No. 14-3877

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al., Plaintiffs-Appellees, v. OHIO ATTORNEY GENERAL MICHAEL DEWINE and OHIO SECRETARY OF STATE JON HUSTED, Defendants-Appellants.	:	On Appeal from the United States District Court for the Southern District of Ohio, Eastern Division District Court Case No. 14-cv-404

BRIEF OF APPELLANTS OHIO ATTORNEY GENERAL MICHAEL DEWINE AND OHIO SECRETARY OF STATE JON HUSTED

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STATEMENT REGARDING ORAL ARGUMENT

This case raises important issues under the U.S. Constitution and Section 2 of the Voting Rights Act. If this case were not on an extremely compressed timetable with early voting for the November 2014 election looming, the Defendants—Ohio Secretary of State Jon Husted and Ohio Attorney General Michael DeWine—would request oral argument. But Defendants believe that the quickest possible resolution of the appeal is the most important thing for Ohioans, and thus are willing to waive oral argument to resolve this case as expeditiously as possible.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. It entered a preliminary injunction on September 4, 2014. On September 5, 2014, the Defendants—Ohio Secretary of State Jon Husted and Ohio Attorney General Michael DeWine (collectively, "State" or "Ohio")—timely appealed the preliminary injunction. Doc.73, Notice, PageID#5919. This Court has jurisdiction over the preliminary-injunction order under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

For the November 2014 election, Ohio amended its schedule for early voting by absentee ballot. Ohio's General Assembly eliminated the first week of voting during which a voter could vote and register simultaneously (the "Statute"); Ohio's Secretary of State set uniform days and hours for all counties during which voters could cast early in-person absentee ballots (the "Directive").[1] The Statute and Directive—which created uniformity, maximized efficiency, and minimized fraud risks—kept Ohio at the forefront of state early-voting laws; indeed, the changes only dropped Ohio's early-voting period from the seventh- to the ninth-longest among the States. Doc.41-3, Trende Decl., PageID#1021. The district court nevertheless enjoined the changes, concluding that Plaintiffs were likely to succeed on their claims that they violated the Constitution and Section 2 of the Voting

[1] As in the district court, the Secretary limits his defense to his Directive, while the Attorney General defends both the Secretary's Directive and the Statute.

Rights Act and that the equities tipped in their favor. This appeal asks whether the district court properly entered that preliminary injunction. Specifically, it asks:

1. Is it likely that Ohio's absentee early-voting schedule, which places Ohio in the top ten States for voting opportunities, unjustifiably burdens the right to vote in violation of the Equal Protection Clause?

2. Is it likely that Ohio's absentee early-voting schedule "results" in a "denial" of the "right to vote" "on account of race" in violation of Section 2 of the Voting Rights Act—based on a "retrogression" analysis that compares Ohio's current early-voting calendar to select prior-year Ohio calendars rather than to the vast majority of States with fewer early-voting opportunities?

3. Do the equities support Plaintiffs, even though courts strongly disfavor last-minute election-law changes and the last-minute nature of this change was caused mostly by Plaintiffs' delay?

STATEMENT OF THE CASE

A. Ohio Introduced Early Absentee Voting After The 2004 Election And Has Expanded It Since Then.

Before 2005, Ohioans could vote early absentee only if they asserted one of thirteen excuses, such as travel plans taking them outside their home counties on Election Day. Doc.41-6, Ohio Rev. Code § 3509.02(A)(1)-(8) (2004), PageID#1132; Doc.41-9, Damschroder Decl., PageID#1167. Historically, these excuse-required absentee ballots were available 35-days before Election Day for

most elections. *See* 1993 Ohio Laws 1389, 1406 (Am. Sub. S.B. 150). That timeline thus included five days before voter registration ended 30 days before Election Day. Ohio Rev. Code § 3503.06(A).

In 2005, Ohio changed its laws to permit *no-excuse* early absentee voting for *any* qualified voter. Doc.41-7, 2005 Ohio Laws File 40, PageID#1135-42. At that time, Ohio's 88 county boards of elections set the times during which voters could cast early absentee ballots in person (as opposed to by mail). Doc.41-9, Damschroder Decl., PageID#1169. This non-uniform policy continued during the 2008 and 2010 elections. *Id.*, PageID#1169. For those elections, most counties allowed voters to cast early in-person absentee ballots only during normal business hours and for four hours on the Saturday before Election Day. *Id*.

To "level the playing field" and eliminate "a patchwork of policies" for the 2012 election, the Secretary set uniform *statewide* hours for early in-person absentee voting. Doc.41-13, Directive 2012-35, PageID#1233-35. That directive, coupled with a subsequent change, offered voters some 246 hours to cast an early in-person absentee ballot. *Id.*

B. In February 2014, Ohio's General Assembly Reduced The Early-Voting Period, And Ohio's Secretary of State Reset The Uniform Hours.

On November 13, 2013, the Ohio Association of Elections Officials ("OAEO"), a bipartisan organization representing all of Ohio's county boards of

elections, circulated a report with two recommended changes: (1) eliminating the week of overlapping registration and absentee voting, and (2) establishing a schedule for all Ohio counties with uniform times for early in-person absentee voting. Doc.41-19, OAEO Rep., PageID#1258-59. The OAEO's 20 trustees include 10 Democrats and 10 Republicans from Ohio's large, medium, and small counties. Doc.41-21, Jones Decl., PageID#1270. The OAEO accounted for the impact that the absentee-voting system has on all counties. Doc.41-19, OAEO Rep., PageID#1256; Doc.41-21, Jones Decl. ¶ 28, PageID#1271.

Ohio's General Assembly and Secretary of State adopted these changes. In February 2014, the General Assembly passed a statute ("the Statute") changing the start of Ohio's early absentee voting so that it began on the first day *after* the close of the registration period, rather than overlap with that period for a week. *See* R.C. 3509.01(B)(2)-(3). The same month, the Secretary adopted Directive 2014-06 establishing uniform times for early in-person absentee voting. Doc.41-16, Directive 2014-06, PageID#1245-47. Later, in June 2014, to comply with the district court's constitutional ruling in *Obama for America v. Husted*, No. 2:12-cv-636, 2014 WL 2611316 (S.D. Ohio June 11, 2014), the Secretary issued a revised directive (the "Directive") adding days close to Election Day as early in-person voting days. Doc.41-22, Directive 2014-17, PageID#1281-83.

C. Ohio Has The Ninth Most Expansive Early-Voting Schedule.

Ohio is a national leader in opportunities for early in-person voting by absentee ballot ("early voting"). It offers early voting across 28 days before Election Day, including two Saturdays and one Sunday. Doc.41-3, Trende Decl., PageID#1019. In New York, New Jersey, Pennsylvania, Virginia and some 13 other States, by comparison, in-person voting is available *only* on Election Day. *Id.* Among all States, the median number of early-voting days is 11. *Id.*, PageID#1024. Ohio, by contrast, has its boards of elections open during 22 of the 28 days before Election Day. *Id.*, PageID#1022. Twenty-eight States offer *no* early voting on weekends, and 39 offer *no* early voting on Sundays. *Id.*, PageID#1025. Other than Ohio, only eight States offer Sunday voting. *Id.* All told, Ohio offers more early voting options than 41 other States and the District of Columbia. *Id.*, PageID#1022, 1024. Further, no State with an African-American population percentage larger than Ohio's offers more early-voting days. *Id.*, PageID#1026.

In addition, Ohio voters can vote absentee by mail. *See* Ohio Rev. Code §§ 3509.03-.05; Doc.41-9, Damschroder Decl., PageID#1166. This year, the Secretary mailed absentee-ballot applications to nearly every registered voter. *Id.*, PageID#1167. And many boards have boxes outside their offices to allow voters to drop off absentee ballots outside business hours. *Id.*, PageID#1166.

Finally, on Election Day, the polls are open from 6:30 a.m. until 7:30 p.m. Ohio Rev. Code § 3501.32. This remains "the most widely utilized means of voting in Ohio." Doc.41-9, Damschroder Decl., PageID#1167.

D. The Recent Changes To Ohio's Early-Voting Calendar Have An Uncertain Impact.

Plaintiffs offered two primary experts—Drs. Smith and Roscigno. With regard to the mid-term election in his Report, Smith analyzed only homogeneous census blocks in only five Ohio counties. Doc.18-1, Smith Rep., PageID#186. The five counties that Smith chose have large African-American populations. Doc.64-3, Smith Dep., PageID#4175. Smith said he selected those counties as "a matter of expediency as well as the probative value." *Id.*, PageID#4173. Smith testified, however, that he "would not be surprised that there would [have] be[en] a ['get out the vote'] effort" in 2010 "by a major political party to target" African-American voters in those counties. *Id.*, PageID#4175.

Smith repeatedly cautioned that his conclusions about the 2010 election were not a "full analysis" of Ohio's 88 counties and his conclusions should not be "extrapolate[d] from these five counties" to the State. *Id.*, PageID#4180, 4215, 4218-19. Smith explained that using different counties as his data set could have generated different results. He testified, for example, that including a sixth county with a mostly white population and a high absentee-voting rate would have altered his chart. *Id.*, PageID#4176.

Smith's mid-term-election chart showed an upswing in early voting among African-Americans on the final days before Election Day. Doc.18-1, Smith Rep., PageID#186. The chart showed, by contrast, *low* African-American early-voting use *before* those final days. And the chart showed that on many of the early-voting days well before Election Day there were minimal, if any, differences between African-American and white voting. *Id.*; Doc.64-3, Smith Dep., PageID#4183.

Smith also did not consider whether voters will vote in upcoming elections on the same day and at the same time as they voted in past elections. Doc.64-3, Smith Dep., PageID#4195. Nor did he analyze how many African-Americans mail their absentee ballots. *Id.*, PageID#4235-36.

Plaintiffs also offered evidence from Dr. Roscigno, a sociologist, about difficulties that certain voters experience. That evidence, he explained, did not consider all Ohio voting opportunities. Doc.64-4, Roscigno Dep., PageID#4287-88, 4290-92. Roscigno agreed that voting opportunities in Ohio are virtually unlimited given the mail option. *Id.*, PageID#4296.

