No. 14-3877

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

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

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INTRODUCTION

After rounds of hurried briefing on the eve of Ohio's Election Month, Plaintiffs nowhere deny what was said by Ohio's Secretary of State and Attorney General ("State" or "Ohio")—that Ohioans have more early-voting options than most Americans. Under the challenged Statute and Directive, Ohio offers early voting across 28 days. Doc.41-3, Trende Decl., PageID#1019. In New York, New Jersey, Michigan, Kentucky, and many States, in-person voting is available one day—Election Day. *Id.* Ohio's boards are open 22 of the 28 days. *Id.*, PageID#1022. Among all States, the median number of early-voting days is 11. *Id.*, PageID#1024. Ohio is open for voting on two Saturdays and a Sunday. Doc.61-13, Directive 2014-17, PageID#2934. Twenty-eight States offer no weekend voting; only nine offer Sunday voting. Doc.41-3, Trende Decl., PageID#1025. Ohio thus offers more early-voting options than 41 States. *Id.*, PageID#1021, 1024.

These facts perhaps best illustrate the breadth of the district court's decision. For they show that the decision can be explained in only two ways—one with an impermissibly far-reaching *result*, the other with an impermissibly far-reaching *rationale*. On the one hand, normal constitutional and statutory standards would evaluate Ohio's present schedule (if at all) against a constitutional or statutory *floor*, not against Ohio's *previous* schedule. If the district court's decision is read

to apply such a floor here, its conclusion that Ohio's early-voting options violate the law means that the *more restrictive* options in 41 other States necessarily do so as well. So the decision largely invalidates the way this Nation votes today and the way the Nation has voted throughout its history.

On the other hand, if the decision is read to sidestep that dramatic *result* by evaluating only Ohio's changes from old schedule to new, its novel *reasoning* would upend our state "laboratories of democracy" as we have known them since Justice Brandeis coined the phrase. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Any State considering expanding early voting would surely hesitate if that experiment resulted not in the State being "laud[ed]" (as the Supreme Court said should happen, *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 811 (1969)), but in the State being sued (as the district court allowed happen here).

To top it off, the district court did this at the last minute, despite this Court's and the Supreme Court's repeated reminders against such late changes. Ohio thus asks the Court to restore the lawful calendar that Ohio's elective representatives enacted, and that its voters and elections officials alike have planned for. Alternatively, the Court, if it affirms, should stay its order and the injunction while Ohio seeks further review before the en banc Court or the Supreme Court.

ARGUMENT

I. PLAINTIFFS' LEGAL ERRORS SHOW THAT THEY HAVE NOT ESTABLISHED A LIKELY EQUAL-PROTECTION VIOLATION.

Ohio's Opening Brief illustrated (at 15-33) that Plaintiffs' constitutional claim failed because Ohio's early-voting schedule is neutral; the schedule does not burden the right to vote, so rational-basis review applies; and the schedule furthers important state interests under even the *Anderson/Burdick* intermediate standard of review. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Plaintiffs' Response shows agreement on three fronts.

First, Plaintiffs concede that Ohio's early-voting schedule is facially neutral, but assert that (at 22) constitutional review still applies to neutral laws.

Second, Plaintiffs do not raise a traditional equal-protection challenge. That would require them to show that Ohio's schedule was passed "'because of,' not merely 'in spite of,'" the disparate impact that Plaintiffs allege. *United States v. Blewett*, 746 F.3d 647, 659 (6th Cir. 2013) (en banc) (citation omitted). Plaintiffs abandon this line of attack (at 21) by saying that laws may face *Anderson/Burdick* review "regardless of whether they were passed with discriminatory intent." That wise disclaimer is disputed by *amicus* Cuyahoga County, which contends (at 6) that Ohio's schedule violates equal protection because its "discriminatory impact" "has always been known." But "[a] disproportionate effect does not violate the Equal Protection Clause, even if it was foreseen." *Blewett*, 746 F.3d at 659.

Third, Plaintiffs agree that Ohio's neutral and non-discriminatory schedule need only satisfy the proper *Anderson/Burdick* standard of review. Here again, Plaintiffs agree with Ohio on the three tiers. As Plaintiffs note, if "'regulations are minimally burdensome and nondiscriminatory, rational-basis review applies.'" Pls.' Br. 21 (citation omitted).

The parties diverge on three points: the scope of *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012); the weight of the burden, if any, that Ohio's schedule poses on Ohio voters; and the state interests on the other side.

A. Plaintiffs Ignore Language From *Obama For America* That Invalidates Their Position.

Plaintiffs (at 22) read into *Obama for America* an implied holding "apart from" its primary holding about facial discrimination between military and non-military voters. They say the case *also* holds that shortening the number of early-voting days "burden[s]" "voting rights" regardless of facial distinctions. Not so. This Court invalidated the law at issue there because it both discriminated among voters and burdened the right to vote. 697 F.3d at 432. If it had not done *both*, the case would have presented a different question. This Court said so: "If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its 'important regulatory interests' would likely be sufficient to justify the restriction. *Id*. at 433-34 (citation omitted). Plaintiffs ignore this finding.

