

In the  
**Supreme Court of the United States**

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JON HUSTED, IN HIS OFFICIAL CAPACITY  
AS OHIO SECRETARY OF STATE, AND  
MICHAEL DEWINE, IN HIS OFFICIAL CAPACITY  
AS OHIO ATTORNEY GENERAL,

*Applicants,*

v.

OHIO STATE CONFERENCE OF THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE, *ET AL.*,

*Respondents (Plaintiffs).*

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**Response In Opposition to Emergency Application for Stay**

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**DIRECTED TO THE HONORABLE ELENA KAGAN,  
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES  
AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT**

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Plaintiffs-Respondents Ohio State Conference of the National Association for the Advancement of Colored People, 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, and Darryl Fairchild (collectively, the “Plaintiffs”) respectfully oppose the emergency application for a stay pending certiorari filed by Michael DeWine, in his official capacity as Ohio Attorney General, and John Husted, in his official capacity as Ohio Secretary of State.

## **INTRODUCTION**

Three facts are critical to the determination of this stay application.

First, the district court’s preliminary injunction simply preserves the status quo. The early voting process that will begin on Tuesday, September 30, under the injunction is the very same process Ohio counties have been using for almost a decade. It is also the process that all 88 counties in Ohio have already been directed to follow by the Secretary of State, and which has been widely publicized to voters for weeks. The preliminary injunction therefore does nothing more than maintain the same early voting rules that have governed the last four general elections in Ohio, and which voters are currently expecting. No harm will flow to the applicants, who, as the district court found as a factual matter, have implemented

these practices for years and are able to maintain them without difficulty in this election. 6th Cir. Panel Op., Doc.45-2 (“Panel Op.”) at 3-4. In particular, applicants cannot credibly assert that simply permitting eligible voters to appear in-person and return their ballots at county Boards of Elections offices starting on Tuesday, on days and times when those offices will already otherwise be open, constitutes irreparable harm.

Second, if the preliminary injunction is stayed, a new process with many fewer opportunities to vote will take effect. While the state made no showing that it would be harmed if it maintains the early voting and same-day registration practices at issue in this case for one more election, two courts have found that Plaintiffs and tens thousands of other Ohio voters would be harmed if a stay were granted. These practices are an integral part of an early voting system that the state itself deemed necessary to resolve the debacle of the 2004 election, and are now heavily relied on by Ohio voters. Evidence that the state did not dispute shows that thousands of people in Ohio vote during the evening hours and Sundays that would be eliminated under the state’s proposed new system. Thousands also vote and register on the same day, a practice that would be completely eliminated. Those thousands of voters are mostly African-American and low income. Panel Op at 16, 19. Two courts have now found that the equities tip decidedly in favor of preserving the existing early voting system in Ohio while this case is litigated to a final judgment; this Court disturbs such findings by the lower courts only in extraordinary circumstances, none of which is presented here.

Third, the Sixth Circuit’s application the *Anderson-Burdick* line of cases and Section 2 of the Voting Rights Act was wholly faithful to the intensive fact-specific nature of the relevant inquiries, which necessarily prevents the panel’s decision from having any automatic application to all 50 states. Ohio’s early voting system arose not from a blank slate or a magnanimous commitment to the broadest possible participation in self-government, but as a necessary remedy to address the state’s demonstrated inability in 2004 to conduct the entirety of an election on a single day. That election resulted in waiting times to vote that stretched into the day after Election Day and failed to provide meaningful access to the ballot for tens of thousands of Ohio voters. Ohio thus comes to court with dirty hands. Furthermore, the challenged provision at issue was not the mere reduction in a raw number of early voting days, but the targeted elimination of *specific* voting opportunities—same-day registration, evening voting, and Sunday voting—that lower-income and African-American Ohio voters have relied on for nearly a decade. And Ohio’s elections officials have had no difficulty implementing these particular voting opportunities in election after election, which may not be the case in other states. The panel also examined a host of social and historical factors bearing on minority political exclusion unique to Ohio. Given the specific context in which this case arises, and the intensely fact-bound nature of the lower court opinions, the Sixth Circuit’s decision is entirely consistent with this Court’s guidance as to fact-intensive nature of the inquiry required under the *Anderson-Burdick* line of cases and Section 2 of the Voting Rights Act.

It comes down to this: leaving the injunction in place will allow the election to go forward under the status quo system, a system on which thousands rely. No harm will come to the state if the injunction stays in place. Serious limits on the ability to vote are likely if it is lifted. Given that, and the fact that the legal rulings of the Sixth Circuit panel were correct, there is no basis for the extraordinary relief applicants seek. The application for an emergency stay should be denied.

### STATEMENT OF THE CASE

#### **A. In 2004, Ohio Voters Faced Unprecedented Chaos and Disastrously Long Lines That Disenfranchised Thousands on Election Day**

Election Day was an unprecedented disaster in Ohio in 2004. “During that election, Ohio voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day.” *Obama for Am. v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012) (“*OFA*”). As was widely observed:

Voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines. Voting machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others. At least one polling place, voting was not completed until 4:00 a.m. on the day following election day. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line. Poll workers received inadequate training, causing them to provide incorrect instructions and leading to the discounting of votes. In some counties, poll workers misdirected voters to the wrong polling place, forcing them to attempt to vote multiple times and delaying them by up to six hours.

*League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008).

Undisputed evidence submitted in the court below corroborated this widespread chaos.<sup>1</sup> These stories—gathered quickly in the short time Plaintiffs had to bring their motion for a preliminary injunction—only scratch the surface. Indeed, several news articles reported “inadequate allocation of voting machines and polling places, especially in urban areas with concentrated populations of African American and college students.” Roscigno Rep., Doc.18-2, PageID#279. One survey estimated that about *130,000 voters* in Ohio left polling places on Election Day in 2004 without voting. *Id.* 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. Cortes*, 591 F. Supp. 2d 757, 764 (E.D. Pa. 2008). “In sum, many voters in the 2004 general election were effectively disenfranchised and unable to vote.” Panel Op. at 5.

In Ohio, voting only on Election Day was no longer constitutionally acceptable.

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<sup>1</sup> Delores Freeman, President of the Youngstown Chapter of Plaintiff A. Philip Randolph Institute, personally witnessed voters leaving polling places without voting due to long lines in Youngstown. S.D. Ohio Mem. Op. and Order, Doc.72 (“PI Order”) at PageID#5867. Mark Freeman, former superintendent of the Shaker Heights City School District in Cleveland “personally witnessed the long voting lines at facilities owned by the school district during the 2004 election, and estimates that between a quarter to a third of those standing in the long lines were African American.” PI Order at PageID#5870. Reverend Robert E. Jones, Retired Pastor of Plaintiff College Hill Community Church Presbyterian, U.S.A., Dayton, also witnessed long lines in Dayton, observing that “many people left in frustration without voting.” Jones Decl., Doc.18-15, PageID#428, ¶ 15. Reverend Dale Snyder, Pastor of Plaintiff Bethel African Methodist Episcopal Church, an African-American church, also testified to long lines “when we had to vote in a single day on Election Day.” Snyder Decl., Doc.18-12, PageID#409, ¶ 23. Glorianne Leck, a former Precinct Committee Person in Youngstown spoke with two African-American voters who left the line because they were hourly wage workers and needed to return to work. Leck Decl., Doc.18-26, PageID#472, ¶¶ 9-10.

**B. In Response to this Disaster, Ohio Created the Right to Early Voting and Same-Day Registration in 2005**

In response to this unprecedented disaster, in 2005 Ohio created the right to vote early, alleviating the strain of Election Day on Boards of Election, and allowing Ohio voters to cast a regular ballot in-person without worrying about Election-Day disenfranchisement. *See* PI Order at PageID#5848-5849 (“The Ohio General Assembly enacted the [early in-person] voting scheme in 2005 as a result of the problems, including long lines and wait times, faced by voters during the 2004 presidential election.”); Panel Op. at 5 (“In 2005, the Ohio General Assembly passed Substitute House Bill 234 to remedy these problems.”). This right, however, was created through a technical amendment to the existing absentee ballot laws.<sup>2</sup> Despite that, early voting in-person in Ohio was commonly understood to be an extension of traditional Election Day voting, or more simply, voting. As Republican Senator Gary Cates, the sponsor of the bill establishing early voting, explained: “We’re expanding Election Day by a 35-day window.” Carrie Spencer Ghose, *Senate Committee Recommends Absentee Voting Bill*, Associated Press, Oct. 12, 2005. Or in the words of the Ohio Supreme Court, “[t]he general election encompasses the in-person casting of absentee ballots for that election, *which is manifestly part of the general election* even though some of it may occur before November 4.” *State ex rel.*

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<sup>2</sup> As typically understood, “absentee ballots” are cast, usually by mail, when a voter has a valid excuse for not being able to vote in-person on Election Day. To establish the right to early voting, however, Ohio simply enacted a technical amendment to the existing absentee voting law by eliminating the excuse requirement. Panel Op. at 5. Thus, while votes cast during the early voting period were technically “absentee ballots,” in no sense could it be said that such voters were “absent” from anywhere.

