Ohio Senate General Government Committee
**Testimony of Eric H. Zagrans Opposing SB 153**
May 27, 2025 at 2:00 p.m.

Good afternoon, Chair Roegner, Vice Chair Gavarone, Ranking Member Blackshear, and members of the Senate General Government Committee. My name is Eric Zagrans and I am testifying in opposition to Senate Bill 153. I intend to focus on the Bill's violations of existing law and its constitutional infirmities.

I'm an attorney licensed to practice in Ohio for 48 years. I was born and raised in Lorain County and, except for the 4 years I spent in law school and a federal clerkship immediately following, I have always lived and worked in Ohio. I was a professor of law at Case Western Reserve University Law School for 6 years and an adjunct professor at Cleveland State University Law School for an additional 10 years. Among many other subjects, I taught Advanced Constitutional Law and the Federal Courts. I have argued cases before the United States Supreme Court, the Ohio Supreme Court, 6 of the 12 federal circuit courts of appeals, and in about half of the States across the country. I have served as a partner at Arter & Hadden, Associate General Counsel of Ernst & Young, and Law Director of the City of North Ridgeville. I am a Life Member of the American Law Institute, a Life Member of the Sixth Circuit Judicial Conference, and a Fellow of the American Bar Foundation. For the last 30 years, I have been the Managing Member of a small, boutique law firm.

At least a dozen provisions of Senate Bill 153 are patently unlawful or manifestly unconstitutional. These provisions will not withstand "heightened" or "strict" scrutiny, and there is no compelling governmental interest that justifies the significant burden the Bill imposes on the fundamental right to vote. As the Supreme Court has made clear:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

*Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526 (1964).

**Challenges at the Polls Based on Voter Citizenship – Current Law**

The current statute allowing challenges at the polls to a voter's citizenship, R.C. 3505.20(A), requires an election official to ask the voter the following four questions:

(1) Are you a citizen of the United States?
(2) Are you a native or naturalized citizen?
(3) Where were you born?
(4) What official documentation do you possess to prove your citizenship? Please provide that documentation.

The statute allows a native-born citizen to cast a regular ballot solely based on a statement under oath that the person is a U.S. citizen, but requires a voter claiming to be a naturalized citizen, in order to cast a regular ballot instead of a provisional ballot, to produce Documentary Proof of Citizenship ("DPOC") in the form of a certificate of naturalization (except that, if the person states under oath that he is a U.S. citizen because at least one of his parents was a naturalized citizen, the statute dispenses with the DPC requirement of a certificate of naturalization).

**R.C. 3505.20(A) is Unconstitutional – *Boustani v. Blackwell* (N.D. Ohio 2006)**

Judge Christopher Boyko of the Northern District of Ohio held R.C. 3505.20(A) to be unconstitutional and permanently enjoined its use almost 20 years ago. *Boustani v. Blackwell*, 460 F. Supp.2d 822 (N.D. Ohio 2006). That injunction remains in effect today. The Court found the following aspects of the statute to be unconstitutional:

- DPOC could be demanded for naturalized citizens but not native-born citizens;
- Any election judge would have unfettered discretion to challenge any voter's citizenship without any guidelines or standards beyond a subjective feeling;
- Naturalized citizens do not normally carry their naturalization certificate around with them and it is not an "easily transportable" document;
- If the naturalized citizen did not have the certificate with them when going to the polls, the person would be required to cast a provisional ballot which would not count unless the person produced "additional information" to the Board of Elections within 10 days of the election;
- If the certificate of naturalization were lost, destroyed, mutilated or the person's name had changed due to marriage, divorce or legal name change, a replacement certificate of

> naturalization would have to be requested. This would involve a fee and a lengthy wait of up to a year to receive it, so that such a voter would not be able to produce the required documentation to the Board within 10 days of the election.

The Court held that R.C. 3505.20(A) discriminates against naturalized citizens with respect to their fundamental right to vote because it targeted them for differential treatment, facially discriminated against them, and cast them as essentially "second-class citizens." 460 F. Supp.2d at 825. Statutes that discriminate regarding the fundamental right to vote are subject to strict scrutiny and are invalid unless the State "can demonstrate that such laws are necessary to promote a compelling governmental interest." *Id*. at 826, quoting *Dunn v. Blumstein*, 405 U.S. 330, 342-343 (1972) ("statutes affecting constitutional rights must be drawn with precision … and must be tailored to serve their legitimate objectives. … And if there other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means").

