

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

OHIO STATE CONFERENCE OF THE	:	
NATIONAL ASSOCIATION FOR THE	:	
ADVANCEMENT OF COLORED PEOPLE, et	:	Case No. 2:14-cv-00404
al.,	:	
	:	
Plaintiffs,	:	Judge Peter C. Economous
	:	
v.	:	
	:	
JON HUSTED, et al.,	:	<b><u>PLAINTIFFS' MOTION FOR</u></b>
	:	<b><u>PRELIMINARY INJUNCTION</u></b>
	:	<b><u>AND MEMORANDUM IN</u></b>
	:	<b><u>SUPPORT OF MOTION</u></b>
Defendants.	:	
	:	<b>ORAL ARGUMENT</b>
	:	<b>REQUESTED</b>

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Plaintiffs Ohio State Conference of the National Association for the Advancement of Colored People, et al., respectfully move this Court, under Fed. R. Civ. P. 65(a), for an order preliminarily enjoining the enforcement of amendments made to Ohio Rev. Code §§ 3509.01(B) and 3511.10 by Senate Bill 238 and requiring Defendant Husted to set uniform and suitable in-person early voting hours for all eligible voters that includes multiple Sundays and weekday evening hours. This motion is supported by the memorandum (incorporated below) and the Complaint in this matter, which is incorporated herein by reference. Plaintiffs request oral argument because of the public importance of this case.

Respectfully submitted,

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**MEMORANDUM OF LAW**

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## SUMMARY<sup>1</sup>

This case seeks to protect the voting rights of Ohio citizens. “There is no right more basic in our democracy than the right to participate in electing our political leaders.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality opinion). Because voting is the fundamental building block of political power, “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.” *Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (“*OFA I*”) (citation omitted). Restrictions on voting rights thus “strike at the heart of representative government” and warrant the closest attention from courts and lawmakers alike. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The Equal Protection Clause of the United States Constitution enshrines these principles by forbidding any state from placing restrictions on the fundamental right to vote without adequate justification. *See Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi*, 504 U.S. 428, 435-36 (1992) Less than two years ago, court intervention was necessary to enforce this constitutional provision to prevent the State from eliminating the last three days of the early voting period for non-military voters. This Court found that thousands of Ohioans had relied on these three days to vote in the previous election, and it also noted the undisputed evidence that this elimination had a particular impact on minority and low-income voters. It rejected the State’s proffer that these restrictions were necessary for administrative convenience or to treat military and non-military voters unequally, and it ordered the restoration of the last weekend of early voting in 2012. The Sixth Circuit affirmed. *See OFA II*.

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<sup>1</sup> Plaintiffs include the preceding Table of Contents and this Summary pursuant to Local Civil Rule 7.2(a)(3).

In this case, what is past is prologue. But this time, the State has brazenly gone further. With this year's passage of SB 238, the State eliminated the first week of early voting as well as the opportunity to register and vote at the same time ("same-day registration"). Directive 2014-06 then eliminated early voting during *all* Sundays and *all* weekday evening hours. After yet another court intervention, *see Obama for America v. Husted*, No. 2:12-cv-636, 2014 WL 2611316 (S.D. Ohio June 11, 2014), the State issued Directive 2014-17, which restored just ten hours of early voting, including four hours on one Sunday. But the impact on minorities and low-income voters will be at least as great as in 2012, as the remaining cutbacks still appear designed to ensure that only those who can afford to take unpaid time off of work or easily make childcare arrangements can cast a ballot in-person during the early voting period. As in 2012, the State cannot justify such sweeping restrictions on the right to vote. *See infra* Part I (p. 9).

Equally as important, Section 2 of the Voting Rights Act ("VRA") provides added protection to the fundamental right to vote. Section 2 announces a clear rule: regardless of the reasons why a state chooses to change a voting practice, that change is unlawful if it "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). By the plain terms of the statute, such an abridgement occurs if a voting practice results in racial minorities having "less opportunity than other members of the electorate to participate in the political process." *Id.* § 1973(b).

This case presents a straightforward Section 2 claim. First, African Americans in Ohio overwhelmingly rely on in-person voting as compared to whites, up to *four times* the rate of whites on several of the eliminated days. *See infra* Part II.A. (p. 21). Second, these voting cutbacks interact with persistent socioeconomic discrimination in Ohio to diminish the opportunity for African Americans to participate in the political process. Because African

Americans have lower socioeconomic status in Ohio, these early voting cutbacks make it disproportionately more difficult for African Americans to vote by systematically eliminating opportunities to vote during hours and days outside regular business hours. *See infra* Part II.B. (p. 28).

As noted above, the recent court-ordered restoration of ten hours, including four hours on a single Sunday, does not cure these violations. This restoration cannot compensate for the elimination of same-day registration, the elimination of an entire week of early voting, and the elimination of all weekday evening hours. Nor can it compensate for the elimination of all of the remaining Sundays from the early voting period – especially when counties representing over 78% of the total African-American population in Ohio allowed early voting on *multiple* Sundays before Defendant Husted first banned that practice in 2012. *See infra* Part III. (p. 39).

The evidence presented is more than enough to justify preliminarily enjoining SB 238, which will temporarily restore the first week of early voting and same-day registration, and requiring that Defendant Husted set uniform hours that include multiple Sundays and weekday evening hours. Absent such relief, thousands of Ohioans will be irreparably harmed by having their right to vote unlawfully abridged, and in many cases denied outright, in the 2014 and other future elections. *See infra* Part IV. (p. 44).

## **BACKGROUND**

### **A. Ohio Introduces Same-Day Registration and Early In-Person Voting After the Disastrously Long Lines in the 2004 Election**

As this Court is aware, in 2004 “Ohio voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day.” *Obama for America v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012) (“*OFA II*”). These long lines, which seemed to hit particularly hard in African-American areas, disenfranchised thousands of Ohio voters. As one court has observed, “there can come a point when the burden of standing in a queue ceases to be an inconvenience or annoyance and becomes a constitutional violation because it, in effect, denies a person the right to exercise his or her franchise.” *NAACP State Conference of Pa. v. Cortés*, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008). *See, e.g.:*

- (Dr. Vincent J. Roscigno, *Racial Inequality, Racial Politics and the Implications of Recent Voting Restrictions in Ohio: Analyses of Senate Factors One, Two, Three, Five, Six and Seven*, June 20, 2014 (“Roscigno”) (Ex. 2) at 28 (citing numerous news articles concerning “inadequate allocation of voting machines and polling places, especially in urban areas with concentrated populations of African American and college students,” and citing one survey estimating that about 130,000 voters in Ohio left the polling place eventually without voting));
- (Declaration of Reverend Robert E. Jones, Retired Pastor of Plaintiff College Hill Community Church Presbyterian, U.S.A., Dayton (“Rev. Jones”) (Ex. 15) ¶ 15 (“In 2004, there were long lines at the polls, and many people left in frustration without voting.”));
- (Declaration of Reverend Dale Snyder, Pastor of Plaintiff Bethel African Methodist Episcopal (“AME”) Church, Columbus (“Rev. Snyder”) (Ex. 12) ¶ 23 (“The people in my community remember waiting in the long lines when we had to vote in a single day on Election Day.”));
- (Declaration of Mark Freeman, Former Superintendent of the Shaker Heights City School District, Cleveland (Ex. 27) ¶¶ 3-10 (“I observed that many people who were waiting to vote [at the Woodbury School in my district] left the line without voting. They told me things like, ‘I have to go back to work,’ and ‘I have to pick up my kids.’ Some people said that they just got tired of standing for so long. . . . I estimate that a quarter to a third of the people voting at Woodbury School in 2004 were African American.”));

- (Declaration of Dolores Freeman, Member of Plaintiff APRI Youngstown Chapter (“D. Freeman”) (Ex. 16) ¶ 30 (“While we were standing in line, I saw three to four people leave the line. One girl who I saw leaving the line without voting told me that she had to go to work and could not wait any longer.”));
- (Declaration of Glorianne Leck, Former Precinct Committee Person, Youngstown (Ex. 26) ¶¶ 9-10 (spoke with two African-American voters who left the line because they were hourly wage workers and needed to return to work)).

“To prevent similar problems from disenfranchising voters in the future and to ease the strain of accommodating all voters on a single day, the State established no-fault absentee voting in October 2005,” *OFA II*, 697 F.3d at 426, which included the ability to cast a ballot in-person before Election Day (hereinafter “early in-person voting” or “early voting”). Each county is permitted only one location at which to permit early in-person voting, usually at the county’s Board of Elections office.<sup>2</sup> *See* Ohio Rev. Code § 3501.10(C). When this system was first introduced, the Board of Elections of each county had the discretion to determine its own early voting hours. *See id.* § 3501.10(B).

The State also instituted “same-day registration” – the ability for a voter to register, or update their registration, and cast a ballot in-person at the same time. Because the early voting period created by the statute had begun one week before the voter registration deadline in Ohio, *see* Ohio Rev. Code § 3503.01(A), voters were permitted to resolve, in one shot, any registration issues that might have otherwise prevented their ballot from being counted.

**B. Thousands of Ohioans Have Relied On Same-Day Registration and Early In-Person Voting**

Thousands of Ohioans have taken advantage of same-day registration. (*See* Dr. Daniel A. Smith, *Analysis of Effects of Senate Bill 238 and Directive 2014-06 on Early In-Person (EIP)*)

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<sup>2</sup> The Ohio Secretary of State is the chief elections officer, and elections are run at the county-level through each county’s Board of Elections. The Secretary of State appoints each of the four members of each county’s Board of Elections. *See* Ohio Rev. Code §§ 3501.04; 3501.06.

*Absentee Voting by Blacks and Whites in Ohio*, June 27, 2014 (“Smith”) (Ex. 1) at 10.) Having a one-stop shop for both registration and voting is particularly important for working-class voters, who not only have to update their registration more frequently because they move more frequently, but also tend to be less aware of registration requirements and deadlines. *See infra* Part I.A. Indeed, “[t]he most common excuse given by individuals for not voting is that they are not registered.” S. Rep. No. 103-6, at 2 (1993) (committee report supporting expansion of voter registration).

Ohioans have also made extensive use of early in-person voting, and its popularity is only increasing. “From the 2006 and 2008 elections, early voting in Ohio increased from 639,416 voters to 1,717,256 voters, representing an increase to 20% of registered voters and 30.2% of the same vote cast. In 2010, . . . at least 29% cast their vote in the same days before Election Day.” *Obama for America v. Husted*, 888 F. Supp. 2d 897, 903 (S.D. Ohio 2012) (“*OFA I*”). In 2012, the percentage of early in-person votes rose to 32%. (*See* Smith (Ex. 1) at 6.)

Early voting hours on weekends and weekday evenings have been especially useful for working-class voters, who cannot easily take time off of work during regular business hours, or make childcare arrangements, in order to vote during the day. *See infra* Part I.B. These working-class voters are also disproportionately comprised of African Americans in Ohio. *See infra* Part II.A. Early voting after church on Sundays, in particular, has become a part of the cultural fabric of many African-American communities in Ohio, a phenomenon known as “Souls to the Polls.” This represented a perfect marriage between African-American churches who believe strongly in civic engagement and the traditional gathering of multiple generations of African Americans on a single day. *See infra* Part II.A.2. Consistent with this demand, counties

representing *over 78%* of Ohio's African-American population had *multiple Sundays* available for early voting in 2008 and/or 2010. *See infra* Part III, n. 30.

**C. In 2010, Elections Officials Attempted to Crack Down on Early Voting**

The fact that early voting had become an African-American phenomenon in Ohio did not go unnoticed. In Franklin County, the county with the second-largest African-American population in Ohio (Ex. 9 at 1), members of the Board of Elections began voting against the establishment of early voting on Sundays in 2010. (*See* Sec'y of State Tie Vote Sept. 22, 2010 (Ex. 39) at 2; Sec'y of State Tie Vote Oct. 25, 2011 (Ex. 42) at ¶ 2.) One of those board members later explained these votes, saying, "I guess I really actually feel we shouldn't contort the voting process to accommodate the urban – read African-American – voter-turnout machine." (Ex. 48 at 1.) Similar votes against weekend or weekday evening hours followed in Lorain and Athens Counties in 2010. (Sec'y of State Tie Vote Sept. 29, 2010 (Ex. 40); Sec'y of State Tie Vote Oct. 21, 2010 (Ex. 41).)

These votes resulted in 2-2 ties among the four-member Boards of Elections, and the ties had to be broken by then-Secretary of State Jennifer Brunner. *See* Ohio Rev. Code § 3501.11(X). In 2010, the Secretary of State broke these ties in favor of allowing early voting outside regular business hours even though it was a non-presidential election. In Franklin County, the Secretary permitted voting on two Sundays in 2010 "[i]n order to accommodate those voters who work multiple jobs or nontraditional hours," and also noted "increasing demand in Franklin County, the state's second most populous voting jurisdiction, for in-person absentee voting." (Sec'y of State Tie Vote Sept. 22, 2010 (Ex. 39) at 2, 3.) In medium-sized Lorain County, the Secretary permitted weekday evening voting and multiple Saturdays, "[g]iven the trend showing voters' increased use" of early voting, and because the county "better serves its

voters by accommodating their diverse work schedules and offering extended weekday and weekend voting hours.” (Sec’y of State Tie Vote Sept. 29, 2010 (Ex. 40) at 2.) And in sparsely-populated Athens County, the Secretary broke a tie-vote in favor of multiple Saturdays, making the common-sense observation that, although voter turnout would likely be lower in a non-presidential year, “[t]he fact that overall voter turnout may be lower than two years ago does not change the circumstances of an elector who wishes to cast an absent voter’s ballot but cannot go to the Board office during normal weekday hours.” (Sec’y of State Tie Vote Oct. 21, 2010 (Ex. 41) at 2.)