*Stokes v. Brunner*, 898 N.E.2d 23, 28 (Ohio 2008) (per curiam) (emphasis added).<sup>3</sup>

The only difference between voting early and on Election Day is that Ohio law only permits each county to have a single polling location for early voting purposes, usually the Board of Elections office. PI Order at PageID#5849. In addition, when the system was first introduced, the Board of Elections of each county had the discretion to determine its own early voting hours. Panel Op. at 5.

Also in 2005, Ohio established the right to register or update one's registration and vote in-person at the same time (hereinafter "same-day registration") for one week before Ohio's 30-day voter registration deadline (sometimes referred to as the "Golden Week"). Same-day registration provided Ohio voters the opportunity to resolve, in one shot, any registration issues that might have otherwise prevented their ballot from being counted. Panel Op. at 5. In establishing same-day registration, the law did not require any county to add any office hours—all the law required was that, in addition to processing voter registrations during existing office hours that week, Boards of Elections also accept ballots returned in-person by voters. PI Order at PageID#5905-5906. Furthermore, the law does not require Boards of Elections to immediately *count* votes that were cast via same-day registration. *See, e.g.*, PI Order at PageID#5862 (discussing the Ohio Revised Code). Instead, the Secretary of State issued a directive that required that such ballots be segregated, and forbade the counting of these ballots unless and until the voter's registration was verified through the existing verification system

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<sup>3</sup> Indeed, in publicizing early voting hours, Ohio's Boards of Election routinely refer to early voting as "early voting" or simply "voting" rather than "no-excuse absentee voting." Rugg Decl., Doc. 18-28, PageID#478-493.

(e.g., by sending a voter acknowledgement card to the voter's mailing address by non-forwardable mail). Directive 2012-36, Doc.53-10, PageID#1625-1626; Panel Op. at 26-27; PI Order at PageID#5862. Thus, voters could not fraudulently cast a ballot by registering for the first time as someone else, since that ballot simply would not be counted unless the registration was independently verified. Panel Op. at 26-27; PI Order at PageID#5862, 5902-04. The applicants do not dispute the effectiveness of these safeguards in their application.

**C. In the Last Ten Years, Hundreds of Thousands of Ohio Voters Have Relied On Early Voting and Same-Day Registration**

This case is not about the *length* of Ohio's early voting period, but rather about specific voting opportunities—namely, same-day registration, evening voting, and Sunday voting. These particular forms of early voting have consistently been implemented by Ohio counties for nearly a decade, and have been relied on by tens of thousands of Ohio voters.

Early voting quickly became woven into the fabric of Ohio's democratic process. In 2008, "approximately 1.7 million Ohioans cast their ballots before election day, amounting to 20.7% of registered voters and 29.7% of the total votes cast. . . . In 2010, approximately 1 million Ohioans voted early, and 17.8% of them chose to cast their ballots in person." Panel Op. at 6 (quoting *OFA*, 697 F.3d at 426). Reliance on early voting in-person has only increased with time, rising to 32% in the 2012 election. *Id.*

Furthermore, as the district court found, and as the applicants do not dispute, lower-income, homeless, and African-American voters in particular rely on



these opportunities. PI Order at PageID#5891-5892, 5897-5898, 5900, 5912-5913; *see also OFA*, 697 F.3d at 426-27 (Ohio early voters “tend[] to be members of different demographic groups than those who voted on election day. Early voters were more likely than election-day voters to be women, older, and of lower income and education attainment. Data from Cuyahoga and Franklin Counties suggests that early voters were disproportionately African-American.” (citation and internal quotation marks omitted)). Crediting the testimony of Plaintiffs’ expert Dr. Daniel Smith—who drew on election and demographic data from 2008, 2010, and 2012, and relied on several different methods to analyze racial differences in early voting usage in Ohio<sup>4</sup>—the district court found that “African Americans rely on [early in-person] voting at far greater rates than whites in Ohio, including on the days and times [at issue in this litigation].” *Id.* at PageID#5891-5892.

The district court further found that African Americans’ disproportionate reliance on these voting opportunities was not a statistical accident. Instead, surveying numerous “undisputed findings regarding employment disparities as well as significant disparities in residential, transportation, and childcare options,” *id.* at

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<sup>4</sup> Dr. Smith is a tenured Professor of Political Science at the University of Florida and a nationally renowned expert on electoral processes and political behavior. Dr. Smith relied on data including: voting and demographic statistics in every census block throughout Ohio during the 2012 election; analogous data from Ohio’s five largest counties during the 2010 election; and Census Bureau data from 2008 and 2012. He then utilized three standard techniques commonly relied upon by social scientists and widely accepted in voting litigation, including bivariate correlation, homogenous area analysis and method of bounds analysis. Each of these methods supported Dr. Smith’s findings that (1) African Americans in Ohio rely on early in-person voting at higher rates than whites; and (2) African Americans disproportionately cast early in-person votes during the Golden Week and on Sundays. *See* PI Order at PageID#5874-5878. In response to one of Defendants’ experts, Dr. Smith also performed two additional analyses, and arrived at results consistent with his original conclusions. *Id.* at PageID#5888. Dr. Smith also analyzed Census Bureau data, which confirmed his findings. *Id.* at PageID#5878-5879.

PageID#5892, the district court found that it was *because* of such disparities that African Americans disproportionately rely on the voting opportunities. *Id.* at PageID#5913.<sup>5</sup> In addition, the district court made extensive findings that voting by mail is not an adequate method of voting for many African-American, lower-income, and homeless Ohio voters. *Id.* at PageID#5901-5902. None of these factual findings are disputed by the applicants.

### **1. The Same-Day Registration Period**

Since the implementation of same-day registration, tens of thousands of Ohio voters have relied upon it. Panel Op. at 6; PI Order at PageID#5897. In 2008, 12,842 voters registered or updated their registration and voted at the same time, and 67,408 voters cast in-person ballots during Golden Week. PI Order at PageID#5854. In 2010, 1,651 people registered or updated their registration during Golden Week, and 26,230 people cast ballots during this period. *Id.* at PageID#5855. During Golden Week in 2012, 14,253<sup>6</sup> voters registered or updated their registration and voted at the same time, and 89,224 voters voted in person. *Id.* at PageID#5857.

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<sup>5</sup> The court credited the testimony of Plaintiffs' expert Dr. Vincent Roscigno that, in part due to ongoing patterns of discrimination in Ohio, African-Americans disproportionately hold hourly-wage jobs, experience residential instability, and lack access to transportation, *see id.* at PageID#5881-5882, 5892, and thus are overrepresented among those groups that rely on same-day registration, including the poor and the homeless, *id.* at PageID#5912.

<sup>6</sup> The district court found that 5,844 used same-day registration in 2012. PI Order at PageID#5898. The "5,844" number, however, is likely based on an inadvertent misread of Defendants' data table, which shows that 5,844 registered *for the first time* and voted at the same time, while 8,409 additional Ohio voters *updated their registration* and voted at the same time during the same-day registration period, 2012 General Election Data, Doc.63-2, PageID#3335, bringing the total to 14,253 Ohio voters using same-day registration in 2012, an *increase* from 2008. *See also* Pls.' Reply in Supp. of Mot. for Prelim. Inj., Doc.52, PageID#1515.

The district court credited the undisputed declarations of numerous witnesses who work with churches, shelters, and other charitable organizations, testifying that voters in Ohio who are low-income, have less education, or are homeless rely heavily on same-day registration. *See id.* at PageID#5865, 5870-5871. Undisputed evidence established that 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.<sup>7</sup> Plaintiffs' unrefuted declarations also established that, because of 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 PageID#5870;<sup>8</sup> *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

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<sup>7</sup> In the last year, according to Census data, *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, Roscigno Rep., Doc.18-2, PageID#262, a fact that was corroborated with several unrefuted declarations. *See* Frech Decl., Doc.18-22, PageID#451-452, ¶ 17 (“[O]ur clients [on welfare] change residences several times a year.”); Rev. Snyder Decl., Doc.18-12, PageID#408, ¶ 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., Doc.18-11, PageID#399, ¶ 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., Doc.18-13, PageID#414, ¶ 12.

<sup>8</sup> *See also* Wood Decl., Doc.18-10, PageID#392, ¶ 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., Doc.18-22, PageID#452, ¶ 19 (“We constantly remind [our clients on welfare] that they have to update their voter registration whenever they move.”); Fairchild Decl., Doc.18-13, PageID#414, ¶ 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.”).

same reason, many are less likely to know how to register without in-person help because lower-income voters tend to be “distrustful of government and the mail, and are fearful that filling out a form or failing to fill out a form and send it in the mail could lead to a denial of benefits.” PI Order at PageID#5869. 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. In sum, “same-day registration works very effectively and is one of the biggest boosts to voter participation, especially among lower-income voters.” Davis Decl., Doc.18-11, PageID#399, ¶ 24.

In light of this overwhelming evidence, the district court found that:

Plaintiffs’ evidence paints a portrait illustrating the importance of Golden Week to those struggling on the margins of society. Such individuals are more likely to move frequently and lack access to transportation. Day to day life for such individuals can be chaotic and merely focused on survival. If a voter moves, he or she is required to update his or her voter registration. Lack of transportation means that travelling to the voting location can present its own hardships. For these reasons, the opportunity to register and vote at the same time during Golden Week is more than a mere convenience to poorer individuals and the homeless, it can make the difference between being able to exercise the fundamental right to vote and not being able to do so.