B. Plaintiffs Have Not Shown Any Burden On The Right To Vote.

Plaintiffs are left claiming (at 23) that the inability to vote on multiple Sundays, or the inability to vote on *more* than 22 days equals a "significant" burden on the right to vote even where Ohio offers 13 hours of Election Day voting and universal vote-by-mail options. That claim is untenable, and any "burden" here triggers only rational-basis review.

1. Plaintiffs have no constitutional right to cast an absentee ballot by their preferred method.

As Ohio explained (at 19-27), there is no right to an absentee ballot or same-day registration. *See McDonald*, 394 U.S. at 807; *Marston v. Lewis*, 410 U.S. 679, 680 (1973). If there were, most state laws would violate the right to vote. Plaintiffs' only responses (at 27-28 & n.8) are that these cases are old and do not consider a *change* from "long-standing" voting opportunities.

Relying on the cases' age is simply an admission that Plaintiffs have no viable response. *See Seggerman Farms, Inc. v. C.I.R.*, 308 F.3d 803, 807 (7th Cir. 2002) (precedent no less binding "with the passage of time"). Regardless, recent cases also reject the idea that absentee voting is on par with Election Day voting. *See Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) ("obvious" that the right to vote does not give courts authority "to decree weekend voting [or] multi-day voting"); *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d

322, 370-74 (M.D.N.C. 2014); *Gustafson v. Ill. State Bd. Elections*, 2007 WL 2892667, at *5 (N.D. Ill. Sept. 30, 2007).

Plaintiffs' defense narrows further on the faulty suggestion that this wealth of precedent—old and new—can be distinguished because none addresses *changes*. They cite no case for this notion (at 27) that the Constitution enshrines past practice. Indeed, precedent rebuts Plaintiffs' claim. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (upholding change to election laws); *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1322 (10th Cir. 2008) (same); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 394-95 (5th Cir. 2013) (same).

2. Plaintiffs cannot turn the district court's legal conclusion that the burdens were "significant" into a fact question.

Plaintiffs also retreat (at 28) behind the district court's assertion that Ohio's schedule imposes "significant burdens." Plaintiffs' mantra (at 25, 26, 28) is that the district court made factual findings entitled to clear-error deference. That suffers two problems: The district court's "burden" conclusions were legal, not factual, and those conclusions are irreconcilable with binding precedent.

Plaintiffs identify no case that treats the ultimate finding of whether a burden is severe (and subject to strict scrutiny), significant (and subject to intermediate scrutiny), or minimal (and subject to rational-basis review) as one appropriate for fact-finding. Precedents oppose the idea. In *Crawford*, the Supreme Court

affirmed summary judgment against a challenge to a voter ID law. 553 U.S. at 187, 204 (Stevens, J. op.). The summary-judgment posture meant that the Court had to treat the facts "in the light most favorable to" those challenging the law. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014). Even so, the Court rejected the challenge without analyzing the burden as one of summary-judgment "fact."

Other cases teach the same lesson. Last year, without deferring to the district court, the Fifth Circuit reversed an injunction premised on the idea that voter-registration laws "imposed" "burdens" on voting rights. *Steen*, 732 F.3d at 388. Just ten days ago, the Seventh Circuit stayed an injunction against Wisconsin's voter ID law. *Frank v. Walker*, 2014 WL 4494153 (7th Cir. Sept. 12, 2014). The district court entered that injunction after extensive fact-finding. *Frank v. Walker*, 2014 WL 1775432 at *18 (E.D. Wis. April 29, 2014). These voting-specific cases comport with the general principle that "legal conclusions masquerading as factual allegations" do not convert a legal question into a factual one. *Bright v. Gallia Cnty.*, 753 F.3d 639, 652 (6th Cir. 2014).

3. Plaintiffs cannot *facially* invalidate a law based on alleged *special* burdens on a subclass.

Plaintiffs lastly argue (at 27 & n.7) that Justice Stevens's *Crawford* opinion would have turned out differently if adequate evidence had showed impacts on a subclass of voters. That reading is wrong.

First, Justice Stevens disclaimed it. He noted that the challengers there—like here—asked the Court "to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests." 553 U.S. at 200. The Court rejected that challenge even though the burden there dwarfs the burden here. Compare the burden on those who had to "gather[] the required documents" to get an ID or "make a second trip to the circuit court clerk's office after voting," *id*. at 198, 200, with the burden of choosing to vote early on one of 22 days, or by mail, or in person on Election Day if one of those does not meet a voter's preference.

Second, Justice Stevens disclaims the idea that burdens on a small class of voters could facially invalidate a neutral law. That is, even *assuming* a perfect record of concrete burdens on a subset of voters, the remedy would not be *facial* invalidation like the district court imposed. Even assuming "an unjustified burden on some voters," facial invalidation is not "the proper remedy" because declaring unconstitutional a "neutral, nondiscriminatory regulation of voting procedure" "frustrates the intent of the elected representatives." *Id*. at 203. Plaintiffs, of course, do not seek extra days or same-day registration and voting for a *subclass* of uniquely situated voters. *Crawford*'s logic thus dooms their *facial* relief.