Judge Boyko emphasized that the State's compelling interest in preventing voter fraud was counterbalanced by the voters' "weightier and more significant interest in exercising the 'fundamental political right' to vote." *Id*., again quoting *Dunn*, *supra*, at 336. Since native-born citizens are not required to show any proof of their citizenship, the statute "creates an unequal application of voting requirements and lacks the justification of promoting a compelling governmental interest." *Id*.

In addition, *Boustani v. Blackwell* held that R.C. 3505.20 imposes an unconstitutional poll tax on naturalized citizens, in violation of the 24th Amendment for federal elections and the 14th Amendment for state elections, because of the need of many electors of having to pay for a replacement certificate of naturalization. "Putting a price on the right to vote cannot survive strict scrutiny since it bears no relation to voting qualifications and burdens a fundamental right of the citizenry." *Id*. The Court concluded its opinion in *Boustani* as follows:

> This Court harbors grave concerns about the ramifications of implementing amended R.C. 3505.20. There is a very real possibility of "profiling" voters by poll workers or election judges exercising an

> unfettered ability to challenge on the basis of appearance, name, looks, accent or manner. ***The Ohio statute offers no clear standards to guide the inquiry into citizenship***. It is offensive to single out a voter in the public polling place, thereby subjecting him or her to embarrassment or ridicule while attempting to exercise a citizenship privilege. The loss of the protected right to vote "for even minimal periods of time, constitutes irreparable injury."

*Id.* at 827, quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis supplied).

In the event a voter's citizenship was challenged during the period from 2006 (when the injunction was issued) until last year, the Ohio Secretary of State instructed election officials to ask the challenged voter only whether he or she was a U.S. citizen. If the person answered "yes," the voter could cast a regular ballot.

**Challenges at the Polls Under SB 153 Will Still Result in Unconstitutional Conditions and Unequal Treatment.**

SB 153 resurrects a DPOC requirement even while it eliminates the distinction between how voters came to be citizens – between native-born citizens and naturalized citizens. Under the Bill's amendments to R.C. 3505.20 (*see* pgs. 111-112 of SB 153), ***everyone*** is subject to the DPOC requirement if challenged by an election official at the polls while attempting to vote on Election Day.

"Proof of citizenship," as provided in proposed amended R.C. 3505.182 (pgs. 99-100 of SB 153), essentially means one of the following documents:

- Copy of a birth certificate (pg. 100:2880-81);
- Copy of U.S. passport (*id*. at 2882-83);
- Copy of a certificate of naturalization (*id*. at 2886-87); or
- Ohio driver's license or state ID if documentation has been submitted to the BMV proving that the voter is a U.S. citizen (pg. 99:2869-74).

However, although the statutory discrimination against naturalized citizens and in favor of native-born citizens has been eliminated, SB 153 still causes unconstitutional discrimination as a result of the disparate treatment of citizens attempting to exercise their fundamental right to vote who, for perfectly legitimate reasons, do not have with them or cannot produce the DPOC at the polls or within 4 days

of the election. *See, e.g.*, R.C. 3505.181 as amended by SB 153 (pg. 94:2720-27); R.C. 3505.182 as amended by SB 153 (pg. 99:2859-66, 100:2892-95); R.C. 3505.183 as amended by SB 153 (pg. 108:3122-25); R.C. 3503.202 as amended by SB 153 (pg. 85:2441-48).

For example, a citizen who was born in Ohio may be able to obtain a replacement birth certificate and present it to the BOE within 4 days of the election whereas a citizen who was born in another state and moved to Ohio (whether recently or many years ago) may not be able to obtain a replacement birth certificate in time to present it to the BOE within 4 days of the election. The former voter's provisional ballot would be counted whereas the latter voter's provisional ballot would not be counted. By contrast, no naturalized citizen seeking to vote in Ohio would be able to obtain a replacement certificate of naturalization within the 4-day time period to have his or her vote count, whereas a native-born citizen might be able to obtain replacement DPOC within the 4-day time period and therefore that ballot would be counted.

The other constitutional infirmities declared by the federal court in Cleveland would still apply to SB 153. It would impose an unconstitutional poll tax on citizens who needed to obtain replacement documents to satisfy the DPOC requirement in violation of the 24th Amendment for federal elections and the 14th Amendment for state elections. It would also continue to allow any election judge to exercise unfettered discretion to challenge any voter's citizenship without any clear standards or guidelines into the citizenship inquiry to cabin that discretion within constitutional bounds.

**A Similar Kansas DPOC Statute Was Struck Down as Unconstitutional**

A very similar DPOC requirement for voters that the Kansas legislature enacted in 2011 (effective in 2013) was held to impose a significant burden on the right to vote requiring heightened scrutiny. *Fish v. Schwab*, 957 F.3d 1105, 1129 (10th Cir. 2020), *cert. denied sub nom*. *Schwab v. Fish*, __ U.S. __, 141 S. Ct. 965 (2020), affirming the injunction entered by the district court, *Fish v. Kobach*, 309 F. Supp.3d 1048 (D. Kan. 2018).