PI Order at PageID#5898. The applicants do not dispute these findings. Indeed, experts for both Plaintiffs and the applicants acknowledged the scholarly consensus that same-day registration boosts participation. *Id.* at PageID#5887, 5891.

## **2. Evening Voting Hours**

Evening voting has also been a fixture in Ohio. One undisputed study estimated that over 42,500 votes were cast in weekday evening hours in 2008.

Robbins Study, Doc.18-4, PageID#335. During the 2010 election, several counties with the highest African-American populations in the State had evening hours. PI Order at PageID#5856. In 2012, *all* 88 counties followed a single statewide early voting schedule, which included evening hours on ten weekdays. *Id.* at PageID#5856-5857. Based on uncontradicted testimony, the district court found that working-class voters in Ohio significantly rely on these evening voting opportunities. *See id.* at PageID#5865, 5872. Hourly-wage workers—who are disproportionately African-American, *see id.* at PageID#5882—often have inflexible work schedules that prohibit them from voting during business hours. *See id.* at PageID#5912-5913. These challenges are compounded by other issues frequently faced by working-class individuals, including lack of transportation, family obligations, and health issues. *Id.* at PageID#5873, 5913.<sup>9</sup>

### **3. Sunday Voting**

Ohio voters also rely on Sunday voting, which were consistently maintained by numerous Boards of Elections across the state over the last decade. In particular, several African-American communities in Ohio rely on Sunday voting to conduct

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<sup>9</sup> The fact that Ohio voters rely on evening voting was amply supported by several unrefuted declarations. For example, David Morgan, member of the Trumbull Chapter of Plaintiff A. Philip Randolph Institute, testified that he received “frequent requests for rides” to the polls from people “voting on their way home from work.” Morgan Decl., Doc.18-17, PageID#436, ¶¶ 16-18. Anthony Brice, member of the Cincinnati Chapter of Plaintiff APRI, witnessed “individuals waiting for at least an hour to cast early in-person ballots after getting off of work.” Brice Decl., Doc.18-18, PageID#438-439, ¶¶ 9-11. Reverend Shawn Braxton, Pastor of New Life Cathedral in East Cleveland, an African-American church, operated a 45-55 person bus to take voters to the polls in the evenings, and “there were times . . . during the evening voting hours where one bus was not enough and we had to take several loads of people.” Braxton Decl., Doc.18-21, PageID#446, ¶¶ 6-8. Erik Crew, an individual volunteer who focused on helping voters in Avondale, a predominantly lower-income, African-American neighborhood in Cincinnati, set a 6pm pick-up and drop-off time precisely because the population would tend to have difficulties getting time off of work. Crew Decl., Doc.18-24, PageID#466, ¶¶ 22-24.

“Souls to the Polls” initiatives, PI Order at PageID#5899, organized efforts by predominantly African-American churches to transport members of their congregations and others to the polls after church services, *see id.* at PageID#5856. These programs “ha[ve] developed into a civic component of African-American church life in Ohio, where community leaders raise awareness of voting and encourage and assist members of the community to vote.” *Id.* at PageID#5899. The district court credited the uncontradicted testimony of numerous witnesses, including over half a dozen leaders of churches and civic organizations, who described the significant reliance of African-American communities on Sunday voting to assist voters confronting difficulties such as poverty, lack of transportation, inflexible work schedules, and disabilities. PI Order at PageID#5864-5868, 5871-5872, 5899.<sup>10</sup> The district court then found that

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<sup>10</sup> That uncontradicted testimony included a declaration from Reverend Snyder, who explained:

“Souls to the Polls” is important to the African Americans in my congregation and community [in Columbus]. 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., Doc.18-12, PageID#410, ¶¶ 24-25. Ray Wood, President of the Toledo Branch of Plaintiff NAACP described a similar phenomenon exists in Toledo, where “Souls to the Polls’ has definitely become a part of African-American culture.” Wood Decl., Doc.18-10, PageID#391, ¶ 31. As he explains:

[I]t is significant that [these] initiatives leverage church resources to provide transportation to voting locations to members of church congregations. Absent the use of transportation provided by the churches, many members of these communities could find it difficult to cast a vote as those in lower socioeconomic groups tend to be more constrained in terms of transportation options.

*Id.* at PageID#5899. Several African-American churches in Ohio view voting as an integral part of their spiritual beliefs. See Rev. Snyder Decl., Doc.18-12, PageID#408, ¶ 12; Simpson Decl., Doc.18-14, PageID#422, ¶ 8; Rev. Cooper Decl., Doc.18-19, PageID#440, ¶ 5. 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., Doc.18-21, PageID#447, ¶ 11. Thus, unsurprisingly, the counties that have “offered multiple Sundays of voting[] tended to be counties with high African-American populations.” PI Order at PageID#5899; see also Cable Decl., Doc.18-29, PageID#494, ¶¶ 2-3 (counties

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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.

*Id.* at PageID#390-391, ¶¶ 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., Doc.18-15, PageID#428, ¶¶ 18-19.

representing over 78% of Ohio’s African-American population had *multiple* Sundays available for early voting in 2008 and/or 2010).

The fact that Sunday voting was an African-American phenomenon in Ohio did not go unnoticed. As Doug Priesse, a member from the Franklin County Board of Elections wrote in an e-mail to a reporter, “I really actually feel we shouldn’t contort the voting process to accommodate the urban—read African-American—voter-turnout machine.” *Id.* at PageID#5885. Mr. Priesse voted to eliminate Sunday voting in Franklin County—which has among the highest number and percentage of African Americans in the state, “Ohio African Americans,” Doc.18-9, PageID#383—on three separate occasions. Rowland Article, Doc.18-48, PageID#551; Sec’y of State Tiebreaking Vote Sept. 22, 2010, Doc.18-39, PageID#536; Sec’y of State Tiebreaking Vote Oct. 25, 2011, Doc.18-42, PageID#544; *see also* PI Order at PageID#5885 (State Representative Matt Huffman stating, “[t]here’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?” (emphasis added)).

The desire to eliminate Sunday voting was fulfilled on August 15, 2012, when the Secretary of State issued Directive 2012-35, which eliminated *all* weekend hours statewide (except, apparently, for certain military voters). Directive 2012-35, Doc.18-34, PageID#527-528. This spurred litigation that eventually led to the granting of a preliminary injunction requiring the Secretary of State to restore early voting hours for the weekend and Monday before the 2012 Presidential election.



The Sixth Circuit affirmed, *OFA*, 697 F.3d at 437, and this Court denied Ohio's application for a stay, *Husted v. Obama for Am.*, 133 S. Ct. 497 (2012). However, counties were permitted only one Sunday, and uncontradicted testimony revealed that four hours of voting on a single Sunday was not adequate for effective Souls to the Polls programs, because of insufficient resources; organizational and logistical limitations; and long lines that result from attempting to process all Sunday voters on a single day. PI Order at PageID#5866, 5868, 5872-73, 5899.

**D. Counties Have Had No Difficulty Maintaining These Voting Opportunities For Nearly a Decade**

The record reveals that Ohio's counties have had no difficulty maintaining these voting opportunities for nearly a decade. PI Order at PageID#5905; Panel Op. at 28-29. As noted above, the same-day registration period did not require any Board of Elections office to be open a single minute longer than their existing office hours. Nor does the record reflect any difficulty maintaining evening and Sunday voting hours. Even with repeated opportunities, the applicants could not demonstrate such difficulties, PI Order at PageID# 5904-05, 5915; 6th Cir. Panel Stay Decision, Doc.22-1, at 3, 7; Panel Op. at 28-29, 44 ("Defendants . . . have failed to demonstrate that BOEs would not be able to administer the extra days and evening hours of [early in-person] voting required by the preliminary injunction, a schedule BOEs had previously administered in past elections"), and they essentially abandoned any attempt at such a showing in their stay application.

### **E. Failed Attempts to Eliminate Sunday Voting in 2012 and Ohio's Highly-Racialized Political Climate**

The district court found African Americans tend to be marginalized in or excluded from the political process in Ohio. It found that voting in Ohio was racially polarized, PI Order at PageID#5912, including in elections for statewide office, *id.* at PageID#5884, such as the imminent 2014 election, in which both applicants are running for re-election. It found that Ohio had “a history of official voting-related discrimination against racial minorities and that more recent voting practices and procedures, such as poll watchers disparately targeting areas with higher minority populations, enhance the opportunity for discrimination against minority groups.” PI Order at PageID#5912. African Americans in Ohio are also “significantly underrepresented, both historically and contemporarily, in the most important, visible and influential elected state posts.” *Id.* (quoting Roscigno Rep., Doc.18-2, PageID#288-289).