The State's experts explained that Smith's conclusions were unreliable. Doc.41-4, McCarty Rep., PageID#1073-1103; Doc.41-5, Brunell Rep., PageID#1105-30. A state expert also analyzed mid-term, early-voting differences between African-Americans and whites for the entire State. He found no statistically significant difference between the early-voting rates of African-

Americans and whites in 2010. Doc.41-3, Trende Decl., PageID#1011-13, 1040-41.

E. Plaintiffs Sued In May, Waited Two Months To Seek A Preliminary Injunction, And Obtained That Relief In September.

Even before the Statute became law, the ACLU prepared to challenge it. It hired Dr. Smith in January 2014, and he started work in late January or early February. Doc.64-3, Smith Dep., PageID#4169. Plaintiffs sued on May 1, 2014, over two months after Ohio's early-voting calendar was set by the Statute and Directive 2014-06 (which was superseded by Directive 2014-17). Plaintiffs alleged violations of the Equal Protection Clause and of Section 2 of the Voting Rights Act. Doc.1, Compl., PageID#29-32. Plaintiffs waited two months more, until June 30, 2014, to seek a preliminary injunction replacing Ohio's early-voting calendar with a court-ordered calendar starting a week earlier and adding Sunday and evening hours. Doc.17, Motion, PageID#92-153.

After expedited discovery, the district court heard oral argument on August 11, taking the case under submission based on the paper evidence. On September 4, the court granted a preliminary injunction. Doc.72, Order, PageID#5848-5918.

The court found that Plaintiffs were likely to succeed on both claims. For equal protection, while it said it could not address Ohio's "absentee ballot[ing] standing in a vacuum," the court measured the impact of Ohio's *changes* on African-American voters relative to others. *Id.*, PageID#5896-97. The court

acknowledged that the changes might not "actually reduce voter turnout," but said that "a reduction in the total time available" for early voting "will burden those groups that use" it, and that the burden was "significant although not severe." *Id.*, PageID#5897-5900. It found that mail-in voting "ameliorates" the burden, but not enough, because "African-Americans, lower-income individuals, and the homeless are distrustful of the mail and/or voting by mail or would prefer to vote in person for unrelated reasons." *Id.*, PageID#5901. The court rejected all justifications for Ohio's schedule, acknowledging that costs of extra hours could be 20% in some counties, but "nothing in the record establish[es] what the total cost" is statewide or that these costs could not be "managed." *Id.*, PageID#5905.

For Section 2, the court likewise focused on "a comparison between past and present" as part of its inquiry into the "totality of the circumstances." *Id.*, PageID#5909. It again noted "the fact that individual voters may simply choose to vote at other times" with turnout unaffected, but said that Section 2 "is not necessarily about voter turnout but about opportunity to participate in the political process compared to other groups." *Id.*, PageID#5914. It concluded that having to vote at another time qualified as a loss of "opportunity" under Section 2. *Id.*

The court analyzed the remaining equitable factors in a few sentences. It dismissed the counties' costs as not "unmanageable," and ignored the presumption against last-minute election changes. *Id.*, PageID#5915.

Turning to the remedy, the court enjoined the Statute and Directive. It ordered early voting to start 35, not 28, days before Election Day. *Id.*, PageID#5917. It also ordered evening hours in certain weeks; and voting on Sunday, October 26. *Id.*, PageID#5918. The court next ordered the Secretary to abandon the uniformity it had previously ordered, prohibiting him from "preventing individual county Boards of Election" from adding more hours. *Id.* Finally, the court ordered Ohio's General Assembly to enact legislation consistent with its order. *Id.*

Ohio appealed the next day. The district court denied its stay request, citing its merits findings and concern over "greater public confusion." Doc.82, Order, PageID#5993. It found that staying the order, thus restoring the status quo that prevailed for almost seven months, would improperly upset the six-day-old status quo. *Id.*

SUMMARY OF ARGUMENT

The Court should reverse the preliminary injunction because (1) Plaintiffs will likely not succeed on their equal-protection claim; (2) Plaintiffs will likely not succeed on their claim under Section 2 of the Voting Rights Act; and (3) the equitable considerations point the State's way.

I. The district court mistakenly held that Ohio's expansive early-voting schedule violates the Fourteenth Amendment. To reach that result, it mixed and

matched two different doctrines—right-to-vote standards and equal-protection standards—to create an unprecedented framework. Its equal-protection analysis (with no *intent* element) would cut large swaths through generally applicable laws; similarly, its right-to-vote analysis (with any *disparate impact* creating an unconstitutional burden) would invalidate nearly all election regulations. This analysis, if accepted, would leave one to wonder whether many States with far fewer early-voting options have breached the Equal Protection Clause. The district court's constitutional holding cannot stand.

First, when considered under a right-to-vote rubric, the district court mistakenly measured the burden on voting and mistakenly assessed the state interest in the scope of early voting. As to the burden, the district court treated some voters' preferences about early voting as significant burdens. That ignores two lines of precedent. One, precedent that assesses the burden not as to the *narrow* voting restriction challenged, but in the context of *all* options to cast a ballot. Two, precedent that assesses the burden in facial challenges against the broad sweep of voters as a *whole*, not particular *subclasses*. As to the state interest, the court inverted the relevant question—demanding that the State show why the injunction did not unduly burden it, rather than asking if Plaintiffs justified the extraordinary remedy.

Second, when considered under an equal-protection rubric, the district court's analysis violated black-letter law by finding a violation based only on disparate *impact* without any discriminatory *intent*.

II. The district court was equally mistaken in finding a likely violation of Section 2 of the Voting Rights Act. Section 2 prohibits States from imposing practices that "result" in a denial of the right to vote on account of race. To determine whether a practice violates the section, courts follow a two-step approach: (1) consider whether the practice has a disparate impact on minorities by *comparing* its impact to the impact on minorities from an *alternative* practice the State could adopt, and then (2) consider the totality of circumstances if a disparate impact has been shown. Under the first step, in many cases (such as literacy tests) the benchmark will be a state regime *without* the practice. For others, however, the benchmark will be far from obvious. And if no "objective and workable standard for choosing a reasonable benchmark" exists, Section 2 does not apply.

Under these standards, this case fails at the outset. Plaintiffs have not shown an objective benchmark against which to compare Ohio's early-voting schedule. Ohio's early-voting schedule would *benefit*—not *harm*—African-Americans compared to the vast majority of benchmarks. Its schedule would beat 41 other state schedules. And a hypothetical "schedule" with even more early-voting times is limitless; it does not provide an *objectively reasonable* benchmark. Nor can

prior Ohio law provide a benchmark for comparing *current* law. The text, legislative history, and case law governing the Voting Rights Act all show that such a "retrogression" approach is reserved for Section 5, not Section 2. Nor is it conceivable that the Congress that enacted Section 2 intended to outlaw all then-existing state voting regimes, none of which matches Ohio's expansive early-voting opportunities. But that is the necessary result of the district court's decision. Finally, the canon of constitutional avoidance and the federalism clear-statement rule both show that Section 2 should not be interpreted in the district court's unlimited fashion.

III. The district court's change of the early-voting calendar, on election eve, should be reversed on the equities. This case is a textbook example why the Court has said that "last-minute injunctions changing election procedures are strongly disfavored." The district court wrote a new schedule just over three weeks out from the new start date. Appellate review, even expedited, puts Ohio within days of the start of voting. And the delay resulted from Plaintiffs dragging their heels; Ohio's schedule was set in *February*; Plaintiffs had seven months until September 30, but they waited *over four months* before seeking an injunction. Now, elections officials must scramble and spend taxpayer money to adjust, and the order creates voter confusion.

STANDARD OF REVIEW

"While a 'grant or denial of a preliminary injunction is reviewed for an abuse of discretion,' [the Court has been] mindful that a preliminary injunction is an 'extraordinary' form of relief and that the moving party in the district court has the 'burden of proving that the circumstances clearly demand it.'" *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012) (citation omitted) ("*SEIU*"). The Court, moreover, reviews all *legal* questions arising in the preliminary-injunction context *de novo*. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685 (6th Cir. 2002). The principal question in such appeals—"'whether the movant is likely to succeed on the merits'"—is a legal question reviewed *de novo*. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011) (citation omitted).

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). This standard is demanding because an injunction is an "extraordinary remedy." *Id.* at 22. A plaintiff must establish a "'strong'" likelihood of success, *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012) (citation omitted); a mere "possib[ility]"

of success does not suffice, *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). Similarly, the plaintiff must show a likely, not just a possible, irreparable injury. *Winter*, 555 U.S. at 22.

Plaintiffs do not meet these standards. They are not likely to succeed on their constitutional claim. *See* Part I. They are not likely to succeed on their statutory claim. *See* Part II. And their delay in seeking an injunction shows that the equities tip in Ohio's favor. *See* Part III.

I. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE OHIO TO SET 35 DAYS OF EARLY VOTING, INCLUDING EARLY VOTING IN THE EVENINGS AND ON THE WEEKENDS, BEFORE ELECTION DAY.

The Constitution permits neutral voting laws that neither severely burden the right to vote nor have a discriminatory intent. Ohio's generous early-voting calendar meets these broad parameters. The district court mistakenly disagreed.

A. States Have Broad Discretion To Adopt Neutral Election Laws That Do Not Severely Burden The Right To Vote.

The Constitution balances competing objectives in the voting context—"confer[ring] on the states broad authority to regulate" elections, while protecting the "implicit[]" "right to vote." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). Courts often confront these dueling concerns when analyzing neutral election regulations that do not make invidious distinctions among voters but that place some "restrictions on the right to vote." *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012). A neutral regulation might require, for example, that

voters show photo identification, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185 (2008), register 50 days before an election, *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973), or use touchscreens to vote, *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003). Courts analyze these laws *both* (1) under a unique voting-rights test *and* (2) under a traditional equal-protection test.

