No. 14-3877

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.

Mike DeWine, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio, Case No. 2:14-cv-00404

APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-3877 Case Name: Ohio State Conf., et al v. DeWine, et al

Name of counsel: Freda J. Levenson

Pursuant to 6th Cir. R. 26.1, Ohio State Conference of the National . . . cont'd on third page
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on September 8, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Freda J. Levenson
ACLU of Ohio Foundation Inc.

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

(cont'd from first page) Association for the Advancement of Colored People; League of Women Voters of Ohio; Bethel African Methodist Episcopal Church; Omega Baptist Church; College Hill Community Church Presbyterian, U.S.A.; A. Philip Randolph Institute; and Darryl Fairchild

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a), Plaintiffs-Appellees request oral argument. While this case is being considered on an expedited basis, the issues it presents are of substantial importance. Plaintiffs believe an oral argument at the Court's earliest convenience would aid the Court in deciding the issues before it—issues involving the fundamental right to vote, racial discrimination, and the ability of Ohio voters to participate in the democratic process.

STATEMENT OF THE ISSUES

1. Did the district court clearly err in its factual findings that the elimination of same-day registration, evening voting, and voting on Sundays would impose significant burdens on Ohio voters?
2. Did the district court correctly find that Plaintiffs are likely to succeed on the merits of their Fourteenth Amendment claim because the significant burdens imposed by the challenged restrictions outweigh the unsubstantiated justifications proffered by Defendants?
3. Did the district court clearly err in finding that SB 238 and the Directives interact with historic and socioeconomic disparities to disproportionately burden African-American voters in Ohio?

4. Did the district court correctly find that Plaintiffs are likely to succeed on the merits of their claim under Section 2 of the Voting Rights Act because of the disproportionate burdens caused by the challenged restrictions?
5. Did the district court abuse its discretion in its consideration of the equitable factors that support the preliminary injunctive relief entered in this case?

STATEMENT OF THE CASE

A. Ohio Established the Right to Same-Day Registration and Early In-Person Voting After Voters Faced Disastrously Long Lines in the 2004 Election

The right to no-fault absentee voting in Ohio was first created nearly a decade ago, in response to the disastrous 2004 Presidential election, in which Ohio "voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day." *Obama for Am. v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012) ("*OFA*"). Thousands of Ohio voters, particularly in African-American areas, were disenfranchised, as long lines forced many to surrender before voting due to inflexible work schedules, child-care commitments, or outright frustration. Op., RE72, PageID#5869-5870.

In 2005, the State responded by removing the requirement that an absentee voter provide an excuse in order to vote before Election Day, and by establishing the statutory right to vote early in-person ("EIP voting") starting on the 35th day before an election. *Id.* at PageID#5848-5849. Because Ohio law sets the deadline

for registration at 30 days prior to an election, this also created a window of time for same-day registration during the first week of early voting ("Golden Week"), providing Ohio voters the opportunity to register or update their registration and vote during a single trip. *Id.* at PageID#5849. Each county is permitted only one voting location for early voting. *Id.*

B. Thousands of Ohio Voters Rely on Same-Day Registration, Evening Voting, and Sunday Voting

Since EIP voting opportunities were established, Ohio voters have increasingly relied on them. During the 2008 election:

> approximately 1.7 million Ohioans cast their ballots before election day, amounting to 20.7% of registered voters and 29.7% of the total votes cast. In Ohio's twelve largest counties, approximately 340,000 voters, or about 9% of the total votes cast in those counties, chose to vote early at a local board of elections office. … In 2010, approximately 1 million Ohioans voted early, and 17.8% of them chose to cast their ballots in person.

OFA, 697 F.3d at 426. This reliance on early voting has only increased, rising to 32% in the 2012 election. *See* Smith Rep., RE18-1, PageID#167. As this Court has observed, EIP voters in Ohio

> tend[] to be members of different demographic groups than those who voted on election day. Early voters were more likely than election-day voters to be women, older, and of lower income and education attainment. Data from Cuyahoga and Franklin Counties suggests that early voters were disproportionately African-American.

OFA, 697 F.3d at 426-27 (internal quotation marks and citation omitted). In particular, many EIP votes are "cast after hours on weekdays [and] on the

weekend." *Id.* at 427.

1. The Same-Day Registration Period

Since the implementation of same-day registration, tens of thousands of Ohio voters have relied upon it. Op., RE72, PageID#5897. In 2008, 12,842 voters registered or updated their registration and voted at the same time, and 67,408 voters cast in-person ballots during Golden Week. *Id.* at PageID#5854. In 2010, 1,651 people registered or updated their registration during Golden Week, and 26,230 people cast ballots during this period. *Id.* at PageID#5855. During Golden Week in 2012, 14,253[1] voters registered or updated their registration and voted at the same time, and 89,224 voters voted in person. *Id.* at PageID#5857.

The district court credited the undisputed declarations of numerous witnesses who work with churches, shelters, and other charitable organizations, testifying that voters in Ohio who are low-income, have less education, or are homeless rely heavily on same-day registration. *See id.* at PageID#5865, 5870-

[1] The district court found that 5,844 used same-day registration in 2012. Op., RE72, PageID#5898. The "5,844" number, however, is likely based on an inadvertent misread of Defendants' data table. According to that table, 5,844 Ohio voters *registered to vote for the first time* and voted during the same-day registration period in 2012. DeWine Statement of Disputed Facts, RE63, PageID#3315, ¶ 4 (citing Nov. 6, 2012 General Election Data, RE 63-2, PageID#3335 (data table)). However, the table shows that 8,409 additional Ohio voters *updated their registration* and voted at the same time during the same-day registration period, RE63-2, PageID#3335, bringing the total to *14,253* Ohio voters using same-day registration in 2012, an *increase* from 2008. *See also* Pls.' Reply in Supp. of Mot. for Prelim. Inj., RE52, PageID#1515.

5871. Such individuals tend to be more transient, requiring more frequent opportunities to update their voter registration, and limited transportation options make it especially valuable to resolve all registration issues and vote in one trip. *See id.* at PageID#5898. The district court found that same-day registration can determine whether one may exercise their right to vote. *Id.* Experts for both Plaintiffs and Defendants acknowledged the scholarly consensus that same-day registration boost participation. *Id.* at PageID#5887, 5891.

The district court found that these voters are disproportionately African Americans, who rely on EIP voting at "far greater rates" than whites in Ohio, including during the same-day registration period. *Id.* at PageID#5892. Crediting the testimony of Plaintiffs' expert Dr. Daniel Smith—who drew on election and demographic data from 2008, 2010, and 2012, and relied on several different methods to analyze racial differences in EIP usage in Ohio[2]—the district court

[2] Dr. Smith is a tenured Professor of Political Science at the University of Florida and a nationally renowned expert on electoral processes and political behavior. Dr. Smith relied on data including: voting and demographic statistics in every census block throughout Ohio during the 2012 election; analogous data from Ohio's five largest counties during the 2010 election; and Census Bureau data from 2008 and 2012. He then utilized three standard techniques commonly relied upon by social scientists and widely accepted in voting litigation, including bivariate correlation, homogenous area analysis and method of bounds analysis. Each of these methods supported Dr. Smith's findings that (1) African Americans in Ohio rely on EIP voting at higher rates than whites; and (2) African Americans disproportionately cast EIP votes during the Golden Week and on Sundays. *See* Op., RE72, PageID#5874-5878. In response to one of Defendants' experts, Dr. Smith also performed two additional analyses, and arrived at results consistent with his

found that "African Americans rely on EIP voting at far greater rates than whites in Ohio, including on the days and times [at issue in this litigation]." *Id.* at PageID#5891-5892.

The district court further found that African Americans' disproportionate reliance on these voting opportunities was not a statistical accident. Instead, surveying numerous "undisputed findings regarding employment disparities as well as significant disparities in residential, transportation, and childcare options," *id.* at PageID#5892, the district court found that it was *because* of such disparities that African Americans disproportionately rely on the eliminated voting opportunities that were eliminated, *id.* at PageID#5913. The court credited the testimony of Plaintiffs' expert Dr. Vincent Roscigno that, in part due to ongoing patterns of discrimination in Ohio, African-Americans disproportionately hold hourly-wage jobs, experience residential instability, and lack access to transportation, *see id.* at PageID#5881-5882, 5892, and thus are overrepresented among those groups that rely on same-day registration, including the poor and the homeless, *id.* at PageID#5912.

In addition, the district court made extensive findings that voting by mail is not an adequate method of voting for many African-American, lower-income, and

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original conclusions. *Id.* at PageID#5888. Dr. Smith also analyzed Census Bureau data, which confirmed his findings. *Id.* at PageID#5878-5879.

homeless Ohio voters. *Id.* at PageID#5901-5902.[3]

2. Evening Voting Hours

Evening voting has also been a fixture in Ohio. During the 2010 election, 13 counties held evening EIP voting hours, *id.* at PageID#5855, including six large counties with the highest African-American populations in the State, *id.* at PageID#5856. In 2012 , all 88 counties followed a single statewide early voting schedule, which included evening hours on ten weekdays. *Id.* at PageID#5856-5857. Based on uncontradicted testimony, the district court found that working-class voters in Ohio significantly rely on these evening voting opportunities. *See id.* at PageID#5865, 5872. Hourly-wage workers—who are disproportionately African-American, *see id.* at PageID#5882—often have inflexible work schedules that prohibit them from voting during business hours. *See id.* at PageID#5912-5913. These challenges are compounded by other issues frequently faced by working-class individuals, including lack of transportation, family obligations, and health issues. *Id.* at PageID#5873, 5913.