The district court also found that there is a “political climate in Ohio that remains somewhat tolerant of explicit race politics.” PI Order at PageID#5884 (citation omitted). For example, a recent highly publicized article titled “America Needs a White Republican President” was posted online by a prominent Ohio figure. PI Order at PageID#5884. Ohio political campaigns continue to use racial appeals, such as a 2010 campaign for State Treasurer that falsely portrayed an African-American opponent as connected to Muslim mosques and those of Arab descent, and a television commercial displaying a shouting African-American woman in inner city Cleveland alongside mostly other African-Americans, claiming that President

Obama gave her a free phone. *Id.* Sixty billboards reading “VOTER FRAUD IS A FELONY!” were placed in disproportionately African-American and lower-income neighborhoods in Columbus and Cleveland. *Id.*

**F. Senate Bill 238 and the 2014 Directives Targeted Same-Day Registration, Evening Voting, and Sunday Voting for Elimination**

It is within this racialized context that the voting restrictions at issue in this litigation were enacted. On November 13, 2013, the Ohio General Assembly introduced Senate Bill 238 (“SB 238”), amending Ohio Rev. Code §§ 3509.01 (B) and 3511.10, to permanently eliminate same-day registration. PI Order at PageID#5849. SB 238 was rushed through the Senate within a week. In the House, proponents of the bill prevented a vote concerning a proposed amendment that would have required the Secretary of State to simply *assess* the impact of SB 238 on African Americans and other marginalized groups. The bill was passed on February 19, 2014 and signed into law by Governor Kasich on February 21, 2014. PI Order at PageID#5849.

Defendant Husted issued Directive 2014-06 four days later, on February 25, 2014. Directive 2014-06, Doc.18-36, PageID#530-531. It eliminated *all* weekday evening hours and, once again, eliminated all Sunday hours. This schedule mirrored a six-page report issued by the Ohio Association of Election Officials (“OAEO”). PI Order at PageID#5857; OAEO Rep., Doc.18-33, PageID#521-526, but the proffered justifications for its recommended cutbacks—which were limited solely to uniformity—were contained in a single page and not even defended in the stay application.

This marked the first time in nearly a decade of Ohio early voting that same-day registration and evening hours were targeted for elimination, and the second time since 2012 that Ohio attempted to eliminate all Sunday hours.

### **G. Procedural History**

Plaintiffs Ohio State Conference of the National Association for the Advancement of Colored People, 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, and Darryl Fairchild are nonpartisan organizations, African-American churches, and individuals who conduct get-out-the-vote programs to educate and assist Ohio voters. They rely on same-day registration, Sunday voting, and/or weekday evening voting in their efforts to help voters—especially African Americans and working-class citizens—exercise their fundamental right to vote. PI Order at PageID#5864-5868.

On May 1, 2014, Plaintiffs filed their complaint, bringing claims under the Fourteenth Amendment and Section 2 of the Voting Rights Act of 1965 (“VRA”), 52 U.S.C. § 10301. Compl., Doc.1; PI Order at PageID#5851. Specifically, Plaintiffs challenged the targeted elimination of same-day registration, evening voting hours, and Sunday voting.

A little over one month later, the district court granted summary judgment and a permanent injunction in a related case, restoring early voting for the three days preceding Election Day. *Obama for Am. v. Husted*, No. 2:12-cv-636, 2014 WL 2611316, at \*5 (S.D. Ohio June 11, 2014). As a result, Defendant Husted issued

Directive 2014-17, which was nearly identical to Directive 2014-06 (collectively, the “Directives”). The new Directive reaffirmed the ban on weekday evening voting, but pursuant to court order, it permitted four hours of voting on a single Sunday on the weekend prior to Election Day. Directive 2014-17, Doc.18-37, PageID#532-533. Thus, Directive 2014-17 continued to ban voting on *multiple* Sundays.<sup>11</sup>

On June 30, 2014, after compiling two expert reports, additional studies on early voting, and over a dozen declarations, Plaintiffs filed a 51-page motion for a preliminary injunction to enjoin the enforcement of SB 238, and to require Defendant Husted to set uniform early voting hours on multiple Sundays and weekday evenings. Pls.’ MPI, Doc.17; *see* PI Order at PageID#5852. The hearing on Plaintiffs’ motion was held on August 11, 2014. By that point over a hundred exhibits had been submitted, including ten expert reports and five expert deposition transcripts. Smith Rep., Doc.18-1; Roscigno Rep., Doc.18-2; Trende Rep., Doc.41-3; McCarty Rep., Doc.41-4; Brunell Rep., Doc.41-5; Burden Rebuttal, Doc.53-4; Gronke Rebuttal, Doc.53-5; Smith Rebuttal, Doc.53-11; Brunell Supplemental Rep., Doc.61-39; McCarty Rebuttal, Doc.67-1; Trende Dep., Doc.64-1; Brunell Dep., Doc.64-2; Smith Dep., Doc.64-3; Roscigno Dep., Doc.64-4; McCarty Dep., Doc.64-5. On September 4, 2014, the district court granted Plaintiffs’ motion and found that SB 238 and Directive 2014-17 are likely unconstitutional and likely violate Section 2 of the VRA. PI Order at PageID#5917. The district preliminarily enjoined enforcement of SB 238 and ordered Defendant Husted to set uniform and suitable

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<sup>11</sup> For the sake of simplicity, Plaintiffs refer to Directive 2014-06’s elimination of *all* Sunday voting, and Directive 2014-17’s elimination of voting on *multiple* Sundays, collectively as an elimination of “Sunday voting.”

early voting hours on evenings and Sundays. *Id.* at PageID#5917-5918. In addition, consistent with Ohio law, the district court enjoined Defendant Husted from preventing individual Boards of Elections from adopting additional hours by majority vote. *Id.* at PageID#5918; *see* Ohio Rev. Code § 3501.10(B).

On September 5, 2014, the applicants noticed their appeal. On September 8, 2014, the applicants filed a motion to expedite the appeal, which was granted on September 11, 2014. That same day, they filed a motion for a stay in the Sixth Circuit, which was denied. *Ohio State Conf. of NAACP v. Husted*, \_\_\_ F.3d \_\_\_, No. 14-3877, 2014 WL 4494938 (6th Cir. Sept. 12, 2014).

At that point, on September 11, 2014, the applicants could have immediately petitioned to have their stay denial reheard *en banc*, or filed a stay application with this Court, with weeks to spare before the same-day registration period was to start on September 30. They did not do so. A directive was immediately issued to all 88 counties directing compliance with the preliminary injunction, and the counties in turn widely publicized the restoration of the same-day registration period, evening voting, and Sunday voting. Boards of Elections websites have now publicized those hours for weeks.

On September 22, merits briefing before the Sixth Circuit was completed. The submissions included a brief from the United States as *amicus curiae* supporting plaintiffs-appellees and urging affirmance of the district court. *See* 6th Cir. Amicus Br. of the United States, Doc.34 (“DOJ Br.”). On September 24, the Sixth Circuit panel affirmed the district court’s preliminary injunction. With

respect to the remedy, the Sixth Circuit observed that the applicants had failed to sufficiently develop their arguments concerning certain aspects of the district court's ordered relief, such as its order to allow Boards of Elections to add early voting hours by majority vote. Given the little time that remained, the panel declined to address the argument at "this stage in the litigation." Panel Op. at 45. The applicants subsequently filed an *en banc* petition as well as the instant application.

### ARGUMENT

The applicants fail to satisfy the core requirements for obtaining a stay with this Court. "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Further, "[t]he conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). "It is ultimately necessary, in other words, 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Id.* at 1305 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted)). "Denial of . . . in-chambers stay applications" pending the filing of a petition for certiorari "is the norm; relief is

granted only in ‘extraordinary cases.’” *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (quoting *Rostker*, 448 U.S. at 1308). The “party requesting a stay bears the burden of showing that the circumstances justify” such extraordinary relief. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

#### **I. THE APPLICANTS HAVE FAILED TO DEMONSTRATE IRREPARABLE HARM, AND THE EQUITIES WEIGH STRONGLY AGAINST A STAY**

First, the applicants cannot demonstrate “a likelihood that irreparable harm will result from the denial of a stay.” *Hollingsworth*, 558 U.S. at 190; *see also Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers) (“[T]he party seeking a stay bears the burden of advancing persuasive reasons why failure to grant [a stay] could lead to irreparable harm.”). The applicants’ attempt to show harm relies exclusively on the proposition that “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); Appl. at 34. But in neither of those cases did enjoining a statute *alone* satisfy the irreparable harm standard. *See New Motor Vehicle Bd.*, 434 U.S. at 1351 (State was being prevented from engaging in investigation and examination of proposed car leadership relocations); *Maryland*, 133 S. Ct. at 3 (noting “ongoing and concrete harm to Maryland’s law enforcement and public safety interests”). Furthermore, the State’s elimination of evening voting and Sunday voting here was not pursuant to statute, but was instead the result of unilateral executive action.



Under the applicants’ proposed rule, a stay would be warranted *every time* a state statute is any way involved with an injunction. The applicants emphasize that “the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections,” *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (citation and internal quotation marks omitted), but just as important is the courts’ role in scrutinizing elected officials’ interference with the very democratic process that put them into office. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (Kennedy, J., separate op.) (“Although the legislative branch plays the primary role in congressional redistricting, our precedents recognize an important role for the courts when a districting plan violates the Constitution.”); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality op.) (“There is no right more basic in our democracy than the right to participate in electing our political leaders.”); *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring) (“Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit.”).