1. A unique voting-rights test gives the States broad authority to set reasonable, non-discriminatory election laws.

A unique "fundamental right[s]" test governing neutral election laws asks whether the law at issue unconstitutionally "burdens" the right to vote. *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591-92 (6th Cir. 2012) ("*NEOCH*"). The level of scrutiny that applies to an election law "depends upon the extent to which [it] burdens" that right. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The more severe the burden, the more rigorous the scrutiny.

Under this *Anderson/Burdick* framework, courts must initially measure the size of the burden. When doing so—at least for *facial* attacks—courts "consider only the statute's broad application to all [the State's] voters." *Crawford*, 553 U.S. at 202 (Stevens, J., op.); *N.C. State Conference of the NAACP v. McCrory*, 2014 WL 3892993, at *27 (M.D.N.C. Aug. 8, 2014). In addition, courts measure the burden of a particular provision by looking at the *entire* election regime, not at the provision in a vacuum. *See Burdick*, 504 U.S. at 435-37.

After identifying the burden's size, courts apply a corresponding tier of review. At one end, courts apply "strict scrutiny" to laws that impose "severe" burdens. *NEOCH*, 696 F.3d at 592. Courts, for example, have strictly scrutinized state laws that made it impossible for minor parties to gain ballot access. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 588-90 (6th Cir. 2006).

In the middle sit laws imposing burdens that, while not severe, are more than minimal. For these, courts balance "the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule." *NEOCH*, 696 F.3d at 592-93 (internal quotation marks omitted). In *Crawford*, for example, a three-Justice plurality upheld Indiana's photo-identification law because the State's fraud-related interests outweighed the "inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph." 553 U.S. at 189-198 (Stevens, J., op.). While the plurality conceded that the law might place a "heavier burden" "on a limited number of persons," such a limited heavy burden was insufficient to invalidate the law. *Id.* at 199-203. Three others, by comparison, would have held that because the "photo-identification law [was] a generally applicable, nondiscriminatory voting regulation," it should not be subject to *any* individualized attacks. *Id.* at 205 (Scalia, J., concurring in the judgment).

At the other end, courts apply rational-basis review to laws that impose no burdens or minimal burdens. *See NEOCH*, 696 F.3d at 592; *Biener v. Calio*, 361 F.3d 206, 214-15 & n.3 (3d Cir. 2004). The "statute need only be 'rationally related to legitimate government interests,'" and the challenger must negate "'every conceivable basis which might support the government action.'" *Johnson v. Bredesen*, 624 F.3d 742, 746-47 (6th Cir. 2010) (citations omitted). That will not be easy. "If the burden is merely 'reasonable' and 'nondiscriminatory,' . . . the government's legitimate regulatory interests will generally carry the day." *Stone v. Bd. of Election Comm'rs for Chicago*, 750 F.3d 678, 681 (7th Cir. 2014); *cf. Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (rejecting heightened scrutiny if law did not *directly and substantially* burden fundamental right).

These deferential rules apply to early-voting laws. *See Gustafson v. Ill. State Bd. Elections*, 2007 WL 2892667, at *9 (N.D. Ill. Sept. 30, 2007). The "right to vote" has never included the "right to receive absentee ballots." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). Rational-basis review thus applies to denials of absentee ballots unless plaintiffs show that the State fully prohibits them from voting. *Id.* at 807-09. Even when a college student and flight attendant alleged that their plans took them out-of-state on Election Day, such burdens triggered rational-basis review. *Fidell v. Bd. of Elections of N.Y.*, 343 F. Supp. 913, 915 (E.D.N.Y.), *aff'd* 409 U.S. 972 (1972); *Prigmore v. Renfro*, 356

F. Supp. 427, 432 (N.D. Ala.), *aff'd* 410 U.S. 919 (1972); *cf. Song v. City of Elyria*, 985 F.2d 840, 843 (6th Cir. 1993) (summary affirmances are binding). Thus, absentee-ballot laws receive higher scrutiny *only if* a refusal to grant that option "absolutely prohibits [the challengers] from voting." *Goosby v. Osser*, 409 U.S. 512, 521 (1973).

2. The traditional equal-protection test separately prohibits neutral laws passed with discriminatory animus.

When challengers cannot show that a neutral voting law severely burdens the right to vote of the *general* class of state voters, they can alternatively show the law's *specific* effect on a discrete class under the traditional equal-protection test. That test requires a challenger to show *both* that the law has a disparately harmful impact on the class *and* that the legislature intended to discriminate against it. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 372-73 (2001). The latter requirement is critical, as "[t]he Equal Protection Clause forbids only intentional discrimination." *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

B. Ohio's Neutral Early-Voting Schedule Does Not Burden The Right To Vote And Was Not Enacted With Any Animus.

Under these principles, three simple facts decide this case. *First*, Ohio's expansive early-voting schedule applies neutrally. *Second*, that schedule imposes

only reasonable, if any, inconveniences on the right to vote. *Third*, the schedule was not enacted with discriminatory intent.

1. Ohio's early-voting schedule is neutral, so *Obama for America* confirms its constitutionality.

Ohio's early-voting schedule for the 2014 election is a "generally applicable, nondiscriminatory voting regulation." *Crawford*, 553 U.S. at 207 (Scalia, J. concurring). *Generally*, Ohio's early-voting regime is facially neutral. Ohio allows *all* "qualified elector[s] [to] vote by absent voter's ballots." Ohio Rev. Code § 3509.02(A). *All* early-voting voters have multiple choices: vote in person at boards of elections, vote at home and mail the ballot, or vote at home and return the ballot to the board (or to an after-hours drop box). Doc.41-9, Damschroder Decl., PageID#1165-66. *All* early in-person voters may vote right after registration closes. Ohio Rev. Code § 3509.01(B)(3). And *all* those voters have equal times to vote from then on. Doc.41-22, Directive 2014-17, PageID#1282-83.

Specifically, the two changes to Ohio's early-voting regime are neutral. The first—the Statute's reduction in early in-person voting to the first day after the close of voter registration—applies to *all* voters using early in-person voting. Ohio Rev. Code § 3509.01(B)(3). As another court found for a similar elimination of same-day registration and voting, the change is "nondiscriminatory in the sense that it applies to every voter without regard to race or other classification." *McCrory*, 2014 WL 3892993, at *27. The second—the Directive's schedule for

early in-person voting—provides *all* voters the same times to vote. Doc.41-22, Directive 2014-17, PageID#1282-83.

The importance of this facial neutrality cannot be overstated. This Court's *Obama for America* decision turned on the distinction between facial discrimination and facial neutrality. It suggested at the preliminary-injunction stage that a facially *discriminatory* law granting three additional early in-person voting days only to military personnel likely would not survive constitutional scrutiny. 697 F.3d at 436. But the Court said it would have reached a *different* result had the law been *neutral*: "If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its 'important regulatory interests' *would likely be sufficient* to justify the restriction." *Id.* at 433-34 (citation omitted; emphasis added). In short, it is *Obama for America*'s carve-out for *neutral* laws, not its reasoning for the *discriminatory* law at issue there, that matters here.

2. Ohio's early-voting schedule comports with the right-to-vote test because the schedule promotes the right to vote.

Ohio's neutral voting calendar does not burden the right to vote and so is subject to rational-basis review. Regardless, the State's interests in passing this early-voting schedule would satisfy even heightened scrutiny.

a. Ohio's early-voting schedule does not burden the right to vote, and so rational-basis review applies.

Under the *Anderson/Burdick* framework, the Court should apply rational-basis review because Ohio's early-voting schedule does not burden the right to vote *at all*. The "right to vote" does not include the right to early voting by absentee ballot. *See McDonald*, 394 U.S. at 807-08. If it did, over a dozen state laws—including laws from two States in this circuit, Michigan and Kentucky—would raise serious constitutional concerns because they offer *zero* early-voting days for all voters. *See* Doc.41-3, Trende Decl., PageID#1019-20. Thus, Ohio's expansive early-voting options *encourage* the right to vote by allowing more opportunities for voting; they do not *hinder* that right.

McDonald made the same point: "Ironically, it is Illinois' willingness to go further than many States in extending the absentee voting privileges . . . that has provided [the challengers] with a basis for arguing that the provisions seem to operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise." *Id.* at 810-11. Rather than a burden, the challenged regime represented a "laudable state policy of absentee coverage." *Id.* Ohio's early-voting regime is light-years beyond the Illinois law applauded by *McDonald* in 1969 and, indeed, is well beyond some 41 other States in 2014. Doc.41-3, Trende Decl., PageID#1024. Ohio should be lauded, not sued.

Even assuming Ohio's expansive early-voting schedule paradoxically "burdens" the right to vote, its calendar is "reasonable" and should be judged under rational-basis review. *Weber*, 347 F.3d at 1107; *Biener*, 361 F.3d at 214-15 & n.3. Voters may vote in person on 19 weekdays between 8 a.m. and 5 p.m. (8-2 on Monday before the election). *See* Doc.41-22, Directive 2014-17, PageID#1282-83. Or voters may vote in person on two Saturdays and a Sunday. *See id.* And if travel is inconvenient, voters can vote by mail. Doc.41-9, Damschroder Decl., PageID#1166. Finally, they can vote on Election Day between 6:30 a.m. and 7:30 p.m. Ohio Rev. Code § 3501.32(A). These expansive options satisfy the right to vote. As Judge Posner found, it is "obvious" that federal courts cannot "decree weekend voting, multi-day voting, all-mail voting, or Internet voting." *Griffin*, 385 F.3d at 1130.

Plaintiffs have not shown that picking from Ohio's smorgasbord of voting options "absolutely prohibits" them from voting, so rational-basis review applies. *Goosby*, 409 U.S. at 521; *McDonald*, 394 U.S. at 809. Instead, Plaintiffs insist on the method they *prefer* or the day and time they *prefer*. But burdens on schedules do not trigger higher scrutiny. *Fidell*, 343 F. Supp. at 915, *aff'd* 409 U.S. 972.

b. Even under intermediate scrutiny, the changes to Ohio's early-voting laws further important interests.

