General Assembly incorporated OAEO recommendations into S.B. 205, which made minor modifications to Ohio's absentee voting procedures.

43. Ohio Substitute Senate Bill 205, which became effective in June 2014, modified certain aspects of Ohio's absentee voting process. *See generally* **D4** (Sub. S.B. 205 (Ohio 2014)). The bill contained a number of provisions the OAEO had specifically recommended: it

added authority for the Secretary to mail unsolicited absentee ballot applications if the General Assembly has made an appropriation, and made clear that only the Secretary could issue the mailings, Ohio Rev. Code § 3501.05(DD); it added two identifiers—date of birth and address—to the list of required identifiers for absentee ballot envelopes, Ohio Rev. Code § 3509.06(D)(3)(a); and it codified notice and cure procedures for deficient absentee ballots, Ohio Rev. Code § 3509.06(D)(3)(b). S.B. 205 also added language permitting boards to preprint a voter's name and address on the identification envelope. Ohio Rev. Code § 3509.04(B).

44. Senator Bill Coley, S.B. 205's sponsor, articulated that one purpose of the bill was to create rules that streamline and clarify laws related to absentee voting. **D99** (S.B. 205 Sponsor Testimony – Senator William Coley (November 19, 2013)) ("Whether you reside in Lima or Lowell, Batavia or Bedford Heights, Hamilton or Hilliard, you should play by the same rules."); **D98** (S.B. 205 Sponsor Testimony – Senator William Coley (October 16, 2013)); *see also* Vol. 6, 188:4-11 (Turner) (noting the same). The OAEO provided Interested Party Testimony on S.B. 205 through its then-president Karla Herron. **D96** (Interested Party Testimony – Karla Herron, OAEO).

45. The birthdate exception outlined in S.B. 205 was a direct result of the OAEO working with the General Assembly to offer flexibility to boards of elections in an attempt to count more ballots. Vol. 7, 201:17-202:10 (Ward); Vol. 11, 50:25-52:3 (Terry).

B. S.B. 216 represented an attempt to reduce provisional ballots and make more ballots count, as well as alleviate burdens on boards of elections.

46. As was true of absentee voting, Ohio's experience with provisional voting had highlighted areas for potential improvements to the system. Around the time the General Assembly introduced S.B. 205, it also introduced Ohio Substitute Senate Bill 216, which addressed aspects of provisional voting. *See generally* **D5** (Sub. S.B. 216 (Ohio 2014)).

1. Prior to the introduction of S.B. 216, a number of challenges related to provisional voting materialized.

47. S.B. 216 was designed to combat several challenges that existed related to the casting and processing of provisional ballots.

a. Provisional ballot affirmations lacked information necessary to register unregistered voters prior to S.B. 216.

48. In particular, the boards of elections faced challenges registering provisional voters who were not registered to vote anywhere in Ohio.

49. In Ohio, the number one reason (by far) that provisional ballots are rejected is because the voter is not registered to vote anywhere in the State. In the 2008, 2010, and 2012 general elections, over 50% of rejected provisional ballots were not counted because the individual was not registered to vote in Ohio. **D13** (2008 Provisional Ballot Statistics), **D14** (2010 Provisional Ballot Statistics), **D15** (2012 Provisional Ballot Statistics); App'x C; Vol. 2, 143:4-14 (Perlatti) (noting in the 2015 general election in Cuyahoga County roughly two-thirds of provisional ballots rejected were for unregistered voters); Vol. 3, 174:9-22 (Adams) (noting in the 2015 general election in Lorain County 232 of 298 (78%) rejected provisional ballots were for unregistered voters); Vol. 7, 206:13-15 (Ward); Vol. 10, 205:23-25 (Poland).

50. Prior to the passage of S.B. 216, the required information on a provisional ballot affirmation was insufficient to register a person to vote. Vol. 10, 204:10-205:6 (Poland).

51. As a result, if an unregistered voter cast a provisional ballot in a subsequent election, completed only the required information on the affirmation, and did not fill out the registration form on the back, the voter's ballot would be rejected and the voter would remain unregistered. Vol. 10, 204:10-205:6 (Poland) ("Their provisional ballot would not be counted, and they would – and they would still not be registered. They would not be a registered voter in the State of Ohio."); Vol. 6, 73:15-19 (Bucaro). Unless the voter took affirmative steps before

the next election, the voter would continue to be unregistered and ineligible to cast a ballot in future elections.

52. The State tried to address this issue by requiring that a separate registration form be included on the back of the provisional ballot affirmation, so that a voter could complete the information necessary to register the voter. Vol. 11, 144:4-12 (Damschroder); Vol. 10, 204:15-19 (Poland); Vol. 11, 52:23-53:6 (Terry); Vol. 6, 242:18-243:3 (Scott). In practice, however, few provisional voters took the time to complete the additional form on the back of the provisional ballot affirmation statement. Vol. 7, 211:20-22 (Ward) ("Voters got tired of filling out paperwork so they never filled out the back."); Vol. 11, 53:7-11 (Terry); Vol. 10, 204:23-25 (Poland); Vol. 7, 177:22-24 (Sauter).

b. Prior to the address requirement, boards had difficulties verifying eligibility and updating registration for voters who had moved without updating their addresses.

53. Problems also existed for voters who moved without updating their addresses. Under Ohio law, voters who move without updating their addresses are permitted to vote provisionally; as long as they vote in the correct voting location for their current address and are otherwise eligible, their votes can count. Dir. 2015-28. Under the prior system, where current address *was not required* on the provisional affirmation, this voter could do everything right on Election Day—show up at the correct polling location, vote provisionally, and provide all the required information on the provisional affirmation. Without that person's current address, it would appear to the election official that they improperly voted in the incorrect precinct, and their vote would have been rejected. **D106** (Dir. 2012-54); Vol. 11, 143:22-145:24 (Damschroder) (generally describing Directive 2012-54 and its application); Vol. 11, 35:5-36:25 (Terry).

54. Ms. Poland, the Republican director of the Hamilton County Board of Elections, provided an example. Prior to 2014, a voter could: move into Hamilton County from Franklin County without updating her address; determine what her new polling location is based upon her new precinct; give her new address to the poll worker and receive the correct ballot; and complete the required information on the prior provisional affirmation. But without that voter's current Hamilton County address on the provisional ballot affirmation, it would appear to the Board of Elections that the voter improperly voted in Hamilton County when she should have, instead, voted in Franklin County. Vol. 10, 188:8-190:1 (Poland) (noting that the voter "may have done everything right" but that without their current address "there's no way for the bipartisan team of election officials to know where the voter is living now so [they] would have to assume they're still in Franklin County… and the ballot can't be counted").

55. This was not an isolated problem. Mr. Perlatti, the Democratic director of the Cuyahoga County Board of Elections also explained without an address, a board could "try to identify the voter in the voter registration database," but even if the board could locate the voter, "whatever the address is on record in the database, that would be the precinct of record that we would have for them." Vol. 2, 74:16-20. Without a current address on the provisional affirmation, a voter who moved without updating their address would not have a current address on file in Cuyahoga County. After the election, the Cuyahoga County Board of Elections would not have the new current address "unless you completed the registration card which was on the backside of the form." Vol. 2, 151:10-15 (Perlatti). Therefore, if the voter did not complete the optional second side of the form, the Board "wouldn't be able to validate your – your provisional in Cuyahoga County." Vol. 2,150:14-151:19 (Perlatti).

56. Mr. Adams, the Democratic director of the Lorain County Board of Elections, provided a similar example: "Before there was a requirement for the address [on a provisional affirmation], it did leave some ambiguity. We had to assume that the poll-worker had asked for the proper address and assume that they had issued them the correct ballot, but we could not confirm that." Vol. 3, 136:24-137:8.

57. In these circumstances, a board was obligated to reject the ballot unless the voter voluntarily completed the optional registration form on the back of the provisional ballot. **D106**.

58. Exacerbating this problem was the fact the provisional affirmation form provided no indication to the voter that the failure to provide address could, as a practical matter, make it more likely that the ballot would be rejected. Vol. 10, 249:4-15 (Poland) ("It was confusing on this form that says that you don't have to provide your address. What the voters didn't know was that if they do provide their address, then that will help the Board of Elections in confirming that they corrected – voted their ballot in the correct precinct.").

59. Although a voter had to orally provide his current address to the *poll worker* in order to obtain the correct paper style, this did not alleviate the problems created by the statutory absence of an address as a required field on the provisional affirmation form. The precinct guides given to poll workers do not indicate whether an address is valid. Vol. 6, 249:4-250:11 (Scott). Moreover, as Ms. Poland testified, poll workers play no role in the processing or validation of provisional ballots. Vol. 10, 244:25-246:23 ("Because it's up to the Board to count the ballot, and we would have no way of knowing where the voter was living."); Vol. 10, 248:20-23 ("Q. Didn't the poll worker confirm [the voter cast the ballot in the correct precinct] when they handed them the ballot after being told their address? A. We are required – the Board of Elections is required to confirm that."); Vol. 11, 36:12-25 (Terry) ("The provisional – The

poll-worker is not the one that processes the provisional ballot. It's done, after Election Day, by our staff. So, the poll-worker knowing the address of the voter doesn't help us in trying to determine the validity of that ballot."). Poll workers merely take the voter at his or her word and issue a paper ballot corresponding to the address the voter provides. Vol. 10, 244:25-246:23 (Poland) ("[Voters] verbally tell the address to the poll worker, but that doesn't get the information to the bipartisan teams at the Board."). They do not and could not reasonably be expected to record the current address for all provisional voters in any reliable manner on the provisional affirmation form or otherwise verify the voter's eligibility to cast that ballot.

60. To the extent that some boards addressed these problems by simply assuming that all provisional voters voted in the correct voting location and precinct, that solution presented a different problem. As numerous boards witnesses emphasized during trial, the issues and contests on a ballot differ, sometimes significantly, from precinct to precinct and a voter's current address is a critical component of the voter's eligibility to vote for particular contests. Vol. 10, 183:19-184:7 (Poland) (noting that the voter should vote in the precinct in which they live so the correct contests appear on their ballot); Vol. 7, 185:15-21 (Sauter) (giving example of person having different address and voting in a different precinct with a different ballot); Vol. 6, 239:4-21 (Scott); Vol. 6, 290:1-6 (Sleeth). The boards are therefore entitled and, indeed, obligated, to verify this key piece of eligibility as a prerequisite to counting the ballot. As Ms. Bloom noted, it is important that a provisional voter fill out their current address completely and correctly, otherwise "[y]ou could get them in the wrong precinct very easily." Vol. 1, 270:16-20. Ms. Poland noted that in many cases, electoral jurisdictions often times cross county lines, including a single city that crosses into three different counties. Vol. 10, 186:4-9. Some precinct lines, or sometimes even splits within a precinct, fall down the middle of roads – one side of a

street will receive one style of ballot, and the other side of the street will receive another. Vol. 3, 195:1-2 (Anthony) ("Certain issues may be on one side of the street and not on the other side of the street….").

61. Even if the board could determine that a voter voted in the correct location and therefore count the ballot, the board could not update the voter's registration information without a current address. Vol. 6, 241:19-22 (Scott). Thus, unless the voter took affirmative steps to update his address before the next election, the voter would have to again vote provisionally in the next election --- thereby creating additional burdens for both the voter and the boards.

c. Identifying voters with common names proved challenging and, in some cases, impossible without the voter's birthdate.

62. Identifying and confirming the eligibility of voters prior to S.B. 216 also presented significant challenges in many cases, particularly for voters with common names.

63. Before a ballot can be counted, election officials must be able to confirm that it was cast by an eligible, registered Ohio voter. As an initial step, the board attempts to locate the voter within their own county-level database. Vol. 6, 290:20-291:5 (Sleeth). If the board cannot locate the voter in the county database, it must then search the statewide database to confirm (i) that a voter who has moved was registered somewhere in Ohio and (ii) that the voter has not already voted. *See* Vol. 4, 137:5-18 (Lee); Vol. 9, 159:21-161:4 (Larrick); Vol. 9, 225:5-25 (Passet).

64. Prior to S.B. 216, a voter provided only name, signature, and a form of ID. *See* **D58** (2012 provisional ballot affirmation).

65. Although signatures may be helpful in positively confirming the identity of a voter once the voter is located in a database, boards of elections cannot use a signature to search either the county database or the statewide database. Vol. 2, 205:23-206:1 (Burke); Vol. 11,

48:25-49:5 (Terry) ("In identifying the voter in terms of absentee and provisional, [signature is] not very helpful.").

66. Similarly, because Ohio is lenient in allowing many different forms of identification, the identification field does not always provide officials with additional information to locate voters. In other words, there will be many cases when the identification an individual uses *when voting* will be different than the identification he used *when registering*. Vol. 7, 144:16-147:20 (Sauter) (noting that the board will sometimes have voters provide a different form of identification on their ballot than what is in the voter registration database). For example, if a voter provides a driver's license number when registering, but then shows a utility bill when voting provisionally on Election Day, there is nothing on that field of the provisional ballot affirmation that assists election officials. Vol. 9, 181:4-18 (Larrick).