**D. In 2012, the Secretary of State Attempted to Ban All Weekend Voting Statewide**

Defendant Secretary of State Jon Husted took office in 2011, and soon thereafter, crackdowns on early voting at the county-level began to succeed. In Montgomery County, Defendant Husted broke a tie vote in favor of *banning* multiple Saturdays and Sundays, as well as all weekday evening hours. (Sec’y of State Tie Vote Oct. 25, 2011 (Ex. 43).) In 2012, tie votes in Cuyahoga, Franklin, Summit, and Lucas – four counties that have among the highest African-American populations in the state (Ex. 9 at 1) – were broken by Defendant Husted in favor of banning *all weekends* from the early voting period. (Exs. 44-47.) By August 15, 2012, without waiting for further tie votes, Defendant Husted established a *de facto* regime whereby the Secretary of State would preemptively set uniform early voting hours that would “level the playing field on voting days and hours” for all counties. (Dir. 2012-35 (Ex. 34) at 2.) Pursuant to this authority, Defendant Husted issued Directive 2012-35, which eliminated *all* weekend hours statewide, though it permitted weekday evening hours (after 5 p.m.) on the last two weeks of the early voting period. (*See id.*) *See OFA I*, 888 F. Supp. 2d at 902.

As this Court is aware, by then litigation had been filed in *OFA*. *See OFA I*. The plaintiffs in *OFA* sought the restoration of only the last weekend of the early voting period, though they did not challenge the elimination of all remaining weekends from that period. This Court noted the undisputed evidence that low-income and minority voters would be disproportionately impacted by the elimination of the final weekend, and it found that the State had failed to substantiate any “precise” interests justifying the burdens imposed on the right to vote. *See OFA I*, 888 F. Supp. 2d at 907-10. This Court ordered the restoration of the last three days of the early voting period, and the Sixth Circuit affirmed. *See OFA II*. Defendant Husted subsequently issued Directive 2012-50, setting uniform hours for the last three days of that period. (Dir. 2012-50 (Ex. 35).)

Nonetheless, Directive 2012-35’s ban on all remaining Sundays, unchallenged by the *OFA* plaintiffs, was left intact for the 2012 elections. Thus, 2012 represented the very first Ohio election in which *no* county was allowed to have more than a single Sunday during the early voting period. All “Souls to the Polls” efforts had to be crammed into a single Sunday, and extremely long lines were found in many counties on that day. *See infra* Part III.

**E. In 2014, SB 238, Directive 2014-06, and Directive 2014-17 Again Slash Into the Early Voting Period**

On February 21, 2014, the Governor signed into law Senate Bill 238, amending Ohio Rev. Code §§ 3509.01(B) and 3511.10 (“SB 238”), which permanently eliminated same-day registration and the first week of the early voting period, by designating the day *after* the registration deadline as the start of the early voting period. (*See Ex. 32.*) A few days later, Defendant Husted issued Directive 2014-06, which set uniform hours for the 2014 elections. Although it permitted two Saturdays of early voting, it curiously eliminated *all* Sundays from the

early voting period. It also eliminated *all* weekday evening hours as well – the first time early voting evening hours were *completely banned* in an Ohio election. (Dir. 2014-06 (Ex. 36).) The plaintiffs in *OFA* then filed a motion for summary judgment, which this Court granted, entering a permanent injunction requiring Defendant Husted “to set uniform and suitable in-person early voting hours for all eligible voters for the three days preceding all future elections.” *Obama for America v. Husted*, No. 2:12-cv-636, 2014 WL 2611316, at \*5 (S.D. Ohio June 11, 2014) (“*OFA III*”). Defendant Husted then issued Directive 2014-17, setting the exact same uniform hours as Directive 2014-06, except that it allowed four hours of voting on a single Sunday and six hours of voting on the Monday before Election Day. (Dir. 2014-17 (Ex. 37).)<sup>3</sup> However, SB 238’s permanent elimination of same-day registration and the first week of the early voting period remain in place, and the bans by Directive 2014-06 – and now Directive 2014-17 – on all weekday evening hours and all remaining Sundays also remain in place for the 2014 elections.

The above cutbacks into the early voting period may thus be represented by the following chart (next page):

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<sup>3</sup> Directive 2014-17 also purports to set uniform hours beyond the last three days for elections after 2014. However, it is unclear whether Defendant Husted or a future Secretary of State will adhere to those hours. *Cf. OFA III*, 2014 WL 2611316, at \*5 (“[T]here is no guarantee that Husted or another Secretary of State would adopt similar hours for future elections.”). In any event, because this motion seeks only preliminary relief for the 2014 elections, Plaintiffs do not address the impact, if any, of Directive 2014-17 on future elections.

<b>2006, 2008, 2010</b>
<ul style="list-style-type: none"> <li>• Same-Day Registration</li> <li>• First week of early voting</li> <li>• Multiple Sundays available<sup>4</sup></li> <li>• Multiple Saturdays available</li> <li>• Weekday evening hours available</li> </ul>
<b>2012 (Directive 2012-35)</b>
<ul style="list-style-type: none"> <li>• Same-Day Registration</li> <li>• First week of early voting</li> <li>• <del>Multiple Sundays available</del></li> <li>• <del>Multiple Saturdays available</del></li> <li>• Weekday evening hours</li> </ul>
<b>2012 (Post OFA I)</b>
<ul style="list-style-type: none"> <li>• Same-Day Registration</li> <li>• First week of early voting</li> <li>• <del>Multiple Sundays available</del> One Sunday</li> <li>• <del>Multiple Saturdays available</del> One Saturday</li> <li>• Weekday evening hours</li> </ul>
<b>2014 (SB 238; Directive 2014-06)</b>
<ul style="list-style-type: none"> <li>• <del>Same Day Registration</del></li> <li>• <del>First week of early voting</del></li> <li>• <del>Multiple Sundays available</del></li> <li>• Multiple Saturdays (Two)</li> <li>• <del>Weekday evening hours</del></li> </ul>
<b>2014 (SB 238; Post OFA III; Directive 2014-17)</b>
<ul style="list-style-type: none"> <li>• <del>Same Day Registration</del></li> <li>• <del>First week of early voting</del></li> <li>• <del>Multiple Sundays available</del> One Sunday</li> <li>• Multiple Saturdays (Two)</li> <li>• <del>Weekday evening hours</del></li> </ul>

<sup>4</sup> “Available” means that counties had the discretion to set such hours. As noted above, counties representing over 78% of African Americans in Ohio had multiple Sundays available in 2008 and/or 2010.

Plaintiffs Ohio State Conference of the National Association for the Advancement of Colored People (“NAACP”), the League of Women Voters of Ohio, Bethel African Methodist Episcopal Church, Omega Baptist Church, College Hill Community Church Presbyterian USA, A. Philip Randolph Institute (“APRI”), and Darryl Fairchild (“Fairchild”) are nonpartisan organizations, African-American churches, and individuals who conduct get-out-the-vote programs in Ohio elections, and they have relied upon same-day registration, Sunday voting, and/or weekday evening voting to help Ohioans – especially working-class citizens – exercise their fundamental right to vote. (*See generally* Exs. 10-18.) As a result of SB 238, Directive 2014-06 and Directive 2014-17, Plaintiffs and the voters they serve will be irreparably harmed in this year’s elections.

### **ARGUMENT**

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest.” *Obama for America v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012) (“*OFA II*”) (citation omitted). *See* Fed. R. Civ. P. 65(a). Plaintiffs have satisfied each of these criteria.

#### **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT DEFENDANTS HAVE VIOLATED THE FOURTEENTH AMENDMENT (FIRST CLAIM FOR RELIEF)**

Plaintiffs are likely to prevail on the merits of their claim that SB 238 and the 2014 Directives together constitute substantial and unjustified burdens on the right to vote in violation of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1. “The right to vote is a precious and fundamental right. Other rights, even the most basic, are illusory if the right to vote

is undermined. The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *OFA II*, 697 F.3d at 428 (quotation marks and citations omitted). For that reason, the “Equal Protection Clause applies when a state . . . places restrictions on the right to vote.” *Id.* (citation omitted).

“The precise character of the state’s action and the nature of the burden on voters will determine the appropriate equal protection standard.” *OFA II*, 697 F.3d at 428. “While a rational basis standard applies to state regulations that do not burden the fundamental right to vote, strict scrutiny applies when a state’s restriction imposes ‘severe’ burdens. For the majority of cases falling between these extremes, we apply the ‘flexible’ *Anderson/Burdick* balancing test.” *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012) (“*NEOCH*”) (citations omitted); *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). That test requires the court to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiffs’ rights.” *NEOCH*, 696 F.3d at 592-93 (citation omitted). “However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., plurality opinion).

**A. SB 238’s Permanent Elimination of Same-Day Registration and the First Week of Early Voting Imposes Substantial Burdens on Voters**

SB 238’s permanent elimination of the first week of early voting imposes substantial burdens on voters. In 2012, over 90,000 votes were cast during the first week of the early voting

period alone. *Compare, e.g., OFA II*, 697 F.3d at 431 (“The district court credited statistical studies that approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day”). The fact that “thousands of voters” would be affected by the cutbacks challenged in *OFA* weighed significantly in the *OFA* plaintiffs’ favor, *see Obama for America v. Husted*, 888 F. Supp. 2d 897, 907 (S.D. Ohio 2012) (“*OFA I*”), and there is no reason why this factor should not similarly weigh in Plaintiffs’ favor here.

Yet the burden imposed on voters by SB 238 is even greater, because it permanently eliminates same-day registration as well. Same-day registration provides a one-stop shop for Ohioans to resolve all registration issues and vote at one time, ensuring that their vote will count. In just seven counties that tracked the number of people who registered and voted on the same day, *thousands* of Ohioans took advantage of same-day registration in 2012. (*See* Ex. 1 at 10.)

The elimination of same-day registration will fall particularly hard on working-class voters, who have even greater need for the ability to resolve pending registration issues while voting in one shot. Low-income Ohioans must generally update their registration more frequently than their wealthier counterparts because they tend to move more frequently due to lower home ownership rates and higher rates of foreclosure and evictions. In the last year, *three times as many* Ohioans making less than \$25,000 a year changed residences as compared to Ohioans making more than \$65,000 a year. (Rosigno (Ex. 2) at 11.)<sup>5</sup> Moreover, because of

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<sup>5</sup> (*See also* Frech Decl. (Ex. 22) ¶ 17 (“[O]ur clients [on welfare] change residences several times a year.”); Rev. Snyder Decl. (Ex. 12) ¶ 11 (“The neighborhood surrounding Bethel AME [Church] is also predominantly African-American, and has very high rates of poverty. People in the neighborhood are very transient – many people only stay around for about 6-8 months.”); *id.* ¶ 17 (“We specifically told people that they were eligible to vote the same day that they were registered . . . , because people in the neighborhood are so transient, and so have to update their registrations.”); Davis Decl. (Ex. 11) ¶ 26 (“We’ve encountered people who were forced to move [due to foreclosure] and thought they could vote but could not because they had not updated their registration.”); Fairchild Decl. (Ex. 13) ¶ 12.)

lower educational attainment, working-class voters are less likely to be familiar with registration deadlines or even the requirement that one’s registration must be updated when they move. (*See Id.* at 23.)<sup>6</sup> *See United States v. City of Euclid*, 580 F. Supp. 2d 584, 609 (N.D. Ohio 2008) (“[S]ocial science literature on voter participation makes clear that educational achievement is strongly and directly correlated with voter registration and turnout.”). For the same reason, many are less likely to know how to register without in-person help (*see* Declaration of Jack Frech, Director of Athens County Jobs & Family Services (“Frech”) (Ex. 22) ¶¶ 8-16); and they cannot get this help without making a separate trip to the Board of Elections – via transportation they are less likely to have and during regular business hours in which they are unlikely to be free. *See infra* Part II.B.1. In sum, “same-day registration works very effectively and is one of the biggest boosts to voter participation, especially among lower-income voters.” (Declaration of Carrie Davis, Executive Director of Plaintiff League of Women Voters Ohio (Ex. 11) ¶ 24.)