Even if heightened scrutiny applied, Plaintiffs' claim fails. Ohio's generous early-voting laws further "relevant and legitimate state interests 'sufficiently

weighty to justify'" them. *Crawford*, 553 U.S. at 191 (Stevens, J., op.) (citation omitted). Those laws promote uniformity, address administrative realities, and help workers validate ballots.

Uniformity. Ohio set its early-voting regime to ensure that all 88 counties follow uniform rules. As a policy matter, the State could rightfully conclude that it is unfair that voters in different counties could vote at different times. Additionally, uniformity makes it easier for the State to educate voters about election days and hours. Uniform early-voting rules also reduce litigation risks. Ohio, for example, has been forced to defend against several lawsuits alleging that different kinds of unequal treatment violated the right to vote. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008); *Hunter*, 635 F.3d at 241-42. Indeed, Plaintiffs cannot genuinely assert that the State has no interest in uniformity when their own counsel repeatedly requested it. *See* Doc.41-14, ACLU Letter, PageID#1238; Doc.41-15, ACLU Letter, PageID#1241.

Administrative Balancing. Ohio designed its early-voting laws to balance dueling objectives—*maximizing* voter access and *minimizing* election costs. The days and hours it set reasonably accomplish that task. On one hand, Ohio "offers one of the longest periods of early voting, among the most days of early voting, and is one of the few states to make any Sundays available." Doc.41-3, Trende Decl., PageID#1054-55.

On the other, Ohio's laws seek to be "more efficient with our tax payer dollars." Doc.41-20, Ockerman Testimony, PageID#1263. "[M]ore hours means more money." Doc.41-18, Walch Decl., PageID#1253. Additional days "and increased early voting hours in the evenings and on weekends [would] increase the costs and administrative burdens" on boards. Doc.68-2, Ward Decl., PageID#5124. If Ohio increased the early-voting days and hours, many boards would have to "bring in additional staff" (requiring "additional funds"). Doc.68-3, Cuckler Decl., PageID#5511; Doc.68-4, Triantafilou Decl., PageID#5531; Doc.68-5, Munroe Decl., PageID#5581. A relatively smaller proportion of voters, moreover, voted during the times Ohio eliminated, compared to the times it kept. *See* Doc.54-3, Young Decl., PageID#1837; *id.*, PageID#1844; Doc.18-1, Smith Rep., PageID#186; Doc.64-3, Smith Dep., PageID#4182.

Indeed, Ohio largely based its times on the OAEO's recommendations. *See* Doc.41-16, Directive 2014-06, PageID#1246; Doc.41-20, Ockerman Testimony, PageID#1263. The OAEO—a bipartisan organization representing all 88 counties' interests—recommended a balance optimizing the tradeoff between ease of voting and administrative costs. Doc.41-20, Ockerman Testimony, PageID#1264. The OAEO's recommendations also account for voter turnout, including the reality that voter turnout has decreased despite increased opportunities to vote since 2005. Doc.54-4, Keeran Decl., PageID#1850. These recommendations additionally were

designed to "work for small, medium and large counties." Doc.41-19, OAEO Report, PageID#1256; Doc.41-21, Jones Decl. ¶ 28, PageID#1271.

Fraud Detection. The Statute also legitimately serves the interest of finding and disqualifying improper ballots. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The OAEO Director explained that the "registration deadline" exists so officials "can confirm that a voter is who they say they are before they cast a ballot." Doc.54-4, Keeran Decl., PageID#1851. When the deadline is later than the start of voting, votes might be counted even though cast "by people who fraudulently registered during this period, because the election officials could not confirm their registration status before Election Day." *Id*. The legislative judgment that less overlap would reduce mistaken counting is an important one.

In sum, Ohio has important reasons for settling on its early-voting schedule. Perhaps reasonable people could disagree on whether Ohio should add an extra day here or drop an extra hour there, but it is not the judiciary's job to enter that debate. "[I]t is the job of democratically-elected representatives to weigh the pros and cons of various balloting systems" and decide on the one that best fits their constituents' diverse needs. *Weber*, 347 F.3d at 1107. Ohio reasonably did so. The right to vote requires nothing more.

3. Since Ohio's early-voting schedule lacks any discriminatory animus, it survives the traditional equal-protection test.

Finally, Plaintiffs could not establish a traditional equal-protection violation. Even assuming the changes to Ohio's early-voting laws have a disparate impact on any class, equal protection prohibits only laws "promulgated *because of*" such an impact. *Horner*, 43 F.3d at 276. The district court did not find, and Plaintiffs did not argue, that the General Assembly passed the Statute or that the Secretary issued the Directive with *intent* to harm African-Americans (or any others). The district court suggested that the changes might affect certain voters differently, but nowhere claimed that Ohio enacted the changes *because of* those effects. Doc.72, Order, PageID#5900. Plaintiffs' arguments were of a piece. Doc.17, Mot., PageID#111. Because "[n]o evidence exists that" Ohio changed its calendar to "disproportionately harm" a class, the calendar satisfies the Equal Protection Clause. *United States v. Blewett*, 746 F.3d 647, 659 (6th Cir. 2013) (en banc).

C. The District Court's Contrary Analysis Was Mistaken.

1. The district court wrongly applied heightened scrutiny based on cases concerning discriminatory laws.

The district court analyzed Ohio's voting calendar as if it were facially discriminatory. Its case citations illustrate that error. *First*, it repeatedly relied on *Obama for America*. Doc.72, Order, PageID#5895-56. But *Obama for America* identifies the standards to apply when a "state treat[s] [a voter] *differently* than similarly situated voters," or burdens "voting rights through . . . *disparate*

treatment." 697 F.3d at 429 (emphases added). *Obama for America*, in other words, found it crucial that the law there "classified voters disparately," *id.* at 432, and said that this distinction between neutral and discriminatory laws drove its result, *id.* at 433-34. The district court ignored the decision's limiting reasoning.

Second, the district court departed from rational-basis review based on *Bush v. Gore*, 531 U.S. 98 (2000). It distinguished *McDonald* because Plaintiffs' claim "is about more than the privilege to use an absentee ballot," and because Ohio's decision to allow for *expansive* early voting prohibits it from "capriciously chang[ing] or implement[ing] that system in a manner that disproportionately burdens the right to vote of certain groups of voters." Doc.72, Order, PageID#5896-97 (citing *Bush*, 531 U.S. at 104-05). But *Bush* involved facially discriminatory standards—the "unequal evaluation of ballots" across counties. 531 U.S. at 106. Here, by contrast, Ohio provides uniform standards. Further, the district court's claim that it should use heightened scrutiny because Ohio adopted "broad" early voting turned a virtue into a vice. Doc.72, Order, PageID#5896. Ohio's "willingness to go further than many States" does not trigger heightened scrutiny; it shows a "laudable" state policy. *McDonald*, 394 U.S. at 810-11.

If anything, the district court's decision *causes* a *Bush v. Gore* problem. By mandating that the Secretary permit counties to set *unequal* hours *above* the uniform, the injunction destroys Ohio's efforts to bring early-voting *equality*.

Doc.72, Order, PageID#5918. If Ohio adopted such *discriminatory* county-by-county standards, it could have been sued. *See NEOCH*, 696 F.3d at 598. Dictating inequality for equality's sake does not turn inequality into equality.

2. The district court's analysis of the "burdens" imposed by Ohio law wrongly imported the traditional equal-protection test into the unique voting-rights test.

The district court's discussion of the "burdens" imposed by Ohio law likewise erred. Doc.72, Order, PageID#5897-5902. *First*, the court mistakenly asked only whether the *specific* early-voting changes burdened Ohio voters, rather than whether the *general* Ohio election rules do. But, when measuring a burden's size, courts do not analyze a challenged provision *in a vacuum*. Rather, they consider the entire regime, and ask whether that regime *overall* burdens the right to vote. For example, when analyzing a law that *altogether* prohibited voters from casting "write-in" votes, the Supreme Court did not measure the write-in prohibition alone. It measured the *entire* system, noting that it "provide[d] for easy access to the ballot" for candidates, and so the write-in prohibition provided only a "limited" burden. *Burdick*, 504 U.S. at 436-37; *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973) (distinguishing laws that "totally denied the electoral franchise" from those that "did not absolutely disenfranchise").

Here, the district court asked only whether the *changes* burdened very particular methods of voting. For example, the court asked whether fewer Sunday

options burdened the ability to vote on Sunday, while conceding that the same voting could occur on Saturday. Doc.72, Order, PageID#5900. The court also found a burden lurking in the possibility of "[un]timely" public transportation to an early-voting place without asking whether those same voters could not vote by mail or in person on Election Day at a (much closer) polling place. *Id*. This detail-oriented approach, if accepted, would invalidate nearly *every* State's early-voting regimes. After all, Ohio's general regime is much more generous to early voters than most States' laws. Doc.41-3, Trende Decl., PageID#1019-20.

Second, the district court mistakenly examined burdens on *individual* voters, not on voters as a *whole*. Yet in *Crawford* six Justices agreed that facial challenges could not proceed by looking "at a small number of voters who may experience a special burden." *Crawford*, 553 U.S. at 200 (Stevens, J., op.); *id*. at 205 ("our precedents refute the view that individual impacts are relevant to determining the severity of the burden") (Scalia, J., concurring). Instead, the Court considered "only the statute's broad application to all" voters. *Id*. at 202-03 (Stevens, J., op.).

The district court overlooked this rule. It cited practices from past elections that some voters had come to "rely on" since no-excuse absentee voting's inception in 2005 and other practices that some "prefer." Doc.72, Order, PageID#5899, 5901. It also speculated how the Statute's changes might affect some voters, stating that the Statute's choices "[might] not" be "suitable" for some.