[3]Voting by mail has recently become more inaccessible. This year, Ohio passed SB 205, which prohibited Boards of Elections from prepaying the return postage for mail-in ballots, prohibited Boards of Elections officials from helping voters fill out the *application* for a mail-in ballot, mandated the invalidation of any ballot that was not perfectly "completed," and prohibited *any* elections official other than the Secretary of State from sending out unsolicited applications for mail-in ballots—and even then, only with the General Assembly's express permission. *See* Ohio General Assembly, SB 205, *available at:* http://www.legislature.state.oh.us/bills.cfm?ID=130_SB_205.

3. Sunday Voting

Ohio voters also rely on EIP voting on Sundays, which were consistently maintained by numerous Boards of Elections across the state over the last decade. In particular, African-American communities rely on Sunday voting to conduct "Souls to the Polls" initiatives, *id.* at PageID#5899, organized efforts by predominantly African-American churches to transport members of their congregations and others to the polls after church services, *see id.* at PageID#5856. These programs, "ha[ve] developed into a civic component of African-American church life in Ohio, where community leaders raise awareness of voting and encourage and assist members of the community to vote." *Id.* at PageID#5899.

Unsurprisingly, the counties that have "offered multiple Sundays of voting[] tended to be counties with high African-American populations." *Id.* at PageID#5899; *see also* Cable Decl., RE18-29, PageID#494, ¶¶ 2-3 (counties representing over 78% of Ohio's African-American population had *multiple* Sundays available for early voting in 2008 and/or 2010).

The district court credited the uncontradicted testimony of numerous witnesses, including over half a dozen leaders of churches and civic organizations, who described the significant reliance of African-American communities on Sunday voting to assist voters confronting difficulties such as poverty, lack of

transportation, inflexible work schedules, and disabilities. Op., RE72, at PageID#5864-5868, 5871-5872, 5899. The district court then found that

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

Id. at PageID#5899.

C. Failed Attempts to Eliminate Weekend Early Voting in 2012

The fact that Sunday voting was an African-American phenomenon in Ohio did not go unnoticed. As a member from the Franklin County Board of Elections wrote in an e-mail to a reporter, "I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter-turnout machine." *Id.* at PageID#5885; Rowland Article, RE18-48, PageID#551; *see also* Op., RE72, PageID#5885 (State Representative Matt Huffman stating, "[t]here's that group of people who say, 'I'm only voting if someone drives me down after church on Sunday.' ... Really? Is that the person we need to cater to when we're making public policy about elections?").

On August 15, 2012, Defendant Husted issued Directive 2012-35, which eliminated *all* weekend hours statewide (except, apparently, for certain military voters), though it permitted some weekday evening hours during the last two weeks of the early voting period. Directive 2012-35, RE18-34, PageID#527-528.

This spurred litigation that eventually led to the granting of a preliminary injunction requiring Defendant Husted to restore EIP voting hours for the weekend and Monday before the 2012 Presidential election. This Court affirmed. *OFA*, 697 F.3d at 437. However, counties were permitted only one Sunday, and uncontradicted testimony revealed that four hours of voting on a single Sunday was not adequate for effective Souls to the Polls programs, because of insufficient resources; organizational and logistical limitations; and long lines that result from attempting to process all Sunday voters on a single day. Op., RE72, PageID#5866, 5868, 5872-73, 5899.

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

On November 13, 2013, the Ohio General Assembly introduced Senate Bill 238 ("SB 238"), amending Ohio Rev. Code §§ 3509.01(B) and 3511.10 to permanently eliminate same-day registration. Op., RE72, PageID#5849. SB 238 was rushed through the Senate within a week. (Introduced on November 13, OGA Opp'n to Pls.' Mot. for Prelim. Inj., RE54-1, PageID#1726; passed on November 20, Senate Dem. Caucus Amicus Br., RE58, PageID#1966-1967.) In the House, proponents of the bill prevented a vote concerning a proposed amendment that would have required the Secretary of State to *assess* the impact of SB 238 on African Americans and other marginalized groups. Pls.' Mot. for Prelim. Inj.,

RE17 ("MPI"), PageID#137. The bill was passed on February 19, 2014 and signed into law by Governor Kasich on February 21, 2014. Op., RE72, PageID#5849.

Defendant Husted issued Directive 2014-06 four days later on February 25, 2014. Directive 2014-06, RE18-36, PageID#530-531. It eliminated *all* weekday evening and Sunday hours. This marked the first time since EIP was established that evening hours were *completely banned* in an election. *Id.* This schedule mirrored a six-page report issued by the Ohio Association of Election Officials ("OAEO"). Op., RE72, PageID#5857; OAEO Rep., RE18-33, PageID#521-526. Uniformity is the only rationale asserted for these cutbacks; neither cost nor fraud is mentioned. *Id.* at PageID#523.

E. Procedural History

Plaintiffs Ohio State Conference of the National Association for the Advancement of Colored People, the League of Women Voters of Ohio, Bethel African Methodist Episcopal Church, Omega Baptist Church, College Hill Community Church Presbyterian USA, A. Philip Randolph Institute, and Darryl Fairchild are nonpartisan organizations, African-American churches, and individuals who conduct get-out-the-vote programs to educate and assist Ohio voters. They rely on same-day registration, Sunday voting, and/or weekday evening voting in their efforts to help voters—especially African Americans and

working-class citizens—exercise their fundamental right to vote. Op., RE72, PageID#5864-5868.

On May 1, 2014, Plaintiffs filed their complaint, bringing claims under the Equal Protection Clause of the Fourteenth Amendment and Section 2 of the Voting Rights Act of 1965 ("VRA"), 52 U.S.C. § 10301. Compl., RE1; Op., RE72, PageID#5851. Specifically, Plaintiffs challenged the elimination of same-day registration, evening voting hours, and Sunday voting.

A little over one month later, the district court granted summary judgment and a permanent injunction in a related case, restoring early voting for the three days preceding Election Day. *Obama for Am. v. Husted*, No. 2:12-cv-636, 2014 WL 2611316, at *5 (S.D. Ohio June 11, 2014). As a result, Defendant Husted issued Directive 2014-17, which was nearly identical to Directive 2014-06 (collectively, the "Directives"). The new Directive reaffirmed the ban on weekday evening voting, but pursuant to court order, it permitted four hours of voting on a single Sunday on the weekend prior to Election Day. Directive 2014-17, RE18-37, PageID#532-533. Thus, Directive 2014-17 continued to ban voting on *multiple* Sundays.[4]

[4] For the sake of simplicity, Plaintiffs refer to Directive 2014-06's elimination of *all* Sunday voting, and Directive 2014-17's elimination of voting on *multiple* Sundays, collectively as an elimination of "Sunday voting."

Although Directive 2014-17 deviated from the OAEO plan, Defendants did not suggest that this would cause difficulties for any Ohio county. Nor did Defendants' opposition to summary judgment in that case seriously argue that deviating from the OAEO plan would cause cost or administrative difficulties. Defs.' Resp. to Pls.' Mot. for Summ. J., *Obama for Am. v. Husted*, No. 12-cv-636 (S.D. Ohio May 9, 2014), ECF No. 87. After Directive 2014-17 was issued, Defendant Husted proclaimed in a press release afterwards that "uniformity" had "won the day." Husted Statement, RE18-38, PageID#534.

On June 30, 2014, Plaintiffs filed a motion for a preliminary injunction to enjoin the enforcement of SB 238, and to require Defendant Husted to set uniform EIP voting hours on multiple Sundays and weekday evenings. Pls.' MPI, RE17; *see* Op., RE72, PageID#5852. The hearing on Plaintiffs' motion was held on August 11, 2014. By that point over a hundred exhibits had been submitted, including ten expert reports, and five expert deposition transcripts. Smith Rep., RE18-1; Roscigno Rep., RE18-2; Trende Rep., RE41-3; McCarty Rep., RE41-4; Brunell Rep., RE41-5; Burden Rebuttal, RE53-4; Gronke Rebuttal, RE53-5; Smith Rebuttal, RE53-11; Brunell Supplemental Rep., RE61-39; McCarty Rebuttal, RE67-1; Trende Dep., RE64-1; Brunell Dep., RE64-2; Smith Dep., RE64-3; Roscigno Dep., RE64-4; McCarty Dep., RE64-5 On September 4, 2014, the district court granted Plaintiffs' motion and found that SB 238 and Directive 2014-17 are

likely unconstitutional and likely violate Section 2 of the VRA. Op., RE72, PageID#5917. The district preliminarily enjoined enforcement of SB 238 and ordered Defendant Husted to set uniform and suitable early voting hours on evenings and Sundays. *Id.* at PageID#5917-5918. In addition, consistent with Ohio law, the district court enjoined Defendant Husted from preventing individual Boards of Elections from adopting additional hours by majority vote. *Id.* at PageID#5918; *see* Ohio Rev. Code § 3501.10(B).

On September 5, 2014, Defendants noticed their appeal. Defs.' Notice of Appeal, RE73, PageID#5919. On September 8, 2014, Defendants filed a motion to expedite the appeal, ECF No. 11,[5] which was granted on September 11, 2014, ECF

[5] That same day, the Ohio General Assembly ("OGA"), which had already previously sought and failed to intervene, filed a second motion for intervention before the district court, which was granted solely for purposes of appeal. Order, RE75, PageID#5954. OGA then noticed an appeal of the district court's preliminary injunction order. ECF No. 1 in No. 14-3881. On September 9, OGA filed a motion with this Court to consolidate its No. 14-3881 appeal with the instant appeal. ECF No. 5 in No. 14-3881. On September 15, OGA filed a motion in this appeal for leave to file a merits brief, *instanter*, requesting that this Court allow it to participate fully in this appeal on the existing expedited schedule, ECF No. 28-1 in No. 14-3877, and attached a copy of its proposed brief, totaling 65 pages and 13,962 words, ECF No. 28-2 in No. 14-3877.