The applicants’ proposed rule would also be inconsistent with this Court’s past practice, which has been to deny a stay of an injunction against a state statute where the equities do not favor the state. *See, e.g., Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327 (1980) (Powell, J.,

in chambers) (lifting Fifth Circuit stay and thereby reinstating district court's injunction barring, on equal protection grounds, enforcement of state statute that denied free public education to "undocumented' alien children," *id.* at 1328, without considering impact on sovereign interests in balancing the equities involved); *Blum v. Caldwell*, 446 U.S. 1311, 1316 (1980) (Marshall, J., in chambers) (denying stay to Commissioner of the New York Department of Social Services after weighing the expense to be incurred by the state absent a stay against the harm to respondents if a stay is granted); *cf. Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315 (1983) (Blackmun, J., in chambers) (denying application from Administrator of Environmental Protection Agency to stay injunction barring enforcement of provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, and finding that no irreparable harm will result).

Applicants do not seriously attempt to demonstrate actual irreparable harm from the injunction because there is none. As the district court found, and as the applicants do not even try to contest, Ohio counties have had no difficulty maintaining these electoral opportunities for nearly a decade. Panel Op. at 28-29. The applicants make the unremarkable assertion that maintaining these electoral opportunities may cost some money, Appl. at 35, but monetary expenditures by themselves do not constitute irreparable harm. *See Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1621 (2014) (Roberts, C.J., in chambers). In any event, same-day registration does nothing more than require Boards of Elections to accept ballots during the exact same office hours in which they are already open, and the

applicants do not dispute the district court's findings that any costs arising from evening and Sunday voting are entirely manageable. Panel Op. at 28-29. The district court's injunction did nothing more than ensure that longstanding electoral processes remain in place temporarily while the parties continue to develop the factual record pending final judgment.

On the other hand, the harm to Plaintiffs and other voters that would arise from staying the injunction is real, substantial, and found by the district court on the basis of solid evidence. The applicants do not dispute the district court's findings that *tens of thousands* of Ohio voters, especially lower-income voters, have relied specifically on same-day registration, evening voting, and Sunday voting for nearly a decade. Panel Op. at 19-20. The applicants glibly refer to the elimination of these voting opportunities that have made the franchise available to thousands as imposing mere "inconveniences" on the poor. Appl. at 35. But no amount of rhetoric can substitute for the district court's extensive factual findings concerning the real burdens imposed on lower-income and homeless voters who have routinely relied on these opportunities for years. *See, e.g.*, PI Order at PageID#5898-5900.

The district court found, and the panel upheld the finding, that the elimination of "Golden Week" when voters could register or update registration and vote on the same day would make it more difficult for poor people and African-Americans to vote. Panel Op. at 16. As the district court explained, poorer people move more frequently than those who are better off, and requiring two trips to

register and vote instead of one compounded the challenges of shortened hours and fewer days. PI Order at PageID#5898.

The district court found, and the panel upheld the finding, that low income and African-American voters would be less able to vote if the evening hours were reduced. Panel Op. at 19-20, 23. As the district court pointed out, it is particularly difficult for lower income voters, many in hourly wage based jobs and reliant on public transportation, to vote between 8 and 5. PI Order at PageID#5900.

The district court found, and the panel upheld the finding, that eliminating all but one day of Sunday voting would make it more difficult for lower income African-Americans to vote. Panel Op. at 16. As the district court explained, church-provided transportation through “Souls to the Polls” made it possible for lower income people who would not be able to get transportation otherwise. PI Order at PageID#5899, 5900.

Against these careful factual findings, only deliberate indifference to the hardships people face when trying to exercise their right to choose who governs them could see the restrictions imposed here as “inconveniences.”

Straining to find some equity that favors the state, the applicants suggest Plaintiffs purposefully delayed filing this lawsuit. Appl. at 34. However, they do not explain how Plaintiffs could have amassed the voluminous exhibits in support of their 51-page motion for a preliminary injunction, which included two expert reports, several additional studies on voter behavior, and dozens of declarations from voter organizers and African-American churches all over Ohio, any faster. The

equities do not warrant punishing Plaintiffs—much less the voting public at large—for taking their burden of proof seriously.

Finally, staying the district court’s injunction on the eve of the same-day registration period will inject uncertainty and confusion into the upcoming election. “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). “As an election draws closer, that risk will increase,” and it is always appropriate to afford “deference to the discretion of the District Court.” *Id.* at 5. The district court’s injunction merely preserves the same early voting opportunities that have been in place for the last four general elections. It has already been widely reported in the media, the Secretary of State has already issued a Directive to all 88 Ohio counties to implement the injunction, and the counties in turn have publicized the hours. Ohio voters expect to be able to cast their ballots starting on Tuesday, and are relying on that expectation. At this final hour, a stay would do nothing more than confuse elections officials, and punish voters who fail to follow the byzantine procedural interstices of post-appellate stay applications.

The state has shown no actual harm to it at all. The harm to the Plaintiffs and Ohio voters is real, substantial and supported by the record. A stay now would only compound it. The equities strongly weigh against granting a stay.

## II. THE SIXTH CIRCUIT’S APPLICATION OF THE *ANDERSON-BURDICK* TEST IS CLOSELY TIED TO THE FACTS OF THIS CASE AND UNLIKELY TO BE REVERSED

The Sixth Circuit’s fact-bound adjudication of Plaintiffs’ Fourteenth Amendment Claim does not “conflict[] with relevant decisions of this Court,” Sup. Ct. R. 10(c), namely, this Court’s seminal cases concerning the constitutional standard that applies in challenges involving the fundamental right to vote: *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992).

### A. The *Anderson-Burdick* Test is a Flexible Balancing Test that is Bound to the Facts in Each Particular Case

As this Court explained in *Burdick*, “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” 504 U.S. at 433 (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); see *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is “preservative of all rights”). At the same time, the Constitution provides that States may prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives.” Art. I, § 4, cl. 1.

To balance these important competing interests, “the full Court agreed in *Anderson* [that] a more flexible standard applies.” *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788-89; *id.* at 808, 817 (Rehnquist, J., dissenting)). Thus:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments 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 plaintiff’s rights.”

*Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). This balancing test operates as a sliding scale: “the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” *Burdick*, 504 U.S. at 434. “Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.” *Anderson*, 460 U.S. at 789.

Context is key under the *Anderson-Burdick* test. As this Court has emphasized, the “results of this evaluation will not be automatic; as we have recognized, there is ‘no substitute for the hard judgments that must be made.’” *Anderson*, 460 U.S. at 789-90 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). More recently, in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), a majority of this Court reaffirmed and agreed that the *Anderson-Burdick* test is a balancing test, not a litmus test. See *Crawford*, 553 U.S. at 190 (Stevens, J., plurality op., joined by Roberts, C.J., and Kennedy, J.) (“Rather than applying any ‘litmus test’ that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.”); *id.* at 210-11 (Souter J., dissenting, joined by Ginsburg, J.) (“Given the legitimacy of interests on both sides, we have avoided preset levels of scrutiny in favor of a sliding-scale balancing analysis: the scrutiny

varies with the effect of the regulation at issue.”); *id.* at 237 (Breyer, J., dissenting) (“In determining whether this statute violates the Federal Constitution, I would balance the voting-related interests that the statute affects, asking ‘whether the statute burdens . . . such interest in a manner out of proportion to the statute’s salutary effects.’” (citation omitted)).

However, although there is no “litmus test for measuring the severity of the burden that a state law imposes on a political party, an individual voter, or a discrete class of voters[,] [h]owever slight that burden may appear, . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Id.* at 191-92 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). Moreover, “particularly where restrictions have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State’s asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.” *Clingman*, 544 U.S. at 603 (O’Connor, J., concurring).

#### **B. The Sixth Circuit Correctly Applied *Anderson-Burdick*’s Balancing Test to the Unique Facts in Ohio**

The Sixth Circuit was appropriately sensitive to the specific factual context presented in this case when carefully balancing the interests and making the “hard judgment” that *Anderson-Burdick* demands. It recognized that Ohio was not writing on a blank slate when it created the right to early voting and same-day registration ten years ago, and that the default Election-Day-only system was no



longer a constitutional option for Ohio. See Panel Op. 4-5, 43-44. The panel then correctly zeroed in on the specific voting restrictions at issue in this case: the targeted elimination of same-day registration, evening voting, and Sunday voting in the context of massive voter reliance and habituation for the better part of a decade. See, e.g., Panel Op. at 19-20. It properly deferred to the district court's extensive factual findings concerning the special burdens that SB 238 and the Directives placed on lower-income and homeless voters in Ohio. It rejected the applicants' argument that *Anderson-Burdick* categorically ignores all burdens that are not faced by the "average" voter, Appellants' 6th Cir. Br., Doc.29, at 30-31, properly heeding this Court's warning that there is no "litmus test for measuring the severity of a burden that a state law imposes on . . . a *discrete class of voters*," *Crawford*, 553 U.S. at 191 (Stevens, J., plurality op.) (emphasis added). The panel then affirmed the district court's careful finding that these burdens, while not severe, were "significant" for lower-income and homeless voters in Ohio. See, e.g., Panel op. at 20, 44.).