67. Furthermore, when provisional voters show a form of identification at the polls (rather than writing their driver's license number or the last four digits of the voter's Social Security number) all an official has after the fact—for purposes of identifying the voter—is a check-marked box. *See* **D55**; **D58**; Vol. 9, 181:4-18 (Larrick).

68. Accordingly, prior to S.B. 216, there were many instances in which an election official only had a name and signature to go on.

69. Identifying voters in the databases using only name and signature was a difficult and time consuming process. Vol. 9, 182:1-4 (Larrick) (noting that name and signature is not enough to identify a voter); Vol. 7, 202:22-203:14 (Ward) ("So the problem is when all I have is a name, trying to identify a voter becomes very difficult and, therefore votes weren't … [s]o what we saw was votes weren't being counted because we could not identify which voter it was."); Vol. 10, 225:10-13 (Poland) (noting that identifying voters by just a signature and an

address in the petition context is difficult).

70. For a voter with a common name, that meant that the board had to individually review each matching name and attempt to match signatures to locate the voter. Mr. Perlatti explained that searching voter registration databases with more identifying fields shrinks the number of records to review. For example, "if you put in just [a] name…if it's a common name, it may return a list of individuals. And then as you add more criteria, that list shrinks and shrinks." Vol. 2, 153:1-5 (Perlatti).

71. The challenge was magnified if the voter did not appear in the county database making the board search for the voter in the statewide database. Statewide, Ohio has approximately 7.5 million registered voters in the statewide voter registration database. Ohio Secretary of State (Apr. 20, 2016), Voter Turnout in General Elections, *available at* http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/HistoricalElectionComparisons/Voter%20Turnout%20in%20General%20Elections.aspx.

72. Even in circumstances in which the voter provided the last four digits of his or her Social Security number as a form of identification, boards of elections could only use that information to narrow the search if the voter had previously provided that number to the boards and, even then, the list of voters with the same name and matching last four digits of their Social Security numbers could be very large.

73. Ms. Poland and Mr. Damschroder illustrated this problem. Ms. Poland ran different searches in the statewide voter registration database. Her search by only the name "Daniel Brown" returned 368 results, Vol. 10, 195:11-196:12, her search by only the name "Betty Young" returned 106 results, Vol. 10, 196:14-20, and her search by only the name "Sarah Pierce" returned 41 results, Vol. 10, 196:22-197:1. Ms. Poland also conducted a search just for

the last four of a social security number, without a name, and the search returned the message: "Your search will return too many results. Please enter additional information." Vol. 10, 198:23-199:4. Finally, when Ms. Poland conducted a search in the statewide voter registration database with a voter's last four of the social security number and a birthdate, it returned a single Ohio voter. Vol. 10, 199:9-22. Similarly, Mr. Damschroder testified that there were nearly 650 different John Smiths in the statewide voter registration database, and 35 of those John Smiths shared the last four digits of their social security number. Vol. 11, 142:11-21.

74. Performing these time-consuming searches presented significant administrative burdens for the boards. Even though the numbers of provisional ballots cast have been decreasing in recent elections, boards still have to process thousands of provisional voters. *See*, *e.g.*, **D15** (over 200,000 provisional ballots cast in 2012).

75. Given the reality of election deadlines, the identification problems also presented risks to voters. In some cases, name and signature simply proved insufficient to match a voter with an entry in the database. Ms. Poland described that, prior to 2014, individuals who were not identified with the information provided on the prior provisional affirmation (name, signature, and ID) were classified as not registered in the State of Ohio, and their ballots were rejected, even if, in fact, they were a registered voter. Vol. 10, 256:6-258:11 ("We were not able to confirm – they may have been registered, but we were not able to confirm their identity and, therefore, had to reject."). Other board witnesses confirmed this risk. Vol. 11, 33:4-19 (Terry) (noting that voters who could not be identified were rejected as not registered); Vol. 7, 202:22-203:14 (Ward). The General Assembly introduced S.B. 216 to address these challenges.

d. Prior to S.B. 216, there were also challenges related to the process for casting and processing provisional ballots.

76. In addition to the issues just described related to the information contained on the

provisional ballot affirmation form, other provisional voting challenges emerged prior to the introduction of S.B. 216. In particular, the existence of multiple precincts in a voting location created confusion for voters and litigation about how to process ballots cast in the correct location, but wrong precinct. Additionally, concerns about the problems of poll worker error and reducing the burdens on boards during the busy post-election time period emerged.

2. The General Assembly introduced S.B. 216 for the express purpose of alleviating these and other issues that had emerged with respect to provisional voting.

77. S.B. 216 was introduced for the express purpose of addressing these and other challenges that had been identified with respect to provisional voting.

78. S.B. 216's sponsor—Senator Bill Seitz—articulated that the "[t]he primary purposes of this legislation are to reduce the number of provisional ballots cast in the State of Ohio and to codify the United States Sixth Circuit Court of Appeals decision pertaining to provisional ballots as a result of two cases: *SEIU v. Husted* and *NEOCH v. Husted*." **D101** (S.B. 216 Sponsor Testimony – Senator Bill Seitz (November 6, 2013)); **D102** (S.B. 216 Sponsor Testimony – Senator Bill Seitz (January 14, 2014)); *see also* Vol. 6, 175:17-25 (Turner) (noting the same). He described the objectives of the law, among them that the law would: "require[] right church, wrong pew ballots to be counted unless a poll worker completes a form that explains the poll worker acted appropriately"; "allow for accepted provisional ballots to doubly count as voter registration" thereby "allow[ing] for easier voter access" and "mak[ing] the process of voting less burdensome"; "reduce[] the number of days after the election which voters who submitted provisional ballot can produce their identification" from 10 days to 7 days; "clarif[y] that the voter, not the poll worker, is required to fill out his or her provisional ballot affirmation statement" and thus "decrease the chances of incorrect information being recorded on the voters' behalf"; and "provid[e] the Boards of Election the authority to have one appointed

supervisor and one pollbook for each polling location" "lead[ing] to fewer provisional ballots being casts at these locations." **D101**.

3. The OAEO and others supported S.B. 216.

79. As was true of S.B. 205, the OAEO played a significant role in the passage of S.B. 216. The Association gave Interested Party Testimony on S.B. 216 through its Executive Director Aaron Ockerman, **D95** (noting that the OAEO is "generally supportive" of S.B. 216), and through then Democratic co-chair of the legislative committee, Mr. Terry, **D100** (noting that the OAEO "supports the intent" of S.B. 216).

80. The birthdate exception outlined in S.B. 216 was a direct result of the OAEO working with the General Assembly to offer flexibility to boards in an attempt to count more ballots. Vol. 7, 201:17-202:10 (Ward); Vol. 11, 50:25-52:6 (Terry). In his testimony on behalf of the OAEO, Mr. Terry outlined what was eventually the framework for the birthdate exception of S.B. 216. **D100**, at 2-3. The birthdate exception was brought to the legislature by both Mr. Terry and Mr. Ward. Vol. 7, 197:19-198:20, 201:9-16 (Ward) (noting that he and Mr. Terry both met with Senator Bill Seitz regarding S.B. 205 and S.B. 216); Vol. 11, 50:22-51:6 (Terry) (noting his involvement in discussions with Senator Seitz regarding the challenged provisions).

81. The OAEO also made recommendations to the cure period. The original draft of S.B. 216 allowed for a three-day cure period, down from the ten-day period prior to S.B. 216. Through OAEO conversations with the General Assembly, a compromise was reached: the cure period would be seven days. Vol. 7, 202:11-20 (Ward); **D95** ("OAEO recognizes that the intention of [reducing the cure period to three days] is admirable, but would suggest that voters be given 7 days to provide this information.").

82. S.B. 216 was ultimately passed February 19, 2014, with many of the recommendations and amendments put forth by the OAEO, and became effective in June 2014.

C. Plaintiffs presented no evidence that the passage of S.B. 205 or S.B. 216 were motivated by an intent to discriminate or any other improper purpose.

83. Plaintiffs attempted to tell a different story about the motivations behind the passage of S.B. 205 and S.B. 216. They alleged in their complaint and at trial that these challenged laws were intentionally designed to discriminate against minority voters. But those allegations are simply not borne out by the factual record presented at trial.

84. Plaintiffs presented testimony from two witnesses, Representative Clyde and former State Senator Nina Turner, ostensibly for the purpose of establishing evidence of intentional discrimination. Both witnesses opposed S.B. 205 and S.B. 216 when these bills were introduced and debated, and both explained their individual opinions of these laws and their respective recollections regarding the processes by which these bills passed. *See, e.g.*, Vol. 1, 111:1-22 (Clyde) ("Q. You are only speaking about why you voted against the laws, correct? A. Correct."); Vol. 6, 167:7-21 (Turner) (discussing engagement in floor debate of bills).

85. But neither offered any credible evidence to support a theory of intentional discrimination. At most, their testimony established that: (1) not all legislators supported S.B. 205 and S.B. 216; (2) there was significant and emotionally charged debate about these laws among the members of the General Assembly; and (3) support for the bill tended to coincide with party lines. *See, e.g.*, Vol. 6, 167:7-21 (Turner). None of these points are in dispute; but nor do they support any adverse inference about the motivations or purposes behind the bills, or in any way counter the undisputed evidence from the OAEO witnesses about the background and context in which these laws were passed. Indeed, several election-related measures contemporaneous with S.B. 205 and S.B. 216 did not make it out of the General Assembly, including a law limiting early voting to 14 days, a law limiting early voting hours, and a law instituting a photo I.D. requirement for Ohio voters. Vol. 1, 112:17-113:3 (Clyde).

III. Impact of S.B. 205 and S.B. 216.

A. In the two years since S.B. 205 and S.B. 216 were passed, the laws have successfully resulted in a number of benefits.

86. Since the implementation of S.B. 205 and S.B. 216, boards of elections have been able to administer elections more efficiently and effectively and count more votes. The laws have resulted in a number of significant benefits.

87. ***Identifying voters.*** The new current address and date of birth requirements help election officials locate and identify voters more accurately and efficiently. Vol. 10, 188:5-25, 258:4-11 (Poland) ("I know that the bipartisan staff in Hamilton County were happy when date of births were made part of the affirmation statement because…we could confirm who they were. So, you know, it ultimately leads to more ballots being counted."); Vol. 11, 34:12-19 (Terry) ("The benefits in [current address and date of birth] are tremendous when trying to find a particular voter in the database, either county or statewide."); Vol. 7, 202:22-203:14 (Ward) ("[T]he best way to find somebody is by the last four digits of their social security number coupled with their birthday. And it brings up one person almost probably 99.9 percent of the time, and now that's how we find people now."); Vol. 9, 132:25-133:3 (Bear); Vol. 9, 180:15-181:3 (Larrick) ("I feel like the date of birth on a provisional ballot is one of the most necessary things that we have…."). Indeed, for the 2016 primary, Hamilton County has "not rejected any absentee ballots yet." Vol. 2, 188:10-12 (Burke).

88. These improvements are not just a matter of administrative convenience; *they make more votes count*. Vol. 10, 188:21-25 (Poland) ("So the result of this law has been that our acceptance rates on provisional ballots has increased."); Vol. 10, 256:6-9 (Poland) ("Q. But you were able to identify provisional voters before the change in the law in 2014, correct? A. Correct. But the rate has increased since the voters are now providing their date of birth."); Vol.

7, 204:4-17 (Ward) ("The Court: And you were able to identify voters, even voters such as your wife who might have had another Christina Ward in Madison County? The Witness: But there were voters that we were not able to identify. The Court: Yes. And there may always be that possibility. The Witness: And so that's why we added the birthday, was trying to help us identify and pinpoint to make more votes count.").

89. ***Confirming eligibility.*** The new identifiers also help officials confirm voters' eligibility. An absentee ballot application can be submitted far in advance of an election—either the first of the year of that election, or 90 days prior, whichever is earlier. Vol. 3, 107:19-25 (Manifold). Absentee ballots, however, are only issued starting 28 days before an election. Vol. 3, 108:3-5 (Manifold). That means a significant amount of time can pass between a voter submitting an application and receiving their ballot. Vol. 3, 108:1-2 (Manifold). In that time, a voter could have a name change, move, or die. Vol. 3, 108:23-25, 109:4-110:11, 115:2-6 (Manifold). As Mr. Manifold, the Democratic manager of Franklin County's absentee department noted, the gap in time between applying for an absentee ballot and receiving it means that "sometimes people will [have] moved in between or I'll get a new address on that that's not – wasn't on any other document that they had sent in. I just actually had that happen twice yesterday when I was doing, like, about 120 of them." Vol. 3, 50:19-23. The new address means "they probably have the wrong ballot style," which means "they could have completely different races to vote in." Vol. 3, 51:2-10 (Manifold); *see also* Vol. 11, 156:6-16 (Damschroder).