These burdens are especially pronounced for the thousands of Ohioans currently experiencing homelessness,<sup>7</sup> who are extremely transient and almost always have to update their registration before voting. Their daily lives are predominantly focused on survival, which makes it particularly important to vote without having to resolve complex registration issues separately. As explained by Josh Spring, Director of the Greater Cincinnati Homeless Coalition (“Spring”), “[b]eing able to register and vote simultaneously is especially important to this population

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<sup>6</sup> (*See also* Wood Decl. (Ex. 10) ¶ 36 (“About four out of ten people that we talked to did not know that they had to update their registration when they moved. Many people still don’t know this.”); Frech. Decl. (Ex. 22) ¶ 19 (“We constantly remind [our clients on welfare] that they have to update their voter registration whenever they move.”); Fairchild Decl. (Ex. 13) ¶ 12 (“The people I have encountered from lower-income backgrounds also tend to have less education and are not aware that they have to update their registration, or do not know about registration deadlines.”).)

<sup>7</sup> *See* Coalition on Homelessness and Housing in Ohio, 2013 Homelessness Report, *available at*: <http://www.cohhio.org/files/2013%20Ohio%20Homelessness%20Report.pdf> (last visited June 24, 2014).

because it is a one-step process. Most of these individuals spend their days looking for housing, jobs, social services, and meeting with caseworkers. A single missed meeting can mean the loss of food, housing, or employment.” (Spring Decl. (Ex. 23) ¶ 21; *see also* Declaration of Erik Crew, Cincinnati community organizer (“Crew”) (Ex. 24) ¶ 9.) Separately mailing in registration forms is even less of an option for people experiencing homelessness. (*See* Spring Decl. (Ex. 23) ¶ 24.) For these reasons, hundreds of voters experiencing homelessness in Ohio have taken advantage of same-day registration with the help of third-party organizations and individuals.<sup>8</sup> Thus, eliminating same-day registration “can mean the difference in homeless individuals having the option to vote and being completely prevented from participating in the democratic process.” (Declaration of Georgine Getty, Former Executive Director at Greater Cincinnati Homeless Coalition (“Getty”) (Ex. 25) ¶ 16.) *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 587 (6th Cir. 2006) (magnitude of burden includes, *inter alia*, “whether alternative means are available to exercise those rights . . . [and] evidence of the real impact the restriction has on the process”);<sup>9</sup> *Frank v. Walker*, No. 12-cv-185, 2014 WL 1775432, at \*17 (E.D. Wis. Apr. 29, 2014) (Wisconsin’s voter ID requirement violated the Fourteenth Amendment because increased costs associated with voting would deter eligible voters).

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<sup>8</sup> (*See, e.g.*, NEOCH Report (Ex. 30) at 7 (“From the reports of the shelters provided, we helped 240 people to vote during Golden Week from the homeless programs either with our vans or those of our partners.”); Fairchild Decl. (Ex. 13) ¶ 13 (drove about a dozen people experiencing homelessness from two shelters, House of Bread and St. Paul United Methodist Church, to the polls during same-day registration); Getty Decl. (Ex. 25) ¶ 13 (about 30 people taken to the polls during first week of early voting from Joseph House and Lighthouse Youth Services); Crew Decl. (Ex. 24) ¶¶ 16-18 (about several dozen people taken to the polls during first week of early voting from Our Daily Bread, City Gospel Mission, and Drop-Inn Center).)

<sup>9</sup> Although *Libertarian Party* is considered a minor party ballot access case, the Supreme Court has “minimized the extent to which voting rights cases are distinguishable from ballot access cases, stating that ‘the right of voters and the rights of candidates do not lend themselves to neat separation.’” *Burdick*, 504 U.S. at 438 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)); *see also Krummen v. City of North College Hill, Ohio*, No. 1:13-cv-193, 2013 WL 3270372, at \*6 (S.D. Ohio June 26, 2013) (similar).

Lastly, the elimination of same-day registration and the first week of early voting burdens other groups such as first-time voters, including Ohioans turning 18; those who have recently been released from prison but are unaware that they are allowed to vote;<sup>10</sup> women (Davis Decl. (Ex. 11) ¶ 42; Ex. 3 at 14); voters with disabilities (Declaration of Plaintiff Darryl Fairchild, Dayton community organizer, (“Fairchild”) (Ex. 13) ¶ 23; Davis Decl. (Ex. 11) ¶ 36); and the elderly. (D. Freeman Decl. (Ex. 16) ¶ 25; Ex. 3 at 14-15); *see OFA II*, 697 F.3d at 431 (crediting evidence that weekend voters were disproportionately “women, older, and of low-income and education attainment”). It also burdens organizations and individuals, including Plaintiffs, who have relied heavily on same-day registration to help economically disadvantaged Ohioans and first-time voters learn about, and exercise, their fundamental right to vote.<sup>11</sup> *See id.* at 431 (burden on partisan organizations was “particularly high”).

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<sup>10</sup> (*See* Rev. Snyder Decl. (Ex. 12) ¶ 26 (“Golden Week allowed younger voters [in the Bethel AME congregation] to register and vote the same week and it also helped those who were recently released from prison who may not know they had a right to vote, to register to vote and vote in the same week.”); Fairchild Decl. (Ex. 13) ¶¶ 16-17 (in 2010 and 2011, “we took about 25-40 first-time student voters to vote during Golden Week”); *id.* ¶ 25 (on the last day of same-day registration, when the offices were open until 9 p.m., “[w]e focused on first-time young voters, because on that day, right after school, there was enough time to bring them together and teach them about voting, after which we would go with them to the Board of Elections and have them register and vote together collectively”); Crew Decl. (Ex. 24) ¶ 11 (“Some [of the volunteers] wanted to help the college students – many of whom were first-time voters or had moved to Cincinnati and hadn’t yet registered – register and vote during Golden Week.”); Simpson Decl. (Ex. 14) ¶ 21 (“During the first week of early voting, . . . I took two high school students to vote. They were turning 18 just before Election Day. I told them that they could register and vote at the same time and they were excited to vote for the first time.”); Getty Decl. (Ex. 25) ¶¶ 13-14 (where approximately 15 people from homeless youth shelter transported to polls during Golden Week, “I saw youths express excitement at the prospect of [] participating in the election and I witnessed them taking pictures of themselves, known as ‘selfies,’ while going to vote”).)

<sup>11</sup> These include organizations serving people experiencing homelessness (*see, e.g.*, Spring Decl. (Ex. 23) ¶ 19; Getty Decl. (Ex. 25) ¶¶ 7-13; NEOCH Report (Ex. 30) at 6-7); African-American churches (*see, e.g.*, Rev. Snyder Decl. (Ex. 12) ¶¶ 17, 28; Rev. Braxton Decl. (Ex. 21) ¶ 9; Simpson Decl. (Ex. 14) ¶ 21); community organizers (*see, e.g.*, Fairchild Decl. (Ex. 13) ¶ 12; Crew Decl. (Ex. 24) ¶¶ 6, 10); and nonpartisan organizations (*see, e.g.*, Wood Decl. (Ex. 10) ¶¶ 34-36 (NAACP Toledo); Davis Decl. (Ex. 11) ¶¶ 24-26 (League of Women Voters of Ohio); Morgan Decl. (Ex. 17) ¶ 12 (APRI)).

SB 238's permanent elimination of same-day registration and the first week of early voting thus impose substantial burdens on thousands of Ohioans, especially low-income voters and other marginalized groups.

**B. The 2014 Directives' Elimination of Multiple Sundays and Weekday Evening Hours Compounds the Burdens Imposed Upon Low-Income Voters**

The 2014 Directives compound these burdens on working-class Ohioans by eliminating multiple Sundays and weekday evening hours. In *OFA I*, this Court noted the un rebutted evidence that "low-income and minority voters [were] disproportionately affected by the elimination" of the final weekend of early voting. *OFA I*, 888 F. Supp. 2d at 906-07. The 2014 Directives cause a similar disproportionate impact because they have banned all but one Sunday from the early voting period.

Furthermore, what is true of weekends is equally true of weekday evenings, which the 2014 Directives ban for the first time since early voting was introduced eight years ago, and upon which thousands of Ohioans have relied to vote. (*See* Ex. 4 at 5, Table 3; Ex. 5 at 6, Table 9.) According to one study, Ohioans who relied on weekday evening voting in 2008 had between 11.7% and 15.0% less income than Ohioans who voted on Election Day or voted by mail. (*See* Ex. 6 at 4, Table 2); *see also* *OFA I*, 888 F. Supp. 2d at 903 (difference between early and Election Day voters most noticeable "among people with annual incomes of less than \$35,000"). And voluminous qualitative evidence demonstrates that working-class Ohioans across several counties will be substantially burdened or even disenfranchised by the elimination of weekday evening hours. *See, e.g.,*:

- (Declaration of Reverend Shawn Braxton, Pastor of New Life Cathedral, East Cleveland ("Rev. Braxton") (Ex. 21) ¶¶ 6-8 (Cuyahoga County) ("We operated a 45-55 person bus and there were times . . . during the evening voting hours where one bus was not enough and we had to take several loads of people."));

- (Declaration of David Morgan, Member of Plaintiff APRI Trumbull Chapter (“Morgan”) (Ex. 17) ¶¶ 16-18 (Trumbull County) (“During the early voting period, we receive frequent requests for rides . . . . A large number of the people I spoke to went to participate in early in-person voting on their way home from work.”));
- (Fairchild Decl. (Ex. 13) ¶¶ 25-27 (Montgomery County) (“In 2010, I called the BOE ahead of time to let them know that about 250 people would show up on that one evening at the end of Golden Week. The BOE accommodated my request by making sure there was enough staff to process all the voters.”));
- (Declaration of Jamie Simpson, Member of Plaintiff Omega Baptist Church (“Simpson”) (Ex. 14) ¶¶ 22-23 (Montgomery County) (“We also had a sign-up sheet where people could sign up to be taken to vote on other days of the week. . . . Several people wanted to vote in the evenings.”));
- (Declaration of Anthony Brice, Member of Plaintiff APRI Greater Cincinnati Chapter (“Brice”), Decl. (Ex. 18) ¶¶ 9-11 (Hamilton County) (“Because I work during the day, the time that I assisted individuals in getting to the early voting location in 2008 was after regular business hours. Many people went to vote after 5 p.m., which was around the time that they got off work. . . . I witnessed individuals waiting for at least an hour to cast early in-person ballots after getting off of work.”));
- (Crew Decl. (Ex. 24) ¶¶ 22-24 (Hamilton County) (“We had a designated pickup location at Avondale, a predominantly lower-income, African-American neighborhood in Cincinnati, and would drop people to the Board of Elections at 12pm and at 6pm. We picked the 6pm time slot for people who could not get out of work during the day. I believe that about two to three people on average would show up to be taken to the polls.”));
- (D. Freeman Decl. (Ex. 16) ¶ 24 (Mahoning County) (“I have a niece and a couple of friends who work from 10 a.m. to 6 p.m., and without evening hours, it would be very difficult for them and others with similar schedules to get to the early voting site prior to close.”));
- (Declaration of Ray Wood, President of Plaintiff NAACP Toledo Chapter (“Wood”) (Ex. 10) ¶ 33 (Lucas County) (“As a union leader, I know that there are many people with hourly wage jobs who cannot vote from 9 a.m. to 5 p.m. and do not have the time to vote during their lunch break.”));
- (Sec’y of State Tie Vote Sept. 22, 2010 (Ex. 39) at 2 (observing need to “accommodate those voters who work multiple jobs or nontraditional hours”); Sec’y of State Tie Vote Sept. 29, 2010 (Ex. 40) at 2 (Lorain County “better serves its voters by accommodating their diverse work schedules and offering extended weekday and weekend voting hours.”)).

*See Florida v. United States*, 885 F. Supp. 2d 299, 329 (D.D.C. 2012) (where “early voting would start after the workday starts and would end before the workday ends,” it is generally “inaccessible to many minority voters who have inflexible work schedules”).

In sum, SB 238 and the 2014 Directives together impose burdens on thousands of Ohio voters, especially working-class voters. *See, e.g., Libertarian Party*, 462 F.3d at 595 (“Viewed individually, each of these requirements may only impose a reasonable burden on constitutional rights. In practice, however, the combination of these laws imposes a severe burden [in violation of *Anderson/Burdick*].”) Because “low-income and minority voters are disproportionately affected by the elimination of those voting days” and hours, these burdens are “significant” and should “weigh[] heavily” in Plaintiffs’ favor. *OFA I*, 888 F. Supp. 2d at 907.

**C. Defendants Cannot Proffer any “Precise” Interests that Make SB 238 and the 2014 Directives “Necessary”**

Given that SB 238 and the 2014 Directives will significantly burden thousands of Ohio voters, especially working-class voters, the State must identify the “precise” interests that make it “necessary” to eliminate the first week of early voting, same-day registration, all Sundays except for four hours on one Sunday, and all weekday evening hours. *Burdick*, 504 U.S. at 434. They have failed to do so.

*First*, having been unable to justify the elimination of early voting days in 2012 on their own in *OFA*, Defendants have apparently attempted to outsource that responsibility to the Ohio Association of Election Officials (“OAE0”), which in 2013 issued a six-page report (Ex. 33) recommending the cutbacks ultimately enacted by SB 238 and Directive 2014-06. (*See OFA*, 2:12-cv-636 (S.D. Ohio Sept. 5, 2012), ECF No. 87.) The State repeatedly emphasizes the fact that the OAE0 is technically bipartisan (*see, e.g., id.* at 3, 4, 5, 6), but as this Court has rightly

recognized, “the fact that the OAE0 is a non-partisan body is not relevant” to the question of constitutionality. *Obama for America v. Husted*, No. 2:12-cv-636, 2014 WL 2611316, at \*5 (S.D. Ohio June 11, 2014) (“*OFA III*”).