Having ascertained the "character and magnitude" of the burdens, the panel correctly refrained from rushing straight to rational-basis review as applicants sought, but balanced those burdens 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 plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Applying this scrutiny to Ohio's proffered interests, the panel correctly found that

on this record, Ohio could not justify—either with logic or evidence—why imposing these significant burdens was necessary. While correctly recognizing the state’s interest in “preventing election fraud,” *Crawford*, 553 U.S. at 196, the panel found that the applicants could not even articulate a logical connection between same-day registration and voter fraud, especially when ballots cast via same-day registration are not counted until and unless the registration is verified. Panel Op. at 26-27. The applicants do not challenge that finding in their application. Nor do they challenge the panel’s rejection of their proffered interest in “uniformity” for purposes of avoiding voter confusion. As the panel straightforwardly explained, “Uniformity can be important to make voter education easier, but Defendants do not explain why a uniform [early in-person] voting schedule could not also include Golden Week and the other eliminated [early in-person] voting times.” Panel Op. at 29.

The applicants also do not challenge the panel’s rejection of their generic argument about costs. As the panel correctly noted, “Arguably *some* cost-saving rationale could be identified in most voting restrictions. Rather, where more than minimal burdens on voters are established, the State must demonstrate that such costs would actually be burdensome.” Panel Op. at 28. If generic cost rationales could always justify restrictions on the fundamental right to vote, the *Anderson-Burdick* test would be reduced to rational-basis review in nearly every circumstance. *See generally, e.g., Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073 (2012) (budget-related justifications satisfied rational basis review); *but see id.*

at 2085 (Roberts, C.J., dissenting, joined by Scalia, J., and Alito, J.) (“desire to avoid administrative hassle” and “fiscal[] challeng[e]” insufficient to pass even rational basis review).

Removing any doubt that the panel was applying the fact-dependent balancing test of *Anderson-Burdick*, the panel went out of its way to emphasize that its holding cannot be used as a “litmus test” that is automatically applicable to every other state, because early voting has played a unique role in Ohio:

[H]ow Ohio’s early-voting system compares to that of other states is not relevant under the *Anderson-Burdick* balancing test. The test directs courts to weigh the burdens imposed on voters in a particular state against the justifications that that state has proffered for the challenged law or practice that imposes those burdens. Early voting does not necessarily play the same role in all jurisdictions in ensuring that certain groups of voters are actually able to vote. Thus, the same law may impose a significant burden in one state and only a minimal burden in another. Similarly, a particular state may have stronger justifications for a law that burdens voters than other states with the same law.

Panel Op. at 25.

The panel’s decision is further cabined because it is premised on Ohio’s *elimination* of longstanding voting opportunities, and not an abstract failure to *affirmatively create* any particular voting opportunities from a blank slate. That critical fact—which applicants ignore entirely—refutes applicant’s suggestion of a circuit split with *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), which simply held that a state could not be constitutionally required to affirmatively create certain types of voting methods.<sup>12</sup> Failing to establish certain forms of voting is a far cry

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<sup>12</sup> Moreover, *Griffin* concerned *absentee* voting specifically, rather than the early in-person voting opportunities in this case, which both Ohio elected officials and the Ohio Supreme Court have

from eliminating means of participation upon which tens of thousands of voters have relied for nearly a decade. *Cf. Florida v. United States*, 885 F. Supp. 2d 299, 332 (D.D.C. 2012) (three-judge court) (failing to create voting opportunities is not analogous to eliminating longstanding voting opportunities because of voter habituation). And even further cabining the panel decision was its focus on the targeted elimination of *specific types of* voting opportunities—same-day registration, evening voting, and Sunday voting—rather than the general elimination of a raw number of early voting days. Thus, the panel’s decision, which faithfully applied *Anderson-Burdick* to the unique facts presented in Ohio, does not impose on any state an obligation to create new voting opportunities, and does not require states to maintain any particular number of early voting days.

This Court does not “grant certiorari to consider . . . fact-bound contentions that may have no effect on other cases.” *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers). Indeed, two years ago, after the Sixth Circuit applied *Anderson-Burdick* in a different case involving the elimination of the final weekend of Ohio’s early voting period, *see OFA*, 697 F.3d 423, Ohio also filed an application for a stay with this Court, warning that “the Sixth Circuit’s decision will have ramifications far beyond Ohio.” Emergency Appl. for Stay Pending Cert. at 5, *Husted v. Obama for Am.*, No. 12A338 (Oct. 9, 2012). This Court denied their application for a stay, yet the applicants fail to point to any ramifications, catastrophic or otherwise. That decision was just as fact-specific as the decision in

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described as an extension of Election Day itself, rather than a form of absentee voting. *See, supra*, Statement of the Case Part B.

this case. This Court was correct to deny their application for a stay then, and should similarly deny their application now, especially on the eve of the same-day registration period which has already been widely publicized for weeks.

**C. Applicants' Arguments Do Not Demonstrate How the Sixth Circuit's Opinion Conflicts with *Anderson-Burdick***

The applicants raise three principle arguments that purport to establish a conflict between the Sixth Circuit's decision and the relevant decisions of this Court. None are availing.

**1. The Sixth Circuit faithfully applied *Anderson-Burdick*, not a disparate impact theory**

First, the applicants appear to argue that the Sixth Circuit erroneously applied a racial disparate-impact test under the Constitution in direct contravention of *Washington v. Davis*, 426 U.S. 229 (1976). Appl. at 10-12, 17-18. The Sixth Circuit, however, did not base its constitutional holding on a racial disparate impact theory, but rather faithfully applied this Court's guidance from the *Anderson-Burdick* line of cases, finding that SB 238 and the Directives impose significant and unjustified burdens on the fundamental right to vote for a significant number of Ohioans, many of whom are lower-income, African-American, and homeless, and who had long relied on these specific voting opportunities. Panel Op. at 23. That the facts happen to be applicable to Plaintiffs' claims under both the Fourteenth Amendment and Section 2 of the Voting Rights Act is wholly unremarkable.

Relatedly, the applicants argue that *Anderson-Burdick* is inapplicable when a voting restriction is found to primarily burden subgroups of voters. Appl. at 16-17.

But this Court has never made such a holding. In *Anderson*, this Court asked “whether Ohio’s early filing deadline placed an unconstitutional burden on the voting and associational rights of [independent candidate John] Anderson’s supporters,” 460 U.S. at 782 (emphasis added), who made up only 5.9% of the electorate. *Id.* at 784. *Burdick* specifically emphasized the particularized nature of the inquiry. *See* 504 U.S. at 434 (courts must consider “the extent to which [the state’s] interests make it necessary to burden *the plaintiff’s rights.*” (emphasis added) (quoting *Anderson*, 460 U.S. at 789)). And Justice Stevens’s controlling plurality opinion in *Crawford* assessed the burdens of the challenged law by focusing precisely on those voters who were *actually impacted* by it. *See* 553 U.S. at 198 (Stevens, J., plurality op.) (in evaluating voter ID law, “[t]he burdens that are relevant . . . are those imposed on persons who . . . do not possess a current photo identification,” rather than on voters generally, most of whom already possessed ID). Indeed, the opinion specifically notes that the “severity of a burden . . . on a *political party, an individual voter, or a discrete class of voters,*” *id.* at 191 (emphasis added), is relevant to the *Anderson-Burdick* balancing test. Applicants’ contrary view was raised and considered by a concurring opinion in *Crawford* that did not command a majority of the Court. *See id.* at 205-06 (Scalia, J., concurring) (“individual impacts” are “[ir]relevant to determining the severity of the burden”).

**2. The Sixth Circuit correctly held that restrictions on early voting are not categorically subject to rational basis review**

Second, the applicants argue that voting restrictions related to absentee ballots are categorically exempt from the *Anderson-Burdick* test and subject always

to rational-basis review, Appl. at 13-16, citing *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807 (1969), which held that Illinois’s failure to affirmatively permit absentee voting for pretrial detainees did not violate the Constitution. But as explained above, Ohio’s entrenched early voting scheme simply does not resemble “absentee voting” as it is commonly understood today, and certainly not as it was understood when *McDonald* was decided in 1969. Furthermore, unlike in *McDonald*, Plaintiffs are not challenging any failure to affirmatively provide additional voting opportunities that had never existed before, but the targeted elimination of specific voting opportunities already embedded in Ohio’s electoral framework. *Cf. Florida*, 885 F. Supp. 2d at 332. The applicants’ proposed categorical exemption for anything related to absentee voting would be tantamount to imposing a “litmus test” that is anathema to the *Anderson-Burdick* line of cases.