Both OGA's motion to consolidate in 14-3881 and OGA's motion to file its merits brief *instanter* in 14-3877 remain pending. Thus, it appears that Plaintiffs are not required to immediately respond to OGA's proposed merits brief. However, out of an overabundance of caution, this brief nonetheless addresses certain portions of OGA's proposed merits brief. Nonetheless, Plaintiffs respectfully reserve their right to seek a full and fair opportunity to respond to OGA's arguments, should it be necessary to do so.

No. 19-2. That same day, Defendants filed a motion for a stay in this Court, ECF No. 18-1, which was denied, *Ohio State Conf. of NAACP v. Husted*, ___ F.3d ___, No. 14-3877, 2014 WL 4494938 (6th Cir. Sept. 12, 2014) ("*Ohio NAACP*").

Following this Court's denial of Defendants' stay motion, Defendant Husted finally complied with the district court's injunction, issuing Directive 2014-28. RE87-1, PageID#6032-6033. It sets forth the EIP voting schedule for the November 2014 Election, and includes the EIP voting opportunities restored by the district court. *Id.*

SUMMARY OF ARGUMENT

Ten years ago, Ohio experienced one of the most disastrous elections in recent history. Voters experienced extraordinarily long lines, many waiting up to 12 hours to exercise their fundamental right to vote. In response, Ohio created statutory rights to vote early and to register, or update one's registration, and cast a vote in a single trip to the polling place. Since that time, *hundreds of thousands* of Ohio voters, especially lower-income and African-American voters, have relied on these rights. Elections officials have had no difficulty administering these opportunities, which only alleviated the pressures of Election Day. These opportunities are fully woven into the fabric of Ohio's democracy.

This year, Ohio ripped into that fabric. Senate Bill 238 and Secretary of State Directive 2014-06 surgically excised the specific voting opportunities that are

particularly valuable to the most marginalized among us: same-day registration, voting on weekday evenings, and Sunday voting. Defendants ignored how lower-income Ohio voters have consistently relied on these opportunities for nearly a decade because of the difficulties they face arranging for transportation, taking unpaid time off of work, or arranging for childcare in order to vote during the workday. Defendants ignored the fact that voting after church on Sundays has become an African-American phenomenon in Ohio, during which multiple generations of African Americans already gathered in church could collectively exercise the most precious right in our democracy. Defendants apparently had not learned their lesson from two years ago, when court intervention was necessary to prevent them from eliminating the last weekend of early voting, upon which hundreds of thousands of Ohio voters rely. *See Obama for Am. v. Husted* ("*OFA*"), 697 F.3d 423, 431 (6th Cir. 2012).

It is one thing for democratically-elected officials to make legitimate decisions about public policy, but it is another thing entirely when elected officials tamper with democracy itself. "There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (Roberts, C.J., plurality opinion). Because voting is the fundamental building block of political power, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *OFA*, 697 F.3d at 428

(citation and internal quotation marks omitted). Restrictions on voting rights thus "strike at the heart of representative government" and warrant the closest attention from courts and lawmakers alike. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

The Equal Protection Clause of the United States Constitution enshrines these principles by forbidding states from placing restrictions on the fundamental right to vote without adequate justification. *See Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi*, 504 U.S. 428, 435-36 (1992). Section 2 of the Voting Rights Act ("VRA") provides added protection, prohibiting voting restrictions that, regardless of intent, result minority voters having "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b).

After reviewing hundreds of exhibits, including dozens of declarations from on-the-ground voter organizers and ten expert reports, the district court issued a 71-page decision with extensive factual findings detailing how same-day registration, evening voting, and Sunday voting, are critical to lower-income and African-American voters in Ohio. The district court further found that African-American voters rely on these opportunities due to profound socioeconomic disparities stemming from discrimination in Ohio, and would thus be disproportionately burdened by the elimination of these opportunities.

Faced with such overwhelming evidence, Defendants scrambled to muster an adequate justification that would actually hold up under the light of judicial scrutiny, supplementing talking points with last-minute declarations from partisans who failed to substantiate those boilerplate assertions with actual evidence. The district court found that Defendants' proffered rationales could not outweigh the very real burdens imposed on vulnerable Ohio voters, and concluded that Plaintiffs were likely to succeed on the merits of their claims under the Fourteenth Amendment and Section 2 of the VRA.

After weighing additional equitable factors, the district court granted Plaintiffs' motion for a preliminary injunction. The entry of that injunction was not an abuse of discretion and should be affirmed.

STANDARD OF REVIEW

This Court reviews a district court's grant of a preliminary injunction "under a deferential abuse-of-discretion standard." *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012) ("*NEOCH*"). An injunction "will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.* (citation and internal quotation marks omitted). While "'considerations specific to election cases' and exigencies of time may be weighed, ... it is 'still necessary, as a procedural matter, for [this Court] to give deference to the discretion of the District

Court.'" *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)).

A plaintiff must establish four factors to receive preliminary injunctive relief: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction." *NEOCH*, 696 F.3d at 591. "At the preliminary injunction stage, 'a plaintiff must show more than a mere possibility of success,' but need not 'prove his case in full.' '[I]t is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.'" *Id.* (citations omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR FOURTEENTH AMENDMENT CLAIM

Plaintiffs are likely to succeed on the merits of their Fourteenth Amendment claim. The district court's careful factual findings concerning the significant burdens imposed by Defendants' targeted elimination of same-day registration, evening voting, and Sunday voting, were not clearly erroneous. And Defendants remain unable to demonstrate why it is "necessary" to impose such burdens.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

A. The Flexible *Anderson-Burdick* Standard Governs Constitutional Review of Elections Practices

"Our Constitution accords special protection for the fundamental right of voting, *Harper* [*v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966)], recognizing its essential role in the 'preservati[on] of all rights,' *Yick Wo v. Hopkins*, [118 U.S. 356, 370 (1886)]." *NEOCH*, 696 F.3d at 591. Because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), "'[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.'" *NEOCH*, 696 F.3d at 592 (quoting *League of Women Voters v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000))).

Courts consider constitutional challenges to restrictions on voting under the flexible balancing test set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). Specifically, courts "calibrate the equal protection standard to '[t]he precise character of the state's action and the nature of the burden on voters.'" *NEOCH*, 696 F.3d at 592 (quoting *OFA*, 697 F.3d at 428). As this Court has recently summarized:

> First, the court must "consider the character and magnitude of" the plaintiff's alleged injury. *Anderson*, 460 U.S. at 789. Next, it "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, it must assess the "legitimacy and strength of each of those interests," as well as the "extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*
>
> The first step in this analysis is important. When the restrictions imposed by the state are "severe," they will fail unless they are narrowly tailored and advance a compelling state interest. *Burdick*, 504 U.S. at 434. If, however, the regulations are minimally burdensome and nondiscriminatory, rational-basis review applies, and the regulations will usually pass constitutional muster if the state can identify "important regulatory interests" that they further. *Id.* Of course, many regulations "fall in between these two extremes." [*OFA*, 697 F.3d at 429]. In these situations, courts engage in a flexible analysis, weighing the burden on the plaintiffs against the state's asserted interest and chosen means of pursuing it. *See Anderson*, 460 U.S. at 789; [*OFA*,] 697 F.3d at 429.

Green Party of Tenn. v. Hargett, ___ F.3d ___, Nos. 13-5975 & 13-6280, 2014 WL 4116483, at *8 (6th Cir. Aug. 22, 2014). Thus, Defendants are wrong when they argue that the Constitution automatically rubber-stamps all voting laws that do not "*severely* burden the right to vote" or "lack discriminatory intent." Br. of Appellants DeWine & Husted, ECF No. 29 ("D.Br."), at 15 (emphasis added); *see also id.* at 27. Rather, *Anderson-Burdick* demands that laws imposing significant burdens that do not rise to the level of "severe" be subjected to more searching inquiry than mere rational basis review, regardless of whether they were passed with discriminatory intent. *See, e.g.*, *OFA*, 697 F.3d at 433-34 (applying more careful scrutiny where the burdens were "not severe, but neither [were they]

slight"); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) ("However slight [a] burden [on voting] may appear, ... it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." (internal quotation marks omitted)).

Seizing on the fact that in *OFA*, the voting restrictions found unconstitutional treated military and non-military voters differently, Defendants suggest that *OFA* is inapplicable to the facts of this case because the voting restrictions here are facially neutral. D.Br. at 19-21, 27-28. However, *OFA* expressly reaffirmed that "[t]he Equal Protection Clause applies when a state *either* classifies voters in disparate ways, *or* places restrictions on the right to vote," *OFA*, 697 F.3d at 428 (emphases added; citation omitted), and described the elimination of the final early voting weekend as a "burden" and a "restriction of voting rights" subject to the *Anderson-Burdick* test, separate and apart from its also-unconstitutional disparate treatment of military and non-military voters, *id.* at 431-32. Furthermore, in *NEOCH* this Court squarely rejected the argument that all voting laws that are facially neutral are exempt from the *Anderson-Burdick* test. As this Court explained, "a clear majority of the Supreme Court in [*Crawford*, 553 U.S. at 189-91] applied some form of *Burdick*'s burden-measuring equal protection standard to Indiana's facially neutral voter-identification requirement." *NEOCH*, 696 F.3d at 592; *see also Anderson*, 460 U.S. at 801 (striking down facially-neutral

candidate filing deadline, noting "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." (internal quotation marks omitted)).