*Second*, the OAE0 report, for its part, explains that the cutbacks are justified by the need for “uniformity,” to “avoid confusion for voters” and “provide certainty for election officials in planning and budgeting.” (Ex. 33 at 3.) But the report fails to explain why “uniformity” makes it *necessary* to *eliminate* Sundays and weekday evening hours for the 2014 elections across the board, or why it justifies the elimination of same-day registration. *See Hunter v. Hamilton Cnty. Bd. of Elec.*, 635 F.3d 219, 238 (6th Cir. 2011) (“[T]he Board has not asserted ‘precise interests’ that justified the unequal treatment.” (citation omitted)).<sup>12</sup> In other words, it does not explain why uniformity cannot also be achieved by *maintaining* same-day registration and including multiple Sundays and some weekday evenings for *all* counties.<sup>13</sup> There is no better illustration for this concept than Directive 2014-17 itself: Once Defendant Husted was ordered in *OFA III* to set “uniform” hours on days that had previously been excluded by Directive 2014-06, he did so, and even acclaimed in a press release afterwards that “uniformity” had “won the day.” (Ex. 38.) There is no reason to think that “uniformity” cannot also “win the day” when it includes multiple Sundays and weekday evening hours for *all* counties.

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<sup>12</sup> *See also Libertarian Party*, 462 F.3d at 594 (“the State has put forth no evidence that these interests . . . are *advanced* by the early filing deadline” (emphasis added)).

<sup>13</sup> *See NEOCH*, 696 F.3d at 596 (“[t]he State offers no reason to think that [an alternative approach] will undermine” its proffered interests); *OFA II*, 697 F.3d at 435-36 (“While we readily acknowledge the need to provide military voters more time to vote, we see no corresponding justification for giving others less time. . . . The State has proposed no interest which would justify reducing the opportunity to vote by a considerable segment of the voting population.”).

*Third*, the OAE0 report makes no mention of administrative concerns, which is unsurprising since there is no evidence of widespread problems in counties that have implemented same-day registration, or early voting on multiple weekends and weekday evening hours. *See OFA II*, 697 F.3d at 433 (“[T]he State has shown no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005.”).

*Lastly*, while the report references the obvious fact that turnout in presidential elections is generally higher than turnout in non-presidential elections, it provides no “precise” justification for why it nonetheless targets Sundays and weekday evening hours during these non-presidential elections.<sup>14</sup> As the prior Secretary of State explained when permitting multiple weekends in sparsely-populated Athens County during the non-presidential elections of 2010, “The fact that overall voter turnout may be lower than two years ago does not change the circumstances of an elector who . . . cannot go to the Board office during normal weekday hours.” (Sec’y of State Tie Vote Oct. 21, 2010 (Ex. 41) at 2.) Low-income voters need evenings and Sundays regardless of whether the election is a presidential or non-presidential election.

In sum, it is difficult “to see how the [State’s] interest is justified or rational at the expense of tens of thousands of votes.” *Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006), *superceded as moot*, 473 F.3d 692 (6th Cir. 2007). Plaintiffs are therefore likely to succeed on the merits of their Equal Protection claim.

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<sup>14</sup> *See Libertarian Party*, 462 F.3d at 593 (“The State has made no clear argument regarding the precise interests it feels are protected by the regulations at issue in the case, relying instead on generalized and hypothetical interests . . . .”); *NEOCH*, 696 F.3d at 595-96 (“[T]he State argues that it has a strong interest in limiting precinct ballots to eligible races . . . . No disagreement there, but these interests do not justify the *precise* restriction challenged here.” (emphasis added)); *Anderson*, 460 U.S. at 796 (“[T]he State’s important and legitimate interest in voter education does not justify the specific restriction . . . at issue in this case.”).

**II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM THAT DEFENDANTS HAVE VIOLATED SECTION 2 OF THE VOTING RIGHTS ACT (THIRD CLAIM FOR RELIEF)**

Plaintiffs are also likely to succeed on the merits of their claim under Section 2 of the Voting Rights Act (“VRA”). Section 2 of the VRA prohibits a state from “impos[ing] or appl[ying]” any electoral practice which “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a). A showing of discriminatory intent is not required. As the Sixth Circuit has explained, “Under the 1982 amendments to section 2 of the Act, we are concerned with the *results* of a practice, not the government’s intent.” *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (citation omitted), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007). “The Supreme Court has said that in interpreting this Act, we should read it in ‘a manner that provides the “broadest possible scope” in combating racial discrimination.’ *Id.* at 877 (citation omitted).

The standard for proving prohibited “discriminatory results” is set out in 42 U.S.C. § 1973(b), which provides:

A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Courts applying this language have distilled two requirements for proving that a voting restriction violates Section 2. *First*, a plaintiff must show that a challenged electoral practice “creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group.” *Frank*, 2014 WL 1775432 at \*25; *see also Stewart*, 444 F.3d at 878 (“Because the African-American plaintiffs claim that they are disproportionately denied the

right to have their ballots counted properly, the district court erred in concluding that the plaintiffs did not state a claim for a violation of the right to vote under the Voting Rights Act.”). Plaintiffs need not show that a challenged practice makes voting *impossible* for minorities, only that it makes voting disproportionately more burdensome. *See Stewart*, 444 F.3d at 877. *Second*, a plaintiff must show that a challenged electoral practice “interacts with social and historical conditions to cause an inequality in the opportunities of [minorities] to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Id.* at 879 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

**A. The Elimination of a Week of Early Voting, Nearly All Sunday Voting, and Evening Hours Disproportionately Impacts African Americans in Ohio**

Eliminating a week of early voting, nearly all Sunday hours, and evening hours imposes burdens on voters that are likely to fall disproportionately on African Americans in Ohio. As this Court noted in *OFA I*, Defendants did not even dispute the statistics that indicated minorities would be “disproportionately affected by the restrictions on in-person early voting.” *OFA I*, 888 F. Supp. 2d at 906-07. *See, e.g., Frank*, 2014 WL 1775432, at \*25 (defendants conceding disproportionate racial impact in Section 2 case). They will unlikely be able to do so here.

**1. Numerous Studies Confirm that African Americans in Ohio Disproportionately Use Early In-Person Voting**

Dr. Daniel A. Smith, a tenured professor of political science at the University of Florida, who has over two decades of experience conducting empirical research on electoral politics, conducted a comprehensive analysis of the impact that the challenged provisions would have on voters in Ohio based on statewide voter files from the Office of the Ohio Secretary of State and absentee voter files from county Boards of Elections. (Smith (Ex. 1), at 2, 7.) He concluded that “blacks in Ohio will likely be disproportionately and negatively affected in 2014 by the reduction

in [early in-person] absentee voting days caused by SB 238 and Directive 2014-06.”<sup>15</sup> (*Id.* at 4.)

This conclusion was amply supported by the following facts.

*First*, African Americans have relied on early in-person voting at significantly greater rates than whites during the 2012 and 2010 elections, including on the days that would have been eliminated had SB 238 and Directive 2014-06 been in effect:<sup>16</sup>

- A regression analysis<sup>17</sup> reveals that:
  - The greater the percentage of the African-American voting-age population in a particular census block,<sup>18</sup> the greater the percentage of early in-person votes that were cast in that block (Smith (Ex. 1) at 13-15, Fig. 1; 22-23, Fig. 7);
  - The greater the percentage of the African-American voting-age population in a particular census block, the greater the percentage of early in-person votes that were cast *on the eliminated days* (*id.* at 15-16, Fig. 2; 23-24, Fig. 8).
- When analyzing the use of early in-person voting in Ohio census blocks comprised *entirely* of African Americans versus census blocks comprised entirely of whites:
  - African Americans consistently used early in-person voting at greater rates<sup>19</sup> than whites in 2012 (*id.* at 17-18, Fig. 3);

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<sup>15</sup> Dr. Smith’s analysis was largely performed before the issuance of *OFA III* (*see* Smith (Ex. 1) at 3 n.1), but as explained *infra* Part III., the mere restoration of four hours on a single Sunday does not come close to curing the disproportionate impact caused by SB 238 and Directive 2014-06.

<sup>16</sup> Dr. Smith’s 2012 analysis includes data from almost all 88 counties, but he was only able to analyze 2010 data from five large counties due to insufficient time. (*See* Smith (Ex. 1) App’x A at 1 (describing data collection from 88 BOEs as “arduous”).) Nonetheless, “[t]he findings from these five counties – which account for more than one-third of the state’s population – are highly probative.” (*Id.* at 10.)

<sup>17</sup> *See Stewart*, 444 F.3d at 879 (remanding for district court to “consider the voluminous amount of the plaintiffs’ evidence, including the regression analysis showing the correlation between overvoting and the percentage of African-American voters in a given precinct”).

<sup>18</sup> A “census block” is “the smallest geographic unit for which the Census Bureau reports data.” (Smith (Ex. 1) at 12.)

<sup>19</sup> For analyses focusing on specific days, the early in-person voting “rate” is defined as the number of early in-person votes cast on that particular day in a census block divided by the overall number of votes cast from that census block at any time by any method. (Smith (Ex. 1) at 17 n.22.) For analyses focusing on the overall use of early in-person voting, the “rate” is defined as the number of early in-person votes

- African Americans used early voting at *two to four times the rate* of white voters during several days of the first week of early voting in 2012 (*id.*);
- African Americans used early voting at *over twice the rate* of white voters on Sunday, November 4, the only Sunday available for early voting in 2012 (*id.*);
- In 2010, whites *barely used early in-person voting at all*, unlike voters from census blocks comprised entirely of African Americans, who consistently voted early in-person at higher rates (*id.* at 24-25, Fig. 9).
- When including Ohio census blocks that are *nearly* all-black or all-white (at least 90%):
  - Voters from nearly all-black census blocks used early voting at *twice the rate* of voters from nearly all-white census blocks in 2012 (*id.* at 19-20, Fig. 4);
  - Voters from nearly all-black census blocks used early voting at *up to three times the rate* of voters from nearly all-white census blocks on days that would have been eliminated by the challenged cutbacks in 2012 (*id.* at 21, Fig. 5);
  - In 2010, voters from nearly all-white census blocks *barely used early in-person voting at all*, unlike voters from nearly all-black census blocks, who voted early in-person at rates up to 4% (*id.* at 26-28, Figs. 10-11).

*Second*, data from the Current Population Survey Voting and Registration Supplement (“CPS”), which is conducted during election years by the U.S. Census Bureau and the U.S. Bureau of Labor Statistics and is “one of the most accurate among all election surveys” (Smith (Ex. 1) at 28 n.31 (citation omitted)), also demonstrates a disproportionate racial impact. According to the CPS, in 2008, African Americans in Ohio voted early in-person at *over twice the rate* of white voters (19.55% African-American versus 8.91% white). That relative disparity grew in 2012, when African Americans in Ohio voted early in-person at *over three times the rate* of white voters (19.88% African-American versus only 6.18% white). (*Id.* at 31.)

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cast at any time in a census block divided by the overall number of votes cast from that census block at any time by any method. (*Id.* at 19.)

*Third*, numerous independent studies, some of which this Court considered in *OFA*, *see generally OFA I*, 888 F. Supp. 2d at 903-04, confirm the disproportionate use of early in-person voting by African Americans in Ohio. (*See, e.g.*, Ex. 5 at 5-6; Ex. 7 at 1; Ex. 8 at 2, 10.) Crucially, these studies specifically demonstrate disproportionate use of early voting on weekends and weekday evening hours:

- The probability that a Cuyahoga voter casting a vote during the *four* weekends prior to the last weekend was African-American was 56.3% in 2008, while the probability that the voter was white was only 39.1% (Ex. 7 at 5, Table 4);
- The probability that a Cuyahoga voter casting a vote after-hours on weekdays was African-American was 53.6% in 2008, while the probability that the voter was white was only 41.0% (*id.*);
- In Franklin County, 21.16% of the total votes cast were by African Americans (Ex. 5 at 5, Table 3), yet:
  - 32.21% of all the votes cast on *all five* weekends<sup>20</sup> were by African Americans (*id.* at 5, Table 7);
  - 29.81% of all the votes cast on weekdays after 5 p.m. were by African Americans (*id.* at 6, Table 9).

The quantitative evidence thus overwhelmingly demonstrates that African Americans rely on early in-person voting at far greater rates than whites in Ohio, including on the days and times eliminated by SB 238 and the 2014 Directives.

## **2. African Americans Rely on Sunday Voting in Particular**

The 2014 Directives' ban on multiple Sundays particularly impacts the African-American community in Ohio. Ample qualitative evidence demonstrates that Sunday voting – commonly referred to as “Souls to the Polls” – has become a fixture in many African-American communities across many counties throughout Ohio. *See, e.g.*:

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<sup>20</sup> (*See Rugg Decl. Attachments (Ex. 28) at 5* (five weekends available for early voting in Franklin County in 2008).)