Id., PageID#5902, 5901. None of this considers the Statute's *broad* application to all voters—or at least the average voter. Instead, the district court's burden analysis reads like a standard equal-protection case involving a *disparate impact* without the *key* equal-protection ingredient of *intentional* discrimination.

Third, the district court erred by calling the following substantial burdens: preferring to vote on Sunday; preferring not to use the mail; and preferring not to vote on Election Day. The error is plain when measured against the following non-severe burdens. *See Crawford*, 553 U.S. at 200 (some voters could not "afford or obtain a birth certificate and [therefore] must make a second trip to the circuit court clerk's office after voting"); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009) (no severe burden "to obtain a free voter identification card"); *cf. Griffin*, 385 F.3d at 1128-30 (no "blanket right" to vote absentee even though "working mothers" had to vote in person on Election Day).

The district court's errors when classifying burdens are especially stark in light of the evidence. For example, the district court said it is "reasonable to conclude that a reduction in the total time" available for early voting—particularly the reduction on Sundays other than the last Sunday before Election Day, Doc.72, Order, PageID#5899—would burden African-Americans, *id.*, PageID#5897. But the relevant question is not African-American's *overall* use of early voting—since

22 days remain—but whether the absence of the desired early-voting days substantially interferes with their right to vote. *See Lyng*, 477 U.S. at 638.

In that regard, Plaintiffs' own charts graphing in-person voting *undercut* the district court's conclusion. African-American and white early in-person voting rates are *more* similar for the days further out from an election (the days the Statute eliminated) and *less* similar on the days that the Directive mandates. Doc.61-16, Smith Dep. Ex. 7, PageID#2940. Even more remarkably, on the second Sunday before the election (a day the injunction orders) voting rates by African-Americans and whites are *nearly identical*. *Id.* Yet on the Sunday immediately before Election Day, African-American use of early in-person voting outpaces white use. *Id*. But that is a day the Directive *requires* early in-person voting.

3. The district court wrongly downplayed Ohio's important interests in support of its present early-voting laws.

Lastly, the district court wrongly assessed Ohio's interests. It minimized Ohio's desire for cost savings by citing *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006). But that case was *vacated* by the en-banc court. 473 F.3d 692 (6th Cir. 2007). This mistaken citation to *Stewart* infects the whole state-interest analysis.

Stewart rejected cost concerns under "strict scrutiny" 444 F.3d at 869, but strict scrutiny does not apply to non-severe burdens, *Burdick*, 504 U.S. at 434. Yet the court subjected the state interests to "careful evaluation," wondering why the State "could not" extend voting. Doc.72, Order, PageID#5902, 5906. Under this

"why not" approach many laws would fall. A State could allow voting *without* ID, could have a *shorter* registration deadline, could use *paper* ballots, could count the votes of those voting at the *wrong place*, and could offer absentee voting *to all*. *See Crawford*, 553 U.S. 181; *Marston*, 410 U.S. at 679; *Weber*, 347 F.3d 1101; *SEIU*, 698 F.3d at 341; *Griffin*, 385 F.3d 1128.

The court even said the *State* must show "undue burdens" on *itself* from the injunction. Doc.72, Order, PageID#5906. But it is the States, not the courts, that are entrusted with "broad authority to regulate the conduct of elections." *Griffin*, 385 F.3d at 1130. The Ohio counties' cost concerns, for example, were bipartisan. *See* Doc.54-4, Keeran Decl., PageID#1850 ("irresponsible" not to consider cost); *id*., PageID#1870 (small counties "fear[ed]" excessive hours). The district court contradicted these judgments (and the democratic process that embraced them) because it did not believe that its injunction would be "financially unworkable." Doc.72, Order, PageID#5905. For an injunction that purports to promote democracy, it has little regard for Ohio's democracy.

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR CLAIM THAT OHIO'S EXPANSIVE EARLY-VOTING CALENDAR VIOLATES SECTION 2 OF THE VOTING RIGHTS ACT.

Section 2 of the Voting Rights Act bars voting practices that "result" in a denial of the right to vote on account of race. Ohio's early-voting schedule does

not result in any such denial. The district court reached a contrary decision by mistakenly importing Section 5's "retrogression" approach into Section 2.

A. Section 2's "Results" Test Requires A Plaintiff To Show *Both* A Racially Disparate Harm *And* Additional Factors Tying This Harm To The Challenged State Practice.

In 1965, Congress enacted Section 2, which "prompted little criticism" because it mirrored the Fifteenth Amendment by requiring parties to show *intentional* discrimination to invalidate state laws. *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009) (plurality). In 1982, Congress amended Section 2 to its current form: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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 or color . . . ." 52 U.S.C. § 10301(a) (renumbered from 42 U.S.C §1973(a)).

This text has been interpreted to cover two types of claims. The first (vote "denial" claims) "challeng[e] voting procedures that disproportionately affect minority voters." *McCrory*, 2014 WL 3892993, at *12. The second (vote "dilution" claims) challenge "'practices that diminish minorities' political influence,' such as at-large elections and redistricting plans that either weaken or keep minorities' voting strength weak." *Simmons v. Galvin*, 575 F.3d 24, 29 (1st Cir. 2009) (citation omitted). For either type, a plaintiff must at least prove *both*

(1) that the challenged practice disproportionately harms minorities as compared to an alternative practice that the State could adopt, *and*, if so, (2) that the totality of circumstances illustrates that the practice has denied or abridged the right to vote.

Disparate Harm. A plaintiff must show that the challenged practice harms minorities. Yet, as the Supreme Court has said, a court cannot determine whether a challenged practice harms minorities without *comparing* the practice's impact on minorities to the impact on minorities from an *alternative* practice that the State could adopt. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("*Bossier II*") ("It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice."); *Holder v. Hall*, 512 U.S. 874, 880 (1994) (Kennedy, J., op.) (noting that "a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice").

In many cases, "the benchmark for comparison" will be "obvious." *Holder*, 512 U.S. at 880 (Kennedy, J., op.). When, for example, a requirement imposes an affirmative *burden* on the right to vote—such as "literacy tests" or "poll taxes," *Simmons*, 575 F.3d at 29—the comparator (or "benchmark") will be a voting system *without* that voting burden. *See Holder*, 512 U.S. at 880-81 (Kennedy, J., op.) (noting that a rule "can be evaluated by comparing the system with that rule to the system without that rule").

For other practices, however, the benchmark will be far from obvious. *Holder* provides a good example. There, challengers brought a vote-dilution claim against a county's choice to have a *single* commissioner. Plaintiffs sought to compare that choice to a "hypothetical *five*-member commission." *Id.* at 881 (emphasis added). That was not a valid benchmark. The plurality found "no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* at 881. Instead, the choice "was 'inherently standardless.'" *Id.* at 885 (citation omitted). Thus, the challengers could not state a Section 2 claim because "there [was] no objective and workable standard for choosing a reasonable benchmark." *Id.* at 881; *see Concerned Citizens for Equality v. McDonald*, 63 F.3d 413, 418 (5th Cir. 1995) (holding that the Texas Constitution's "elastic and amorphous phrase, 'for the convenience of the people,' cannot supply the type of 'objective and workable standard' that the Supreme Court envisions'" under Section 2 (citation omitted)).

Totality of Circumstances. Even if plaintiffs can show a disparate harm by measuring the challenged practice against an objective benchmark, "[i]t is well-settled, . . . that a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act." *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986). Indeed, "[s]everal courts of appeal have rejected § 2 challenges based purely on a showing of some relevant statistical disparity

between minorities and whites." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (citing cases).

Instead, "such a [disparate-impact] showing merely directs the court's inquiry into the interaction of the challenged [practice] 'with those historical, social and political factors generally probative of dilution.'" *Wesley*, 791 F.2d at 1261 (upholding felon-disenfranchisement law) (citation omitted). At this point, in other words, "[t]he plaintiff must also demonstrate that the totality of the circumstances supports a finding" of liability. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier I*"). Vote-dilution claims, for example, structure this totality test around the nine dilution "factors" identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See Brown v. Detzner*, 895 F. Supp. 2d 1236, 1245 n.13 (M.D. Fl. 2012).

B. Section 2 Does Not Micromanage The Method By Which Ohio Adjusts Its Generous Early-Voting Schedule.

Applying these rules here, the Court should interpret Section 2 not to reach Ohio's early-voting schedule. With respect to the Statute, a North Carolina court rejected a similar same-day-registration claim. *See McCrory*, 2014 WL 3892993, at *10-19. With respect to the Directive, a Florida court rejected a similar hours-based claim. *See Brown*, 895 F. Supp. 2d at 1249-55. Just last week, the Seventh Circuit overturned an injunction against a photo-identification law, holding that Wisconsin's "probability of success on the merits" was "sufficiently great that the

state should be allowed to implement its law." *Frank v. Walker*, No. 14-2058, Order (7th Cir. Sept. 12, 2014). The decision below stands alone.

1. The lack of an objective "benchmark" against which to measure Ohio's early-voting schedule dooms Plaintiffs' Section 2 claim.

To begin with, Plaintiffs have not shown an objective benchmark against which to compare Ohio's early-voting schedule. The choice of a benchmark is just as "'inherently standardless'" in this case as it was in *Holder*. 512 U.S. at 885 (Kennedy, J., op.) (citation omitted). Even assuming the district court's finding that African-Americans participate in early-voting opportunities more than whites, Doc.72, Order, PageID#5912, Ohio's early-voting schedule would *benefit*—not *harm*—African-Americans compared to the vast majority of alternative benchmarks.

A few examples illustrate the point. Overall, Ohio's schedule would beat 41 other States' schedules because it has more early-voting opportunities. Doc.41-3, Trende Decl., PageID#1021. Or maybe the comparison should be with the *average* schedule of all States with a *higher* percentage of African-Americans in their population? Here, too, Ohio's schedule is more expansive than *every one* of those States. *Id.*, PageID#1026. Or perhaps it should be an intra-circuit matchup among the four States in this Circuit. Ohio fares better than these States as well. *Id.*, PageID#1022.