90. ***Counting ballots and updating information for voters who have moved.*** Unlike prior law, the current provisional affirmation form provides boards of elections with a voter's current address, allowing them to verify the voter's eligibility, count the ballots and update the

voter's registration. Vol. 10, 188:8-189:20 (Poland); Vol. 11, 143:9-144:15 (Damschroder).

91. ***Registering unregistered voters.*** And critically, the challenged laws allow boards to register unregistered provisional voters, thus helping boards to count future voters. S.B. 216 was specifically targeted to cure the most common reason that provisional ballots are rejected in Ohio: not registered in the State. The current provisional affirmation form is "much better, much, much better" than the prior provisional affirmation form for voters because it serves as a registration form for unregistered voters and as a name and address update for those that are registered. Vol. 11, 53:12-54:1 (Terry). By registering unregistered individuals, provisional affirmation statements are intended to reduce the universe of provisional voters. And since 2014, provisional affirmations have done just that. Vol. 10, 206:18-207:8 (Poland) (noting that in the 2014 election, 256 voters had provisional ballots rejected because they were not registered; 233 of those voters were registered because they completed the provisional affirmation statement; and 60 of those voters actually voted in the 2015 election); Vol. 7, 212:20-213:1 (Ward) ("With this latest election with 158 provisionals, only two failed to complete the form in its entirety. So roughly 156 of the 158 will now be registered to vote in November. I think that's a success story.").

92. These are not just abstract numbers. Because of S.B. 216, non-registered provisional voters who filled out the new provisional affirmation statement became registered to vote in Ohio. Voters, like James Butler, from Harrison County, who attempted to vote on Election Day in 2014, had to vote provisional ballots, which were rejected for not being registered in the State. **D81** (Harrison County Provisional Listing, November 4, 2014 General Election). Mr. Butler completely filled out the provisional affirmation statement (which now contains the five fields necessary to register to vote in Ohio), and the Harrison County Board of

Elections registered him based on the information he provided. Vol. 9, 136:8-21 (Bear); **D83** (James Butler Provisional Ballot Affirmation & VoterFind). Because the provisional affirmation statement registered Mr. Butler after the 2014 general election, he was able to and did vote in the 2015 general election and the 2016 primary election. Vol. 9, 136:14-21 (Bear); **D83**. The record is replete with examples of real Ohio voters that have benefited from these laws. *See* Vol. 9, 44:8-51:7 (Reed), **D68-79**; Vol. 9, 133:18-138:19 (Bear), **D81-86**; Vol. 9, 271:7-276:14 (Snyder), **D88-93**; Vol. 11, 54:2-58:23 (Terry), **D94**.

93. In some counties, every provisional voter that was rejected for not being registered in the State became registered because of the new law. *See, e.g.*, Harrison County in 2014, Vol. 9, 133:18-136:20 (Bear), **D81-83**; Fayette County, Vol. 9 271:10-274:1 (Snyder), **D88-90**; and Allen County, Vol. 11, 54:2-57:17 ("Q. And based on your review of these documents, at least as of the date these searches were ran, how many of those 14 [provisional] voters [rejected for not being registered in 2014] are now registered in Allen County? A. All 14 of them."), **D94**.

94. With these new laws, boards can more quickly and efficiently search for voters in their voter registration databases. Recall the example in which Ms. Poland searched the statewide voter registration database. Simply searching by name resulted in hundreds of results. *See* Vol. 10, 195:11-197:1. But when Ms. Poland searched by last four digits of a social security number *and* by birthdate, only one voter was found. Vol. 10, 199:9-22. Mr. Morgan, the Democratic deputy director of the Miami County Board of Elections, noted that his board typically looks up provisional voters in the county or statewide voter registration databases by the voter's date of birth. Vol. 4, 99:23-25. Lorain County also noted that a birthdate is useful to distinguish between voters with similar information, such as a father and son. Vol. 3, 175:17-22

(Adams). Of the eight search criteria that Cuyahoga County trains its provisional ballot employees to use, five use either date of birth or address. Vol. 2, 154:15-24 (Perlatti).

B. The challenged laws impose minimal burden on voters.

95. In contrast to the benefits that have resulted from the passage of S.B. 205 and S.B. 216, the increase in burden for voters as a result of these laws has been minimal.

96. Although Plaintiffs purport to challenge a number of provisions contained in S.B. 205 and S.B. 216, their proffered evidence of burden related almost exclusively to the five field requirements.

97. But the record as a whole fails to support Plaintiffs' assertion that the changes to the five fields resulted in a widespread increased burden.

1. Adding birthdate and address to the required fields did not materially increase the burden on voters.

98. As an initial matter, the testimony presented by all witnesses uniformly and unambiguously confirmed that S.B. 205 and S.B. 216 required only two new pieces of information – birthdate and address. Vol. 6, 31:14-21 (Bucaro) (noting only added information in 2014 was birthdate and current address).

99. Thus rejections for other reasons—and much of the evidence Plaintiffs presented during trial—are unrelated to the laws that are challenged in this case.

100. Importantly, these non-relevant reasons for rejection represented a much larger share of the overall rejections than any rejection related to this case. *See generally* App'x A.

101. In both 2014 and 2015, the most common reason by far for absentee ballot rejection was that the voter missed the voting deadline (as opposed to missing/inaccurate information on the absentee identification envelope). *See* **D22** (2014 Absentee Supplemental Report); **D24** (2015 Absentee Supplemental Report); App'x E.

102. In both 2014 and 2015, far more provisional ballots were rejected because the voter was not registered to vote in Ohio than for any voter error. *See* App'x D.

103. Neither of these bases for rejection stems from the challenged laws here, and, indeed, S.B. 216 is working to *reduce* the number of rejections for lack of registration.

104. Ballots that were rejected because of voter errors on the envelope or affirmation statement related to the printed name, ID, or signature requirements are likewise unrelated to the laws at issue here. Voters have been required to provide conforming names and signatures since Ohio instituted its absentee voting system. The challenged laws did not make any changes to these requirements. Vol. 4, 49:9-50:14 (Anthony). Nor did the laws change the ID requirements, or otherwise impact the standard by which those fields were evaluated. Vol. 10, 205:7-14 (Poland) (noting that standard of reviewing provisional affirmation forms has not changed, the information always needed to be correct). Accordingly, Plaintiffs' exhibits highlighting ballots rejected for mistakes in social security number or driver's license or failure to provide a printed name are not relevant to the challenged laws as these ballots would have been rejected before these laws were passed.

2. Birthdate and address are familiar requirements necessary for other aspects of the voting process.

105. Plaintiffs' contention that the addition of birthdate and address materially changed the burden on voters is belied by the evidence establishing that voters are routinely required to provide this information throughout the voting process.

106. For example, the undisputed evidence confirms that voters must provide the same five fields, birthdate and address, to register to vote or to apply for an absentee ballot. **D42** (2012 Voter Registration Form); **D47** (2012 Form 11-A Application for Absent Voter's Ballot).

107. Even outside the voting context, birthdate and address (and far more information) are commonly required to apply for government benefits, to pay taxes, or any number of other everyday activities. Vol. 7, 19:19-20:13, 35:23-37:11 (Strasser).

108. On an intuitive level, therefore, these basic requirements do not appear onerous.

3. Indeed, Plaintiffs themselves believe that the five fields are reasonable and required to verify the identity and eligibility of the voter.

109. Donald Strasser, former executive director and current board member of Plaintiff Columbus Coalition for the Homeless, testified that it is reasonable to require on absentee and provisional ballots the same five fields used for registration. Vol 7, 4:13-14, 10:3-5, 47:9-19.

110. Additionally, Brian Davis, the executive director of Plaintiff Northeast Ohio Coalition for the Homeless, testified that, for a board of elections to verify the identity and eligibility of an absentee or provisional voter, the voter needs to provide the same five fields used for registration and that the five fields need to match the registration information. Doc. 557-2 at 39:9-40:21 (Davis Depo. Trans. Designations).

4. Data does not support Plaintiffs' hypothesis that changes to the fields have resulted or will result in increased rejections.

111. Actual election data confirms this conclusion. Recent data from the two general elections that have taken place with the challenged laws in place show *no* marked change in the rates at which boards are accepting or rejecting absentee and provisional ballots. *See* App'x C.

112. ***Absentee ballots***. In both 2014 and 2015, the acceptance rate of domestic absentee ballots exceeded 98% (98.8% in 2014, 98.2% in 2015). *See* **D21–D24**; App'x C.

113. Notably, this acceptance rate was higher in 2014, with the new laws in place, than it was in the prior 2010 midterm election, before the challenged laws—98.8% to 98.5%. *See* **D19** (domestic absentee ballot report for 2010).

114. ***Provisional ballots*.** Provisional ballot data reveal similar results. In 2014, with the challenged laws in place, Ohio counted more than 90% of provisional ballots statewide. *See* **D16**; App'x C.

115. Ohio was one of only five States in 2014 with a provisional ballot acceptance rate of 90% or higher. **D25** at 16; App'x B. The provisional ballot acceptance rate was lower in 2015, ~85%, but this was due entirely to an increase in rejections for unregistered and wrong location voters (constituting ~90% of provisional ballots rejected in 2015). *See* **D17**.

116. Thus the 2014 and 2015 data do not support Plaintiffs' working hypothesis that the small adjustments to absentee and provisional ballot procedures in 2014 have led or will lead to increased rejections for minor errors.

5. Expert analyses of election data focusing on rejections relating to the five fields further contradicts Plaintiffs' theory.

117. This finding holds true when focusing only on rejections relating to voter errors in any of the five fields.[1]

118. Expert testimony from Defendant's expert, Dr. M.V. (Trey) Hood III illustrates this point.

119. Dr. Hood is a tenured professor of Political Science at the University of Georgia. Vol. 10, 6:18-22. He has three degrees in political science: Ph.D. (Texas Tech 1997), M.A. (Baylor 1993), and B.S. (Texas A&M 1991). Vol. 10, 6:14-15, 6:18-22; **D9** (Hood CV).

120. Dr. Hood has authored at least thirty-seven peer-reviewed papers and five book chapters, and he has presented on political science topics at dozens of symposia. **D9** at i-xii. He is the Director of Graduate Studies at the University of Georgia. *Id*. at i. He sits on the editorial boards of the Social Science Quarterly and the Election Law Journal. *Id*. at xii; Vol. 10, 8:22-

[1] For the "voter error" category within his initial report Dr. Hood included rejections relating to signature, name, address, identification, and date of birth. Vol. 10, 28:16-29:1 (Hood).

9:1. His research includes the areas of American politics and policy, election administration, early voting, voter ID laws, voter fraud, voting behavior, demographics and voting, and racial politics. Vol. 10, 6:23-8:135.

121. The Court accepted Dr. Hood as an expert in the areas of political science, election administration, voter behavior, and quantitative analytical methods. Vol. 10, 14:19-15:10.

122. Dr. Hood provided an assessment of changes to Ohio's provisional balloting regulations, changes to administrative procedures related to absentee ballots, and the administration of multi-precinct voting locations. Vol. 10, 16:17-21; **D8** at 2 (Hood initial report). In other words, he "was asked to issue my own assessment of whether or not, for instance, these changes to provisional ballot laws or absentee ballot laws…, were or were not, causing, … more provisional ballots to be rejected or not." Vol. 10, 25:4-8.

123. To answer these questions, Dr. Hood analyzed the laws and directives at issue, statistical data from the Secretary of State's office, and statements and interviews with county and state elections officials. Vol. 10, 16:25-17:7, 18:8-12.

124. For both absentee and provisional ballots, Dr. Hood found a number of election administration benefits for the changes to the law. First, the more information available to election officials, the better chance they have of accurately locating a voter in the registration databases; for that reason, requiring an address and birthdate helps election officials count more ballots. Vol. 10, 27:7-12; 43:20-44:1. Second, the provisional affirmation form can now be used to register voters, or update their registration with a change of address. Vol. 10, 21:24-22:5. Finally, the changes to the cure period for absentee and provisional ballots standardized that process across both types of balloting, and provided a workable stopping point before election

officials must begin the official canvass post-election. Vol. 10, 23:1-10.

125. As Dr. Hood outlines, in 2014 only 599 provisional ballots, 0.02% of the total votes cast, were rejected due to voter error. **D8** at 5-6; App'x G. This percentage was lower than all of the three preceding general elections. *Id.* at 5. In fact, the numbers from 2008 until 2015 reflect lower rates of rejection due to voter error following implementation of the challenged laws. *Id*. at 6. Or, broken down somewhat differently, during 2014 and 2015 (post-implementation of the challenged laws) the number of provisional ballots rejected due to voter error was 1.2% of the total provisional ballots cast—for the 2008, 2010, and 2012 elections this rejection rate was higher, at 1.6%. *Id*. at 6-7. In other words, "even though the number of categories in which someone's provisional ballot might have been rejected because of voter error increases, the provisional ballot rejection rate due to voter error falls…[which] would lead me to believe that the State asking provisional voters for these additional pieces of information has not increased the rejection rate." Vol. 10, 34:16-35:1.