"There is no litmus test to separate valid from invalid regulations." *NEOCH*, 696 F.3d at 593 (quoting *OFA*, 697 F.3d at 429 (citing *Crawford*, 553 U.S. at 190)). After carefully weighing the burdens on voters against the state's proffered justifications, courts must make the "hard judgment that our adversary system demands." *NEOCH*, 696 F.3d at 593 (quoting *OFA*, 697 F.3d at 429 (quoting *Crawford*, 553 U.S. at 190)).

B. The District Court Did Not Clearly Err in Finding that the Targeted Elimination of Same-Day Registration, Evening Voting, and Sunday Voting Imposes "Significant" Burdens on Low-Income Voters

The district court properly exercised that "hard judgment" here in finding that Ohio's targeted elimination of same-day registration, Sunday voting, and evening voting likely violate the Equal Protection Clause. In considering the "character and magnitude" of the burdens that these targeted eliminations collectively imposed, the district court carefully sifted through voluminous evidence including the State's own records concerning the number of voters who rely on the eliminated opportunities, Op., RE72, PageID#5854-5857, over a dozen unrebutted declarations from on-the-ground voter organizers, *id.* at PageID#5864-

5873, expert testimony, *id.* at PageID#5879-5883, and four additional studies concerning the use of early voting in Ohio, *id.* at PageID#5892-5893.

Based on this extensive evidence, the district court made numerous factual findings to support its conclusion that the burdens imposed by these targeted eliminations are "significant." *Id.* at PageID#5900. First, the district court recognized that thousands of Ohioans rely on same-day registration, *id.* at PageID#5898, and found that "Golden Week is more than a mere convenience to poorer individuals and the homeless, it can make the difference between being able to exercise the fundamental right to vote and not being able to do so." *Id.* (emphasis added; citation omitted). Second, the court found that the ban on evening voting would burden "lower-income voters," because they "are more likely to rely on public transportation and work wage-based jobs" and thus are less likely to be able to travel potentially great distances to the only voting location available in the county during regular business hours. *Id.* at PageID#5900. Third, with respect to Sunday voting, the court found that African Americans have disproportionately lower income in Ohio, *id.* at PageID#5899, that the counties with the largest African-American populations offered multiple Sundays for voting in the past, and that "Souls to the Polls" efforts have become a "civic component of African-American church life in Ohio." *Id.* The court also found that Saturdays and Sundays are not perfectly interchangeable, *id.*, and that vote-by-mail was an

inadequate substitute, *id.* at PageID#5901-5902. *See, e.g.*, *OFA*, 697 F.3d at 431 (rejecting argument that burden on non-military voters is "slight" because they can vote by mail).

The substantial evidentiary basis for these careful findings meets, if not greatly exceeds, the evidence proffered by the plaintiffs in *OFA*. *See* 697 F.3d at 431 (surveying evidence). There, this Court upheld, as not clearly erroneous, the district court's findings concerning the significant burdens imposed by the elimination of the final weekend of the early voting period, especially voters with lower incomes and less education. *See id.* Defendants did not proffer *any* evidence to rebut the many declarations illustrating the burdens imposed on low-income voters and those "struggling on the margins of society." Op. at PageID#5898. Where the State "d[oes] not dispute the evidence presented by Plaintiffs, nor d[oes] it offer any evidence to contradict the district court's findings of fact," *OFA*, 697 F.3d at 431, the district court's careful factual findings concerning the "significant" burdens imposed cannot be clearly erroneous.

C. Defendants' Attempt to Minimize These Burdens Fails

Defendants raise three arguments in an attempt to sweep these undisputed burdens under the rug. First, Defendants callously disregard the real burdens imposed on low-income voters by repeatedly framing this entire case as being about "preferences" and "convenience." *See* D.Br. at 9, 11, 17, 20, 22, 23, 26, 30,

31, 39, 43, 58, 59, 60; *see also* Br. of Appellant Ohio General Assembly, ECF No. 28-2 ("OGA Br."), at 27, 29, 31, 34, 45. That glib rhetoric cannot substitute for the district court's careful findings of fact concerning the evidence of the very real burdens that will be faced by low-income Ohioans who have relied on these voting opportunities for nearly a decade.

Second, Defendants argue that burdens on low-income voters are totally irrelevant under *Anderson-Burdick* so long as "the average voter," D.Br. at 31—whatever that means (well-educated, middle-class?)—is not significantly burdened. They rest this theory on Justice Scalia's concurrence in *Crawford*, in which he opined that that "individual impacts" are "[ir]relevant to determining the severity of the burden," and that the focus should be on "voters generally." 553 U.S. at 205-06 (Scalia, J., concurring). But Justice Scalia's view did not command a majority of the Justices. Justice Stevens's controlling opinion,[6] by contrast, assessed the burdens of the challenged law by focusing precisely on those voters who were *actually impacted* by it. *See id.* at 198 (Stevens., J., controlling op.) (in evaluating voter ID law, "[t]he burdens that are relevant … are those imposed on persons who

[6] Where no one opinion commands a majority of the Justices, the controlling opinion must be the one that represents the "narrowest grounds" on which the decision was made. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

… do not possess a current photo identification," rather than on voters generally, most of whom already possessed ID).[7]

Indeed, *Anderson* itself asked "whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of *Anderson's supporters*." 460 U.S. at 782 (emphasis added). And *Burdick* specifically emphasized the individualized nature of the inquiry. *See Burdick*, 504 U.S. at 434 (courts must consider "'the extent to which [the state's] interests make it necessary to burden *the plaintiff's rights*.'" (quoting *Anderson*, 460 U.S. at 789) (emphasis added).

Lastly, Defendants reprise the same argument they made in *OFA*, arguing that the targeted elimination of same-day registration, evening voting, and Sunday voting deserves only rational basis scrutiny because they impose *no burdens at all*. D.Br. at 18-19, 22; OGA Br. at 24-25. According to Defendants, cases such as *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969) and *Goosby v. Osser*, 409 U.S. 512 (1972) held that there is no absolute right to in-person absentee voting. But neither *McDonald* nor *Goosby* involve contexts where, as here, the state sought to eliminate long-standing voting opportunities. And as this

[7] The reason the challenge failed in *Crawford* was not because Justice Stevens thought impacts on subgroups such as the "indigent" were irrelevant, 553 U.S. at 201, but because the plaintiffs failed "to *quantify* either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified," *id.* at 200 (emphasis added). That is decidedly not the case here.

Court explained, neither case precludes constitutional scrutiny when plaintiffs are able to show a challenged restriction *burdens* the right to vote, *see OFA*, 697 F.3d at 431, especially given the Supreme Court's subsequent development of the *Anderson-Burdick* balancing test, *see OFA*, 697 F.3d at 439 (White, J., separate op.).[8]

Because the district court's factual findings are not clearly erroneous, it properly found that SB 238 and the Directives impose significant burdens on the right to vote.

D. Defendants Fail to Proffer "Precise" Interests that Make it "Necessary" to Eliminate Same-Day Registration, Evening Voting, and Sunday Voting

The significant burdens imposed by SB 238 and the Directives must next be weighed "against the state's asserted interest and chosen means of pursuing it." *Green Party*, 2014 WL 4116483, at *8. Specifically, these burdens require a more careful form of scrutiny, in which the mere articulation of a valid interest is insufficient. Rather, Defendants must submit adequate *evidence* that their proffered rationales actually justify the burdens imposed. *See, e.g.*, *OFA*, 697 F.3d at 433-34 (finding no "evidence" to support the State's "vague interest in the smooth

[8] The absentee balloting cases on which Defendants rely are all more than 40 years old. Courts considering absentee ballot restrictions since that time have applied more rigorous scrutiny under the *Anderson-Burdick* balancing test. *See, e.g.*, *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008) (rejecting "pure rational basis review" in absentee balloting case as "incorrect").

functioning of local boards of elections" where the "burden on non-military Ohio voters is not severe, but neither is it slight").