- (Wood Decl. (Ex. 10) ¶¶ 15-23 (Lucas County) (“I would estimate that hundreds of voters in Toledo were taken to the polls – mainly on Sundays – in 2008 and again in 2012. Those voters were primarily African-American. [NAACP Toledo] partnered with about 80 to 90 African-American churches in Toledo to provide transportation for their congregations. Many of those churches contributed vans – there were probably about a dozen vans. . . . and it was so much easier to coordinate transportation and drivers on Sunday.”));
- (Morgan Decl. (Ex. 17) ¶ 20 (Trumbull County) (“APRI Trumbull County Chapter helped to coordinate efforts to transport individuals to the early voting location from churches after Sunday services (‘Souls to the Polls’). We got churches to use their vehicles.”));
- (Rev. Snyder Decl. (Ex. 12) ¶ 18 (Franklin County) (Bethel AME Church made “several vans” available for Souls to the Polls in 2010 and 2012); *id.* ¶ 19 (“In 2012, I also coordinated ‘Souls to the Polls’ voting drives among other churches, including five AME churches in Columbus and several other African-American churches. I believe we had about 29 vans available among all the churches.”));
- (Rev. Braxton Decl. (Ex. 21) ¶¶ 6-7 (Cuyahoga County) (“When working with African-American churches, . . . [w]e operated a 45-55 person bus and there were times both on Sundays and during the evening voting hours where one bus was not enough and we had to take several loads of people. Church members also sometimes carpoled to the early voting location when there was not enough space on the bus.”));
- (Declaration of Reverend Joseph Copeland, Associate Minister at Greater New Hope Missionary Baptist Church, Cincinnati (“Rev. Copeland”) Decl. (Ex. 20) ¶ 5-7 (Hamilton County) (“In 2012, I helped coordinate a Souls to the Polls effort that engaged 12-15 churches in the Cincinnati area. Approximately 80 percent of these churches were African American. . . . Between 400 and 500 people participate in our Souls to the Polls efforts.”));
- (D. Freeman Decl. (Ex. 16) ¶ 20 (Mahoning County) (“We also worked with African-American churches on Souls to the Polls efforts and helped increase awareness about these efforts.”));
- (Rev. Jones Decl. (Ex. 15) ¶¶ 15-16 (Montgomery County) (coalition of several African-American churches “promoted voting after Sunday service, and they contributed vans to help transport people to the polls after Sunday services. College Hill has one van that it has used to help transport people to the polls, and each of the other churches contributed at least one van each.”));
- (Rev. Cooper Decl. (Ex. 19) ¶ 9 (Montgomery County) (“Wayman Chapel owns a mini-bus that holds about 15 people. If Sundays were available for early voting, we would use the minivan for our Souls to the Polls efforts . . . .”));

- (Simpson Decl. (Ex. 14) ¶ 16 (Montgomery County) (“The vans were packed during Souls to the Polls. I believe that about 45-50 people were taken to vote on the one Sunday that early voting was available in 2012.”)).

Souls to the Polls has quickly taken on special meaning in the African-American community in Ohio, and for good reason. As Reverend Snyder of Plaintiff Bethel AME Church, located in Columbus, explains:

“Souls to the Polls” is important to the African Americans in my congregation and community. It is a way for family members across 2 and 3 generations to vote together. As we take bus rides to the polls, we share the stories of the sacrifices that people have made to give us the right to vote. We share with the younger generation of voters what Jim Crow was like. We sing freedom songs on the way to the polls. It is a sense of pride and honor that most of our young people don’t get to experience living here in America. Many of our young people are discouraged and won’t participate in the electoral process unless older generations encourage them.

Over the last few years, “Souls to the Polls” has become a cultural fixture and a tradition among the African-American churches in my community. It is a way for the Christian community to exercise their faith by sharing their civic and voting experiences with members from the community and the church. This is Christian faith in action because we know that if we can get more people to vote, chances are we will get elected officials to hear our concerns. We share a meal. We share our hearts. We talk about the concerns of the community, the issues on the ballot and we share our hopes and dreams of a better America.

(Rev. Snyder Decl. (Ex. 12) ¶¶ 24-25.) A similar phenomenon exists in Toledo, where ““Souls to the Polls’ has definitely become a part of African-American culture.” (Wood Decl. (Ex. 10) ¶ 31.) As Ray Wood, President of the Toledo Branch of Plaintiff NAACP, explains:

Traditionally, in the Toledo African-American community, Sunday has always been the day of the week when everyone gets together. Many older and elderly African Americans simply do not leave the house all week except on Sundays. Many generations of African Americans get together for church, and then gather together for the Sunday meal. For instance, on Sundays, you simply cannot get into any soul food restaurant in Toledo; the lines are out the door. The movie “Soul Food,” which is about an African-American family that gets together for Sunday dinner every week, really captures the African-American tradition in Toledo. Sunday was a focal point also because many churches already provide transportation to take people to church, and carpools are also arranged so that everyone is together.

(Wood Decl. (Ex. 10) ¶¶ 24-25.) And in Dayton:

Sunday voting has . . . become church work for the African-American churches I've worked with. For College Hill and these other churches in Dayton, Sunday voting has become a communal event. After church, you usually have a social hour, so the people are already there, and the fellowship and camaraderie is there. There's a certain esprit de corps of being together and then voting together. It was also easier for the African-American churches I worked with to take people to the polls on Sunday because many churches already have drivers that take people to the Sunday service.

(Rev. Jones Decl. (Ex. 15) ¶¶ 18-19.) As is apparent, fueling this phenomenon is a deep belief that “[v]oting is especially important to the African-American community because we were denied the right to vote for so many years.” (Rev. Braxton Decl. (Ex. 21) ¶ 11.) Indeed, several African-American churches in Ohio view voting as an integral part of their spiritual beliefs. (*See* Rev. Snyder Decl. (Ex. 12) ¶ 12; Simpson Decl. (Ex. 14) ¶ 8; Rev. Cooper Decl. (Ex. 19) ¶ 5.)

Sunday voting as an African-American phenomenon in Ohio is so well-known that elections officials have openly acknowledged it – but as a phenomenon that must be stamped out. As Doug Priesse, a member of the Board of Elections in Franklin County explained in an e-mail in 2012, “I guess I really actually feel we shouldn't contort the voting process to accommodate the urban – read African-American – voter-turnout machine.” (Ex. 48 at 1.) Consistent with those beliefs, Priesse voted specifically against Sunday voting on at least three prior occasions in 2010 and 2011. (*See* Sec'y of State Tie Vote Sept. 22, 2010 (Ex. 39) at 2; Sec'y of State Tie Vote Oct. 25, 2011 (Ex. 42).) Of course, Priesse did not need to keep trying to ban Sunday voting on his own, because Directive 2012-35 and Directive 2014-06 finished the job by banning *all* Sunday voting across *all* counties starting in 2012, with this Court having to step in – twice – to salvage four hours on a single Sunday from this onslaught. Yet the continued ban on additional Sundays continues to directly target and impact African Americans in Ohio.

### **3. African Americans Will Be Burdened Disproportionately By the Elimination of Same-Day Registration**

Lastly, as discussed *supra* Part I.A., the evidence demonstrates that low-income voters in particular rely upon same-day registration, and low-income and homeless voters in Ohio are disproportionately comprised of African Americans, as explained in the next section, *infra* Part II.B.<sup>21</sup> Thus, the permanent elimination of same-day registration disproportionately impacts African Americans. *See Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1256 (N.D. Miss. 1987) (“[L]imited hours for registration, was and is particularly onerous on poor persons [and] . . . a disproportionate number of the poor persons in Mississippi are black.”); *Texas v. Holder*, 888 F. Supp. 2d 113, 138-141 (D.D.C. 2012), *vacated and remanded on other grounds*, 133 S. Ct. 2886 (June 27, 2013) (in Section 5 case, finding racially disparate impact of voter ID law, even without evidence of ID possession rates among racial groups, because burdens disproportionately fell on poor voters who are predominantly minority).

For all these reasons, Plaintiffs have established that the cutbacks enacted by SB 238 and the 2014 Directives overwhelmingly harm African-American voters in Ohio.

#### **B. Historical and Social Conditions in Ohio Disfavor Racial Minorities**

Because the challenged provisions have a disproportionate impact on African Americans, Section 2 requires the Court to identify the relevant historical and social conditions in Ohio and then determine whether SB 238 and the 2014 Directives interact with those conditions to impose a disproportionate burden on the ability of African Americans to vote. *See Stewart*, 444 F.3d at 876. In evaluating the social and historical conditions relevant to a Section 2 claim, courts have

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<sup>21</sup> (*See also, e.g.*, Spring Decl. (Ex. 23) ¶ 11 (“According to one study, roughly 66% of people experiencing homelessness in Cincinnati are African-American. From my experience, this is likely to be an underestimate.”); Getty Decl. (Ex. 25) ¶ 12 (“Approximately 80 percent of the individuals [experiencing homelessness] who took advantage of our ride services were African American.”).)

looked to a nonexclusive list of factors found in the Senate Report that accompanied the 1982 amendments to the VRA:

- (1) the history of voting-related discrimination in the State or political subdivision;
- (2) the extent to which voting in the elections of the State or political subdivision is racially polarized;
- (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;
- (4) the exclusion of members of the minority group from candidate slating processes;
- (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- (6) the use of overt or subtle racial appeals in political campaigns;
- (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;
- (8) whether elected officials are unresponsive to the particularized needs of the members of the minority group; and
- (9) whether the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

*Thornburg v. Gingles*, 478 U.S. 30, 44-45 (citing S. Rpt. No. 97-417, at 28-29 (1982)); *see, e.g., Rural W. Tenn. African-American Affairs Council v. Sundquist*, 209 F.3d 835, 841 (6th Cir. 2000). “[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.” *Gingles*, 478 U.S. at 45 (quoting S. Rpt. No. 97-417, at 29).

**1. The Challenged Cutbacks Interact with Socioeconomic Disparities in Ohio to Cause an Inequality in the Opportunities of Minorities to Participate in the Political Process (Senate Factor Five)**

Factor Five examines “the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process.” As Dr. Vincent J. Roscigno, a tenured sociology professor at The Ohio State University, explains thoroughly in an accompanying report (Roscigno (Ex. 2)), African Americans in Ohio continue to bear the effects of racial discrimination on a variety of socioeconomic indicators.<sup>22</sup> These include the following:

- **Employment.** Whites in Ohio are significantly overrepresented (32%) relative to African Americans (13-19%) in upper-tier positions where “job security, flexibility, benefits and rewards are significantly higher.” Conversely, African Americans (29%-36%) are more likely than whites (22-23%) to work in service and sales-related jobs (Roscigno (Ex. 2) at 5-6, Figs. 1, 2), where it is more difficult to take time off work. (*Id.* at 16.)
- **Housing Segregation.** Racial segregation levels in Cleveland, Cincinnati, and Columbus rank as “very high,” and are all among the top-21 most segregated cities in the nation. (*Id.* at 9-11, Fig. 3.) Segregation prevents African Americans from accessing more employment opportunities in the suburbs, better schools, better security, and institutional resources. (*Id.* at 14-15.) *See, e.g., City of Euclid*, 580 F. Supp. 2d at 606 (relying on index of dissimilarity to measure segregation in Euclid).
- **Residential Transiency.** Whites in Ohio are almost twice as likely (72.8%) to be homeowners compared to African Americans (38.5%). As a result, racial minorities experience nearly *twice* the rate of residential instability, with over 21.6% of African Americans in Ohio having moved within the last year, as compared to 12.9% of whites. (*Id.* at 11, Fig. 4.)
- **Transportation.** African Americans in Ohio are about *three times* as likely to rely on public transportation or walk to work as compared with whites, and *four times* less likely to own a car. (*Id.* at 16, Fig. 5.)
- **Childcare.** 72% of African-American households in Ohio are single-parent families with at least one child, compared to only 25% of white households. And even *among* these

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<sup>22</sup> Dr. Roscigno’s sterling credentials include the publication of 65+ peer-reviewed articles and two books, positions on several journal editorial boards, and multiple recognitions and awards. (Roscigno (Ex. 2) at 2-3, 42-57.)

single-parent households, the poverty rate among African-American single-parent households is significantly higher (over 55%) compared to white single-parent households (around 40%). (*Id.* at 17-18, Fig. 6.)

- ***Income and Poverty.*** Average African-American household income in Ohio is around \$35,000, nearly 60% that of white households, which is around \$65,000. The African-American poverty rate is 30% – nearly *three times* that of whites. (*Id.* at 19-20, Fig. 7.)
- ***Education.*** Ohio schools remain intensely racially segregated. Schools in *a dozen* cities in Ohio have dissimilarity scores of higher than 60, which is considered a high level of segregation. Student poverty rates in the African-American schools are consistently nearly *twice as high* as the student poverty rates in white schools, across all 12 cities. The higher the concentration of poverty in a school, the more negative overall implications for the quality of education. Indeed, high-school dropout rates are 7% higher for African Americans in Ohio, and college educational attainment is only 15%, compared to 25% for whites. (*Id.* at 20-23, Table 1, Fig. 8.) *See also City of Euclid*, 580 F. Supp. 2d at 606-07 (describing how housing segregation resulted in educational segregation in Euclid).
- ***Health.*** These disparate socioeconomic indicators contribute to disparities in health on a variety of indicators in Ohio. African Americans experience higher disability rates (19.3%) as compared to whites (15.6%). African-American children diagnosed with mental health needs are twice as likely (60%) to remain untreated compared to white children who are also diagnosed (30%). And whereas 17% of whites lack access to health insurance coverage, that is true for 27.6% of African Americans in Ohio. (*Id.* at 24-25.)