126. Dr. Hood was unable to provide a similar quantitative analysis for absentee ballots because "there were just not enough detailed information provided by the State on absentee ballot rejection rates, specifically." Vol. 10, 44:11-16. Data at that level of detail are important, because "really what we want to do is…zoom down to this level of an absentee-by-mail ballot being rejected specifically because the voter failed to provide one of these additional fields. And that information is just not there, unfortunately." Vol. 10, 44:16-20.

127. In sum, Dr. Hood concluded, "In terms of absentee ballots and provisional ballots, the changes to those laws, I haven't found any evidence that there's any kind of detrimental impact from those. And, in addition, there seem to be some really I would just call, common-sense administrative justifications for these changes to the law." Vol. 10, 53:15-20.

6. Plaintiffs presented no evidence that any provisions other than the five fields resulted in any increased burden for voters.

128. Plaintiffs also challenge other aspects of S.B. 205 and S.B. 216. But Plaintiffs wholly fail to substantiate their claims that these aspects of the law have had any adverse impact on voters.

129. For example, Plaintiffs did not identify a single voter who claimed to have been impacted by the reduction in cure period for provisional ballots from ten to seven days, nor did any of their witnesses cite to any example. To the contrary, the undisputed testimony of the boards of elections officials confirms that previously few, if any, voters ever came in to cure deficiencies between the seventh and tenth days following an election. *See* Vol. 2, 8:17-19 (McNair) ("I mean very, very few people came in on the days he wanted to cut back, days eight, nine and ten."); Vol. 3, 149:25-150:3 (Adams) (noting it is "not very often" that a voter will come in to the board to correct a missing identification field on their provisional affirmation); Vol. 11, 88:20-89:1 (Terry) (noting that in eight-plus years two people came in to cure their provisional affirmation statement deficiency); Vol. 10, 202:24-203:5 (Poland) (noting that two individuals came in the March 2016 primary to cure their provisional affirmation statements, but neither actually needed to cure).

130. Similarly, though some of Plaintiffs' witnesses hypothesized that requiring voters, rather than poll workers, to complete the provisional ballot affirmation statement, would result in an increased burden for voters, they presented *no* evidence substantiating this theory. To the contrary, the evidence that was submitted confirms that this change makes sense and actually reduces the risk of errors on the form that could result in a ballot being rejected.

131. Poll workers have a number of tasks to attend to on Election Day. Vol. 11, 39:21-40:10 (Terry) ("In fact, their current task load is pretty heavy. … And it's really hard on them,

and there is a lot of pressure and stress. And it's a long day. They're very tired. So it's very difficult, in some situations, for poll-workers.").

132. Poll workers are temporary workers, who, at most, only work a couple days a year. Vol. 10, 185:2-186:2 (Poland) ("You know, in the polling place we have – our poll workers only work one or two days a year versus the staff that we have at the Board of Elections…."); Vol. 11, 39:21-40:10 (Terry) ("And it's hard – you know, they're expected to be elections experts on that day, when they only do it once a day for every six months.").

133. Given the great need for poll workers on Election Day, recruiting qualified individuals is always an issue for boards of elections. As Sandy McNair, former member of the Cuyahoga County Board of Elections noted: "Now, as a practical matter, when you're hiring 5,000 people for a one-day event, you're not going to get, necessarily, all the most qualified people that you want." Vol. 2, 40:9-11.

134. Under these circumstances, it is possible that poll workers do not execute their duties flawlessly, and to diminish the possibility of error that can compromise a voter's ballot, Ohio requires voters to complete their own ballot and paperwork. *See* Vol. 4, 76:18-77:9 (Anthony) ("The poll-worker should not do that [fill out information for the voter]. That puts, I think, undue pressure on the poll-worker; and it probably will create more poll-worker error if the poll-worker had to fill out the information."); Vol. 10, 191:6-18 (Poland) ("If someone else completed [the information on the affirmation statement] for the voter, they may make a mistake on filling that out. Perhaps they – if the voter verbally communicated their address or their date of birth or their – their – the last four digits of their social, the poll worker may hear it wrong or record it wrong.").

135. Importantly, nothing in the challenged laws prevents boards of elections staff or poll workers from providing general assistance to voters. To the contrary, numerous witnesses testified that they can and do answer questions and provide assistance to voters. Vol. 7, 167:24-168:2, 185:22-186:4 (Sauter); Vol. 7, 231:23-233:6 (Ward); Vol. 10, 181:2-183:4 (Poland); Vol. 9, 13:15-14:7 (Reed); Vol. 9, 92:18-93:23 (Crawford); Vol. 9, 104:9-11 (Bear); Vol. 9, 148:25-151:10 (Larrick); Vol. 9, 212:8-14 (Osman); Vol. 11, 41:11-25, 59:3-60:1 (Terry); Vol. 6, 70:25-71:8 (Bucaro); Vol. 11, 164:3-14 (Damschroder).

136. Additionally, voters who are blind, disabled, or illiterate can still receive assistance completing their forms. Vol. 10, 182:21-183:18 (Poland); Vol. 9, 65:20-66:24 (Crawford); Vol. 9, 104:9-11 (Bear); Vol. 9, 151:8-10 (Larrick); Vol. 9, 212:8-18 (Osman); Vol. 11, 164:3-25 (Damschroder). Although it is true that a voter who falls into one of these categories must generally ask for assistance, Plaintiffs fail to demonstrate that this is an onerous burden for any voter.

137. To the contrary, the evidence confirms that an individual who is illiterate would require assistance in a number of voting and non-voting contexts alike. Vol. 6, 70:22-24 (Bucaro). For example, a voter who is illiterate would need assistance to read and understand registration forms, instructions for using a DRE machine or voting a paper ballot, and even the issues and races on the ballot.

138. Importantly, an individual does not need to tell the board or poll worker that he or she is blind, disabled, or illiterate to receive assistance. Vol. 11, 165:2-5 (Damschroder); Vol. 9, 212:15-18 (Osman); Vol. 9, 66:5-20 (Crawford).

139. Voters who request assistance in filling out a ballot or envelope, however, can receive it from a bipartisan team. *See*, *e.g.*, Vol. 6, 222:22-223:13 (Scott); Vol. 10, 182:21-183:4, 309:13-22 (Poland); Vol. 6, 70:25-71:8 (Bucaro).

140. A voter needing assistance can also bring a person of their choosing with them to the polls to help the voter with all aspects of the voting process. Vol. 10, 182:21-183:4 (Poland); Vol. 11, 41:17-25 (Terry); Vol. 11, 165:6-15 (Damschroder); Vol. 6, 71:9-11 (Bucaro).

C. Plaintiffs presented no evidence demonstrating that the laws have had a disproportionate impact on minority voters.

141. The evidence similarly offers no support for Plaintiffs' unfounded assumption that the challenged laws have and/or will disproportionality impact minority voters—the premise of a number of Plaintiffs' claims. Plaintiffs' proffered evidence of disproportionate impact consisted of testimony and a report from Jeffrey Timberlake, Ph.D, an Associate Professor of sociology at the University of Cincinnati. Dr. Timberlake specifically tested county-level election data from 2008 until 2014 (through statistical regression analyses) in an attempt to evaluate any potential relationship between county minority population and absentee/provisional voting.[2] *See* **P-1194** at PTF-143–PTF-152 (Timberlake's January 11, 2016 report). The State, in turn, presented testimony and a report from Nolan McCarty, Ph.D, the Chair of the Politics Department at Princeton University and founding Editor-in-Chief of the *Quarterly Journal of Political Science*,

[2] In addition to Dr. Timberlake's new analyses in this case, Plaintiffs also submitted his prior September 2015 expert report in the *ODP v. Husted* case. *See* **P-1194** at PTF-153–PTF-218. But Dr. Timberlake conceded (i) that his approach in the prior case was less sophisticated than his new regression analyses, and (ii) that his opinions had softened based on his new analyses. *See* Vol. 5, 34:21-25, 110:24-111:10. Dr. Timberlake's prior absentee and provisional voting tables from his September 2015 report also contain several math errors and used inaccurate voting data. *See*, *e.g.*, Vol. 6, 3:18-4:13; **P-1194** at PTF-211–PTF-214. Moreover, although Dr. Timberlake was aware of at least some of the flaws/errors within his prior September 2015 report (relating to his sorting of Ohio counties), he still resubmitted the prior report with uncorrected tables based on the advice of counsel. *See* Vol. 5, 191:11-192:17.

to evaluate Dr. Timberlake's analyses and conclusions. **D11** (McCarty's January 25 rebuttal report); *see also* **D12** (McCarty's curriculum vitae).

142. The testimony and reports of these opinion witnesses does not show that the challenged laws have had, or will have, a disparate impact on minority voters for several reasons.

1. Drs. McCarty and Timberlake agree that election data was inconclusive for purposes of showing any disparate impact.

143. Both Drs. McCarty and Timberlake agreed that election data from 2008 and 2014 was inconclusive in terms of demonstrating any disparate impact associated with the challenged laws. Dr. McCarty, for example, testified, "I am not able to state anything confidently that the new laws caused rejection rates to go one way or another. Simply, the basis of my report is that the data that was offered in this case are completely inconclusive." Vol. 8, 61:21-24. He also opined that "based on [Dr. Timberlake's] own analysis, one cannot establish to any precision that there is any relationship between minority population share and the ballot rejection rates." Vol. 8, 28:15-18; *see also* Vol. 8, 45:6-9 ("I just find no real statistical relationship between minority population share and the rates of absentee and provisional ballot casting and rejection.").

144. Dr. McCarty summarized his conclusion as follows:

> My overall conclusion was that the data and the analysis used in Professor Timberlake's report were not sufficient to establish that there was a relationship between the minority population share and the rate of rejection of absentee and provisional ballots; moreover, that there was no evidence that the changes associated with the [challenged laws] had a racially disparate impact in the 2014 General Election.

Vol. 8, 16:15-21.

145. Dr. Timberlake similarly conceded that the election data in this case is not pointing strongly in favor of any disparate impact conclusion (in either direction):

> Q. Is it fair to say that the data in this case isn't really obviously pointing…any direction?

> A. I think that that's fair.… I think it's fair to say that it's not obvious that there has been an effect from the data that we have at hand, but I would also urge caution in the other direction that it's not obvious that there hasn't been an impact.
>
> That's really the main point I want to make.
>
> * * *
>
> Q. And couldn't a possible conclusion about what you're saying about post-implementation comparisons is just we can't prove anything at this time?
>
> A. On the basis of the data that I've seen, I would agree with that, that it's – it's really hard to see any obvious conclusion at this point. I think other kinds of data would have to be brought to bear other than the kinds of data that have at our disposal ….

Vol. 5, 171:23-173:6; *see also* Vol. 5, 86:23-87:9 ("And, so, unfortunately, neither side has very good data on this question. … [I]t's simply not possible to draw a conclusion either about the impact on any one election -- for example, the upcoming 2016 General -- *or to say anything about disparate racial impact*.") (emphasis added).

2. Any potential relationship between minority population and absentee/provisional voting has been weakening since 2008 and was at its weakest in 2014 following implementation of the challenged laws.

146. To the extent any inferences can be derived from this inconclusive data, they do not support a finding that the challenged laws resulted in a disparate impact.

147. Both Drs. Timberlake and McCarty agreed that Dr. Timberlake's regression analyses reflected that any relationship between county minority population and absentee and provisional voting has been declining over time. Dr. McCarty testified, "even if you take [Dr. Timberlake's] estimates at face value and accept them, they showed that the relationship, that relationship between minority population share and casting and rejection rates, it's declined very, very dramatically from 2008 through 2014." Vol. 8, 21:13-17; *see also* Vol. 8, 27:4-7 ("To the extent to which there is any relationship between minority population share and [absentee and provisional] ballot casting and rejection rates, it's a declining…one. The effects have gotten

much, much smaller over time."). Dr. Timberlake similarly conceded the weakening of any relationship over time:

> Q. And your findings are weaker in 2014, which is the only post-implementation election you tested, correct?
>
> A. Yes. I would say that -- I mean, what I think is probably happening for some reason *is that the overall trend is towards a weakening relationship*….
>
> Q. But it does look like the overall relationship is declining as we move from least recent to most recent elections?
>
> A. It does look like it. It is getting weaker, yes. At least as measured by these data.

Vol. 5, 135:11-24 (emphasis added).

