STATEMENT OF PAUL M. DE MARCO IN OPPOSITION TO SENATE BILL 296

MAY 10, 2016

Because I am unable to appear in person before the committee, I am submitting this statement, in lieu of live testimony, in opposition to Senate Bill 296. I appreciate the committee chairman's indulgence in allowing me to do so.

Extreme and unusual voting delays plagued polling places across Hamilton County all day long on November 3, 2015. Voters usually able to cast their ballots before work or on their lunch hour experienced long waits at polling places in what otherwise was a low turnout election. Many voters in Hamilton County simply grew frustrated and left without voting.

The indisputable cause of these problems was the introduction of electronic poll books, or e-poll books, by the Hamilton County Board of Elections. Several months earlier, that Board's Executive Director had touted the e-poll books as a way to make voting "quicker." But on November 3, 2015, they doubtless made voting slower—much slower.

My law firm represented the voter who filed the lawsuit that resulted in the order keeping the polls open that day. No reasonable person can dispute that the delays occasioned by the e-poll books had a profound impact on the election in Hamilton County on November 3, 2015. An official report found that poll workers in almost 85% of the precincts in Hamilton County experienced problems using the e-poll books that day.

This was a massive, unprecedented failure on the part of the Hamilton County Board of Elections. Imagine the hue and cry there would be if another government agency reported that 85% of its locations had botched the job on a single day. When government fails to do its job to such an unusual extent, justice demands it be held accountable—by the voters, by the executive branch, by the legislature, and, if necessary, by the courts.

But in perverse response to this particular incident, where the government agency in question failed to do its job properly at almost 85% of its locations, Senate Bill 296 aims for less government scrutiny over that agency, not more; less chance that derelict government officials running the agency will have their official conduct questioned, not more; and, ultimately, less government accountability, not more.

Senate Bill 296 would achieve these undesirable ends by means of a tax disguised as a bond—a tax on voters with the temerity to step forward and point out, then seek immediate

judicial relief from, government incompetence so serious and widespread that it imperils the cherished voting process.

I know that others who have addressed the committee in opposition to Senate Bill 296 have pointed to this legislation's unhealthy deterrent effect on the willingness of voters to bring meritorious suits to extend voting hours. That effect alone warrants rejection of this legislation. Yet another reason to reject it is its unjustifiable effect on access to justice.

The authors of this legislation seem to have gone out of their way to deny or sharply limit the ability of ordinary citizens to access justice when it comes to protecting the precious, fundamental right to vote. The concept of requiring parties to post bonds before filing suit, though common in foreign courts, is foreign to our courts. Where courts in our country do impose bond requirements, they at least do so as a condition of giving a party what it seeks in the suit (e.g., the right to an injunction or to halt execution of a court order pending appeal), not as a condition of *filing* the suit. For instance, a party who sues for an injunction forcing the opposing party to do something is not required to post a bond before filing the injunctive action but rather must do so before the other party is required to do what the court has mandated in its injunction order. Here, though, under Senate Bill 296, the party filing suit would be required to come up with an enormous bond as a precondition of filing suit—a very odd occurrence in American law.

It also is unusual in American law for a party filing suit to be required to post a bond without any assurance that the opposing party will ever perform the act for which the bond serves as security. As I said, a party who sues for an injunction forcing the opposing party to do something is required to post a bond before the other party is required to do what the court has mandated. But at least in that example, the party posting the bond thereby gains certainty that the other party actually will do what the court has mandated. Under Senate Bill 296, however, the voter posting the bond has no assurance of obtaining in fact the relief the court has mandated in law—that is, that the polls actually remain open. They may remain open, or due to other factors beyond the court's control—e.g., the whims or mere ignorance of the scattered poll workers—the polls may close and stay closed, regardless of the court order. Whether the polls remain open or not in the wake of such a court order, the party filing the suit must pay the bond, and may be required to forfeit it, under Senate Bill 296. Indeed, under this legislation, even if every single poll worker ordered to keep the polls open simply went home, the party filing suit still could forfeit his or her bond. This fundamentally unfair prospect makes this less like a true bond and more like an irretrievable tax.

Lest there be any doubt, moreover, this tax will only burden those in the middle class. No voter who qualifies as poor will ever have to pay this tax disguised as a bond—the legislation specifically exempts them. And no wealthy voter of a mind to sue to extend voting hours would ever be the least bit deterred by the confiscatory advance payment required by Senate Bill 296. Thus, only a middle class voter—one who earns too much to be considered poor and not enough to be carefree—would have to think twice before challenging the government for incompetence such as that committed by the Hamilton County Board of Elections on November 3, 2015.

Insofar as it would deter reasonable and meritorious efforts to protect the right to vote and would unreasonably limit access to justice, this is a bad bill. I respectfully urge the committee to reject Senate Bill 296. The sort of debacle that occurred in Hamilton County on November 3, 2015 is rare and cannot serve as a perverse pretext for slamming the courthouse door on anyone seeking to vindicate, for themselves and others, the precious right to vote.

Thank you for considering my written statement in lieu of live testimony.

Respectfully,

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