*See United States v. City of Euclid*, 580 F. Supp. 2d 584, 609 (N.D. Ohio 2008) (surveying socioeconomic disparities); *Armour v. Ohio*, 775 F. Supp. 1044, 1055-56 (N.D. Ohio 1991) (same). These widespread socioeconomic disparities did not occur in a vacuum, but as Dr. Roscigno explains, are attributed partly to both historical and contemporary discrimination. (Roscigno (Ex. 2) at 6-9, 12-14, 20-21.)

As the text of Factor Five itself explains, these socioeconomic disparities alone “hinder [minorities’] ability to participate in the political process.” (*See also* Roscigno (Ex. 2) at 15-17, 23, 25.) But these disparities also directly interact with SB 238 and the 2014 Directives to cause an inequality in the opportunities of minorities to participate in the political process. *Stewart*, 444 F.3d at 879. As Dr. Roscigno straightforwardly explains, since African Americans in Ohio

“have greater difficulty securing transportation,” the challenged cutbacks “exacerbate this difficulty by restricting the times that are available for them to make the trip and by decreasing the probability of carpooling options, since voting hour options have been increasingly restricted in the direction of ‘normal’ working hours.” (Rosigno (Ex. 2) at 18.)<sup>23</sup> Because African Americans in Ohio “have greater difficulty taking time off to work (usually unpaid),” the challenged cutbacks “exacerbate this difficulty by eliminating evening hours and Sundays – times that were previously available if the voter was unable to take time off of work during the day.” (*Id.*)<sup>24</sup> Because African Americans in Ohio “experience a disparate burden in arranging for childcare,” the challenged cutbacks “exacerbate this difficulty by reducing flexibility and making it harder for such voters to perhaps find friends or relatives available to look after their children in times that are available and convenient to potential, alternative caregivers, such as evenings and Sundays.” (*Id.*) And these impacts are “inextricably intertwined” with the other disparities described in Dr. Rosigno’s report. (*Id.* at 18-19.)

SB 238’s elimination of same-day registration also interacts with these socioeconomic disparities to make it more difficult for African Americans to vote. (Rosigno (Ex. 2) at 22.)

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<sup>23</sup> (*See, e.g.*, D. Freeman Decl. (Ex. 16) ¶ 21 (“In the 2014 primary, we provided about 25-30 people with rides to the polls and in 2012 we provided rides to approximately 100 individuals. Most of the individuals who requested rides were African American.”); Morgan Decl. (Ex. 17) ¶¶ 15-17 (“Because public transportation is very minimal in the Warren area, we provide rides to the polls . . . . During the early voting period, we receive frequent requests for rides and have driven over a hundred people to the polls during the early voting periods in both presidential and gubernatorial election years. The individuals that we registered and provided rides to were predominantly African American.”); Getty Decl. (Ex. 25) ¶ 12 (“Approximately 80 percent of the individuals who took advantage of our ride services were African American.”); Frech Decl. (Ex. 22) ¶¶ 29-32.)

<sup>24</sup> (*See, e.g.*, Rev. Braxton Decl. (Ex. 21) ¶ 12 (“Many people do not have jobs that permit them to get to the polls during their normal hours of operation. Individuals in the communities I work with, which are predominately African American, cannot use their vacation days to take Election Day off work . . . .”) Frech Decl. (Ex. 22) ¶ 25 (“Our clients who are employed cannot easily take unpaid time off of work during weekday business hours. The most common job held by our clients is in fast food . . . .”)).

Voters who move more frequently need to update their registrations more often, and African Americans in Ohio tend to move nearly twice as frequently as whites. (*Id.* at 11, Fig. 4.) Voters with less educational attainment are more likely to be unaware of registration deadlines and the need to update registration upon moving, and are more likely to need in-person help with registration forms, and there is a persistent racial disparity in educational attainment in Ohio. (*Id.* at 20-23.) Voters without access to transportation will generally find it more difficult to make a separate trip to take care of any registration issues in-person before the deadline, and then make a second trip to cast a vote – difficulties exacerbated by the need to make these trips during regular business hours. (*Id.* at 16.) Once again, African Americans are *three times* more likely to lack a vehicle. (*Id.* at 16, Fig. 5.) The ability to resolve registration issues and vote simultaneously is therefore very important to the African-American community, precisely because of these socioeconomic disparities.

In sum, SB 238 and the 2014 Directives interact with these social and historical conditions to impose a “materially increased burden on African–American voters’ effective exercise of the electoral franchise . . . analogous to . . . closing polling places in disproportionately African–American precincts.” *Florida*, 885 F. Supp. 2d at 328-29. Plaintiffs are thus likely to succeed on the merits of their Section 2 claim on this basis alone.<sup>25</sup>

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<sup>25</sup> See generally *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614, at \*3 (D.N.D. Oct. 21, 2010) (Native Americans’ lower socioeconomic status made transportation to new polling place more difficult); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003) (lower education and literacy rates in Hispanic community made voting more difficult without minority poll workers); *Operation Push*, 674 F. Supp. at 1255 (registration restrictions “have a disparate impact on the opportunities of black citizens in Mississippi to register to vote because of their socio-economic and occupational status”); *Brown v. Dean*, 555 F. Supp. 502, 504-05 (D.R.I. 1982) (“[m]any of the [African-American] class members are elderly, and-or without automobiles” making it “considerably more difficult” for them to vote because of polling place change).

**2. The Challenged Cutbacks Interact with Several Other Factors to Further Hinder African-American Political Participation in Ohio (Other Senate Factors)**

Further reinforcing Plaintiffs' likelihood of success on their Section 2 claim is the presence of several other Senate Factors. One such factor is racial polarization (Factor Two), which "refers to the situation where different races ... vote in blocs for different candidates," *Gingles*, 478 U.S. at 62, thus "allow[ing] those elected to ignore [minority] interests without fear of political consequences." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). In Ohio, exit poll data suggests "significant and substantial patterns of racially polarized voting" (Roscigno (Ex. 2) at 31), for federal, state, and local elections. (*Id.* at 30-32.)

Ohio has also had a political climate that appears to be quite tolerant of "the use of overt or subtle racial appeals in political campaigns" (Factor Six). Racial appeals impact minority political participation by "discouraging or dissuading minority voters" through "reinforcing their suspicion that they simply do not belong to the political process." (Roscigno (Ex. 2) at 33.) "The use of racially-charged campaign issues, such as campaign literature that preys on racial anxiety, is a well-recognized form of racial appeal." *City of Euclid*, 580 F. Supp. 2d at 610. Some of the more recent racial appeals include (*see* Roscigno (Ex. 2) at 32-36):

- An article posted by a popular Ohio politician in 2013 entitled, "*America Needs a White Republican President*," and stated: "Admit it. You want a white Republican president again. Wanting a white Republican president doesn't make you racist, it just makes you American.";
- "PUT THE WHITE BACK IN THE WHITE HOUSE" T-shirts printed and worn at Ohio rallies for Presidential candidate Mitt Romney in 2012;
- The placement of several dozen "Voter Fraud" billboards disproportionately placed in African-American and poorer neighborhoods of Cleveland and Columbus during the early voting period of 2012, including within eyeshot of four large public housing communities, *cf. Harris v. Graddick*, 593 F. Supp. 128, 132-33 (M.D. Ala. 1984) (due

- to history of white intimidation at polls, underrepresentation of Blacks as poll workers depressed Black registration and turnout and likely violated Section 2);
- A 2010 advertisement which falsely suggested that an African-American candidate had made corrupt, backroom deals to Muslim mosques, playing stereotypical Middle-Eastern music in the background;
  - A 2008 television advertisement displaying a shouting African-American woman in inner city Cleveland alongside mostly other African Americans, claiming that President Obama gave her a free phone;
  - *City of Euclid*, 580 F. Supp. 2d at 589-90 (“racially divisive rhetoric” concerning housing proposal by African-American church, followed by mayoral campaign was infused with “racial overtones”);
  - *Armour*, 775 F. Supp. at 1056 (surveying history of overt racial appeals in Youngstown);
  - (See Spring Decl. (Ex. 23) ¶ 12 (opponents of an affordable housing proposal likely to bring African Americans into Cincinnati neighborhood voiced fears that “it’s going to bring drugs,” “their kids will bring drugs to school,” they will teach our kids to do bad things,” and “it will increase crime,” and describing other similar appeals)).

Of particular relevance to this case are racial appeals that have been made specifically as a basis for *cutting back early voting*. As discussed *supra* Part II.A.2., a Board of Elections official in Franklin County openly admitted, “I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban – read African-American – voter turnout machine,” which explained his repeated prior votes specifically against Sunday voting. (Ex. 48 at 1; Sec’y of State Tie Vote Sept. 22, 2010 (Ex. 39) at 2; Sec’y of State Tie Vote Oct. 25, 2011 (Ex. 42).) And in 2014, a State Representative explained, “There’s that group of people who say, ‘I’m only voting if someone drives me down after church on Sunday.’ . . . Really? Is that the person we need to cater to when we’re making public policy about elections?” (Ex. 49 at 1.) As Dr. Roscigno explains, “Voters sensitive to the dog whistle of subtle racial appeals are likely to understand his reference to ‘that group of people,’ particularly because [he] suggests with his ‘cater to’ comment that such a group is lazy.” (Roscigno (Ex. 2) at 37.) See *Roberts v. Wamser*,

679 F. Supp. 1513, 1531 (E.D. Mo. 1987) (liability based on Factor Six), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989).

Ohio has also been unresponsive to the particularized needs of African Americans (Factor Eight).<sup>26</sup> This is best illustrated by the Ohio legislature's handling of SB 238 itself. When an ameliorative amendment was proposed that would simply require the Secretary of State to *assess* the racial impact of SB 238, the amendment was not even allowed to be debated.<sup>27</sup> *See also Operation Push*, 674 F. Supp. at 1265 (finding a "significant lack of responsiveness on the part of elected officials" with respect to the satellite registration at issue in the case); *Conn. Cit. Action Gr. v. Pugliese*, Civil No. N 84-431, 1984 U.S. Dist. LEXIS 24869, at \*12 (D. Conn. Sept. 27, 1984) (finding widespread "unresponsiveness" in changing voter registration procedures which were the subject of lawsuit).

Worsening the political marginalization of African Americans in Ohio are recent voting practices that have "enhance[d] the opportunity for discrimination against the minority group" (Factor Three). (*See also* Roscigno (Ex. 2) at 24-26 (recounting "history of official voting-related discrimination" (Factor One)); *see, e.g., Armour v. Ohio*, 775 F. Supp. at 1053-54. These include the use of poll watchers in predominantly African-American areas, voter ID laws, and of course, cutbacks to early voting. (Ex. 2 at 26-28.) Indeed, a host of voting practices that tend to

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<sup>26</sup> (*See, e.g.,* Frech Decl. (Ex. 22) ¶ 20 (recent dramatic cuts to welfare rolls); Spring Decl. (Ex. 23) ¶ 13 (Cincinnati politician proposed stigmatizing largely African-American population experiencing homelessness by making them wear T-shirts or city-made signs that identify them as homeless); Rev. Jones Decl. (Ex. 15) ¶ 11 (recent attempts to expand I-675, cutting off access to mostly-African-American central Dayton and discouraging investment there).) *See City of Euclid*, 580 F. Supp. 2d at 611 (the Court finds that that . . . , on at least certain issues, the City of Euclid historically has been unresponsive to the needs of its African-American community").

<sup>27</sup> *See* Ohio House of Representatives Journal at 2-3, 5-6 (Feb. 24, 2014), *available at*: <http://www.legislature.state.oh.us/journaltext130/HJ-02-24-14.pdf> (last visited June 25, 2014).

hinder political participation by low-income voters – and therefore disproportionately African-American voters – have required court intervention. *See, e.g.*:

- *SEIU v. Husted*, Nos. 2:12-cv-562, 2:06-cv-896, 2012 WL 5497757, at \*5 (S.D. Ohio Nov. 13, 2012) (Defendant Husted’s directive violated consent decree intended to protect the votes of the indigent and homeless);
- *Harkless v. Husted*, No. 1:06-cv-2284, 2011 WL 2149179, at \*3, \*26 (N.D. Ohio March 31, 2011) (Ohio’s failure to provide voter registration opportunities at public assistance agencies in violation of federal law);
- *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 825, 827 (N.D. Ohio 2006) (statute permitting election judges “unbridled discretion to challenge any voter’s citizenship without any guidelines” was unconstitutional, as it creates a “very real possibility of ‘profiling’ voters . . . on the basis of appearance, name, looks, accent or manner”); *id.* at 827 (“It is shameful to imagine that this statute is an example of how the State of Ohio says ‘thank you’ to [naturalized citizens] who helped build this country.”);
- *City of Euclid*, 580 F. Supp. 2d at 607-08 (slotted at-large system in Euclid enhanced opportunity for discrimination); *see also United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 743 (N.D. Ohio 2009) (“minorities in Euclid have been systematically denied the opportunity to elect their preferred candidates to the Board”);
- *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 699, 703 (N.D. Ohio 2006) (enjoining new voter registration laws which effectively shut down voter registration drives in “low- and moderate-income, minority, and other disenfranchised communities” and “have the discriminatory effect of imposing an undue burden primarily on poor and/or elderly voter registration workers”);
- *Armour v. Ohio*, 775 F. Supp. 1044, 1046 (N.D. Ohio 1991) (apportionment of Ohio House of Representatives diluted minority vote);
- *Mallory v. Eyrich*, 922 F.2d 1273, 1275-76 (6th Cir. 1991) (judicial elections in Hamilton County Municipal Court violated Section 2 of the Voting Rights Act).