1. Defendants' proffered justifications have shifted during the course of this very litigation

Defendants' proffered rationales are dubious at the outset because they have shifted in the course of this litigation. In the district court, Defendants relied on two opposition briefs, which asserted separate and distinct interests in support of SB 238 and the Directives: two interests, fraud and cost, were asserted as justifications for the elimination of same-day registration OGA Opp'n to Pls.' MPI, RE54-1, PageID#1741-1745,[9] and only *one* interest, uniformity, was asserted in support of eliminating evening and Sunday hours. Husted Opp'n Pls.' MPI, RE41, PageID#1000-1001. The district court addressed these different interests separately, and found them wanting. *See* Op., RE72, PageID#5902-5907. Defendants now assert for the first time on appeal that *all three* justifications mostly support *both* SB 238 and the Directives. D.Br. at 24-26. This Court should therefore decline to address these justifications to the extent they are proffered in support of a challenged voting restriction in a manner not raised below. *See*, *e.g.*, *Wagenknecht v. United States*, 533 F.3d 412, 418 (6th Cir. 2008). More to the

[9] Defendants also asserted interests in reducing the cost of political campaigns and preventing buyer's remorse, interests that are as farfetched as they are cryptic. OGA Opp'n to MPI, RE54-1, PageID#1745. They wisely abandon those justifications on appeal.

point, Defendants' mercurial rationales hardly suffice as the "precise" interests *Anderson-Burdick* demands to specifically demonstrate the necessity of burdens on voting. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

2. Defendants' proffered interests remain unsubstantiated and do not justify the significant burdens imposed by SB 238 and the Directives

a. Uniformity does not justify eliminating voting opportunities

Defendants assert that uniformity justifies both SB 238 and the Directives by avoiding voter confusion (i.e., by having the same hours everywhere). But uniformity does not necessarily justify the *elimination* of same-day registration, evening hours and Sunday hours across all counties. Uniformity could just as easily be achieved by *maintaining* same-day registration and the same evening and Sunday hours across all counties. *See, e.g.*, *NEOCH*, 696 F.3d at 595-96 ("[T]he State argues that it has a strong interest in limiting precinct ballots to eligible races, which facilities the administration of elections ... . No disagreement there, but these interests do not justify the *precise* restriction challenged here." (emphasis added)); *cf. OFA*, 697 F.3d at 442 (White, J., separate op.) ("The desire for uniformity has little to do with the elimination of all weekend and after-hours in-person voting."). There is no better illustration for this concept than Directive 2014-17 itself. When Defendant Husted was ordered to set "uniform" hours on the weekend days that he previously excluded, *see Obama for America v. Husted*, No. 2:12-cv-636, 2014

WL 2611316 (S.D. Ohio June 11, 2014), he issued Directive 2014-17, and proclaimed in a press release afterwards that "uniformity" had "won the day." Husted Statement, RE18-38, PageID#534. Uniformity continues to "win the day" with Directive 2014-28, recently issued in compliance with the district court's preliminary injunction, which reinstates same-day registration and establishes the *same* evening and Sunday hours statewide. Directive 2014-28, RE87-1, PageID#6032. Defendants' "uniformity" rationale simply fails to justify the targeted eliminations here.[10]

b. Defendants do not proffer evidence that same-day registration, evening voting, and Sunday voting have been unworkable

Next, Defendants assert cost, or "administrative balancing," as a justification. But the governing standard is not whether eliminating voting opportunities saves money. *See Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006) ("Governments almost always attempt to justify their conduct based on cost and administrative convenience."), *superseded as moot*, 473 F.3d 692 (6th Cir. 2007). The standard is whether Defendants have provided "*evidence* that local boards of elections have *struggled to cope*" with implementing the voting

[10] Defendants argue that the district court's preliminary injunction order violates the uniformity principle because it also allows each county to *add* more early voting hours by majority vote. D.Br. at 28-29; Op., RE72, PageID#5918. Plaintiffs note that while they did not specifically seek this relief, *see* Pls.' MPI, RE17, PageID#152, it is consistent with Ohio law, Ohio Rev. Code §§ 3501.10(B), 3501.11.

opportunities being eliminated. *OFA*, 697 F.3d at 434 (emphases added); *see also Stewart*, 444 F.3d at 872-73 (State failed to show it "cannot manage the costs," "encountered significant technological difficulties or undue financial burdens");[11] *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 595 (6th Cir. 2006) ("Moving the filing deadline closer to the date of the primary ... may impose some additional costs on the state, but this is the price imposed by the First Amendment."). The vague testimony about cost cited in Defendants' brief, D.Br. at 25, simply fails to demonstrate "how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005." *OFA*, 697 F.3d at 433; *see also Ohio NAACP*, 2014 WL 4494938, at *4 (Defendants "have not argued that the Secretary or the Boards are not equipped financially or organizationally to administer the EIP voting schedule imposed by the Order.").[12]

[11] Defendants argue that *Stewart* is inapplicable because it "rejected cost concerns under 'strict scrutiny.'" D.Br. at 32. They fail to note that this *Stewart* found that those same cost concerns would *fail even under rational basis review*. *See Stewart*, 444 F.3d at 872-73.

[12] OGA cites the same vague testimony about cost and also points to testimony from partisans about the alleged cost of same-day registration. OGA Br. at 43-45. But a price tag, without any budgetary context, does not automatically demonstrate that Boards of Elections, which must be open for business during Golden Week anyway have "struggled to cope" with implementing these opportunities. *OFA*, 697 F.3d at 434.

They next grasp at the six-page OAEO report, D.Br. at 25, but that paper aegis does not even mention cost or administrability, OAEO Rep., RE18-33, PageID#523. It observes that, obviously, turnout in Presidential elections is generally higher than in non-Presidential elections, but provides no "precise" justification for targeting Sundays and evening hours for elimination during midterms. Notably, when opposing the restoration of the last weekend of early voting in *Obama for America v. Husted* this year, Defendants did not assert *any* argument that deviating from the OAEO plan would cause cost or administrative difficulties. Defs.' Resp. to Pls.' Mot. for Summ. J., *Obama for Am. v. Husted*, No. 12-cv-636 (S.D. Ohio May 9, 2014), ECF No. 87. When eliminating voting opportunities upon which tens of thousands of Ohio voters rely, the Constitution demands more.

3. Defendants do not show how same-day registration increases fraud

Lastly, Defendants assert that the elimination of same-day registration prevents fraud, asserting that fraudulent votes cast via same-day registration "might be counted" because elections officials may not be able to "confirm their registration status before Election Day." D.Br. at 26. They fail to mention that Defendant Husted crafted a Directive that fully addresses this precise concern. According to Directive 2012-36, when a same-day registrant casts a ballot, that ballot is segregated and *cannot be counted until the registration is verified*.

Directive 2012-36, RE53-10, PageID#1625-1626. Defendants proffer nothing to suggest that their own Directive does not work. Indeed, same-day registration ends *a month* before Election Day, and Defendants proffer nothing to suggest that this period of time is insufficient to verify registrations, especially when they have the same amount of time to process *every other registration form* not submitted through the same-day registration process.[13] *Cf. Stewart*, 444 F.3d at 869 ("[T]he State's alleged concern with voter fraud ... is not compelling in light of the Secretary of State's report concluding that the technology can securely be implemented.").

Thus, the district court did not clearly err in finding that the targeted elimination of same-day registration, evening voting, and Sunday voting, imposes significant burdens, and Defendants have failed to put forward evidence that would sufficiently justify these burdens. Plaintiffs are therefore likely to succeed on the merits of their Fourteenth Amendment claim.

[13] Similarly, nowhere in OGA's arguments about fraud, OGA Br. at 38-43, can they ever manage to explain exactly how same-day registration increases fraud. They insist that "sometimes, ballots from ineligible voters *are* counted," *id.* at 42, but the conclusory declarations they cite similarly fail to explain how *same-day registration* caused these anomalies. They conclude that courts should blindly trust the State to deal with fraud, *id.* at 42-43, but rational basis review does not apply here.

E. Affirming the District Court Will Not Unduly Constrain Ohio or Other States

Defendants argue that affirming the preliminary injunction will unduly constrain other states. But this case is about Ohio. Defendants' targeted elimination of same-day registration, evening voting, and Sunday voting does not exist in a vacuum, but in a context specific to this state, which established a statutory right to these voting practices directly in response to the disastrously unacceptable fiasco of the 2004 election in Ohio. *See OFA*, 697 F.3d at 426; *id.* at 441 (White, J., separate op.). Since that time, for nearly a *decade*, tens of thousands of Ohioans have relied on the specific voting opportunities that Defendants seek to eliminate.

In spite of that fact, Defendants contend that Ohio may, subject to rational basis review, make *any* changes to these early voting opportunities—and even revoke them altogether—so long as those changes are facially neutral. But the voting opportunities at issue in this are now woven into the fabric of Ohio's democracy. *Cf. Florida v. United States*, 885 F. Supp. 2d 299, 332 (D.D.C. 2012) (creating voting opportunities is not the same as eliminating voting opportunities because of voter habituation). This Court has previously recognized that "a significant number of Ohio voters will in fact be precluded from voting" by early voting reductions. *OFA*, 697 F.3d at 431. And Plaintiffs in this case offered expert testimony that removing *existing* early voting opportunities will have a negative effect on voters, in a manner that is distinct from contexts where states are faced

with the question of whether to *add* voting opportunities. *See* Op., RE72, PageID#5891.

Thus, affirming the district court's ruling based on these facts does *not* entail Defendants' caricature of a requirement that all states adopt specific voting practices or any particular number of early voting days, nor does it mean that every state without early in-person voting will be swept into constitutional liability. D.Br. at 29-30. Rather, consistent with this Court's precedent, it would simply recognize that where, as here, a state imposes significant burdens on voting by eliminating existing voting opportunities upon which thousands of voters rely, those eliminations are unlawful unless "sufficiently justified" by the state. *OFA*, 697 F.3d at 432. And, in fact, eliminating voting opportunities may be justifiable in certain contexts. For instance, voters in other states may not rely as heavily on similar early voting methods, such that the burdens of reducing such opportunities would not be as significant. Similarly, reducing certain types of voting opportunities without eliminating them altogether might in some instances not be particularly burdensome. On the flip side, reductions might not be improper if a state can demonstrate that there are adequate justifications for them, for example if the state is "struggl[ing] to cope" with maintaining those *specific* opportunities. *OFA*, 697 F.3d at 434.