**3. The Sixth Circuit properly affirmed the district court’s careful factual findings that the state’s rationales were unsupported**

Third, the applicants quibble with the manner in which the Sixth Circuit conducted the *Anderson-Burdick* balancing test, arguing that it gave a little too much weight to the burdens and not enough weight to Ohio’s interests. Appl. at 18-21. But mere “misapplication of a properly stated rule of law” “rarely” qualifies for certiorari. Sup. Ct. R. 10. In any event, the applicants are wrong. They argue that voting by mail cures all voting burdens, Appl. at 19, but completely ignore the district court’s specific factual findings concerning the unique difficulties of voting by mail faced by the affected populations in Ohio. **PI Order at \_\_.** The applicants

then criticize the Sixth Circuit for having the audacity to “mak[e] the State *justify*” its targeted elimination of same-day registration, evening voting, and Sunday voting, Appl. at 20, but seeking such a justification is the bread-and-butter of the *Anderson-Burdick* test. See *Burdick*, 504 U.S. at 434 (courts to assess “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 plaintiff’s rights” (quoting *Anderson*, 460 U.S. at 789)). Finally, they again misleadingly caricature the Sixth Circuit’s decision as “asking only if it was possible for the State to do more.” Appl. at 20. The Sixth Circuit did not ask Ohio why it didn’t do more; it asked Ohio why it went out of its way to specifically eliminate voting opportunities that tens of thousands of Ohio voters, especially lower-income voters, have relied on for nearly a decade. It was not an exceedingly difficult question, and, tellingly, applicants remain wholly unable to provide an answer. See Appl. at 20-21.

For these reasons, the Sixth Circuit’s fact-bound adjudication of Plaintiffs’ constitutional claim did not conflict with the *Anderson-Burdick* test.

### **III. THE SIXTH CIRCUIT’S RULING THAT OHIO VIOLATED SECTION 2 OF THE VOTING RIGHTS ACT IS ALSO CLOSELY TIED TO THE FACTS OF THIS CASE AND UNLIKELY TO BE REVERSED**

The Sixth Circuit’s application of Section 2 of the Voting Rights Act did not conflict with this Court’s precedent, and was a faithful and correct application of the text of Section 2.



**A. Section 2 of the Voting Rights Act Prohibits Voting Standards, Practices, or Procedures that Result In Unequal Electoral Opportunity**

Section 2 of the Voting Rights Act prohibits a state from “impos[ing] or appl[ying]” any “voting . . . standard, practice, or procedure” 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.” 52 U.S.C. § 10301 (a). Voting restrictions that are passed with discriminatory intent violate Section 2, but a showing of discriminatory intent is not required under Section 2’s “results” prong. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). The standard for proving prohibited “discriminatory results” is set forth in 52 U.S.C. § 10301 (b):

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.

In applying the “totality of the circumstances” prong of Section 2, this Court has turned to a nonexclusive list of factors found in the Senate Report that accompanied the 1982 amendments to the Voting Rights Act:

- (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.

*Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 97-417, at 28-29 (1982)). The list of factors is “neither comprehensive nor exclusive,” *Gingles*, 478 U.S. at 45, and courts must ultimately conduct “an intensely local appraisal of the design and impact” of the challenged electoral practice. *Id.* at 79 (citation omitted). Thus, the application of Section 2 is necessarily intensely fact-driven.

In sum, “the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” *Id.* at 47. As this Court has explained, “[I]n interpreting this Act, we should read it in ‘a manner that provides the “broadest possible scope” in combating racial discrimination.’” *Chisom v. Roemer*, 501 U.S. 380, 403 (1991). Indeed, “racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunities to share and participate in our democratic processes and traditions; and § 2 must be interpreted to ensure that continued progress.” *Bartlett v.*

*Strickland*, 556 U.S. 1, 25 (2009) (Kennedy J., plurality op., joined by Roberts, C.J., and Alito, J.).

**B. The Sixth Circuit Properly Applied the Text of Section 2 to the Unique Facts in This Case**

The Sixth Circuit faithfully and correctly applied the text of Section 2 and this Court’s precedent to the facts of this case. The court found that the early voting restrictions imposed by SB 238 and Directive 2014-17 clearly constitute a “voting . . . standard, practice, or procedure,” and noted that there are no exceptions to those broad terms in the text of Section 2. Panel at 33. *See, e.g., Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring, joined by Scalia, J.) (“The section thus covers all manner of registration requirements, the practices surrounding registration (including the selection of times and places where registration takes place and the selection of registrars), the locations of polling places, the times polls are open, . . . and other similar aspects of the voting process that might be manipulated”); *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.) (“If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, . . . § 2 would therefore be violated”).

Next, the panel correctly recognized that Section 2 does not only prohibit outright disenfranchisement, but also voting “abridgment,” whose “core meaning is ‘shorten.’” *Reno v. Bossier Parish Sch. Bd.* (“*Bossier II*”), 528 U.S. 320, 333-34 (2000), or “[t]o reduce or diminish,” Black’s Law Dictionary (9th ed. 2009). To assess whether SB 238 and Directive 2014-17 “results in” disproportionate abridgment of

African Americans’ voting opportunity, the Sixth Circuit naturally looked at whether African Americans in Ohio disproportionately used the specific voting opportunities—same-day registration, evening voting, and Sunday voting—in the past. *Cf. Holder v. Hall*, 512 U.S. at 880 (Kennedy, J., plurality op., joined by Rehnquist, C.J., and O’Connor, J.) (“In certain cases, the benchmark for comparison in a § 2 dilution suit is obvious[, and] . . . can be evaluated by comparing the system with that rule to the system without that rule.”); *Bossier II*, 528 U.S. at 333-34 (abridgment “necessarily entails a comparison”). The district court had found, after weighing ten competing expert reports and five expert depositions from a total of seven experts, in addition to dozens of voluminous exhibits, that African Americans in Ohio disproportionately used the specific voting opportunities that were eliminated by SB 238 and Directive 2014-17, and the Sixth Circuit correctly found that those findings were not clearly erroneous.

Lastly, the panel applied the “totality of the circumstances” prong of Section 2, 52 U.S.C. § 10301(b), Panel Op. at 36-37, focusing solely on the unique facts present in Ohio. The panel did not disturb the district court’s extensive factual findings that in Ohio, African Americans’ disproportionate reliance on these voting opportunities was not an accident, but the product of widespread socioeconomic disparities—which the court found are themselves tied to “contemporary institutional practices and discrimination.” PI Order at PageID#5881, 5913. The panel found that, within this context, the targeted elimination of same day registration, evening voting, and Sunday voting, directly causes minority voters to

have less ability to participate in the political process in violation of Section 2. The panel also did not disturb the district court's findings concerning the factors that contribute to minority political exclusion in Ohio, such as Ohio's overly-racialized politics. This included overt comments made by a member of a Board of Elections, who expressly stated that he voted on multiple occasions to eliminate Sunday voting because too many African Americans were using it.

The Sixth Circuit's application of Section 2 was faithful to the text and to this Court's precedent, and therefore a stay is unwarranted. *See also* DOJ Br. at 9-23, 25-27.

### **C. Applicants' Arguments to the Contrary Are Erroneous**

The applicants make essentially four arguments: (1) that the district court used a Section 5 retrogression analysis instead of a Section 2 analysis; (2) that the district court used an improper "benchmark" to gauge the Section 2 violation; (3) that applying Section 2 to early voting restrictions would have such sweeping consequences that courts should create an implied exception for such restrictions from Section 2's plain text; and (4) that the doctrines of constitutional avoidance and federalism counsel in favor of such an implied exception. Each of these arguments fails.

#### **1. The Sixth Circuit did not use retrogression analysis**

First, unable to contest the district court's factual findings, which fit squarely within the established framework for Section 2 liability, the applicants assert that the panel found a violation only by conducting a Section 5 retrogression analysis. Appl. at 24-26. But as the Circuit panel pointed out, the district court correctly

asked whether Ohio’s newly-adopted restrictions on early voting would result in members of minority groups having less opportunity to participate in the process than others. Panel Op. at 26. This was not retrogression, but rather a proper application of Section 2, which considers the relative burdens that a challenged measure imposes on minority voters as compared to white voters. *See, e.g., Chisom*, 501 U.S. at 408 (Scalia, J., dissenting) (issue is whether enactment “ma[kes] it more difficult for blacks to register [or vote] than whites.”). That comparison establishes a Section 2 violation here, because African-American voters will be disproportionately burdened by the elimination of the early voting practices at issue.

Section 5, by contrast, focuses solely on the effect of a change in law on minority voters, comparing the relative position of minority voters under a proposed voting practice with an existing one (the Section 5 “benchmark”), requiring certain “covered” jurisdictions to obtain federal approval before enacting the proposed change, 52 U.S.C. § 10304(a), by establishing, *inter alia*, that it would not “lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.” *Bossier II*, 528 U.S. at 329 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

Although Section 5 is focused exclusively on changes to voting laws, changes to the status quo may also be challenged under Section 2, as in this case. As this Court has explained, Section 2 proceedings “involve *not only changes* [to the status quo]” like Section 5, “but [also] the status quo itself.” *Bossier II*, 528 U.S. at 334

(emphasis added). Section 2 claims in this context are made not by comparing the old system to the new one, but rather, as the district court did here, by examining the comparative effect of the new measures on African-American and white voters. Panel Op. at 26. And here, in order to make an assessment of the impact of these changes, the district court naturally turned to evidence concerning how African Americans have relied on these opportunities as compared to whites in the *past*. Merely considering this clearly probative evidence as one component of the relevant “totality of circumstances” does not convert the district court’s analysis identical to a formal “retrogression” inquiry. Panel Op. at 27, 40-42; *see also Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (observing that “some parts of the § 2 analysis may overlap with the § 5 inquiry.”). Indeed, that evidence is the most reliable indicator for assessing the likely impact of the challenged voting restrictions on minority voters as compared to whites.