Nor can a plaintiff's preferred hypothetical "schedule" to expand options further, such as "unlimited evenings and weekends," provide an *objective* alternative. The "ever more" standard has no limiting principle. Within a fixed timeframe of 28, 35, or any days, it could be four or five Saturdays or Sundays, with evening hours up to midnight. Or maybe 24/7? And when the *beginning* of the voting period is challenged, the hypotheticals are truly unlimited (or limited only by the candidate registration deadlines months earlier, and perhaps those, too, should move). In short, "it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place." *Holder*, 512 U.S. at 882 (Kennedy, J., op.). Ohio would comply with Section 2 under any *reasonable* benchmark. Because the hypothetical choice is standardless, it should not be made.

2. Section 5 reinforces that no objective benchmark exists under Section 2.

Section 5 of the Voting Rights Act confirms the absence of any objective benchmarks to analyze Ohio's early-voting schedule under Section 2, because the former shows that one potential objective benchmark—the State's *prior* law—cannot be used for the latter. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007) ("Statutes must 'be read as a whole.'" (citation omitted)).

Start with the text of the Sections. Section 2 prohibits all States from "impos[ing] or apply[ing]" a standard, practice, or procedure in a manner that

"*results*" in the "denial or abridgement of the right . . . to vote on account of race." 52 U.S.C § 10301(a) (emphasis added). Section 5, by contrast, required certain States to submit a *change* in election procedure to preclearance proceedings in which the States must show that the *change* "neither has the purpose nor will have the *effect* of denying or abridging the right to vote on account of race or color." 52 U.S.C. § 10304(a) (renumbered from 42 U.S.C. § 1973c(a)) (emphasis added). The separate Sections' use of different language shows that Congress meant for different scopes. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

Case law confirms this. The sections "differ in structure, purpose and application," *Holder*, 512 U.S. at 883 (Kennedy, J., op.), and the Supreme Court has "consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States," *Bossier I*, 520 U.S. at 477. Section 5 "uniquely deal[s] only and specifically with *changes* in voting procedures." *Bossier II*, 528 U.S. at 334. Under Section 5, therefore, "[t]he baseline for comparison is present by definition; it is the existing status." *Holder*, 512 U.S. at 883 (Kennedy, J., op.); *Bossier II*, 528 U.S. at 334 (noting that "the baseline is the status quo that is proposed to be changed"). Not so under Section 2. "Retrogression is not the inquiry" for that provision. *Holder*, 512 U.S. at 884 (Kennedy, J., op.) That is precisely why—unlike with Section 5's built-in baseline—a plaintiff in a Section 2 case "must postulate a reasonable alternative

voting practice to serve as the benchmark 'undiluted' voting practice." *Bossier I*, 520 U.S. at 480.

Legislative history is equally illustrative. The Senate Report said that Section 2's 1982 amendment "referr[ed] to the '*results*' of a challenged practice"—rather than asked "whether a proposed change has a discriminatory '*effect*'"—to expressly "*distinguish[]* the standard for proving of violation under Section 2 from the standard" for proving a violation under Section 5. *See* S. Rep. No. 97-417, at 68 (1982) (emphases added). In a footnote, the report added that a plaintiff "could *not* establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, *involved a retrogressive effect*." *Id.* at 68 n.224 (emphasis added). Retrogression does not cut it . . . period.

The Voting Rights Act's structure thus shows that the *only* objective benchmark off the table under Section 2 is the *very* benchmark that Plaintiffs use here—past Ohio early-voting schedules. Their motion repeatedly alleges discriminatory "results" by examining the *changes* to those schedules. Plaintiffs argued, for example, that "[e]liminating" some early-voting times disparately burdened African-Americans and that the "challenged cutbacks" caused inequality. Doc.17, Mot., PageID#122, 131. They also admitted that their studies allegedly found a disparate impact by examining the "reduction" in Ohio's early-voting

schedule. *Id.*, PageID#122. All of this—potentially relevant if Ohio were a covered State under Section 5—is beside the point under Section 2.

This is why recent courts have held that Section 2 "does not incorporate a 'retrogression' standard," *McCrory*, 2014 WL 3892993, at *16, and that the proper standard is "not comparing the new statute against the old to determine whether these voting changes will" harm minority voters, *Brown*, 895 F. Supp. 2d at 1251. They have also recognized the "'dramatic and far-reaching effects'" of this necessary reading of Section 2. *McCrory*, 2014 WL 3892993, at *16 (citation omitted). If North Carolina's departure from same-day registration violated Section 2, it would have "plac[ed] the laws of at least 36 other States which do not offer [that same-day option] in jeopardy of being in violation of Section 2." *Id.* And Florida's reduction to eight early-voting days could prove problematic for the States that lacked *any* early voting. *Brown*, 895 F. Supp. 2d at 1254. But these cases are small potatoes compared to this one—a case in which Plaintiffs seek to hold Ohio liable even though its early-voting schedule *leads* most States. In short, "[t]he important distinction between a Section 5 and a Section 2 claim [should] play[] a significant role in the Court's decision in this case." *Id.* at 1251.

3. The Congress that passed Section 2's amendments would not have intended to cover Ohio's early-voting schedule.

Situating Section 2 in its place in history confirms that it does not cover Ohio's expansive early-voting schedule. "[R]easonable statutory interpretation

must account for . . . 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation omitted). It is inconceivable that the Congress that enacted the Section 2 amendment *in 1982* would have intended to cover Ohio's early-voting schedule. Early absentee voting, or "convenience voting," barely existed when the Voting Rights Act was passed in 1965 and amended in 1982. A little over a decade before the amendment, the Supreme Court had held that the constitutional "right to vote" did not include the "right to receive absentee ballots." *McDonald*, 394 U.S. at 807. By the early 1990s, only about 7% of votes across all States were cast by any early absentee voting. *See* Burden, Canon, Mayer, and Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform,* 58 Am. J. of Pol. Sci. 95, 96 (2014).

Accepting Plaintiffs' view would mean that Congress, by amending Section 2, immediately outlawed *all 50 States*' voting regimes because *none* offered the expansive early-voting schedules Ohio offers today. The Supreme Court has repeatedly rejected interpretations that would lead to such unrealistic results. Last Term, for example, it rejected the EPA's reading of the Clean Air Act because the reading gave the agency "extravagant statutory power over the national economy," power the agency admitted "would render the statute 'unrecognizable to the Congress that designed' it." *Util. Air*, 134 S. Ct. at 2444 (citation omitted).

Similarly, the Court rejected the Food, Drug, and Cosmetic Act's application to cigarettes because the result would have required the FDA to ban smoking. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137 (2000). It is equally implausible to think that Congress meant to cover Ohio's early-voting schedule because that result would ban most election schedules at the time (and today).

4. Constitutional-avoidance and federalism canons resolve any doubt about Section 2's scope in Ohio's favor.

Two canons of construction confirm that the Court should not read Section 2 in this extravagant way as reaching Ohio's early-voting schedule.

Avoidance. Under the traditional canon of constitutional avoidance, courts interpret statutes with ambiguous scopes in a manner that avoids constitutional questions. *See Davet v. City of Cleveland*, 456 F.3d 549, 554-55 (6th Cir. 2006); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568, 575 (1988). This canon applies to the Voting Rights Act—which has been no stranger to constitutional litigation. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204-05 (2009); *cf. Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (invalidating coverage formula).

This case would raise a constitutional question under Plaintiffs' view. Section 2 arises from Congress's "power to enforce [the Fifteenth Amendment's ban on racial voting discrimination] by appropriate legislation." U.S. Const. amend. XV, § 2. Under this enforcement provision, Congress may *both* prohibit

violations of the Fifteenth Amendment (as it has done with 42 U.S.C. § 1983), *and* "enact so-called prophylactic legislation that proscribes *facially constitutional* conduct, in order to prevent and deter *unconstitutional conduct*." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003) (emphases added). But the scope of the latter prophylactic power has limits. That broad legislation must have "congruence and proportionality" between the harm remedied and the means employed. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Proper legislation responds to a history of *actual* constitutional violations arising from the type of practice at issue. *See Garrett*, 531 U.S. at 368; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000).

Indeed, in an early Voting Rights Act case, the Supreme Court explained that Congress's power to enforce voting rights was limited to practices that had a demonstrated history of use for racial discrimination. *See Oregon v. Mitchell*, 400 U.S. 112, 118 (1970), *superseded by* U.S. Const. amend. XXVI. In *Oregon*, the Court affirmed Congress's temporary ban on literacy tests, because "Congress had before it a long history of discriminatory use of literacy tests to disenfranchise voters on account of their race." *Id.* at 132 (Black, J., op.). The Court, by contrast, *invalidated* Congress's attempt to lower the minimum voting age from 21 to 18 for state elections, because "Congress made no legislative findings that the 21 year old

requirement was used by the States to disenfranchise voters on account of race." *Id.* at 130.

The Eleventh Circuit invoked the same reasoning for Section 2. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1229-32 (11th Cir. 2005). In *Johnson*, it rejected application of Section 2 to felon-disenfranchisement laws, noting that "plaintiffs' interpretation of [Section 2] raises grave constitutional concerns." *Id.* at 1232; *see id.* at 1231 (noting the "complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters"). At least with felon-disenfranchisement laws, some evidence exists outside the Voting Rights Act's record of their use for discriminatory purposes. *See Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985).

Here, by contrast, Plaintiffs have provided no evidence that States historically set their early-voting schedules to discriminate, just as no evidence existed that the 21-v.-18 voting age had a racial aspect. That is because, as noted, early in-person voting for all voters is a recent innovation that Ohio designed to *encourage* voting access. The *absence* of that practice when Congress amended Section 2 in 1982 shows that it did not face a record of States adopting the practice to hide discrimination. Because interpreting Section 2 to cover Ohio's early-voting schedule would raise substantial constitutional questions, the Court should not read the statute to do so.