148. The coefficients within Dr. Timberlake's regression analyses—*i.e.*, the numbers that measure the strength of the relationship between county minority population and casting/rejection rates—confirm the overall decline (between like elections) in any potential relationship. *See* **P-1194** at PTF-149–PTF-152; **D11** at 10; App'x C-D; *see also* Vol. 8, 18:3-23 (McCarty) (describing why it is "most informative" to compare the two presidential elections and the two midterm elections).

149. Critically, these numbers reflect that the relationship was weakest, and generally nonexistent, in 2014—the only post-implementation election Dr. Timberlake evaluated. As Dr. McCarty described, "[i]n 2014, it's the smallest -- it's the smallest impact. *In the case of absentee rejection rates and provisional rejection rates, there is no statistically significant relationship between minority population share and the rejection rates*." Vol. 8, 27:9-13 (emphasis added); *see also* Vol. 5, 129:15-17 (Timberlake) ("Q. So for 2014 data you're not seeing much, if any, of a relationship for either [absentee] casting or rates, are you? A. That's correct."); Vol. 5, 138:2-13 (Timberlake) (stating no relationship in terms of 2014 provisional

rejections); Vol. 5, 154:17-20 (Timberlake) ("So it is true, and I want to be clear, that there is no obvious evidence in 2014 that there's a strong relationship between county percent minority and these kinds of voting outcomes I've talked about….").

150. Dr. Timberlake, in fact, admitted that if limited to his *only* post-implementation analysis (2014) he would not have reached the same conclusions within his report. Vol. 5, 153:14-24. And, despite the fact that he only tested four elections, Dr. Timberlake conceded that at various points in summarizing his written conclusions he failed to mention specifically the weakness of his 2014 findings. *See e.g.*, Vol. 5, 132:18-134:4, 152:9-25, 160:5-7, 167:7-11.

151. Thus, there is no evidence from 2014 that any of the modest changes under the challenged laws, including addition of date of birth and address fields, strengthened any relationship—much less contributed to any disparate relationship—between county percent minority and absentee or provisional ballot rejections. *See, e.g.*, Vol. 5, 130:13-16 (Timberlake) ("Q. So is it fair to say that nothing about this [absentee] data from these years indicates that the challenged laws strengthened any relationship? A. That's correct."); Vol. 5, 139:13-18 (Timberlake) ("Q. And nothing about your 2014 specific regression analysis suggests that the challenged laws did anything to strengthen the relationship between county percent minority and provisional ballot rejection, correct? A. Correct. I would not conclude that the relationship got stronger.").

3. Dr. Timberlake's methodology was flawed.

152. Setting aside the admitted weakness of his results, Dr. Timberlake's analyses also suffer from significant methodological problems. Dr. McCarty specifically noted that Dr. Timberlake's analyses fails to adequately account for the well-known statistical pitfalls of aggregation bias and omitted variable bias. *See* Vol. 8, 29:1-34:24; **D11** at 6-7.

153. Aggregation bias is a concern in this case because Dr. Timberlake attempted to use county-level data (regarding minority population) to draw inferences about individual relationships (the race of specific voters). *See, e.g.*, Vol. 8, 29:8-12 (McCarty) ("In particular, even if we observe a correlation between minority population share and ballot rejection rates, we do not still, logically, know that the relationship comes about because minorities were having their ballots rejected at higher rates. There might be something that those counties incidentally related to minority population shares that leads to higher rejection rates."); Vol. 5, 114:6-9 (Timberlake) ("A. Yes. If white voters in high minority counties behave very differently from white voters in low minority counties, then the correlation or association between percent minority and the outcomes that I'm looking at could be biased."). And the problem of aggregation bias is particularly significant in a case like this where—even in high minority counties—nonminority voters make up the considerable majority of Ohio's population in every county. Dr. McCarty explained this issue:

> Q. So, when thinking about aggregation bias when you're using county-level sets of data, does it matter how big the subgroup you're trying to draw an inference about is?
>
> A. Yes it does. So, in the case of Ohio counties, I believe that I report somewhere here that the most minority county is around 30 percent, yet ballot rejection rates are around one or two percent or less.
>
> So it's easy to see, in a county that's even 30 percent minority, that variation in a one or two percent number could be driven solely by the people in the majority community and need not be related to the behavior of the minority community.

Vol. 8, 29:19-30:4.

154. Closely related to aggregation bias, Dr. Timberlake's analyses also fail to sufficiently account for omitted variable bias, which refers to any factor left out of an analysis that might be influencing a relationship. Vol. 8, 33-34 (McCarty). Here, Dr. Timberlake only

controlled and tested for five variables that might be affecting voter behavior. Vol. 5, 116:2-11. He, however, left various other factors unaccounted for. *See* Vol. 8, 33:14-34:10 (McCarty) (listing several other factors that might explain variation in voting across counties).

155. Based on his experience in quantitative analysis, Dr. McCarty opined that Dr. Timberlake's model left a "significant amount of the variation…unexplained by minority population share." Vol. 8, 31:10-11; Vol. 8 31:17-19 ("[T]he variables he chose are not picking up something systematic about casting and rejection of absentee ballots."); *see also* **D11** at 11 ("Given the poor performance of his extended models, an alternative approach is needed to lessen the effects of aggregation and omitted variable bias."). With regard to methodology, Dr. McCarty concluded Dr. Timberlake's approach did not support reliable conclusions:

> Q. And, so, in terms of methodology, would you have been willing to rely on Professor Timberlake's regression analyses to form any firm conclusions?
>
> A. I don't believe that his analyses are really sufficient to form any conclusions about the relationship between minority population share and ballot casting and rejecting rates.
>
> Q. And, just briefly, why is that…?
>
> A. Again, there are a lot of factors, you know, that differ across counties in terms of the demographics, the local political context, et cetera, which are not controlled for in his analyses.
>
> If any of those factors just happen to be correlated with minority population share …his statistical estimates are going to be biased.

Vol. 8, 34:16-35:5.

156. Dr. Timberlake also erred by including all absentee/provisional ballot rejections (rejected for any reasons) within his analyses rather than those rejected for reasons related to the challenged laws. *See* **D11** at 11-12. Once again, most absentee and provisional ballot rejections occur because of reasons completely unrelated to the challenged laws or this case (*e.g.*, missing

absentee voting deadline, unregistered provisional voters). *Id.* at 11. Dr. McCarty described the problem with including all reasons for rejection: "What we really want to know is what the impact of the new laws are. And so adding data that's not affected by the laws is going to, perhaps, inflate those effects; if not, just simply make them more noisy and harder to detect." Vol. 8, 35:21-24. Even taking an "upper bound estimate" of rejection at issue, Dr. McCarty found that eliminating rejections unrelated to this case further weakened Dr. Timberlake's analyses for the 2014 election. **D11** at 12 (Table 4); Vol. 8, 37:17-23 ("The table suggests that any relationship between minority population share and rejections is much, much smaller if one focuses on the narrower set of rejections which were at issue. It also suggests, especially, that if you look at the model with controls, that there's no statistically significant relationship between rejection rates and minority population share….").

4. Dr. McCarty's alternative approach also weighs against any disparate impact finding.

157. In evaluating Dr. Timberlake's report, Dr. McCarty also performed alternative analyses using the same data. Specifically, Dr. McCarty proposed a "first difference" approach to assess whether any changes in voting and rejection rates between the 2010 and 2014 midterms were disparately impacting counties with large minority populations. *See* **D11** at 13-17. The advantage of this approach is that, by comparing election data from the same county (*e.g.*, Franklin County in 2010 versus Franklin County in 2014), the approach eliminates many omitted variable bias concerns. Vol. 8, 40:3-25 (McCarty).

158. Applying the first difference approach, Dr. McCarty found that both absentee and provisional rejection rates fell between 2010 and 2014. **D11** at 17. Importantly, following implementation of new fields in 2014, rejection rates fell at equal or greater levels in large minority counties. *Id.*; *see also* Vol. 8, 44:15-18 (McCarty) (testifying that based on his first

approach he "reached the conclusion that the changes in the ballot-casting rejection rates across the counties in the two elections had no real relationship to the minority population share"). These findings are inconsistent with a disparate negative impact. *See* Vol. 8, 42:1-2 (McCarty) ("That would be inconsistent with a disparate impact. If you took these literally, it would suggest a disparate benefit.").

5. The record does not reflect that the challenged laws will have an overall negative impact on voters.

159. Another flaw with Plaintiffs' approach is their unproven assumption that the overall impact of the challenged laws will be negative. During his testimony, Dr. Timberlake conceded on numerous occasions that he had not attempted to measure the actual impact of the challenge laws. *See, e.g.*, Vol. 5, 134, 20-23 ("[Q] Nothing about these findings shows what's going to happen because of SB 205 and 216, correct? A. That is correct."); Vol. 5, 143:18-20 ("So you basically didn't analyze any potential impact…either positive or negative? That's correct.") Rather, Dr. Timberlake relied on the *untested* assumption that "all else held constant" imposing additional requirements on voters would lead to more rejections. Vol. 5, 141:5-144:3.

160. But under the challenged laws everything else is not held constant. *See* Vol. 5, 142:23-143:1 (Timberlake) ("And, in fact, I would say lots of other things surely changed also. That's what makes it so hard to isolate the impact of any one variable, because a lot of other things are changing at the same time."). Instead, in addition to providing two new field requirements, the challenged laws are also helping voters in a variety of ways such as by (i) supplying election officials with more information to identify voters in their databases (reducing the number of unfound voters); (ii) confirming the eligibility of provisional voters that have moved without updating their registration; (iii) creating a better system for registering unregistered voters (benefiting future voters); and (iv) codifying a statutory right to an absentee

ballot cure period (a less tangible, but still significant increase to voters' rights). In considering the overall impact of the challenged laws, therefore, the Court cannot simply say more requirements means a negative impact; it must weigh all potential impacts both positive and negative. As Dr. Timberlake described, "[i]n evaluating the impact of the law, one would want to know *both the positive and negative aspects of the law*." Vol. 5, 148:2-4 (emphasis added); *see also* Vol. 5, 148:10-13 ("But it is possible that some aspect of the challenged provisions is helping voters and others could be hurting, and those could be working at cross purposes.").

161. At bottom, neither Plaintiffs nor their opinion witness have engaged in the balancing necessary to show the challenged laws have had, or will have, a negative net impact.

IV. The Secretary of State has issued detailed guidance and taken additional steps to clarify the law and improve the voting process.

162. The evidence presented at trial also reflects that the Secretary of State's office has provided detailed guidance and training to the boards regarding all of Ohio's election laws, including those challenged here, and has voluntarily taken a number of steps to minimize any potential burden from the challenged laws.

163. Mr. Damschroder testified that the Secretary of State's office has taken the unprecedented step of creating a consolidated manual of permanent directives, so that elections officials can readily find all relevant laws and directives in one place. Vol. 11, 108:17-20. As part of this process, the Secretary posted proposed permanent directives for public review and comment and incorporated some of the comments received through that process in the final directives. Vol 11, 110:23-111:21 (Damschroder).

164. Other steps taken by the Secretary include:

- Requiring counties to preprint a voter's name and address on their absentee ballot ID envelopes, thereby reducing the risk of any errors related to these fields. Vol. 11, 162:11-15 (Damschroder).

- Requiring all counties to consolidate pollbooks. Vol. 11, 150:18-20 (Damschroder). As Plaintiffs note in their complaint, this important step "eliminates casting a provisional ballot in the wrong precinct when the voter is in the correct polling location." 2d Supp. Compl. ¶ 102.

- Advocating for and successfully securing state funding to enable counties to purchase e-pollbooks. Vol. 11, 150:21-151:4 (Damschroder). Several witnesses testified about the benefits e-pollbooks offer for boards and voters. Vol. 2, 203:12-22 (Burke); Vol. 6, 38:20-39:2, 71:12-17; 72:19-24 (Bucaro); Vol. 4, 63:14-64:2 (Anthony); Vol. 10, 227:5-230:1 (Poland).

- Increasing and improving training for board officials and poll workers. Vol. 11, 165:20-166:14, 168:6-25 (Damschroder); **D105** (PEO Manual).

- Requiring county boards to provide voters with information about their correct polling location, access their voter registration information, see their registration address, review a sample ballot, and track their absentee ballots. Vol. 11, 123:6-16 (Damschroder); Vol. 4, 32:21-33:15 (Anthony); Vol. 2, 155:19-156:3 (Perlatti); Vol. 6, 236:24-237:7 (Scott) (noting that officials direct voters to the proper polling locations); Vol. 10, 228:3-229:2 (Poland).

165. Notably, the Secretary routinely solicits and responds to feedback from various sources, including Plaintiff ODP, about ways to improve election procedures. Vol. 11, 159:20-160:10 (Damschroder). For example, the directive requiring all counties to preprint name and address on all absentee ballot ID envelopes incorporated suggestions and addressed concerns counsel for ODP raised with the Secretary. Vol. 11, 160:6-10 (Damschroder).

166. The Secretary also invited and incorporated suggestions from organizations, including the League of Women Voters, when developing a new provisional ballot envelope. Vol. 11, 153:19-23 (Damschroder).