## **2. The Sixth Circuit did not use an improper “benchmark”**

Applicants next assert that the panel’s decision conflicts with decisions of this Court because it did not require the plaintiffs to identify a “benchmark,” *i.e.*, a different hypothetical voting practice to use as a basis for comparison for the challenged restrictions. Appl. at 22. But as the panel pointed out, that kind of hypothetical benchmark is only appropriate in vote *dilution* cases, where courts are called upon to make a judgment about whether a challenged practice has diluted minority voting strength, or whether some other factor is responsible for a lack of minority success at the polls. Panel Op. at 38-39. Such a claim must generally involve the comparison of different redistricting plans (*i.e.*, comparing the

challenged plan to a hypothetical non-dilutive “benchmark” plan). *See Holder v. Hall*, 512 U.S. 874, 880 (1994) (“In a § 2 *vote dilution suit* . . . a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice.”) (emphases added); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) (“*Bossier I*”) (“[T]he very concept of vote dilution implies—and, indeed, necessitates—the existence of an ‘undiluted’ practice against which the fact of dilution may be measured,” and thus requires a plaintiff to “postulate a reasonable alternative voting practice to serve as the benchmark ‘undiluted’ voting practice.”).

A hypothetical benchmark is unnecessary in a vote *denial* case like this one, which challenges new restrictions on access to the ballot itself. The very language of Section 2 itself provides the only benchmark needed to make a judgment about whether Section 2 has been violated in this context:

Again, under Section 2(b), the relevant inquiry is whether minority voters “have *less opportunity than other members of the electorate* to participate in the political process and to elect representatives of their choice.” [52 U.S.C. § 10301(b)] (emphasis added). The benchmark is thus quite straightforward—under the challenged law or practice, how do minorities fare in their ability “to participate in the political process” *as compared to other groups of voters?*

Panel Op. at 39. Thus, lower courts have sustained Section 2 claims in the vote denial context without requiring plaintiffs to put forward such a hypothetical benchmark, focusing simply on whether a challenged voting restriction interacts with social and historical circumstances to disproportionately burden minority voters. *See, e.g., Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th



Cir. 1991) (affirming Section 2 liability in challenge to Mississippi’s restrictions on voter registration); *Stewart v. Blackwell*, 444 F.3d 843, 878 (6th Cir. 2006), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007) (reversing final judgment and holding that challenge to disproportionate usage of antiquated voting machines in minority areas was cognizable under Section 2).

Ultimately, as this Court explained in *Holder*, the effect of a challenged voting practice “can be evaluated by comparing the system with that rule to a system without that rule,” *Holder*, 512 U.S. at 880-81. Thus, to the extent that any sort of alternative voting practice is necessary as a formal benchmark against which to measure Ohio’s new restrictions on early voting, the facts of this case provide one: Ohio’s early voting system *without* the newly-enacted rules banning same-day registration, evening voting and Sunday voting. This is not case like *Holder*, where the plaintiffs challenged a county’s “failure” to replace the only form of government the county ever had with something entirely new—an inherently standardless pursuit, *see* 512 U.S. at 882. Plaintiffs do not demand some entirely new or hypothetical voting practices, but simply an injunction against new restrictions enacted by Defendants. *See also* DOJ Br. at 19-21.

**3. There is no implied exception to the Voting Rights Act for restrictions on early voting**

Applicants next argue that this Court should categorically exempt early voting restrictions from Section 2’s plain text, based on speculation about what Congress in 1982 would have intended and a misguided characterization of the purportedly “far reaching results” of the panel’s decision. This Court should decline

that invitation, which has no basis in the text of Section 2 and ignores the unique facts of this case.

As an initial matter, Applicants' underlying premise about the purportedly "far-reaching" implications of the Circuit's opinion is mistaken. Section 2 conditions liability on the "totality of circumstances." 52 U.S.C. § 10301(b). As this Court has explained, the Section 2 inquiry "is peculiarly dependent upon the facts of each case," and requires courts to engage in "an intensely local appraisal of the design and impact" of a challenged practice. *Gingles*, 478 U.S. at 79 (citations and internal quotation marks omitted). Properly applied, Section 2 neither prohibits nor freezes into place any particular set of election practices for all time across all jurisdictions. Indeed, this Court has explained that, under Section 2, the same electoral practice may be permissible in some contexts but not others. *See id.* at 46 ("[E]lectoral devices, such as at-large elections, may not be considered *per se* violative of § 2," as liability depends on "the totality of the circumstances"). *See also* DOJ Br. at 16-17, 23-25.

Consistent with that guidance, the panel's opinion was appropriately tailored and expressly limited to the unique factual context presented in Ohio, where early voting opportunities were necessary to remedy Ohio's egregious failure to provide meaningful ballot access in 2004, and voters have come to rely heavily on those opportunities for nearly a decade—including African-American voters at "far greater rates" than white voters. PI Order at PageID#5892. In this particular context, the targeted elimination of specific existing voting opportunities relied on

heavily by African-American voters was found to violate Section 2. The panel’s finding of liability was *not* based on an abstract *failure to create* a particular voting opportunity, but on the disproportionate burdens that would be imposed by the elimination of existing opportunities in Ohio, on which tens of thousands of voters—disproportionately African Americans—now rely. *See, e.g.*, Panel Op. at 23-24; *cf. Florida v. United States*, 885 F. Supp. 2d 299, 332 (D.D.C. 2012) (creating voting opportunities is not the same as eliminating voting opportunities because of voter habituation).

Nevertheless, Applicants argue that Congress could not have intended Section 2 to apply in this context, based on the fact that there was little early voting when Section 2 was amended in 1982. Appl. at 28. But there is no textual basis for exempting restrictions on early voting from Section 2’s reach, and no court has so interpreted the statute. Indeed, this Court has recognized that the plain language of the statute applies broadly and without exception to “*any* voting qualifications or prerequisites to voting, or *any* standards, practices, or procedures which result in the denial or abridgment of the right to vote of any [minority] citizen.” *Gingles*, 478 U.S. at 43 (emphasis added); *see also* 52 U.S.C. § 10301(a). (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race”). That early voting was less common in 1982 than it is today is entirely unremarkable. The Court has also made clear that broadly-worded statutes like Section 2 are applicable without

exception to unanticipated facts and situations. *See, e.g. Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” (citation and internal quotation marks omitted)).

Applicants invoke decisions holding that laws which disenfranchise former felons have been held by some Circuits to be exempt from the Act. But those rulings turn on the express sanction for such laws in text of the Fourteenth Amendment. *See, e.g., Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005). There is on the other no similar basis for exempting restrictions on early voting from the reach of Section 2, which this Court has held should be “interpreted . . . in a manner that provides the ‘broadest possible scope’ in combating racial discrimination.” *Chisom*, 501 U.S. at 403-04 (1991) (citation omitted).

#### **4. Section 2 is not unconstitutional as applied by the panel**

Finally, applicants assert that Section 2 must be interpreted not to reach early voting due to constitutional concerns. This serious charge was not made in district court and is therefore waived. The Sixth Circuit therefore deemed this argument waived (but, for the sake of “completeness,” considered it briefly and rejected it), Panel Op. at 34, just as this Court similarly rejects attempts to assert the unconstitutionality of a statute’s application for the first time on appeal under the guise of “constitutional avoidance.” *See, e.g., United States v. Apel*, 134 S. Ct. 1144, 1153 (2014); *United States v. Castleman*, 134 S. Ct. 1405, 1416 (2014). A challenge to an important act of Congress under its broad Fourteenth and Fifteenth

Amendment powers should not be the basis of a stay in this Court when that argument was not fully developed in the courts below.

Applicants' argument is also wrong. Section 2's results standard is indisputably constitutional. *See Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (summary affirmance); *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 905 (9th Cir. 2004). Congress undoubtedly has "the authority both to remedy and to deter violation of rights guaranteed [by the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)).

#### **IV. SUMMARY REVERSAL IS UNWARRANTED**

Finally, summary reversal is unwarranted. Applicants' contention that summary adjudication is appropriate is belied by the length and complexity of the application itself, which spans 38 pages and raises numerous arguments concerning the appropriate legal standards under the Fourteenth Amendment and Section 2 of the VRA. In any event, those arguments have been unanimously rejected by four federal judges. The decision below is correct on the merits, such that any reversal—summary or otherwise—is inappropriate. Lastly, Defendants' own authority, *Purcell*, only highlights the impropriety of summary reversal (or a stay), insofar as *Purcell* counsels "deference to the discretion of the District Court," and warns against "conflicting orders" on the eve of an election. 549 U.S. at 4-5.

## CONCLUSION

For the foregoing reasons, the stay application should be denied.

September 27, 2014

Respectfully submitted,



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