There is a reason that the *Anderson-Burdick* test is called a "balancing" test. *Crawford*, 553 U.S. at 190. Otherwise, it could be used as a talisman to forever immunize any law that alters or eliminates existing voting opportunities. Indeed, in asking this Court to compare Ohio's voting practices to those of other states—whose respective histories and needs vary tremendously—Defendants would transform the *Anderson-Burdick* inquiry into a roving survey of other states' practices, or worse, a simplistic "litmus test" which the Supreme Court has repeatedly warned is anathema to the fact-specific "hard judgment[s]" that *Anderson-Burdick* demands. *Crawford*, 553 U.S. at 190. The district court's findings responded to, and were specifically tied to, the unique facts presented in this case at this moment in time in Ohio.

Lastly, notwithstanding Defendants' concerns about experimentation with voting laws, the Fourteenth Amendment necessarily places *some* constraints on politicians' ability to tamper with the fundamental right to vote without adequate justification. *See NEOCH*, 696 F.3d at 591. To be sure, the Constitution naturally entrusts our elected leaders to make (and experiment with) many public policy decisions for the state. But if those very decisions pollute the *very process by which those elected leaders are chosen*, the Fourteenth Amendment requires that courts take notice, because all "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17. If, as Defendants

suggest, elected officials could restrict or altogether eliminate any voting practices that they deem gratuitous, then *Anderson-Burdick* would completely collapse into a toothless rational basis test. That may be what Defendants desire, but it is not the law.

II. PLAINTIFFS ARE LIKELY TO SUCCEED UNDER SECTION 2 OF THE VOTING RIGHTS ACT

This Court should also affirm the district court's conclusion that SB 238 and the Directives, by targeting same-day registration, evening voting, and Sunday voting for elimination, likely violate Section 2 of the VRA. After weighing all of the evidence recounted above, the district court did not clearly err in finding that SB 238 and the Directives interact with severe, undisputed socioeconomic disparities and other undisputed factors bearing on minority political exclusion in Ohio, to result in less opportunity for minorities to participate in the political process as compared to whites.

A. Section 2 of the VRA Prohibits Voting Restrictions that Interact With Social and Historical Circumstances to Impose Disproportionate and Unjustified Burdens on Minorities

Section 2 of the VRA prohibits a state from "impos[ing] or appl[ying]" any electoral "standard, practice, or procedure" which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Voting restrictions that are passed with discriminatory intent violate Section 2, but a showing of discriminatory intent is

not required under Section 2's "results" prong. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). As this Court has explained, "[u]nder the 1982 amendments to section 2 of the Act, we are concerned with the *results* of a practice, not the government's intent." *Stewart*, 444 F.3d at 877. "The Supreme Court has said that in interpreting this Act, we should read it in 'a manner that provides the "broadest possible scope" in combating racial discrimination.'" *Id.* (quoting *Chisom v. Roemer*, 501 U.S. 380, 403 (1991)).

The standard for proving prohibited "discriminatory results" is elaborated upon in 52 U.S.C. § 10301(b):

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

Thus, a Section 2 plaintiff must first show that a challenged electoral standard, practice, or procedure imposes burdens that fall disproportionately on a particular racial group. *Cf. Stewart*, 444 F.3d at 878 ("Because the African-American plaintiffs claim that they are disproportionately denied the right to have their ballots counted properly, the district court erred in concluding that the plaintiffs did not state a claim for a violation of the right to vote under the Voting Rights Act."). Plaintiffs need not show that a challenged practice makes voting

impossible for minorities, only that it makes voting disproportionately more burdensome. *See id.* at 877. Next, a plaintiff must show that such a challenged electoral practice "interacts with social and historical conditions to cause an inequality in the opportunities [of minorities] to elect their preferred representatives." *Id.* at 879 (quoting *Gingles*, 478 U.S. at 47). In evaluating the social and historical conditions relevant to a Section 2 claim, courts have looked to a nonexclusive list of factors found in the Senate Report that accompanied the 1982 amendments to the VRA:

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

(9) whether the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

Gingles, 478 U.S. at 44-45 (citing S. Rep. No. 97-417, at 28-29 (1982)). The list of factors is "neither exclusive nor controlling." *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986). In applying the "totality of the circumstances" provision of 52 U.S.C. § 10301(b), courts must conduct "'an intensely local appraisal of the design and impact' of the challenged electoral practice." *Stewart*, 444 F.3d at 878 (quoting *Gingles*, 478 U.S. at 78).

Thus, courts have routinely found that barriers to registration and voting that interact with social and historical conditions to disproportionately burden minority voters violate Section 2, including: restrictions on registration, *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1262-68 (N.D. Miss. 1987), *aff'd sub nom. Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991); closure or relocation of polling places, *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010); *Brown v. Dean*, 555 F. Supp. 502, 504-05 (D.R.I. 1982); limits on early voting, *Brooks v. Gant*, No. 12-5003, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (denying motion to dismiss); and the use of old voting technology in minority communities, *Stewart*, 444 F.3d at 878 (reversing final judgment).

B. Defendants Do Not Dispute the District Court's Findings that SB 238 and the Directives Interact with Social and Historical Factors to Disproportionately Burden Minority Voters in Ohio

The district court's exceedingly thorough decision was laced with numerous factual findings supporting its conclusion that SB 238 and the Directives "interact[] with social and historical conditions to cause an inequality in the opportunities of [minorities] to elect their preferred representatives." *Stewart*, 444 F.3d 879 (quoting *Gingles*, 478 U.S. at 47). Indeed, it was the very definition of an "intensely local appraisal of the design and impact" that these restrictions would have in Ohio.

After carefully analyzing ten expert reports from seven different expert witnesses, in addition to the deposition transcripts of five of the experts, Smith Rep., RE18-1; Roscigno Rep., RE18-2; Trende Rep., RE41-3; McCarty Rep., RE41-4; Brunell Rep., RE41-5; Burden Rebuttal, RE53-4; Gronke Rebuttal, RE53-5; Smith Rebuttal, RE53-11; Brunell Supplemental Rep., RE61-39; McCarty Rebuttal, RE67-1; Trende Dep., RE64-1; Brunell Dep., RE64-2; Smith Dep., RE64-3; Roscigno Dep., RE64-4; McCarty Dep., RE64-5; Op., RE72, PageID#5874-5892, the district court credited the report of Plaintiffs' expert Dr. Smith, finding that "African Americans rely on EIP voting at far greater rates than whites in Ohio, including on the days and times eliminated by SB 238 and the 2014 Directives." Op., RE72, PageID#5891-5892. The court also credited four

other statistical reports and studies "tending to support the conclusions of the Plaintiffs' experts," regarding racially disproportionate reliance on early voting in Ohio. *Id.* at PageID#5892-5893. The court also found that the precise forms of early voting at issue in this case—namely same-day registration, evening hours, and Sundays—are heavily used by low income voters in Ohio, *id.* at PageID#5912-5913, and that these voters are disproportionately African Americans, *id.* at PageID#5879-5883, 5892. Given these facts, the district court made a factual determination that these eliminations will disproportionately affect African Americans.

In addition to these statistical disparities, the district court observed that African Americans' disproportionate usage of these opportunities was not an accident, but the product of widespread socioeconomic disparities and discrimination. The district court credited the "undisputed findings" from Plaintiffs' expert Dr. Roscigno "regarding employment disparities as well as significant disparities in residential, transportation, and childcare options; and conclude[d] that these disparities significantly increase the cost of casting a vote." *Id.* at PageID#5892. It is *because* of these disparities—which are themselves tied to "contemporary institutional practices and discrimination," *id.* at PageID#5881, that African Americans disproportionately rely on the particular voting opportunities that were eliminated. *Id.* at PageID#5913.

Operating within this context, the targeted elimination of same day registration, evening voting, and Sunday voting, directly *causes* minority voters to have less ability to participate in the political process. *Cf. Stewart*, 444 F.3d at 878-79 (remanding for court to consider interaction of challenged voting practices with "social and historical conditions" in determining Section 2 violation); *Operation Push*, 674 F. Supp. at 1262-68 (dual registration system coupled with "vast socio-economic disparities" and other factors violated Section 2); *Spirit Lake Tribe*, 2010 WL 4226614, at *3-4 (interaction of polling place closure with "entrenched problems of poverty, alcoholism, illiteracy, and homelessness" likely violated Section 2).

This case is therefore easily distinguishable from out-of-circuit cases cited by Defendants, in which racial disparities were *not* caused by the challenged practice. *See Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1990) (cause of underrepresentation on school board was not appointive process, but minorities' decision not to seek school board seats); *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1555 (5th Cir. 1992) ("true cause for lack of Hispanic electoral success was not unequal electoral opportunity, but rather the failure of Hispanic voters to take advantage of that opportunity"); *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 313-14 (3d Cir. 1994) (cause of minorities being purged from voter rolls was not statute, but

voters' decision not to vote). In each of these cases, the disproportionate burdens on minorities were insufficient to establish liability because they did not result from the challenged voting restriction's interaction with social and historical circumstances. They are a stark contrast to this case, where the targeted elimination of specific forms of early voting, operating within a socioeconomic context of discrimination and severe socioeconomic inequalities, directly and disproportionately burdens minority voters.[14]

Lastly, the district court credited Dr. Roscigno's findings concerning the remaining Senate Factors, all of which bear on minority political exclusion in Ohio and magnify the impacts of SB 238 and the Directives on minority voters, Op., RE72, PageID#5879-5885, 5911-5912, and further noted that the policy

[14] OGA raises several irrelevant arguments about the effect of early voting on turnout. OGA Br. at 59-61. But the expert testimony on which OGA relies concerns the effect of *adding* early voting opportunities, rather than when such opportunities are eliminated, a "critical" difference, because research "specifically address[ing] situations where early voting opportunities have been removed suggests that removing such opportunities has had a negative effect on voters." Op., RE72, PageID#5891 (quoting Plaintiffs' expert Dr. Gronke). *Cf. Florida*, 885 F. Supp. 2d at 332 (research addressing "the question of how adding early voting days affects overall voter turnout ... does not address the specific question before us: how decreasing an established early voting period ... will affect African-American voter turnout"). Moreover, the challenged restrictions can have a separate and independent burden on voters regardless of ultimate turnout, Gronke Rebuttal, RE53-5, PageID#1569-1570, ¶ 26, such as forcing low-income voters to take time off of work. None of Defendants' experts examine those independent barriers except Dr. Brunell, who conceded that "early voting makes casting a ballot easier" and "makes it more convenient for voters to vote," Brunell Rep., RE41-5, PageID#1109, and thereby "lowers the cost of voting for people who intend on voting," *id.* at PageID#1108.

justifications in support of SB 238 and the Directives were "relatively weak when subjected to careful examination" and "tenuous" for the same reasons relevant to Plaintiffs' Fourteenth Amendment claim, *id.* at PageID#5913-5914.