Kansas justified the DPOC requirements as ensuring that only eligible voters can vote in its

elections and as safeguarding voter confidence in the electoral process. *Fish, supra,* 957 F.3d at 1132. Such interests were found to be important and legitimate in the abstract but were unsupported by any concrete evidence suggesting they were more than merely imaginable or necessary to burden voters' rights. Under those circumstances, the federal Tenth Circuit Court of Appeals held that such legitimate interests were insufficiently weighty to justify the limitations on the right to vote imposed by the DPOC requirement. *Id*. at 1132-33. It held the DPOC requirement to be unconstitutional and affirmed the district court's injunction. *Id*. at 1136.

**The United States Constitution Provides that Federal Laws Enacted by Congress Preempt State Laws and Regulations With Respect to Federal Elections.**

The Elections Clause of the United States Constitution (Article I, Section 4, clause 1) confers on Congress the power to preempt state law and regulations regarding the "times, places and manner of holding" federal elections. *Arizona v. Inter Tribal Council of Ariz., Inc*., 570 U.S. 1, 8, 14-15 (2013). State law is also preempted "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co*., 496 U.S. 72, 79 (1990).

Therefore, the National Voter Registration Act of 1993 ("NVRA") preempts both existing Ohio law and SB 153 if it were enacted. Among other things, the NVRA requires states to "accept and use" a federal form created by the United States Election Assistance Commission to register voters for federal elections. NVRA, § 6, 52 U.S.C. 20505(a)(1). This means that the federal form must "be accepted as ***sufficient*** for the requirement it is meant to satisfy." *Inter Tribal Council*, *supra*, 570 U.S. at 10 (emphasis in original). The federal form contains "only such identifying information … and other information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant [to register to vote] and to administer voter registration and other parts of the election process." NVRA, § 9, 52 U.S.C. 20508(b)(1). The federal form requires applicants only to check a box and attest under penalty of perjury that they are citizens of the United States.

**SB 153 Violates the Provisions of the National Voter Registration Act of 1993 and the Civil Rights Act of 1965 in Multiple Ways:**

■ SB 153's requirement of DPOC in order to vote in federal elections is expressly preempted by Section 6 of the NVRA and has been so held by the Ninth Circuit Court of Appeals three months ago in a case involving similar DPOC requirements – *Mia Familia Vota v. Fontes*, 129 F.4th 691, 711-712 (9th Cir. 2025).

■ The DPOC requirement has also been held to be preempted by the "minimum-information" principle of Section 5 of the NVRA, 52 U.S.C. 20504(c)(2)(A)-(C). *Fish v. Kobach*, 840 F.3d 710, 733, 736 (10th Cir. 2016) ("a state motor voter form 'may require only the minimum amount of information necessary' for state officials to carry out their eligibility-assessment and registration duties"), quoting 52 U.S.C. 20504(c)(2)(B). The DPOC requirement of the Kansas "SAFE" statute necessarily required more information than federal law presumed to be necessary for state officials to meet their eligibility-assessment and registration duties and was held to be preempted by section 5 of the NVRA and permanently enjoined. *Fish v. Schwab*, *supra*, 957 F.3d at 1144.

■ The requirement of Documentary Proof of Residency ("DPOR") in order to vote in federal elections in R.C. 3205.20 (*see, e.g.*, SB 153 at pgs. 113:3260-62; 114:3285-87) violates Sections 6 and 9 of the NVRA because those requirements are neither equivalent to the federal requirement nor "necessary" or "essential" to assess a person's eligibility to vote. The NVRA provides that attestation of residency is sufficient. Very similar provisions of an Arizona bill (Ariz. H.B. 2492) were held to violate Sections 6 (52 U.S.C. 20505(a)(2)), 7 (52 U.S.C. 20506(a)(6)(A)), and 9 (52 U.S.C. 20508(b)) of the NVRA. *Fontes*, *supra*, 129 F.4th at 712-714, 719-720.