In large part because of these Factors, African Americans in Ohio have had difficulty winning office particularly in state level positions, many of which are filled on non-presidential election years (Factor Seven) (Rosigno (Ex. 2) at 37-39), heightening the sensitivity and importance of protecting the franchise on those years. *See also, e.g., City of Euclid*, 580 F. Supp. 2d at 588-89 (“Never in the history of the City of Euclid has an African-American been elected

as its mayor, council president, a member of its council, or to serve on its school board.”); *Armour*, 775 F. Supp. at 1056 (“No black has ever won a county-wide election. Only one black candidate has ever won a city-wide election other than for school board.”).

These additional Factors work to exclude African Americans from the political process, and SB 238 and the 2014 Directives add insult to injury by magnifying these effects. They cut into an early voting period that has offered an essential in-person participation opportunity for African Americans who have grown distrustful of the political process due to the legacy of racial discrimination in voting (Senate Factors One and Three) and Ohio’s seemingly high tolerance for racialized politics (Factors Two, Six, and Eight), including a climate that permitted an open admission by a Board of Elections official that his opposition to Sunday voting was motivated by a desire to make it harder for African Americans to vote. (Ex. 48 at 1.) Indeed, it is Ohio’s own history of voting discrimination that largely fuels African-American churches’ “Souls to the Polls” gatherings on Sundays, when multiple generations of African Americans can collectively participate in a fundamental right for which their “African-American ancestors in the faith fought, sacrificed, and in some cases, gave their lives to secure.” (Rev. Snyder Decl. (Ex. 12) ¶ 12.) SB 238 and the 2014 Directives thus interact with a host of “social and historical conditions to cause an inequality in the opportunities” of minorities to participate in the political process. *Stewart*, 444 F.3d at 879 (citation omitted).

**3. The Policy Justifications for SB 238 and the 2014 Directives Are “Tenuous” at Best (Senate Factor Nine)**

Defendants cannot proffer a non-tenuous justification for the disproportionate burdens that SB 238 and Directive 2014-06 place on African Americans in Ohio (Factor Nine).<sup>28</sup> As discussed *supra* Part I.C., a mere interest in “uniformity” for the sake of avoiding voter confusion does not justify imposing *burdens* on voters across the board, especially when they fall disproportionately on African Americans. *Cf. Anderson*, 460 U.S. at 801 (“Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.” (citation omitted)). Defendants have no non-tenuous justification for these cutbacks, much less a “legitimate and compelling rationale” for targeting the hours relied upon by African-American voters. *Cf. Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (“chief” reason felon disenfranchisement law did not violate Section 2 was because of “the state’s legitimate and compelling” interest in disenfranchising convicted felons).<sup>29</sup> For all these reasons, Plaintiffs are likely to succeed on the merits of their claim under Section 2 of the Voting Rights Act.

**III. THE RESTORATION OF THE LAST TWO DAYS OF THE EARLY VOTING PERIOD DOES NOT CURE DEFENDANTS’ VIOLATIONS**

Plaintiffs have demonstrated that eliminating same-day registration, the first week of early voting, nearly all Sunday hours, and all evening hours are likely to violate the Equal

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<sup>28</sup> The justification for Directive 2014-17 is not even relevant, since the only reason Defendant Husted restored a single Sunday was because this Court forced him to do it. (*See Ex. 38.*)

<sup>29</sup> Obviously, the interest in disenfranchising convicted felons does not apply here. *See also Operation Push*, 674 F. Supp. at 1266-68 (justifications tenuous for lack of any “legitimate or “compelling” basis); *Brown*, 555 F. Supp. at 504 (“no evidence” connecting “considerations of security” to moving polling location); *McMillan v. Escambia Cnty.*, 748 F.2d 1037, 1045 (5th Cir. 1984) (justification for at-large elections “tenuous”); *Frank*, 2014 WL 1775432, at \*32 (voter ID law “only weakly serves the state interests put forward by the defendants”).

Protection Clause and Section 2 of the Voting Rights Act. Although Directive 2014-17, pursuant to court order, restored uniform hours on the Sunday and Monday before Election Day, such a limited restoration does not absolve Defendants of liability in this case, and it certainly does not cure the constitutional and statutory violations at issue here. This is so for several reasons.

*First*, Directive 2014-17's restoration of two days of early voting clearly cannot make up for SB 238's permanent elimination of the first week of the early voting period. As explained *supra* Part I.A., over 90,000 Ohioans cast a vote during this period in the last general election. It cannot be assumed that these 90,000 Ohioans can suddenly shift to voting during these last two days. These same two days *were available* in the last general election due to *OFA I*, and yet those 90,000 Ohioans chose to vote during the first week of early voting

*Second*, the restoration of two days of early voting well after the registration deadline cannot substitute for SB 238's permanent elimination of same-day registration, upon which thousands of Ohioans relied in the last general election. *See supra* Part I.A. For voters who discover after the registration deadline that their vote will not be counted due to some registration irregularity, it is too late. Two days of early voting after the registration deadline obviously do nothing to help them.

*Third*, these restored days – consisting of four hours on Sunday afternoon and six hours during the day on Monday – cannot completely compensate for the elimination of *all* evening hours, for the simple reason that these restored hours are not *evening* hours. Election hours are not perfectly fungible. Working-class voters who must rely on evening hours to vote on their way home from work may not be able to make a separate trip to vote during the four-hour window on Sunday afternoon, and definitely will not be able to vote during the day on Monday.

*Lastly*, restoring four hours on a single Sunday does not make up for the wholesale ban on *all remaining* Sundays from the early voting period, a policy which began in 2012 with Directive 2012-35. Before 2012, counties representing *over 78%* of Ohio’s African-American population had *multiple Sundays* available for early voting in 2008 and/or 2010.<sup>30</sup> Each of these counties also ranked among the highest in Ohio for the number African Americans per county, in terms of both absolute numbers and percentage of the county’s population. (Ex. 9 at 1.) Several of these counties even had *three to five* Sundays available for early voting,<sup>31</sup> and some counties had *three to five* Saturdays available as well.<sup>32</sup> Thousands of voters, especially African Americans, took advantage of those additional Sundays before Defendant Husted banned them in 2012. According to a study which analyzed the impact of Directive 2012-35’s elimination of all weekends from the early voting period (published just after *OFA I* was decided), *38,000* Ohioans cast a vote *on weekends prior to the last weekend* in 2008. (Ex. 4 at 1, 6.) County-specific studies confirm that the use of early voting on those prior weekends was also disproportionately by African Americans. (Ex. 5 at 5, Tables 3, 7; Ex. 7 at 5, Table 4.)

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<sup>30</sup> These counties include: Cuyahoga, Franklin, Hamilton, Summit, Lucas, Montgomery (Rugg Decl. (Ex. 28) ¶ 11), Richland and Trumbull. (Cable Decl. (Ex. 29) ¶¶ 2-3.) The Census numbers as reported by the Ohio Development Services Agency (“DSA”) include the number of African Americans for all of these counties except Richland. (Ex. 9 at 1.) The number of African Americans in Richland was computed by multiplying the percentage (10.5%) as reported on the DSA document by the total population as reported on the Census website. See Census Quickfacts, Richland County, Ohio, June 11, 2014, <http://quickfacts.census.gov/qfd/states/39/39139.html> (last visited June 27, 2014). Added together, these counties have a total of 1,209,387 African Americans, out of a total of 1,541,771 African Americans statewide, resulting in a percentage of 78.44%. (Ex. 9 at 1.)

<sup>31</sup> These counties include Cuyahoga, Franklin, Summit (Rugg Decl. (Ex. 28) ¶ 12), Richland, and Trumbull. (Cable Decl. (Ex. 29) ¶¶ 2-3.)

<sup>32</sup> These counties include Cuyahoga, Franklin, Hamilton, Summit, Greene, Butler (Rugg Decl. (Ex. 28) ¶ 13; Fairchild Decl. (Ex. 13) ¶ 35), Richland, Trumbull (Cable Decl. (Ex. 29) ¶¶ 2-3), and Lorain. (Sec’y of State Tie Vote Sept. 29, 2010 (Ex. 40) at 3.)

Indeed, when only one Sunday was permitted in 2012, voters in several counties faced extremely long lines on that single Sunday, and those who waited in line were disproportionately African-American. *See, e.g.:*

- Franklin County:
  - Video, “Line at the Columbus OH early voting center Sunday,” published Nov. 4, 2012, <https://www.youtube.com/watch?v=pvCwREI7Kys>;
  - (Rev. Snyder Decl. (Ex. 12) ¶ 21 (“During the 2012 elections, there was only one Sunday available for early voting [in Franklin County]. On that Sunday, I saw long lines of voters in my community, most of whom were African-American.”));
- Hamilton County:
  - Video, “Early Voting in Cincinnati” (date shown at opening frame as Sunday, November 4, 2012), published Nov. 4, 2012, [https://www.youtube.com/watch?v=ba-DjEo\\_Fhw](https://www.youtube.com/watch?v=ba-DjEo_Fhw);
  - (Rev. Copeland Decl. (Ex. 20) ¶ 8 (“We were only able to conduct our Souls to the Polls efforts on the last Sunday of the early voting period [in Hamilton County] . . . . The lines on that day were lengthy and people had to wait well over an hour at the early voting location in order to cast their ballot.”));
- Cuyahoga County:
  - Video, “Early Voting – General Election 2012” (comment notes, “Voters are waiting in line for early voting on Sunday, November 4, 2012), published Nov. 4, 2012, <https://www.youtube.com/watch?v=SIQb0xkhdZg>;
  - (Written Testimony by Brian Davis, Northeast Ohio Coalition for the Homeless, Nov. 20, 2013 (Ex. 31) at 4 (“On the . . . Sunday before Election Day 2012, Cuyahoga County had lines of 45 minutes to one hour.”));
- Montgomery County:
  - Video, “Polling Lines in Dayton, Ohio – Early Voting” (comment notes, “Insane long early voting lines at the one polling station in Dayton, Ohio. Note: Mostly African[]-American voters. This is Sunday “Souls to Polls” day.”), published Nov. 5, 2012, <https://www.youtube.com/watch?v=qqv5Xawn4i0>;
  - (Simpson Decl. (Ex. 14) ¶ 17 (“On the one Sunday of early voting in 2012, I saw long lines at the Board of Elections. There was a community room with chairs

where people could take a number, sit down, and wait to be called. The people in the lines that I saw were predominantly African-American.”)).

Furthermore, permitting only four hours of voting on a single Sunday means that African-American voters relying on “Souls to the Polls” may be disenfranchised if they happen to be unable to vote on the one given Sunday due to unpredictable events such as illness, weather, or a sudden change in work shift. *Cf. OFA II*, 697 F.3d at 435 (in addition to military voters, “any voter could be suddenly called away and prevented from voting on Election Day. At any time, personal contingencies like medical emergencies or sudden business trips could arise, and police officers, firefighters and other first responders could be suddenly called to serve at a moment’s notice.”). And forcing African-American churches to coordinate all of their “Souls to the Polls” efforts during four short hours on a single Sunday makes it harder on the voters who are relying on that transportation that day. (*See* Wood Decl. (Ex. 10) ¶ 32; Rev. Cooper Decl. (Ex. 19) ¶ 11; Rev. Copeland Decl. (Ex. 20) ¶¶ 8-9.) *See Florida*, 885 F. Supp. 2d at 329-30 (“Record evidence suggests that such efforts are important in enabling African-Americans who want to vote but need help getting to the polls to exercise the franchise. With a substantially reduced early voting period, third-party groups would not be able to assist minority voters as effectively. This, in turn, would likely make it more difficult for those minority voters who rely on such efforts to make it to the polls.” (citations omitted)).

All of the above confirms the “common-sense judgment that a dramatic reduction in the form of voting that is disproportionately used by African-Americans would make it materially more difficult for some minority voters to cast a ballot . . . .” *Florida*, 885 F. Supp. 2d at 333. Directive 2014-17’s restoration of a handful of hours including a single Sunday afternoon simply cannot compensate for the combined elimination of same-day registration, an entire week of

early voting, all evening hours, and additional Sundays that had been available in counties serving the vast majority of African Americans in the state before Defendant Husted singlehandedly put a stop to that practice in 2012. Plaintiffs thus remain likely to succeed on the merits of their claims notwithstanding Directive 2014-17's restoration of the last two days of the early voting period.