Defendants do not explicitly argue that this avalanche of factual findings is clearly erroneous, but attempt to relitigate expert testimony about whether African Americans use the eliminated voting opportunities at higher rates. *See, e.g.*, D.Br. at 6-7, 32, 55-56. Needless to say, drawing this Court into an already-fought battle between competing expert testimony does not demonstrate clear error. *See United States v. Byrd*, 689 F.3d 636, 639-40 (6th Cir. 2012).[15] Accordingly, this Court should affirm the district court's conclusion that Plaintiffs are likely to succeed on the merits of their Section 2 claim.

[15] Nor was there much of a battle. Defendants cling to the testimony of Sean Trende, a self-described "psephologist" with no Ph.D. in political science, much less actual experience with early voting analysis, Trende Dep. from *NAACP v. McCrory*, RE53-6, PageID#1573, 1576, for the suggestion that African Americans and whites early voted at indistinguishable rates in 2010. But Trende relied on a survey sample that was too small in 2010 to draw any statistically reliable inferences. Smith Dep., RE64-3, PageID#4202. OGA is more brazen, explicitly arguing that the district court *clearly erred* in finding that African Americans rely on EIP voting at far greater rates than whites in Ohio, but they do nothing more than regurgitate all of the back-and-forth between the experts. OGA Br. at 46-58. In any event, all of OGA's arguments essentially boil down to the unremarkable assertion that there is no perfect method of ascertaining with 100% certainty exactly how many African Americans voted on each day, since Ohio does not keep race data on its voters. But that is precisely why Dr. Smith used multiple, independent methodologies, all of which point to racially disparate early voting, even after accounting for the criticisms of Defendants' experts. Op., RE72, PageID#5874-5879, 5888.

C. The District Court Properly Applied Section 2, Not Section 5, of the VRA

The Section 2 claim in this case is simple: the targeted elimination of same-day registration, evening voting, and Sunday voting interact with social and historical factors to disproportionately burden African-American voters compared to white voters, and are therefore unlawful. Rather than focus on the district court's factual findings, Defendants remarkably assert that the "*only conceivable way*" that the district court could have found liability is by using a "Section-5-style retrogression formula." D.Br. at 49 (emphasis added). But the district court was not confused about the difference between Section 2 and Section 5. Defendants are.

Section 2 considers the relative burdens a challenged measure imposes on minority voters as compared to white voters. *See, e.g.*, *Chisom*, 501 U.S. at 408 (Scalia, J., dissenting) (issue is whether enactment "ma[kes] it more difficult for blacks to register [or vote] than whites."). That comparison establishes a Section 2 violation here, because African-American voters will be disproportionately burdened by the elimination of the early voting practices at issue. Section 5, by contrast, compares a proposed voting practice with an existing one (the Section 5 "benchmark"), requiring certain "covered" jurisdictions[16] to obtain federal

[16] At present, very few jurisdictions are considered covered jurisdictions, because the Supreme Court held in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), that the formula for determining which states and counties are deemed "covered" was

approval before enacting the proposed change, 52 U.S.C. § 10304(a), by establishing, *inter alia*, that it would not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) ("*Bossier II*") (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Thus, "[i]n § 5 preclearance proceedings—which uniquely deal *only and specifically with changes* in voting procedures—the baseline is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334 (emphasis added).

But changes to the status quo may also be challenged under Section 2, as in this case. As the Supreme Court has explained, Section 2 proceedings "involve *not only changes* [to the status quo]" like Section 5, "but [also] the status quo itself." *Bossier II*, 528 U.S. at 334; *see also Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("some parts of the § 2 analysis may overlap with the § 5 inquiry"). Section 2 may properly be invoked to challenge *changes* to election laws, including Defendants' elimination of existing forms of early voting, by examining the comparative effect of those measures on African-American and white voters. And here, in order to make an assessment of the impact of these changes, the district court naturally turned to evidence concerning how African Americans have relied on these opportunities as compared to whites in the *past*. Merely considering this clearly

unconstitutional. A few jurisdictions remain covered under Section 3(c) of the VRA, 52 U.S.C. § 10302(c), sometimes referred to as the "bail-in" provision.

probative evidence as one component of the relevant totality of circumstances does not render the district court's analysis identical to a formal "retrogression" inquiry.

Defendants next fixate upon whether Plaintiffs have "shown an objective benchmark against which to compare Ohio's early-voting schedule." D.Br. at 38; *see id.* at 36-44. But such a formal benchmark is only necessary in a vote *dilution* claim challenging the effect of an electoral arrangement on overall minority voting power, which must generally involve the comparison of different proposed redistricting plans (i.e., "benchmarks"). *See Holder v. Hall*, 512 U.S. 874 (1994) ("In a § 2 *vote dilution suit* ... a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice") (emphases added); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier I*") ("Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice."). But no court has required such a comparative benchmark in the context of a vote *denial* case like this, which challenges new restrictions on access to the ballot itself. Indeed, none of the cases sustaining Section 2 challenges to practices such as registration restrictions required plaintiffs to posit such a benchmark. *See supra* Part II.A.

But even if a formal benchmark were required here, the facts of this case provide one: the longstanding methods of registration and voting that have been eliminated. Unlike in *Holder*, where the plaintiffs challenged a county's "failure" to replace the only form of government the county ever had with something entirely new—an inherently standardless pursuit, *see* 512 U.S. at 882—here, Plaintiffs do not demand something new or hypothetical. Instead, Plaintiffs challenge the lawfulness of newly-enacted restrictions on voting, the "effect [of which] can be evaluated by comparing the system with that rule to a system without that rule." *Id.* at 880-81.

D. The Elimination of Same-Day Registration or Methods of Early Voting Are Not Categorically Exempt from Section 2 Liability

Defendants insist that any voting practice or procedure related to early voting should be categorically exempt from Section 2. First, Defendants point to two district court cases rejecting challenges to reductions in early voting days. *See* D.Br. at 37 (citing *Brown v. Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012) and *N.C. State Conf. of NAACP v. McCrory*, 997 F.Supp.2d 322 (M.D.N.C. 2014)). However, *Brown* acknowledged that Section 2 is applicable to laws that eliminate existing voting opportunities, as it "consider[ed] whether, based on an objective analysis of the totality of the circumstances," the early voting reductions at issue in that case "act[ed] to exclude African American voters from meaningful access to the polls." 895 F. Supp. 2d at 1249-50 (internal quotation marks omitted). The

plaintiffs in *Brown* failed to carry their burden because the challenged law required the state to maintain the same aggregate early voting hours, resulting in a net *increase* in the very types of early voting (evenings and Sundays) that Ohio eliminated here. *See id.* at 1252-53 (declining to find liability because Florida expanded early voting "after work hours during the weekday" and "increase[d] the availability of Sunday voting … the very day Plaintiffs say is most important to African American voters"). The early voting law in *McCrory* had a similar aggregate hours feature that expanded the hours offered each day of early voting. *See* 997 F. Supp. 2d at 371-75. Thus, if anything, these cases point *towards* a finding of liability here, as Ohio seeks to implement a *net decrease* in total voting hours generally, and voting opportunities during non-working hours specifically, the precise times that the district court found are critical for minority voters.

Second, Defendants imply that the legality of a practice under Section 2 should depend on national averages, D.Br. at 42-43, but the Supreme Court has squarely rejected this argument. *See Holder*, 512 U.S. at 881-82 ("It makes little sense to say … that the sole commissioner system should be subject to a [Section 2] dilution challenge if it is rare—but immune if it is common.").

Third, Defendants note that there was hardly any early voting when Section 2 was amended in 1982. D.Br. at 38, 42-43, 51. But there is no textual basis for exempting restrictions on early voting from Section 2 liability, as the plain

language of the statute applies broadly and without exception to *any* voting "standard, practice, or procedure." 52 U.S.C. § 10301(a); *see also Gingles*, 478 U.S. at 43 (Section 2 prohibits states "from imposing *any* voting qualifications or prerequisites to voting, or *any* standards, practices, or procedures which result in the denial or abridgment of the right to vote of any [minority] citizen." (emphasis added)); *Cousin v. McWherter*, 46 F.3d 568, 572 (6th Cir. 1995) (same). That early voting and same-day registration were not as widespread in 1982 as they are now is irrelevant. *See Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (internal quotation marks omitted)); *cf. Stewart*, 444 F.3d at 877 (Section 2 should be "read … in 'a manner that provides the "broadest possible scope" in combating racial discrimination." (citation omitted)). There is no textual basis for carving out early voting restrictions from Section 2's broad scope.