■ SB 153's amendment of R.C. 3503.152 (pgs. 53:1523, 56:1592-57:1641) to require the Secretary of State to review the Statewide Voter Registration Database to purge the names of registered voters who have not satisfied the DPOC requirement and cancel their registration "every day during the period beginning on the forty-sixth day before an election and ending on the day before the day of

the election" violates the "90-day Provision" of the NVRA. Section 8(c)(2) of the NVRA, 52 U.S.C. 20507(c)(2)(A), mandates that states "shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." It also lists the exceptions to the 90-day Provision, which allow removals during the 90 days before a federal election only "at the request of the registrant," "by reason of criminal conviction or mental incapacity," "the death of the registrant," or "a change in the residence of the registrant." 52 U.S.C. 20507(c)(2)(B). This kind of non-systematic or individualized cancellation of registrations within the 90-day window relies on "individualized information or investigation" to determine removal of ineligible voters from voting rolls rather than canceling batches of registrations based on a set procedure such as "us[ing] a mass computerized data-matching process to compare the voter rolls with other state and federal databases, following by the mailing of notices." *Arcia v. Fla. Secretary of State*, 772 F.3d 1335, 1344 (11th Cir. 2014).

In light of the purposes of the 90-day Provision and the NVRA, the periodic cancellation of registrations required by SB 153 at pages 53-57 and elsewhere is precisely the type of systematic cancellation program that the 90-day Provision was meant to preclude. Numerous federal courts have held very similar provisions to violate the 90-day Provision of the NVRA and have entered injunctions against them, including without limitation *Fontes*, *supra*, 129 F.4th at 714-717 (Ariz. H.B. 2243); *Arcia*, *supra* (Fla. executive action); *Majority Forward v. Ben Hill County Board of Elections*, 512 F. Supp.3d 1354, 1368 (M.D. Ga. 2021) (Ga. statute); *Virgina Coalition for Immigrant Rights v. Beals*, Case No. 1:24-cv-1773, 2024 U.S. Dist. LEXIS 195908 (E.D. Va. Oct. 25, 2024) (Va. statute); *North Carolina State Conf. of the NAACP v. Bipartisan Bd. of Elections, etc.*, Case No. 1:16-cv-1274, 2018 U.S. Dist. LEXIS 134228 (M.D.N.C. Aug. 8, 2018) (N.C. statute).

- The provisions of R.C. 3505.20 requiring the voting location manager to "put ***such other questions*** to the person challenged ***as are necessary*** to determine the person's qualifications as an

elector at the election" (SB 153 at pg. 115:3318-20, emphasis supplied), and requiring a provisional ballot to be given to a voter "if ***for any other reason*** a majority of the precinct election officials ***believes*** the person is not entitled to vote" (*id*. at pg. 115:3325-29, emphasis supplied), violate the "different standards, practices and procedures" provision ("DSPP Provision") of the Civil Rights Act of 1965, 52 U.S.C. 10101(a)(2)(A) ("[n]o person acting under color of law shall, in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote").

The federal Court of Appeals in *Fontes*, *supra*, held that the "reason to believe" provision of Arizona H.B. 2243 ***encouraged*** election officials to apply different standards, practices, and procedures to some voters than were applied to other voters, and thereby violated the DSPP Provision of the Civil Rights Act. The Court found that subjective decisions will necessarily occur given the open-ended "reason to believe" provision and will correspondingly invite the disparate treatment of similarly situated voters. *Fontes*, *supra*, 129 F.4th at 722-724.

The "for any other reason a majority … believes" provision of SB 153 is substantively identical to the "reason to believe" provision of the Arizona bill that was held to violate federal law in *Fontes*.

* * *

To qualify to vote in a general election in Ohio under Ohio Const., art. V, §§ 1, 4 and 6, a person must be:

- a United States citizen,
- at least 18 years old on or before election day,
- a resident of Ohio and registered to vote in Ohio for at least 30 days before election day,
- not be incarcerated for a felony, and
- not adjudicated incompetent by a probate court.

When registering to vote or updating a voter registration, a person currently:

- must ***attest*** he or she is a U.S. citizen under penalty of election falsification, but
- is ***not*** required to provide DPOC, and
- election officials are ***not*** required to verify the person's citizenship before allowing him or her to vote a regular ballot.

The legal rules and regulations to enforce these provisions are surely sufficient in the absence of any evidentiary proof of widespread attempts to vote by non-citizens.

As you heard from Mr. Topper, out of 5.85 million votes in the 2024 election, 139,400 Ohioans voted by provisional ballot including anyone whose citizenship was challenged. Of the 139,400 provisional ballots, only 5 were rejected because proof of citizenship was not provided. And that does not mean that any of the 5 were actually non-citizens; it means only that 5 people for whatever reason did not provide proof of citizenship. Five out of almost 6 million votes cast! All of this illegality and unconstitutionality is trying to prevent an occurrence that is literally less than one in a million even without SB 153!

Thank you for your time and I'll be happy to answer any questions you may have!