167. When the Secretary receives information regarding problems impacting the voting process, he takes steps to address the issues. Recently, when the Secretary became aware that post office errors relating to postmarks were resulting in ballots being rejected, the Secretary investigated the problems, consulted with the United States Postal Service and issued directives to the counties aimed at addressing those problems. Vol. 11, 171:22-172:20 (Damschroder).

168. The steps the Secretary has taken and to clarify and improve the voting process both further reduce any burden the challenged laws have in the context of Ohio's overall scheme.

V. Burdens on the Boards of Elections.

169. The post-election time period is very busy for boards, and includes a number of tasks that must be accomplished in a short amount of time, including the processing of provisional ballots. Vol. 2, 42:8-10 (McNair) (noting that the time frame immediately post-election is "a busy time" with numerous administrative tasks to be accomplished); Vol. 10, 230:2-233:25 (Poland). According to Ms. Poland, "the two or three weeks after election day is just as busy or sometimes even busier than the two or three weeks leading up to election day." Vol. 10, 231:9-12. As just one example, within roughly 10 days, boards must account for every single ballot issued in the election to prepare for the official canvass. Vol. 1, 274:15-20 (Bloom) (noting that "[t]he actual [accounting] process, it's quite lengthy"); Vol. 3, 197:12-22 (Anthony); Vol. 7, 184:14-20 (Sauter) (noting that the board is going through reconciliation in the days and weeks following the election). This accounting also ensures the election integrity, "so that we know that there aren't any ballots out there that somebody's voting and then trying to mail it to us or whatever." Vol. 3, 197:18-22 (Anthony).

170. Provisional ballots must be voted on by the board at one time; the boards cannot open and count provisional ballots until they have all been voted on by the board. Dir. 2015-28.

171. The window for processing and counting provisional ballots is narrow. Vol. 7, 218:10-18 (Ward). Vol. 10, 192:17-18 (Poland) ("We have to – we have 14 days to complete this verification process so we want to get that started right away.").

172. Board staff must accomplish a number of tasks to verify provisional ballots before presentation to the board of elections for approval – find the voters in databases; verify the information is correct (Vol. 7, 184:3-4 (Sauter); Vol. 10, 192:19-194:18 (Poland) (describing the

"tedious process" of verifying provisionals)); verify the voter voted the correct ballot; verify with other counties that the voter did not already vote in the election (Vol. 7, 184:3-11 (Sauter) (noting that verifying with other counties "can be a daunting task"); Vol. 10, 192:9-15 (Poland) (explaining that verifying with other counties "takes time")); and verify internally that the voter did not submit an absentee ballot already (Vol. 10, 202:14-18 (Poland)).

173. Boards have markedly different resources to accomplish these tasks. The difference between the budgets for boards is vast: from a little over $100,000 in the smallest counties, to over $14 million in the largest. Vol. 11, 116:16-25 (Damschroder). Permanent staff at boards of elections range from two individuals that each work two-and-a-half days to make sure the week is covered, (Vol. 11 117:4-15 (Damschroder)), to over 90 permanent staff in Cuyahoga County (Vol. 2, 160:24-25 (Perlatti); Vol. 4, 42:9-14 (Anthony) ("We have more staff assigned to specific areas of responsibility. Smaller boards, they tend to be generalists. They tend to do it all.")).

PROPOSED CONCLUSIONS OF LAW

174. To obtain relief, Plaintiffs bear the burden of proving standing and every element of their claims by a preponderance of the evidence. *United States v. Brown*, 988 F.2d 658, 663 (6th Cir. 1993). Plaintiffs fail to satisfy this burden.

I. The challenged laws are constitutional.

175. Plaintiffs' constitutional challenges fail under any theory. Plaintiffs allege the laws: impose an undue burden on the right to vote in violation of the First Amendment and equal protection (count four); violate procedural and substantive due process (counts three and seven); constitute intentional race discrimination in violation of equal protection and the Fifteenth Amendment (count nine); arbitrarily treat similarly situated voters differently in violation of *Bush v. Gore* and equal protection (counts five and six); and constitute viewpoint

discrimination in violation of the First Amendment (count ten). But they are wrong on all counts.

A. The challenged laws do not unconstitutionally burden the right to vote.

1. The *Anderson-Burdick* framework provides a flexible analysis that recognizes the State's broad authority and evaluates election regulations based on the burden they impose.

176. Plaintiffs' undue burden claim invokes—and fails under—the well-established *Anderson-Burdick* framework. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

177. This unique "fundamental right[s]" test, *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591-92 (6th Cir. 2012) ("*NEOCH*"), balances the right to vote against the State's broad "power to regulate their own elections," *Burdick*, 504 U.S. at 433.

178. *Anderson-Burdick* sets forth a sliding scale of review based on the severity of the burden a regulation imposes. *Id*. Regulations that impose little to no burden on the right to vote trigger rational basis review. *NEOCH*, 696 F.3d at 592. Laws that severely restrict the right to vote invoke strict scrutiny review. *Id.* And when the burden falls somewhere between these two poles, courts apply a flexible balancing test that weighs "'the character and magnitude of the asserted injury'" against "'the precise interests put forward by the State'" and "'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting Anderson, 460 U.S. at 789). Even within this flexible middle tier, *Anderson-Burdick* is not the same as traditional intermediate scrutiny (*e.g.*, gender classifications); rather, the less severe the burden the more deferential the review (closer to rational basis). *Ohio Council 8 Am. Fed. of State v. Husted*, 814 F.3d 329,335 (6th Cir. 2016).

179. Thus, the first step under *Anderson-Burdick* is to measure the burden so that the Court can tell what relative level of scrutiny to apply.

2. Burden is measured by looking at all voters in the context of the entire election scheme, not based on individual impacts.

180. When measuring burden, the Court focuses on the "statute's broad application to all [State] voters" in the context of the entire election regime, not on the ultimate effect of noncompliance. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197-200, 202-03 (2008) (plurality) (focusing on the burdens associated with obtaining photo ID, not that people without ID will be unable to vote); *see also id.* at 205 (concurrence) ("[O]ur precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.").

181. The point is not to diminish the importance of any single vote. The point is that to regulate elections, States must have rules, even though these rules will inevitably affect voting in some fashion. *See Burdick*, 504 U.S. at 434; *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).

182. Indeed, as *Griffin* explained, any voting restriction "is going to exclude, either de jure or de facto, some people from voting." 385 F.3d at 1130; *see also Burdick*, 504 U.S. at 434 (acknowledging that "all election regulations" "have an impact on the right to vote"). But "state legislatures may [still] without transgressing the Constitution impose extensive restrictions on voting." *Griffin*, 385 F.3d at 1130 (rejecting argument that the Constitution mandates absentee voting for working mothers). Voting deadlines illustrate the point: once a State imposes a deadline for voting, someone will inevitably miss it. In fact, more absentee ballots are rejected for missing the deadline than for any other reason, including those Plaintiffs challenge here. *See supra* ¶ 101. Yet no one disputes the State's authority to impose the deadline.

183. The "constitutional question" is not, therefore, whether the restriction will result in the exclusion of some voters' attempted ballots, but whether the "restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin*, 385 F.3d 1128, 1130.

3. Courts applying *Anderson-Burdick* have upheld restrictions similar to and even more stringent than the laws challenged here.

184. In answering this question, the Court does not write on a blank slate. The Supreme Court *upheld* Indiana's far more stringent voter ID law that required in-person voters "to present photo identification issued by the government." *Crawford*, 553 U.S. at 185. The Court concluded that for most voters the burdens of obtaining identification "surely [do] not qualify as a substantial burden on the right to vote, *or even represent a significant increase over the usual burdens of voting*" and are "*amply justified* by the valid interest in protecting the integrity and reliability of the electoral process." *Id.* at 198, 204 (Stevens, J., plurality) (emphasis added); *see also Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) (holding that Wisconsin's identification law did not violate the Constitution).

185. In 2012, the Sixth Circuit rejected a challenge highly similar to the ones here in the related *SEIU v. Husted* case. *NEOCH*, 696 F.3d at 599-600. The Court held that the *SEIU* plaintiffs were not likely to succeed on their constitutional challenges to Ohio's provisional ballot affirmation process, emphasizing that deficiencies relating to provisional ballot affirmations arose "from voters' failure to follow the form's *rather simple instructions*." *Id.* (emphasis added). The Court concluded that "Ohio's legitimate interests in election oversight and fraud prevention *easily justify the minimal, unspecified burden* asserted by the SEIU plaintiffs." *Id.* (emphasis added).

186. Most recently, a North Carolina district court upheld an omnibus election law that made significant changes to North Carolina's election procedures, including imposing a photo identification requirement, eliminating procedures for counting ballots cast in the wrong precinct, and substantially reducing early voting hours. *N.C. State Conference of the NAACP v. McCrory*, No.1:13-cv-658 (M.D.N.C. April 25, 2016). Importantly, even North Carolina's

exception to its photo identification law imposes more onerous requirements than the laws challenged here. *Id*., slip op. at 102-06 (describing two-step process that voters must complete to qualify for the exception). According to the court, the plaintiffs failed to show those requirements were "more difficult than other voting mechanisms that Plaintiffs either advocate for or have not challenged." *Id*. at 117-18.

187. If laws that impose similar or even greater burdens are constitutional, it follows that the laws challenged here easily pass scrutiny.

4. The challenged laws impose, at most, a minimal burden.

188. Against this legal backdrop, the record in this case compels the conclusion that the modest changes Ohio made in 2014 impose, at most, a minimal burden.

189. Ohio voters have expansive options to cast a ballot, and the rules are the same regardless of the person's race, whether they are a student, or with which party they are affiliated. As one Ohio district court recently observed, "[w]hile not without its flaws, Ohio's voter laws provide its citizenry, disabled or not, with broad access to the right to [vote]." *Ramsden v. Husted*, No. 4:16-cv-641, slip op. at 8 (N.D. Ohio Mar. 17, 2016).

190. Unlike more than a dozen other states, *see Frank*, 768 F.3d at 747, Ohio does not require voters to present photo identification to vote. Instead, Ohio has adopted a far more lenient ID system that permits voters to choose any one of a number of different identification forms. *See supra* ¶ 3. Indeed, to vote absentee or provisionally, a voter need only provide the last four digits of his or her Social Security number.

191. The challenged laws made only minor adjustments to Ohio's election system. As the findings of fact confirm, the challenged laws added only two basic requirements—birth date and address—to the ID information required for absentee and provisional ballots.

192. To the extent these simple requirements impose any burden, the burden does not "represent a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198; *see also McCrory*, No. 1:13-cv-658 at 437. To the contrary, voters must provide these basic pieces of information throughout the voting process, including to register to vote or to apply for an absentee ballot. *See supra* ¶¶ 38, 42. Moreover, they must provide this information (and much more) in a number of different everyday contexts. *See supra* ¶ 107.

193. "To deem [such] ordinary and widespread burdens…severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). "The Constitution does not require that result." *Id.*; *see also McCrory*, No. 1:13-cv-658 at 427 ("[E]ven though '[e]lection laws will invariably impose some burden upon individual voters,' not all burdens are unconstitutional." (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)) (second alteration in original)).

194. Recent election law data further confirm the conclusion that the challenged laws have not resulted in a significant increase in burden. The data show that acceptance rates for both provisional and absentee ballots have remained consistent (or improved) since the challenged laws were passed. *See supra* ¶¶ 90, 111-14. "Data from actual implementation of an election law are precisely the sort of electoral information that courts are encouraged to consider, because they permit an understanding of the effect of the law based on 'historical facts rather than speculation.'" *McCrory*, No. 1:13-cv-658 at 194 (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (Stevens, J., concurring)).

195. Together, the facts and governing law lead to a single conclusion: the challenged laws impose, at most, a minimal burden in the context of Ohio's election system. Thus, rational

basis or "a less-searching examination *closer to rational basis applies*." *Ohio Council 8 Am. Fed. of State*, 814 F.3d at 335 (emphasis added).

196. Under this standard, a plaintiff challenging a state's election law "*bear[s] a heavy constitutional burden*"—one Plaintiffs here cannot meet. *Id.* at 338 (emphasis added) (quotation omitted). "[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions[,]…the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (quotations omitted).

197. The numerous significant state interests and benefits the challenged laws serve more than satisfy this deferential standard (and indeed, would justify the laws even under heightened scrutiny, not applicable here).