Relatedly, Defendants fret that affirming the district court will transform Section 2 into a "one-way ratchet" where states can never eliminate early voting opportunities that were created. D.Br. at 53. These concerns are unsupported by any legal authority. *Cf. Ohio NAACP*, 2014 WL 4494938, at *2 (Defendants' arguments concerning alleged expansiveness of district court's ruling unsupported by legal authority). Section 2 neither prohibits nor freezes into place any particular

set of election practices for all time across all jurisdictions, but rather conditions liability on the "totality of circumstances," 52 U.S.C. § 10301(b), which may render particular voting practices unlawful in some contexts but not others. *See Cousin*, 46 F.3d at 573-74 (noting that at-large elections "are not *per se* violations of Section 2," because liability always "depends upon 'a searching practical evaluation of the past and present reality ... and on a functional view of the political process.'") (quoting *Gingles*, 478 U.S. at 45).

The State has unusually targeted the precise voting opportunities that lower-income and African American voters have relied on for the better part of the decade. This transpired shortly after high African-American turnout in Ohio helped elect and re-elect the nation's first African-American President. These are the types of voting restrictions Section 2 abhors. No one would dispute that, if the district court had found that the challenged restrictions were motivated by discriminatory intent, that would violate Section 2's intent prong. There is then no basis for the proposition that such eliminations are somehow be immune from Section 2's results prong, which applies no less broadly than the intent prong to any and all voting practices. *Cf. Chisom*, 501 U.S. at 398, 404 ("The results test mandated by the 1982 amendment is applicable to all claims arising under § 2." "It is difficult to believe that Congress, in an express effort to broaden the protection afforded by

the Voting Rights Act, withdrew, without comment, an important category of elections from that protection.").

Finally, Defendants make the hail-mary argument that Section 2 is unconstitutional as applied to early voting, D.Br. at 44-48, but that argument is waived because it was never raised below,[17] and is in any event wholly without merit.[18]

The district court properly applied Section 2 of the VRA and found that Plaintiffs are likely to succeed on the merits of their Section 2 claim.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN WEIGHING THE REMAINING PRELIMINARY INJUNCTION FACTORS

The injunctive relief ordered by the district court prevents irreparable injury to the voters, does not appreciably harm the State, and serves the public interest. "The State has not shown that the district court abused its discretion in weighing

[17] The Supreme Court routinely rejects such attempts to assert the unconstitutionality of a statute for the first time on appeal under the guise of "constitutional avoidance." *See, e.g.*, *United States v. Apel*, 134 S. Ct. 1144, 1153 (2014); *United States v. Castleman*, 134 S. Ct. 1405, 1416 (2014). Defendants' "federalism" arguments, D.Br. at 47-48, are simply repackaged arguments about unconstitutionality that were also never raised below.

[18] Section 2's results standard is indisputably constitutional. *See Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (summary affirmance); *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 905 (9th Cir. 2004). Defendants' observation that felon disfranchisement laws are exempt from Section 2's results standard due to constitutional concerns is inapposite, given the affirmative sanction for felon disfranchisement laws under the Fourteenth Amendment. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1229 (11th Cir. 2005).

the[se] equitable considerations." *NEOCH*, 696 F.3d at 599. Defendants do not dispute that "[a] restriction on the fundamental right to vote ... constitutes irreparable injury." *OFA*, 697 F.3d at 436. Such injury "outweighs any corresponding burden on the State, which has not shown that local boards will be unable to cope with" the injunctive relief entered. *Id.*; *see* Op., RE72, PageID#5915 ("[N]othing in the record suggests that additional costs incurred will be unmanageable for the Boards."). Defendants complain that elections officials must "go back" to processing registrations during early voting, D.Br. at 58, but, in fact, the injunction simply requires that they maintain practices that they have regularly performed for years without difficulty, which only underscores the lack of harm to the State. And "[t]he public interest ... favors permitting as many qualified voters to vote as possible." *OFA*, 697 F.3d at 437.

Without any evidence, Defendants wildly accuse Plaintiffs of purposeful "delay," D.Br. at 57, a laches argument that was already raised, which the district court did not abuse its discretion in rejecting, Op., RE72, PageID#5852-5853. *See Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227, 231 (6th Cir. 2007) ("[A]n appellate panel reviews a district court's resolution of a laches question for an abuse of discretion." (citation and internal quotation marks omitted)). As the district court found, ample notice was provided of Plaintiffs' motion for a preliminary injunction, and Defendants still cannot "demonstrate how such

extensive materials" including a "51-page motion and voluminous exhibits," should have been produced sooner by Plaintiffs. Op., RE72, PageID#5853.

Defendants' arguments concerning "last-minute injunctions" were already raised in their motion for a stay, *see* Defs.' Emergency Mot. for Stay, ECF No. 18-1, at 7, which has already been rejected by this Court, *see* Order, ECF No. 22-1. Moreover, Defendants again fail to note that the preliminary injunction simply *maintains* voting opportunities that have been around for nearly a decade. Indeed, Defendants' own authority, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), D.Br. at 56, *supports* affirmance, as it cautions that a last-minute *appellate reversal* of a district court is highly disfavored in the elections context:

> The Court of Appeals [i]s required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, *especially conflicting orders*, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. ... It [i]s still necessary, as a procedural matter, for the Court of Appeals to give *deference to the discretion of the District Court*.

549 U.S. at 4-5 (emphases added).

Defendants have not "shown abuse in the district court's fashioning of injunctive relief tailored to the identified harm." *NEOCH*, 696 F.3d at 599.

CONCLUSION

For the forgoing reasons, this Court should affirm.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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 13,479 words.
2. The brief has been prepared in 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 19th 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 DOCUMENTS

Plaintiffs-Appellees designate the following district court documents:

RE No.	Document Name	PageID#
1	Complaint	1-35
17	Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support	92-153
18-1	Report by Dr. Daniel A. Smith: Analysis of Effects of Senate Bill 238 and Directive 2014-06 on Early In-Person (EIP) Absentee Voting by Blacks and Whites in Ohio	162-250
18-2	Report by Vincent J. Roscigno, Ph.D.: Racial Inequality, Racial Politics and the Implications of Recent Voting Restrictions in Ohio: Analyses of Senate Factors One, Two, Three, Five, Six and Seven of the Voting Rights Act	251-307
18-29	Declaration of Timothy Cable	494
18-33	Ohio Association of Election Officials (OAEO) Report and Recommendations for Absentee Voting Reform	521-526
18-34	Directive 2012-35	527-528
18-36	Directive 2014-06	530-531
18-37	Directive 2014-17	532-533
18-38	Statement From Secretary of State Jon Husted	534
18-48	Darrel Rowland, "Voting in Ohio: Fight over poll hours isn't just political," *Columbus Dispatch*, Aug. 19, 2012	551-557

40	Memorandum of Proposed Intervenor-Defendant the Ohio General Assembly in Opposition to Plaintiffs' Motion for a Preliminary Injunction	722-771
41	Secretary of State Jon Husted's Opposition to Plaintiffs' Motion for Preliminary Injunction	955-1005
41-3	Declaration of Sean P. Trende	1009-1071
41-4	Report by Nolan McCarty: Response to Expert Report of Daniel A. Smith	1072-1103
41-5	Declaration of Thomas Brunell, Ph.D.	1104-1130
48	Order Denying Motion to Intervene by Proposed Intervenor the Ohio General Assembly	1474-1478
52	Plaintiffs' Reply in Support of Motion for Preliminary Injunction	1514-1535
53-4	Rule 26(A)(2)(B) Expert Rebuttal Declaration of Barry C. Burden, PhD	1553-1557
53-5	Rule26(A)(2)(B) Expert Rebuttal Declaration of Paul Gronke, PhD	1558-1570
53-10	Directive 2012-36	1625-1626
53-11	Expert Rebuttal Declaration of Dr. Daniel A. Smith	1627-1653
54	Defendant Ohio Attorney General Mike DeWine's Supplemental Memorandum Contra Plaintiffs' Motion for Preliminary Injunction	1714-1716
54-1	Memorandum of Proposed Intervenor-Defendant the Ohio General Assembly in Opposition to Plaintiffs' Motion for a Preliminary Injunction (Re-filed by Defendant DeWine)	1717-1766

58	Amicus Brief of the Ohio Senate Democratic Caucus and the Ohio House Democratic Caucus Opposing Defendant Ohio Attorney General Mike DeWine's Supplemental Memorandum Contra Plaintiffs' Motion for Preliminary Injunction or Any Amicus Brief of the Ohio General Assembly	1962-1981
61-39	Supplemental Report of Thomas Brunell	3251-3257
63	Defendant Ohio Attorney General Mike DeWine's Statement of Contested and/or Disputed Facts	3314-3318
63-2	November 6, 2012 General Election Data Through COB October 9, 2012	3320-3335
64-1	Deposition of Sean Trende	3987-4086
64-2	Deposition of Thomas Brunell, Ph.D.	4087-4166
64-3	Deposition of Dr. Daniel A. Smith	4167-4276
64-4	Deposition of Professor Vincent Roscigno	4277-4317
64-5	Deposition of Nolan McCarty	N/A
67-1	Nolan McCarty's Rebuttal to Declarations of Daniel A. Smith, Barry Burden, and Paul Gronke	5067-5093
72	Memorandum Opinion and Order	5848-5918
73	Defendants' Notice of Appeal	5919-5921
75	Order Granting the Ohio General Assembly's Motion to Intervene for Appeal	5954
87-1	Directive 2014-28	6031-6104