#### **IV. THE LIKELIHOOD OF IRREPARABLE HARM TO VOTERS, BALANCE OF HARDSHIPS, AND PUBLIC INTEREST ALL FAVOR A PRELIMINARY INJUNCTION**

“When a party seeks a preliminary injunction on the basis of a potential constitutional violation, ‘the likelihood of success on the merits often will be the determinative factor.’” *OFA II*, 697 F.3d at 436 (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). Nonetheless, the remaining three preliminary injunction factors – the likelihood of irreparable harm, the balance of the equities, and the public interest – also strongly favor granting a preliminary injunction. Thus, this Court should preliminarily enjoin the enforcement of SB 238, restoring same-day registration and the first week of early voting, and require Secretary of State Husted to set “uniform and suitable” in-person early voting hours for all eligible voters that include multiple Sundays and weekday evening hours. *OFA III*, 2014 WL 2611316, at \*5.

As demonstrated above, the elimination of same-day registration, the first week of early voting, all weekday evening hours, and nearly all Sundays will substantially burden if not outright disenfranchise thousands of Ohioans – especially low-income and African-American voters. “There is no right more basic in our democracy than the right to participate in electing our political leaders.” *McCutcheon*, 134 S. Ct. at 1440-41. “A restriction on the fundamental right to vote therefore constitutes irreparable injury.” *OFA II*, 697 F.3d at 436. The balance of

the equities also overwhelmingly favors a preliminary injunction, since there is nothing to suggest that counties have had widespread difficulties implementing same-day registration, or that they have had problems implementing early voting during the first week of the early voting period, on Sundays, or on weekday evening hours. *See, e.g., id.* (balance of equities favored plaintiffs because the State “has not shown that local boards will be unable to cope with three extra days of in-person early voting – as they have successfully done in past elections.”). And “[w]hile states have a strong interest in their ability to enforce state election law requirements, the public has a strong interest in exercising the fundamental political right to vote.” *Id.* at 436 (citations and quotations omitted). Indeed, “[t]he public interest . . . favors permitting as many qualified voters to vote as possible.” *Id.* at 437.<sup>33</sup>

It is clear in light of these factors that this Court should enjoin the enforcement of SB 238, which will temporarily restore same-day registration and the first week of early voting. However, this Court should also require Defendant Husted to set uniform and suitable in-person early voting hours for the 2014 elections that include multiple weekends and weekday evening hours.<sup>34</sup>

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<sup>33</sup> *See, e.g., Project Vote*, 455 F. Supp. 2d at 708 (“Because the restrictions . . . do not promote the exercise of the right to vote but, rather, chill the exercise of that right . . . , the public interest can only be protected through elimination of these barriers.”); *Spirit Lake Tribe*, 2010 WL 4226614, at \*3 (granting preliminary injunctive relief for Section 2 claim, noting, “An official action that has a disparate impact on the right to vote of a protected class under the Voting Rights Act, needs to be closely scrutinized as there is simply no remedy at law for such harm other than an injunction.”).

<sup>34</sup> Plaintiffs are not necessarily asking this Court to order Defendant Husted to set uniform hours for *all five weekends* of the early voting period, nor are Plaintiffs seeking an order requiring evening hours on *every single weekday* of the early voting period – though that has certainly been done before without incident. (*See* Rugg Decl. (Ex. 28) Attachments at 7, 15 (Summit County had *five Saturdays, five Sundays*, and evening hours on *all weekdays* in both 2008 and 2010).) Rather, because the evidence overwhelmingly demonstrates that the elimination of multiple Sundays and weekday evening hours will cause irreparable harm especially to working-class and African-American voters, Defendant Husted should set uniform and suitable hours for at least *some* Sundays and weekday evenings.

**A. Merely Enjoining the 2014 Directives Will Not Prevent Irreparable Harm**

Merely enjoining the 2014 Directives, for instance, will not prevent irreparable harm. In *OFA III*, this Court implicitly recognized that simply enjoining Directive 2014-06 was not appropriate when it affirmatively required Defendant Husted to set uniform and suitable hours for the last three days. As the Sixth Circuit has emphasized, mere preservation of the “status quo” is often not enough to prevent irreparable harm; indeed, with respect to even preliminary injunctive relief, “preservation of the court's ability to exercise meaningful review may require *affirmative* relief in order to prevent some future irreparable injury.” *UFCW Local 1099 v. SW Ohio Regional Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (emphasis added). “The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo,” and “[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury.” *Id.* (quoting *Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978)). At the end of the day, where likelihood of success has been established, the prospect of irreparable injury and the balancing of equities determine whether the requested relief is appropriate, whether or not the relief sought preserves the “status quo.” *See id.* Merely enjoining the 2014 Directives, which technically restores discretion to the county Boards of Elections to set their own hours, is inappropriate for at least three reasons.

*First*, restoring “discretion” to the Boards of Elections would run contrary to the State’s own professed interest in uniformity, which according to the OAE0 Report itself would lead to voter confusion and uncertainty for election officials. (*See Ex. 33 at 3.*) Thus, only a uniform remedy – one that *protects* rather than *eviscerates* voters’ rights across the board – would be adequate. Indeed, it should not be more difficult for a low-income voter to vote outside of

regular business hours simply because he or she lives in the wrong county. (Frech Decl. (Ex. 22) ¶ 32 (“Although we are in a sparsely populated, rural county, the poor people in [Athens County] need these evenings and Sunday voting opportunities just as much as the poor in more populated counties need them.”).) *Cf. Stewart*, 444 F.3d at 870 (“Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.” (citation omitted)). Furthermore, restoring “discretion” may simply result in similarly-restrictive early voting hours being imposed, county-by-county across each of the 88 counties at the last minute, making it impracticable for Plaintiffs to seek temporary restraining orders in each county. Such an outcome surely would only add to voter confusion and uncertainty for election officials. (*See Ex. 33 at 3.*)

*Second*, the restoration of “discretion” to the Boards of Elections to set their own hours may be entirely illusory, and may in reality simply restore discretion back to Defendant Husted. Since 2010, several county Boards of Elections have been increasingly voting along partisan lines in setting early voting hours, resulting in 2-2 tie votes that must ultimately be broken by the Secretary of State. (*See Exs. 39-47.*) Whenever a tie vote was referred to Defendant Husted, he *always* broke the tie by voting in favor of *rejecting* voting on Saturdays, Sundays, and weekday evening hours. (*See Exs. 43-47.*) There is every reason to believe he will do the same thing if “discretion” is returned to the Boards of Elections, resulting in early voting schedules that are just as restrictive as Directive 2014-06, if not more so, leading to the same irreparable harm to voters through a different route. Leaving the fox in charge of the henhouse is not an effective remedy.

*Lastly*, a preemptive remedy is necessary to prevent Defendant Husted himself from simply issuing another directive that imposes a different set of uniform hours across *all* counties

which again make it harder to vote for low-income and African-American voters without waiting for tie votes. It is not unheard of for Defendant Husted to enact such changes in seeming defiance of prior court orders, with callous disregard of the impact on marginalized voters, and sometimes even at the last minute just before an election. *See generally, e.g.:*

- *OFA III*, 2014 WL 2611316, at \*5 (“Directive 2014-06 is inconsistent with the Preliminary Injunction . . . . Further, Directive 2014-06 does not expressly mention UOCAVA voters. The Court is concerned by this fact because Directive 2012-35 also did not expressly do so, and Husted took the position that that directive should be interpreted to allow individual county Boards of Elections discretion as to when to set UOCAVA in-person early voting hours on the three days preceding the 2012 presidential election.”);
- *OFA*, 2:12-cv-636 (S.D. Ohio Sept. 5, 2012), ECF No. 52 (ordering Defendant Husted to personally appear to explain why a directive issued right after a preliminary injunction was entered did not violate the court’s order);
- *SEIU v. Husted*, Nos. 2:12-Cv-562, 2:06-CV896, 2012 WL 5497757, at \*5 (S.D. Ohio Nov. 13, 2012) (Defendant Husted’s directive violated consent decree intended to protect the votes of the indigent and homeless);
- *Id.* at \*7 (“The Court also notes, with grave misgivings, that [Defendant Husted] changed an election rule on a Friday evening for an election scheduled for the following Tuesday, after repeatedly asserting, to both this Court and the Sixth Circuit, that he could not comply with injunctive relief ordered by this Court because he lacked sufficient time prior to the election. The surreptitious manner in which the Secretary went about implementing this last minute change to the election rules casts serious doubt on his protestations of good faith.”);
- *Id.* at \*8 (“For an executive official of the state [Defendant Husted] to flaunt state law in arbitrarily reassigning a poll worker’s statutory duty to a voter, with the result being disenfranchisement of the voter, is ‘fundamentally unfair and constitutionally impermissible.’” (citation omitted));
- *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2013 WL 4008758, at \*8 (S.D. Ohio Aug. 5, 2013) (noting that Husted’s counsel was dismissive of the principle that “[a]ll legal votes that are cast by indigent and homeless voters on Election Day will be counted”).

Therefore, simply enjoining the enforcement of the 2014 Directives will not prevent the irreparable harm to African-American and working-class voters that Plaintiffs have demonstrated.

**B. This Court Should Require Defendant Husted to Set Uniform and Suitable Hours that Include Multiple Sundays and Weekday Evening Hours**

Instead of simply enjoining the 2014 Directives, this Court should require Defendant Husted to set uniform and suitable hours that include multiple Sundays and weekday evening hours. This is amply justified by the remaining preliminary injunction factors. *See UFCW Local 1099*, 163 F.3d at 348. As discussed *supra* Part III., Directive 2014-17's restoration of four hours on a single Sunday and six hours during the day on Monday does not come close to preventing the irreparable harm caused by the elimination of all remaining Sundays and all weekday evening hours. When balancing the equities, it is again clear that such overwhelming harm substantially outweighs any burden on the county Boards of Elections, given the lack of any evidence that those counties – many of which had multiple Sundays available for voting prior to 2012, and *all* of whom had two weeks' worth of weekday evening hours in 2012 – have had tremendous difficulties administrating early voting during these hours. *See OFA I*, 888 F. Supp. 2d at 910 (“Plaintiffs will suffer irreparable injury if in-person early voting is not restored the last three days before Election Day, and there is no definitive evidence before the Court that elections boards will be tremendously burdened.”).

And the public's interest in “permitting as many qualified voters to vote as possible” is obviously promoted by including such hours. *OFA II*, 697 F.3d at 437. Moreover, requiring uniform and suitable hours on multiple Sundays serves the public interest in particular by encouraging political participation among a group of voters that has been historically

disenfranchised and continues to be saddled with socioeconomic and other barriers to voting caused in part by discrimination. *See supra* Part II.B. Restoring voting on multiple Sundays also sends a message that the State cannot simply stamp out what has become widely known as a burgeoning African-American cultural phenomenon in Ohio unless there is a non-tenuous justification for doing so. (*Contrast* Rev. Braxton Decl. (Ex. 21) ¶ 15 (“minority communities I have worked with . . . feel the cuts to Sunday voting was a direct attack on African-American churches”) *with* Ex. 48 at 1 (“I guess I really actually feel we shouldn’t contort the voting process to accommodate the urban – read African-American – voter-turnout machine.”).) Twice, the State has attempted to eliminate all Sundays, and twice, this Court has had to partially thwart such efforts through the restoration of a single Sunday. Now that Plaintiffs have shown that the elimination of *multiple* Sundays is also likely to disproportionately burden African Americans, this Court should not participate any further in the State’s game of two-steps-backward, one-step-forward, especially when that game is being played on the backs of African-American and low-income voters. Instead, this Court should require uniform and suitable hours on *multiple* Sundays.

Setting uniform and suitable weekday evening hours also serves the public interest by preventing, at least temporarily, the *first* statewide ban on *all* weekday evening hours since early voting was first introduced in 2006. For the thousands of Ohioans who have relied upon weekday evening voting in the past, *see supra* Part I.B., maintaining weekday evening hours will not only prevent disenfranchisement of these voters, but will also prevent confusion among those who have relied these hours in past elections. (*See, e.g.*, Sec’y of State Tie Vote Sept. 29, 2010 (Ex. 40) at 2 (“[T]he Board has extended its hours during the previous two years and . . . voters have accordingly begun to expect extended voting hours in October.”); Davis Decl. (Ex. 11) ¶ 20

(“Only election officials view different types of elections as being different; voters do not. Every year, people are constantly asking us about the changing voting hours and whether they have weekend voting or evening voting because the rules are always changing.”.)

### **CONCLUSION**

For the above-stated reasons, this Court should grant Plaintiffs’ motion for a preliminary injunction; enjoin the enforcement of amendments made to Ohio Rev. Code §§ 3509.01(B) and 3511.10 by Senate Bill 238, which will restore same-day registration and the first week of early voting; and require Defendant Husted to set uniform and suitable in-person early voting hours for all eligible voters that includes multiple Sundays and weekday evening hours.

Dated this 30th day of June, 2014.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The foregoing Motion for Preliminary Injunction and Memorandum of Law in Support was filed this 30<sup>th</sup> day of June, 2014 through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

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