5. The challenged laws serve significant state interests and *help voters*.

198. In contrast to any limited burdens, the State's interests in this case are great. Federal courts, including the Supreme Court, have recognized that States have many significant interests in regulating elections and identifying voters, including but not limited to: (a) protecting, safeguarding, and inspiring "public confidence in the integrity of the electoral process," (*Crawford*, 553 U.S. at 197; *Griffin*, 385 F.3d at 1130-31); (b) "assessing the eligibility and qualifications of voters," (*Gonzalez v. Arizona*, 624 F.3d 1162, 1198 (9th Cir. 2010)); (c) "election oversight," (*NEOCH*, 696 F.3d at 600); (d) preventing and deterring election fraud, (*Crawford*, 553 U.S. at 196; *NEOCH*, 696 F.3d at 600; *Frank*, 768 F.3d at 750); (e) "ensuring accurate and complete election results," (*Siegel v. LePore*, 234 F.3d 1163, 1184 (11th Cir. 2000) (concurrence)); (f) keeping accurate voter records and registration rolls, (*Crawford*, 553 U.S. at 196; *Burns v. Fortson*, 410 U.S. 686, 687 (1973)); (g) "dispelling confusion," (*Werme v. Merill*, 84 F.3d 479, 487 (1st Cir. 1996)); (h) reducing the potential for "invalid ballots," (*Griffin*, 385 F.3d at 1131); (i) ensuring consistency with federal registration and identification requirements,

(*Crawford*, 553 U.S. at 192-94); and (j) maintaining orderly, efficient, and fair election processes, (*Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997); *Dudum v. Arntz*, 640 F.3d 1098, 1115-16 (9th Cir. 2011)).

199. The challenged laws serve these and other legitimate and compelling interests. Specifically, as the findings of fact confirm, these laws serve to:

- Register voters (combatting the top reason provisional ballots are rejected);
- Update address and name changes (making more votes count and reducing future provisional ballots);
- Identify voters;
- Confirm voter eligibility;
- Standardize voting laws and reduce confusion;
- Codify notice and cure opportunities for absentee voters;
- Balance voter and administrative interests by keeping the cure period open for the time period voters actually use; and
- Reduce the risk that a ballot will be rejected because of a poll worker's error.

See supra ¶¶ 38, 43, 86-94, 124, 129.

200. These compelling interests justify the laws under any level of scrutiny.

201. In sum, *Anderson-Burdick* balancing is not difficult in this case: the State's interests are compelling, and the burden is light.

202. Though Plaintiffs may not agree with some of the legislative balancing and philosophical choices the Ohio legislature made in passing S.B. 205 and S.B. 216, they fail to demonstrate that these laws impose an unconstitutional burden on the right to vote for voters generally or for any subset of voters.

203. The challenged laws are all reasonable, nondiscriminatory rules; they readily survive constitutional scrutiny under *Anderson-Burdick*.

B. The challenged laws satisfy due process.

204. The *Anderson-Burdick* analysis and conclusions also foreclose Plaintiffs' claims that the challenged laws violate procedural and substantive due process.

205. The Supreme Court has developed *Anderson-Burdick* balancing to specifically evaluate whether election laws meet due process requirements. The *Anderson-Burdick* framework already accounts for procedural due process concerns including (i) the right at stake; (ii) potential burdens to that right; and (iii) the public interests and the extent to which election laws are serving those interests. *Compare Burdick*, 504 U.S. at 433-34; *with Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

206. To the extent further analysis is necessary, the challenged laws meet constitutional standards.

207. Procedural due process requires that a person receive notice and an opportunity to be heard when a property or liberty interest is in question. *Jahn v. Farnswoth*, 617 F. App'x 453, 459 (6th Cir. 2015). But due process is context specific and does not require the same procedures for every situation. *Mathews*, 424 U.S. at 334.

208. The processes and protections afforded under Ohio's election system, including the challenged laws, far exceed the minimum constitutional requirements. S.B. 205 *created* a statutory right for absentee voters to receive notice and an opportunity to cure any deficient information on their identification envelope. *See supra* ¶ 160. Moreover, absentee voters have a variety of ways to check on the status of their absentee ballots, including by checking online. *See supra* ¶¶ 10, 164.

209. Provisional voters also receive sufficient process. Indeed, *the provisional ballot process is, in and of itself, a procedural safeguard protecting voters' rights* by allowing voters whose eligibility to vote is in question to provide additional information establishing their

eligibility through the affirmation process. *See supra* ¶¶ 4-5. At the time voters cast provisional ballots, they receive a provisional ballot notice form that includes (i) hotlines for voters with questions or who want to check on the status of their ballots and (ii) instructions for voters that need to provide identification. *See supra* ¶ 8. Voters can provide identification within seven days of the election. Ohio Rev. Code § 3505.181(B)(7). And the ultimate validity of provisional ballots is then determined by bipartisan board members at meetings open to the public, which voters are free to attend. Dir. 2015-28 § 1.03(C).

210. Plaintiffs' demand for procedures similar to those provided to absentee voters ignores the practical realities of election administration and the differences between the absentee and provisional voting processes. *See Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, *9 (N.D. Ill. Mar. 13, 2006) (recognizing that "absentee voters and provisional voters stand in different positions before the election authority" and that the burden on election staff is greater with provisional ballots); *see also supra* ¶¶ 4-14, 169-72.

211. Ohio's process comports fully with the constitution.

212. Plaintiffs' substantive due process claim fares no better. The Sixth Circuit has recognized that substantive due process "protects against *extraordinary* voting restrictions that render the voting system fundamentally unfair," and applies only to "substantial changes to state election procedures" or "non-uniform standards" that "result in significant disenfranchisement." *NEOCH*, 696 F.3d at 597 (quotations omitted) (emphasis added). The challenged laws made only minor adjustments to Ohio's absentee and provisional ballot approaches, impose at most limited burdens, and serve many legitimate and compelling interests.

213. In short, whether viewed through the lens of Anderson-Burdick balancing or due process, the challenged laws are constitutional.

C. Plaintiffs fail to show that the challenged laws were intended to discriminate.

214. Plaintiffs' claim that the challenged laws constitute intentional discrimination in violation of the equal protection clause and Fifteenth Amendment also lacks merit.

215. The Equal Protection Clause forbids only intentional discrimination. *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) (citing *Washington v. Davis*, 426 U.S. 229 (1976)). To show intentional discrimination, when faced with a *facially neutral law*, like the laws here, a challenger must show *both* that the law has a disparately harmful impact on the class *and* that the legislature *intended* to discriminate against the class. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001). "A disproportionate effect does not violate the Equal Protection Clause, even if it was foreseen." *United States v. Blewett*, 746 F.3d 647, 659 (6th Cir. 2013).

216. Plaintiffs fail to demonstrate that the challenged laws have had a disproportionate impact on minorities, much less that the legislature intended to discriminate.

217. The evidence presented at trial *negates* rather than proves any inference of discriminatory motives on the part of either the Secretary or the General Assembly. For example:

- In 2005, while Secretary Husted was Speaker of the Ohio House of Representatives, the General Assembly enacted expansive universal absentee voting in Ohio. Sub H.B. 234 (Ohio 2005).

- In 2013, the OAEO helped to bring about the introduction and passage of the challenged laws, worked closely with the legislature to draft the laws, and submitted written testimony in support. The OAEO recommended the five identifiers for mail-in absentee identification envelopes, and they successfully advocated for amendments that were made and ultimately incorporated into the final versions of the laws. *See supra* ¶¶ 34-43, 79-82.

- The 2014 changes at issue in this case represent only modest adjustments to Ohio's system.

- The challenged laws serve several legitimate and compelling election interests. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979) (recognizing that the existence of "legitimate noninvidious purposes" weighs against any finding of discriminatory intent).

- Following a preliminary 2014 Supreme Court ruling *in Ohio's favor*, *Husted v. Ohio NAACP*, 135 S.Ct. 42 (2014), Ohio *voluntarily* settled a lawsuit with the Ohio NAACP and the League of Women Voters of Ohio concerning Ohio's early voting schedule through 2018. **D33.**

- Ohio's universal absentee voting process remains one of the most expansive in the country. *See supra* ¶ 20; App'x B.

- The Secretary has been responsive to ideas about election procedures and has taken a number of voluntary steps to improve the voting process and minimize any burden on voters. *See supra* ¶¶ 165-66.

218. Rather than focus on these important pieces of background, Plaintiffs instead sought to show the legislative intent of the many lawmakers who supported the challenged laws, by offering statements of the laws' *opponents*, including Representative Clyde and former-Senator Turner. "However, isolated statements made by opponents of a bill are to be accorded little weight because [i]n their zeal to defeat a bill, [opponents] understandably tend to overstate its reach. Thus, [t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Feiger v. U.S. Att'y Gen.*, 542 F.3d 1111, 1119 (6th Cir. 2008) (citation and quotation omitted) (alterations in original).

219. Plaintiffs' comparison between past and current administrations is also highly misleading. Litigation over Ohio's election laws was prevalent well before 2011. And any objective comparisons of the 2008 and 2012 presidential elections or the 2010 and 2014 midterm elections reflect that absentee and provisional ballot acceptance rates are improving, not getting worse. *See* **D13**–**D24** (election data from 2008 until 2015).

220. Ultimately, Plaintiffs failed to show that any lawmaker, much less a voting majority of the legislature, passed these laws *because of* discriminatory motives.

D. Ohio has uniform statewide standards that are not leading to arbitrary treatment of voters.

221. Plaintiffs incorrectly assert that Ohio's system results in arbitrary and unequal treatment of similarly situated voters. *See* 2d Supp. Compl. ¶¶ 143-54. This assertion triggers analysis under the Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000). But the challenged laws (and the directives implementing them) bear no resemblance to the "standardless" processes invalidated in *Bush v. Gore*.

222. Ohio's five-identifier approach provides county boards with "adequate statewide standards" for identifying voters and confirming eligibility, as well as "practicable procedures to implement them." *See Bush*, 531 U.S. at 110. The challenged laws provide clear rules that have been further explicated through trainings from the Secretary of State and close to 600 pages of directives offering detailed step-by-step guidelines for implementing the rules. *See, e.g.*, Dir. 2015-27 § 1.06; Dir. 2015-28. Ohio's laws and directives also explain when exceptions apply. *See, e.g.*, Dir. 2015-27(B). In other words, Ohio provides specific, uniform standards "for determining what is a legal vote." *Bush*, 531 U.S. at 110.

223. The evidence at trial showed that boards sometimes reach different conclusions when applying these rules to particular facts. But *Bush v. Gore* did not forbid officials from applying generally applicable standards to fact-specific situations. *Id.* Nor would such an expansive interpretation of that case make sense. Any system in which multiple decision-makers apply generally-applicable standards to fact-specific situations will require some level of judgment in which reasonable minds may reach different conclusions. Given these realities, it is likely, if not certain, that every State's election system, if put under a microscope, will have instances when uniform standards lead to some non-uniform applications based on decisions made jointly by bipartisan election officials. This does not equate to an equal protection

violation under *Bush v. Gore*. See *Lemons v. Bradbury*, 538 F.3d 1098, 1107 (9th Cir. 2008) (recognizing that "uniform standards can produce different results").

224. Plaintiffs demonstrated that Ohio's system is human. And no human system will achieve perfect uniformity. But neither the Constitution nor *Bush v. Gore* imposes such an impossible standard. Plaintiffs' claim lacks merit.

E. Plaintiffs' remaining equal protection claims fail.

225. Plaintiffs' remaining equal protection theories also fail. To implicate equal protection, different classes must be "*similarly situated in all relevant respects*." *EJS Props., LLC v. Toledo*, 698 F.3d 845, 865 (6th Cir. 2012) (emphasis added) (quotation omitted). Plaintiffs fail to prove that *similarly situated* groups are treated differently.

226. Plaintiffs complain that absentee voting procedures differ from provisional voting procedures. But these categories of voters are not similarly situated. Absentee and provisional voting are fundamentally different forms of voting, and involve very different circumstances, both in terms of how and when they are cast and how and when they are processed. *See supra* ¶¶ 4-14, 169-72.

227. Nor are voters who vote in the wrong location similarly situated to voters who vote in the right location, but wrong precinct. The Sixth Circuit has *already rejected* this type of comparison. *See SEIU v. Husted*, 698 F.3d 341 (6th Cir. 2012). The Court reasoned that "[w]hile poll-worker error may contribute to the occurrence of wrong-place/wrong-precinct ballots, the burden on these *voters* certainly differs from the burden on right-place/wrong-precinct voters" given the voter's access to information about his or her correct voting location. *Id*. at 344.

228. Because Plaintiffs fail to demonstrate that any group of voters is treated differently than other similarly situated voters their equal protection claims fail.

F. The challenged laws do not constitute viewpoint or associational discrimination.

229. Plaintiffs' final constitutional challenge similarly lacks merit. Although the precise contours of this claim are somewhat unclear, Plaintiffs seem to contend that the challenged laws were motivated by unconstitutional political motives. Even assuming such a claim presents a justiciable question, *see Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (Scalia, J., plurality) (concluding that there was no "judicially enforceable limit on the political considerations that the States and Congress may take into account when districting"); *see also id.* at 306 (Kennedy, J., concurrence) (agreeing that "great caution" was necessary in the area, but refusing to "foreclose all possibility of judicial relief"), it fails here.