Federalism. The Supreme Court requires Congress to include a clear statement if it intends to take away traditional state powers. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). State law, of course, has long governed elections, so when a "federal statute concerns congressional regulation of elections . . . a court must not lightly infer a congressional directive to negate the States' otherwise proper exercise of their sovereign power." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2261 (2013) (Kennedy, J., concurring in part and concurring in the judgment).

To be sure, the Court has inferred such an intent without a clear statement for legislation enacted under the *Elections Clause*, which allows Congress to set the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S Const., Art. I, § 4, cl. 1; *see Inter Tribal*, 133 S. Ct. at 2256-57. But the Voting Rights Act is *not* Elections Clause legislation (it applies to state elections), so it leaves courts with the usual "starting presumption that Congress does not intend to supplant state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

"The historic accomplishments of the Voting Rights Act are undeniable": it significantly changed the federal-state balance and for good reason given the "rampant" unconstitutional discrimination arising at the time. *Nw. Austin*, 557

U.S. at 201. But Congress, through Section 2, did not convey the required clear statement to micromanage Ohio's generous early-voting calendar. Indeed, Section 2 governs how States and their political subdivisions choose their state and local representatives, and the Supreme Court has acknowledged the "unique nature of state decisions that 'go to the heart of representative government.'" *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (citation omitted).

Not only that, Congress, through *other* legislation, conveyed the *opposite* intent. For one thing, based on its constitutional authority under the Elections Clause, Congress told the States that they must have only *one* election day. *See* 2 U.S.C. §§ 1, 7 (senators and representatives); 3 U.S.C. § 1 (president). If Congress wanted States to enact thirty-five additional earlier-voting days, it would have said so. For another, the National Voter Registration Act blessed state registration *deadlines* 30 days before Election Day. 52 U.S.C. § 20507(a) (renumbered from 42 U.S.C. § 1973gg-6(a)(1)(D)). Because "this statute was passed 11 years after the amendment to Section 2, it is difficult to conclude that Congress intended that a State's adoption of a registration cut-off before Election Day would constitute a violation of Section 2." *McCrory*, 2014 WL 3892993, at *17. Accordingly, the clear-statement rule, too, requires this Court to resolve any remaining doubt about Section 2 against Plaintiffs' stretch.

C. The District Court Incorrectly Interpreted Section 2.

The district court's contrary holding made at least three errors.

1. The district court undertook a retrogression analysis.

The heart and soul of the district court's order—the only conceivable way it could find that Ohio's early-voting calendar violated Section 2—is the use of a Section-5-style retrogression formula. It found a discriminatory "result" by engaging in a "*comparison* between past and current [early in-person] voting days and hours" and finding that Ohio's *reduction* in early-voting days and hours disproportionately "burden[s] the voting rights of African Americans." Doc.72, Order, PageID#5909, 5912 (emphasis added). The district court gave three reasons for this old-to-new comparison—the *Bossier II* decision, the totality-of-circumstances test, and the notion that Section 2 requires an "intensely local appraisal." *Id.*, PageID#5909-10. Each of these reasons confirms the court's error.

Bossier II. The district court initially cited *Bossier II* to support its use of *prior* Ohio law as the baseline to compare Ohio's *current* early-voting schedule. *Id.*, PageID#5909-10. But *Bossier II* interpreted Section 5, not Section 2. The appellants argued that a court could deny preclearance to a government's redistricting plan under *Section 5* if—even though the plan has no negative retrogressive effect on racial minorities (because the new plan is just as good as the *prior* plan)—the new plan is not as good as a *hypothetical* third plan. 528 U.S. at

324-25. The Court disagreed. It recognized the need for a *baseline* against which to compare a challenged practice under *both* Section 2 and Section 5: "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* at 334.

But *Bossier II* held that the baseline is different for the two sections. For Section 5 (like the claim at issue *there*), "the baseline is the *status quo* that is proposed to be changed"—i.e., a comparison of the *prior* law to the new law. *Id.* at 334 (emphasis added). For Section 2 (like the claim at issue *here*), the "comparison must be made with a *hypothetical alternative*" rather than prior law; "[i]f the *status quo* 'results in [an] abridgement of the right to vote' . . . relative to what the right to vote *ought to be*, the status quo itself must be changed." *Id.* at 334 (first emphasis added). *Id.* *Bossier II* could not make clearer that the Section 2 baseline is *not* the prior-law baseline the district court used here.

Totality of Circumstances. Nor could the district court claim that its retrogression baseline was "relevant to [Section 2's] totality of the circumstances inquiry." Doc.72, Order, PageID#5909. That put the cart before the horse. As noted, the first question that must be asked in a Section 2 case is whether the challenged practice has a "disproportionate racial impact." *Wesley*, 791 F.2d at 1260. Only if the answer is "yes" does this conclusion then "direct[] the court's inquiry into the interaction of the challenged legislation 'with those historical,

social and political factors generally probative of dilution.'" *Id.* at 1261 (emphasis added; citation omitted). In other words, the totality-of-the circumstances test never gets triggered unless a plaintiff *initially* shows that the practice harms racial minorities. And that initial "harm" question requires the court to identify "some baseline with which to compare the practice." *Bossier II*, 528 U.S. at 334.

Assume, for example, that everyone agreed that the baseline should be the state of the States' early-voting laws in 1982 when Congress amended Section 2. If that were so, Plaintiffs could not possibly claim that Ohio's expansive early-voting schedule has a disparate *harmful* impact. If anything, Ohio's schedule would have a *beneficial* impact—so long as one accepts the district court's conclusion that "African Americans use [early in-person] voting at higher rates than other groups of voters." Doc.72, Order, PageID#5912. Given that fact, the Section 2 analysis would end with a "no violation" conclusion. Nobody would say the district court must nevertheless examine the totality of circumstances to see if this racially *beneficial* practice *violates* Section 2.

Local Appraisal. While the district court said it should consider the *totality*-of-the circumstances, it swept aside *every* potential baseline against which to measure Ohio's early-voting schedule *except* the retrogression baseline. It rejected Ohio's proposed comparisons to other States because a Section 2 claim requires "'an intensely local appraisal.'" Doc.72, Order, PageID#5909 (quoting *Stewart*,

444 F.3d at 878, in turn, quoting *Gingles*, 478 U.S. at 78). Neither *Stewart* nor *Gingles* supported the district court's disregard of practical realities.

As for *Stewart*, it was, as noted, superseded by an en-banc decision. *See* 473 F.3d at 692. Regardless, that case does not help Plaintiffs. There, counties with higher African-American populations used punch-card technology that led to some votes not getting counted. The court said that it would be irrelevant if punch-card errors in counties with more Caucasian populations effectively cancelled out the other errors as a proportional matter. The court used the "local appraisal" language to reject the idea that "vote dilution in *one part* of the state can be remedied by *another part* of the state." 444 F.3d at 879 (emphases added). That analysis bears no similarity to this case.

As for *Gingles*, it was a vote-dilution case that tied its "local appraisal" language to *redistricting*. In particular, the case considered whether the use of a *multimember districting scheme* in North Carolina legislative districts impaired the opportunity of African-Americans to participate in the political process. 478 U.S. 30. In "evaluating a statutory claim of *vote dilution through districting*," the Court said, such a "determination [was] peculiarly dependent upon the facts of each case," and "requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Id.* at 79 (internal quotation marks omitted;

emphasis added). This fact-bound requirement for analyzing *districting* says nothing about a statewide voting law like an early-voting schedule.

One final point. The Court should look at the big picture. The district court's retrogression approach provides negative incentives from the perspective of anyone who truly wants to expand voting opportunities in all States, as opposed to cherry-picking attacks on Ohio. Any State considering an *experiment* in expanding early voting—to see if increased turnout or other benefits outweigh the administrative costs of the expansion—will surely hesitate if any attempted experiment forces that State, by a one-way ratchet, to keep the expansion *forever*. As noted, for example, Michigan and Kentucky do not have early in-person voting for all voters. *See* Doc.41-3, Trende Decl., PageID#1019-20. Affirmance for Plaintiffs on the district court's retrogression theory would only discourage these and other States to expand their early-voting opportunities.

2. The district court erred by substituting the *Gingles* factors for a finding of a "reasonable alternative" benchmark.

After the Court adopted a retrogression theory to find the disparate impact on African-Americans, it relied on the nine *Gingles* factors that are generally used in the vote-dilution context. *See* Doc.72, Order, PageID#5910-14. It made two mistakes by analyzing these factors.

For starters, the court should not have looked at these factors *at all* to resolve this vote-denial claim. The *Gingles* factors "were clearly designed with

redistricting and other 'vote-dilution' cases in mind." *McCrory*, 2014 WL 3892993 at *12. *Gingles*, itself a vote-dilution case, observed that the factors originated from another *vote-dilution* case that considered whether a redistricting plan minimized the strength of racial groups. *See Gingles*, 478 U.S. at 36 & n.4. Accordingly, the factors are "of limited usefulness" and should not be "specifically addressed" in the vote-denial context. *See Brown*, 895 F. Supp. 2d at 1245 n.13; *Simmons*, 575 F.3d at 42 n.24.

Even assuming these factors have a role to play, the district court erred in analyzing them *immediately* without first determining whether an adequate "hypothetical alternative" exists against which to measure the challenged practice. *Bossier II*, 528 U.S. at 334. At the least, these factors would be relevant *only* to the totality-of-circumstances test that comes *after* a court finds the challenged practice has a disparate racial impact. In other words, these factors are not a *substitute* for a holding that an adequate "hypothetical alternative" exists; they are an *independent* requirement that must be met in addition to that holding.

Holder makes this clear. To state a vote-dilution claim, it held that a plaintiff *must* prove three elements: (1) that separate "*Gingles* preconditions [have been] met"; (2) that the "totality of the circumstances" (including an analysis of the *Gingles* factors) "supports a finding of liability," *and* (3) that there exists "a reasonable alternative practice as a benchmark against which to measure the

existing voting practice." 512 U.S. at 880 (Kennedy, J., op.); *see Bossier I*, 520 U.S. at 479-80 (identifying same elements). A finding that the *Gingles* factors have been met—the second element—does nothing also to establish that the third element has been. And that element is missing here as a matter of law.

3. The district court ignored Section 2's causation element.

Lastly, the district court erred by never addressing causation. Doc.72, Order, PageID#5908-14. Under Section 2, a plaintiff must establish that there was "some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote." *Ortiz v. Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310 (3rd Cir. 1994). The Fourth Circuit, for example, found no Section 2 violation when there was no "causal link between the [challenged] appointive system and black underrepresentation." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1990). The Fifth likewise rejected a Section 2 claim because "the cause of Hispanic voters' lack of electoral success [was] failure to take advantage of political opportunity," not any state practice. *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992).

Here, Plaintiffs' own evidence shows that it cannot prove causation. Plaintiffs' expert purported to show that in five counties in the last mid-term election, African-Americans used early in-person voting more than whites.

Doc.18-1, Smith Rep., PageID#191-93. But Smith warned against extrapolating from this data conclusions about the entire State. Doc.64-3, Smith Dep., PageID#4215. That warning was for good reason: Ohio considered the statewide data for the same election and found no statistical difference between African-American and white early in-person voting. Doc.41-3, Trende Decl., PageID#1047-54. Further, Smith's data showed both that the early-voting days *eliminated* by the Statute and the Directive were among the days with the *lowest* African-American voting rates, *and* that the days *retained* were among the days with the *higher* African-American voting rates. *See, e.g.*, Doc.61-16, Smith Dep. Ex. 7, PageID#2940.

III. COURTS DISFAVOR LAST-MINUTE CHANGES IN ELECTION PROCEDURES, SO THE EQUITIES TIP AGAINST THE INJUNCTION.

Even assuming that the merits were closer, the Court should reverse because the equities cut against this last-minute injunction.

A. Courts Disfavor Last-Minute, Election-Law Changes.

"As a general rule, last-minute injunctions changing election procedures are strongly disfavored." *SEIU*, 698 F.3d at 345; *Purcell*, 549 U.S. at 4-5. This presumption is an election-specific application of the equitable factors governing injunctions—fairness to the parties and effect on the public interest. *See Winter*, 555 U.S. at 20. As for the public interest, last-minute changes harm the officials who administer the elections and cause voter confusion. *SEIU*, 698 F.3d at 346.

As for fairness, a delay in seeking an injunction matters: "plaintiffs' failure to act earlier in pursuing these claims significantly undermines their assertions of irreparable harm in the absence of the injunction." *Id*.

Despite these admonishments against last-minute injunctions, the Court has repeated the message nearly every election cycle. *See Nader v. Blackwell*, 230 F.3d 833, 834-35 (6th Cir. 2000); *Summit Cnty.*, 388 F.3d at 551; *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006). In 2012, the Court even rejected vacatur of a published opinion mooted by the election to "provid[e] guidance on injunctive relief as it concerns last-second changes to election procedures." *Serv. Emps. Int'l Union v. Husted*, 531 F. App'x 755, 756 (6th Cir. 2013).

B. The District Court's Last-Minute Change Is Unfair Because Plaintiffs Delayed For Months And The Change Harms Voters And Election Officials.

The presumption against last-minute changes applies with full force here.

Delay. The Plaintiffs waited months—consuming over half of the available time—before seeking this injunction. The Statute was signed into law on February 21, 2014. And the Secretary's initial directive setting hours and dates was issued on February 25. Yet Plaintiffs took two months to sue, and another two to seek an injunction. That delay consumed *over half* the available time.

Plaintiffs' Injury. Nothing about Plaintiffs' alleged injuries outweighs the equity favoring the State as a result of their delay. The district court conceded that Plaintiffs presented no evidence that any voter would be *denied* the right to vote. And any mere *inconvenience* of having to vote at another time or by the mail does not tip equity in their favor. "[L]ife's vagaries" do not establish an irreparable injury. *Crawford*, 553 U.S. at 197 (Stevens, J., op.).

Public Injuries. The injunction, by contrast, is unfair to the public and elections officials. Ohio's voters are harmed. Any benefit of extra hours is outweighed by the confusion resulting from the injunction's changes. *Purcell*, 549 U.S. at 4-5. Plaintiffs *admit* that last-minute changes can cause voter confusion, but they use that as a reason to avoid appellate review. Doc.81, Resp., PageID#5986. Their argument confirms that the district court *never* should have entered the injunction to begin with—the balance of the equities should account for the State's ability to exhaust appellate review. *Cf. Purcell*, 549 U.S. at 5. Elections officials also have been planning all year for a different calendar. They must now go back to processing registrations during early voting. They must be open nights and weekends. They still will not know their final schedule until their board of elections decides whether to add further hours.

Finally, the public interest includes Ohioans' interest in having their laws put into place. *See Summit*, 388 F.3d at 551. The challenged laws might not

represent policies that Plaintiffs prefer, but that is what democracy is all about. "[I]t is the job of democratically-elected representatives to weigh the pros and cons of various [election laws]. So long as their choice is reasonable and neutral, it is free from judicial second-guessing." *Weber*, 347 F.3d at 1107.

C. The District Court Ignored The Admonition Against Last-Minute Changes And Its Statements About The Equities Were Wrong.

The district court did not account for the presumption against last-minute injunctions. And while it did discuss the three equity factors, that discussion was flawed. Doc.72, Order, PageID#5915-16. The court said that Plaintiffs were irreparably harmed by burdens on voting, that the boards of elections would not be burdened by unbudgeted costs, and that the public was served by maximizing turnout. *See id.* Those summary statements miss the mark.

First, the court erred in saying that Plaintiffs would be harmed by a "restriction of the fundamental right to vote," as it *never* found such a restriction and, indeed, admitted that "it [was] *impossible* to predict whether voters who have voted during [the earliest week] in past elections would not now vote." Doc.72, Order, PageID#5897. Instead, the court cited the inconvenience of voting at another time as the "burden." *Id.* Even if that inconvenience were somehow relevant to the merits, it cannot justify injunctive relief.

Second, the court dismissed the burden on the boards of election as not "unmanageable." Doc.72, Order, PageID#5915. The court said only that the costs

of even longer early-voting schedules were manageable, saying *nothing* to address the costs of additional nights and weekends. And the court pointed to nothing beyond its intuition that the costs would be manageable and justified.

Third, the court's description of the public interest got it backwards. The court said that the public interest favors maximum turnout, but it never found that the expanded hours would improve turnout, as opposed to merely making it more convenient for some voters to vote. And it failed *entirely* to mention the public interest in the State having its laws upheld—something this Court and the Supreme Court have stressed. *See, e.g.*, *Summit Cnty.*, 388 F.3d at 551.

CONCLUSION

The Court should reverse the district court's preliminary injunction.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32 (b)(1), the brief contains 13,773 words.

2. The brief has been prepared in monospaced (nonproportionally spaced) typeface using a Times New Roman, 14 point font.

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 15th day of September 2014. Electronic service was therefore made upon all counsel of record on the same day.

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DESIGNATION OF DISTRICT COURT RECORD

Defendants-Appellants Ohio Attorney General Michael DeWine and Ohio Secretary of State Jon Husted designate the following district court documents:

Document No.	Name of Document and Date	PageID#
1	Complaint (5/1/2014)	1-35
17	Plaintiffs' Motion for Preliminary Injunction (6/30/2014)	92-153
18-1	Dr. Smith Expert Report (7/1/2014)	162-242
41	Defendant Husted's Response in Opposition to Motion for Preliminary Injunction (7/23/2014)	955-1005
41-3	Trende Declaration (7/23/2014)	1010-1071
41-4	Report of Nolan McCarty (7/23/2014)	1072-1103
41-5	Report of Thomas Brunell, Ph.D. (7/23/2014)	1104-1130
41-6	Ohio Revised Code § 3509.02 (7/23/2014)	1131-1134
41-7	2005 Ohio Laws File 40 (Sub. H.B. 234) (7/23/2014)	1135-1142
41-9	Declaration of Matthew Damschroder (7/23/2014)	1163-1174
41-13	Directive 2012-35 (7/23/2014)	1233-1235
41-14	Aug. 13, 2012 Letter from ACLU to Husted (7/23/2014)	1236-1239
41-15	Nov. 15, 2012 Letter from ACLU to Husted (7/23/2014)	1240-1244
41-16	Directive 2014-06 (7/23/2014)	1245-1247
41-18	Declaration of Dana Walch (7/23/2014)	1251-1254

41-19	OAEO Report and Recommendations for Absentee Voting Reform (7/23/2014)	1255-1261
41-20	Testimony of OAEO Executive Director Aaron Ockerman regarding S.B. 238 (7/23/2014)	1262-1266
41-21	Declaration of OAEO President Kathy Jones (7/23/2014)	1267-1280
41-22	Directive 2014-17 (7/23/2014)	1281-1283
54-3	Declaration of Brad Young (7/23/2014)	1830-1844
54-4	Declaration of Vincent Keeran (7/31/2014)	1845-1875
61-16	Smith Deposition Exhibit 7	2939-2940
64-3	Deposition of Dr. Daniel A. Smith taken Aug. 1, 2014 (8/7/2014)	4167-4276
64-4	Deposition of Vincent Roscigno, Ph.D. taken July 10, 2014 (8/7/2014)	4277-4317
68-2	Declaration of Timothy A. Ward (8/8/2014)	5122-5127
68-3	Declaration of Steven Cuckler (8/8/2014)	5509-5529
68-4	Declaration of Alex M. Triantafilou (8/8/2014)	5530-5580
68-5	Declaration of Mark E. Munroe (8/8/2014)	5581-5582
72	Memorandum Opinion and Order granting Motion for Preliminary Injunction (9/4/2014)	5848-5918
73	Defendants DeWine and Husted's Notice of Appeal (9/5/2014)	5979-5921
81	Plaintiffs' Response to Motion to Stay (9/10/2014)	5983-5988
82	Order denying Motion to Stay (9/10/2014)	5989-5993