230. The Supreme Court in *Crawford* held that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators." 553 U.S. at 203-04 (plurality). As already discussed, the challenged laws are "amply justified" by significant state interests. Thus, like the law in *Crawford*, "partisan interests" provide no basis for relief. *Id.* at 204.

II. The challenged laws do not violate Voting Rights Act.

231. Plaintiffs' statutory claims fare no better than their constitutional challenges.

A. The challenged laws do not violate Section 2 of the Voting Rights Act.

1. To succeed on a Section 2 claim, Plaintiffs must prove harm, causation, and a lack of meaningful access.

232. To prove a Section 2 claim under the Voting Rights Act, a plaintiff must prove at least three things: (1) that the challenged law *harms* the right to vote of a minority group; (2) that the law *causes* the group's right to vote to be denied or abridged; *and* (3) that under the totality of the circumstances, the group lacks *meaningful access* to the polls, on account of race.

233. *Proof of Harm*. A plaintiff must prove actual injury—that the challenged practice harms a minority group's right to vote. 52 U.S.C. § 10301(a). To prove harm, the Supreme Court requires a comparison of the law's impact on minorities with the impact on minorities from an *alternative* practice that the State could adopt. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000).

234. With some election laws, there can be no alternative practice because there is "no principled reason" why one voting practice "should be picked over another." *Holder v. Hall*, 512 U.S. 874, 881 (1994) (plurality). Further, the benchmark in a Section 2 claim cannot simply be the old law. Using the old law as the benchmark would eliminate the important differences between a Section 2 and a Section 5 claim. Section 5 "uniquely deal[s] only and specifically with *changes* in voting procedures." *Reno*, 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. In contrast, under Section 2, "[r]etrogression is not the inquiry." *Id.* at 884

235. *Causation*. Proof that the challenged law "results" in denial or abridgement of voting rights is also essential to a Section 2 claim. 52 U.S.C. § 10301(a). "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)

236. A plaintiff cannot establish Section 2 causation based solely on disproportionate impact. *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986). The "causation requirement is crucial"; there must be proof that a practice results in a denial or abridgement of voting rights "on account of race or color." *Gonzalez*, 624 F.3d at 1194.

237. *No Meaningful Access*. The third requirement for a Section 2 claim, which courts reach only if a plaintiff proves the two requirements above, is whether under the "totality of circumstances," a law prevents a minority group from having "meaningful access" to the polls. *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004). In litigation alleging vote denial, courts have considered different (nonexclusive) factors, including: (1) the adequacy and scope of voting opportunities (*Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992)); (2) the implications of relief on other States (*Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004)); (3) a State's "legitimate and compelling rationale for enacting the statute" (*Wesley*, 791 F.2d at 1261); and (4) "current" or "present day" political conditions (*Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2628 (2013)).

2. Plaintiffs offer no objective benchmark.

238. Plaintiffs did not put forward an acceptable benchmark against which to compare the challenged laws. Notably, Plaintiffs' expert, Dr. Timberlake, has not even tried to evaluate the current system against a possible alternative. To the extent Plaintiffs are simply comparing the challenged laws to prior Ohio law, such a retrogression analysis is improper under Section 2. *See Holder*, 512 U.S. at 884; *Bossier*, 528 U.S. at 334.

239. Identification methods vary greatly across the States, but comparisons show that Ohio's approach is not uncommon or unreasonable. *See Crawford*, 553 U.S. at 197 ("States employ different methods of identifying eligible voters at the polls."). Provisional ballots in Alabama, for example, require a signature, name, address, date of birth, and telephone number. Ala. Code § 17-10-2. Provisional voters in Tennessee similarly must provide their name, signature, date of birth, and the last four digits of their Social Security number. Tenn. Code Ann. § 2-7-112(3)(A). In Virginia, provisional voters must provide their name, signature, address, date of birth, a phone number, and their driver's license number or the last four digits of their

Social Security number. Va. Code Ann. § 24.2-653(A). In Utah, provisional voters must submit their name, date of birth, address, signature, driver's license, and the last four digits of their Social Security number. Utah Code Ann. § 20A-6-105. Wisconsin requires provisional voters to provide their name, signature, address, date of birth, phone number, and their driver's license or proof of residence. Wis. Stat. § 6.97. Furthermore, a review of state election codes suggests there are *many* States with either no provisional cure period or a shorter cure period than Ohio. *See, e.g.*, Ark. Code Ann. § 7-5-308; Cal. Elec. Code § 14310; Neb. Rev. Stat. § 32-915; R.I. Gen. Laws § 17-19-24.3; Vt. Stat. Ann. tit.17, § 2555; W. Va. Code § 3-1-41; Mont. Code § 13-15-107; Wyo. Stat. Ann. § 22-15-105; 10 Ill. Comp. Stat. 5/18A-5; Nev. Rev. Stat. § 293.3082; Va. Code Ann. § 24.2-653(A); Wis. Stat. § 6.97.

240. If anything, Ohio's present system appears to be a good benchmark for other States. In 2014, the first election with the laws in place, Ohio was one of only five states to count 90 percent or more of its provisional ballots. **D25**.

241. Congress, when it enacted the Voting Rights Act, did not intend that the Act would be used to litigate over basic personal identifiers for universal absentee voting. Early absentee voting, or "convenience voting," barely existed when the Voting Rights Act was passed in 1965 and amended in 1982. As further evidence, in the Help America Vote Act of 2002, Congress authorized voter registrations to require identification such as "a copy of a current utility bill, bank statement, government check, paycheck, or other government document," "a driver's license number," and "at least the last 4 digits of the individual's social security number." H.R. 3295 Section 303(b) ("HAVA"). This law reflects that Congress does not have a problem with using common forms of identification for voting purposes.

242. Plaintiffs' misapplication of Section 2, if ever realized, "would render the statute unrecognizable to the Congress that designed it." *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427, 2444 (2014) (quotation omitted).

3. Plaintiffs cannot prove causation.

243. Plaintiffs also failed to show any casual connection between the challenged laws and any potential disproportionate impact. Within the context of Plaintiffs' intentional discrimination challenge, even setting problems of ecological inference aside (*i.e.*, using county data to try and draw inferences about individual characteristics, *see* **D10** at 9-10 (Hood Rebuttal)), any evidence of disproportionate impact is limited. Specifically, the reports/analyses of the experts in this matter reflect that any evidence of a disproportionate impact:

- is not strong for absentee voting (and includes negative relationships for 2012 and 2014);
- has been weakening for both provisional and absentee casting/rejections since 2008; and
- is at its weakest for both absentee and provisional voting—with no significant relationship with controls between minority population percentage and rejection rates—when one looks at the 2014 election, with the challenged laws in place.

P-1194 at 7-10; **D11** at 4-5, 7-8, 18 (concluding, based on review of Dr. Timberlake's analyses, that "there is little to no evidence that recent changes in absentee and provisional voting in Ohio have disproportionately affected its minority voters").

244. But even overlooking the weakness of any overall relationship since 2008, Dr. Timberlake's analysis *does nothing* to show that the challenged laws *are actually causing or contributing* to any disproportionate relationship. If anything, Dr. Timberlake's analyses suggest the opposite, given the weakness of the 2014 findings. *See* **P-1194** at 8-10 (Tables 4 and 8). Underlying Dr. Timberlake's opinions is the *untested* assumption that because the challenged

laws add a few reasons for potential rejections, total rejections will eventually go up. *See* **P-1195** at 1 (Timberlake Rebuttal). But this assumption is highly flawed. Given the many ways the challenged laws assist voters, it is improper to simply assume that overall rejection rates will become worse. Post-implementation numbers thus far do not reflect any spike in rejection rates; if anything, they suggest things are getting better. **D8** at 6-7.

4. Every voter in Ohio has meaningful access to the polls.

245. Because Plaintiffs failed to prove harm and causation, their Section 2 claim should end before considering the totality of the circumstances. But under the totality of circumstances, there can be no doubt that Ohio's broad voting opportunities provide all registered voters with meaningful access to the polls, and that the modest 2014 changes to the election procedures did not eliminate this meaningful access. *Jacksonville Coal.*, 351 F. Supp. 2d at 1335, (claims of "inconvenience" are not "a denial of meaningful access to the political process"(quotation omitted)).

246. In considering meaningful access, the question is not simply whether socioeconomic disparities exist in Ohio.

247. Instead, the narrower question for Section 2 consideration is whether, under the totality of the circumstances, the social and historical conditions *interact* with the challenged laws to deny/abridge meaningful access to the political process. *Gingles*, 478 U.S. at 47. Here, Ohio's voter registration and turnout data contradicts any contention that the challenged laws are interacting with other conditions to deny minority voters political participation. *See* **D10** at 1-4. Dr. Hood specifically concluded, "The data collected on registration and turnout by race in Ohio over the last decade demonstrates that on these important metrics of political participation, blacks and whites are on equal footing in Ohio." *Id.* at 4. And Dr. Hood's conclusion included review of the 2014 general election with the challenged laws in place. *Id.*

248. Given the varied approaches to voter identification (including more stringent systems than Ohio), if Ohio's approach violates the Voting Rights Act, then the systems of many other States do as well.

249. Finally, the many opportunities Ohio allows voters—including roughly a month of universal in-person and by-mail absentee voting—contradicts the notion that any category of Ohio voters lack opportunity to participate in the political process. Ohio's laws need to be viewed against present-day political conditions. *Shelby Cnty.*, 133 S.Ct. at 2629. And present-day Ohio takes many steps to ensure that all of its citizens have broad opportunities to vote.

250. Plaintiffs fail to prove a violation of Section 2 of the Voting Rights Act.

B. Plaintiffs' remaining claims under the Voting Rights Act lack merit.

251. Plaintiffs' other claims under the Voting Rights Act can be summarily rejected. Plaintiffs purport to bring a claim under Section 1971 of the Voting Rights Act (renumbered as 52 U.S.C. § 10101). But Plaintiffs concede that binding Sixth Circuit precedent forecloses this claim. As the Sixth Circuit has correctly held, "Section 1971 is enforceable by the Attorney General, not by private citizens." *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000); *see also* 52 U.S.C. § 10101(c) (assigning enforcement of 52 U.S.C. §10101(a)-(b) to the Attorney General).

252. Plaintiffs' claim that Ohio's voting process constitutes a literacy test under Section 1973aa of the Voting Rights Act (renumbered as 52 U.S.C. § 10501) also fails. First, like Section 1971, Section 1973aa creates no private cause of action. Similar to Section 1971, the statute specifically assigns enforcement of Section 1973aa to the United States Attorney General. 52 U.S.C. § 10504. It creates no comparable cause of action for private individuals. *Id.* Thus, the natural conclusion from the Sixth Circuit's holding in *McKay* is that Section 1973aa "is enforceable by the Attorney General, not by private citizens." 226 F.3d at 756.

253. Even if the Court could reach the merits of this claim, Plaintiffs' comparison of Ohio's absentee and provisional voting systems to a literacy test is unfounded. Requiring voters to provide their birthdate and address, even in combination with the remaining fields, bears no resemblance to the "discriminatory tests to suppress the registration of minorities" that the Voting Rights Act aims to combat. *Greater Birmingham Ministries v. Alabama*, 2016 WL 627709, at *7 (N.D. Ala. Feb. 17, 2016).

254. Moreover, the ability to complete such forms is simply not a "prerequisite for voting." 52 U.S.C. § 10501(b). Rather, all Ohio voters have various options as to which voting methods they choose. For example, voters have the option of voting on Election Day and showing one of many different identification documents and signing the poll book. *See* Dir. 2015-29 § 1.04. And Ohio law expressly allows for assistance to illiterate, blind, or disabled voters in completing voting forms. *See* Ohio Rev. Code §§ 3505.181(F), 3505.24.

255. In sum, the challenged laws comport fully with the Voting Rights Act. Plaintiffs show no violation of federal law.

CONCLUSION

For the above reasons, and those set forth in Defendants pre-trial brief, doc. 583, and incorporated by reference here, Plaintiffs fail to prove that the challenged laws violate the constitution or any law, and Defendants are entitled to judgment in their favor on all claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on April 28, 2016, and served upon all parties of record via the Court's electronic filing system.

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APPENDICES

Appendix	Description
A	Statewide Absentee and Provisional Ballot Rejections Based on Address and/or Date of Birth Fields in the 2014 and 2015 General Elections
B	U.S. Map of Provisional Ballot Rejection Rates in the 2014 General Election
C	Absentee and Provisional Ballot Overall Acceptance Rates from 2008 to 2015
D	Provisional Ballots Rejected Due to Lack of Registration from 2008 to 2015
E	Absentee Ballots Rejected Due to Missed Deadline in 2014 and 2015
F	Discovery Counties Share of Statewide Ballots Cast in 2014 and 2015 General Elections
G	Provisional Ballots Rejected Due to Voter Error from 2008 to 2015