In sum, Plaintiffs' desire to rely entirely on the district court's "fact" finding should be put in perspective. A preliminary injunction is an "extraordinary remedy," *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008), that "ought to be subject to effective, and not merely perfunctory, appellate review," *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (citations omitted). After all, Congress would not have made such orders immediately appealable "if it intended appellate courts to be mere rubber-stamps." *Id*. (citation omitted). A district court's hurried conclusions to suspend a State's election schedule is no small matter. When those conclusions equate burden with inconvenience, and credit the preference not to vote by mail in support of finding a burden, the injunction calls out for searching appellate review.

C. Plaintiffs Mistakenly Apply Strict Scrutiny To Ohio's Interests.

Plaintiffs next invoke (at 28-34) strict scrutiny to measure Ohio's interests—in application if not in name. At the outset, they say (at 29) that Ohio raises new interests on appeal. Ohio's Brief (at 23-26) named three general interests—uniformity, administrative balancing, and fraud detection. Ohio raised the same categories below. Doc.54-1, Opp., PageID#1726-28, 1741-45; Doc.41, Opp., PageID#970-73, 997-1001. Plaintiffs' challenge to each category fails.

Uniformity. Plaintiffs claim (at 30-31) that uniformity "could just as easily be achieved by *maintaining* . . . the evening and Sunday hours" existing

previously. During the last mid-term election in 2010, however, uniformity did *not* exist. In 2010, only five counties opened on a Sunday. Doc.41-9, Damschroder Decl., PageID#1169. To *create* uniformity, Ohio had to balance those counties desiring more days with those desiring fewer. And the chosen level came from a bipartisan plan that accounted for the diverse wishes of the 88 counties. Doc.41-21, Jones Decl., PageID#1271.

Further, Plaintiffs relegate to a footnote (at 31 n.10) that the injunction does not achieve their "extended" uniformity because it permits counties to *deviate* from its minimum schedule. Doc.72, Order, PageID#5918. Plaintiffs concede they did *not* seek this relief. Instead, Democratic legislators sought this relief, noting that they had been unsuccessful in efforts to pass similar legislation. Doc.58, *Amicus* Br., PageID#1979-80. The district court not only granted this relief, it also ordered the General Assembly to pass legislation consistent with its order. *See* Doc.72, Order, PageID#5918. The Court must at least reverse this non-requested, non-uniformity.

Administrative Balancing. Plaintiffs wrongly contend (at 31-32) that Ohio must show that its boards have "struggled to cope" with greater hours. Plaintiffs bear the burden of proof. *Winter*, 555 U.S. at 20. Regardless, Ohio's evidence shows the commonsense principle that "more hours means more money." Doc.41-18, Walch Decl., PageID#1253; Doc.41-20, Ockerman Testimony, PageID#1264;

Doc. 41-9, Damschroder Decl., PageID#1169; Doc. 68-5, Munroe Decl., PageID#5581; Doc. 68-3, Cuckler Decl., PageID#5511.

Plaintiffs' case citations (at 31-32) do not help them. *Obama for America* held that the State's interests *would* have justified a non-discriminatory schedule. 697 F.3d at 433-34. The other cases applied strict scrutiny. *See Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 591 (6th Cir. 2006); *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006). Plaintiffs respond (at 32 n.11) that *Stewart* also held that the cost concerns identified there would have failed rational-basis review, but that was because the voting technology at issue *inaccurately* counted ballots and lost votes. No such concerns are present here, and *Stewart* was vacated by the en banc Court. 473 F.3d 692 (6th Cir. 2007).

Fraud Detection. Plaintiffs claim (at 33-34) that a directive (Directive 2012-36) that requires the segregation of early ballots undercuts Ohio's interest in fraud detection. But Ohio can use more than one safeguard to prevent the counting of mistaken ballots; indeed, evidence showed risks that wrong ballots still slipped through the cracks. Doc.68-3, Cuckler Decl., PageID#5510 ("numerous issues" with individuals registering in multiple counties); Doc.68-4, Triantafilou Decl., PageID#5531 (citing inability to confirm some votes when ballots and registrations were processed at the same time).

D. Plaintiffs Cannot Contain Within Ohio's Borders Their Expansive View Of The Constitutional Right To Vote.

Plaintiffs, lastly, try to discount (at 35-38) the implications for other States of invalidating Ohio's early-voting rules. If Ohio's rules are illegal, the 41 States' less-generous options are also in trouble. In response, Plaintiffs claim that Ohio is different because early voting is (at 35) "woven into the fabric" of Ohio, whose voters "heavily" rely (at 36) on it. These platitudes provide no limiting principle and are wrong in all events. In Ohio, voting on Election Day remains "the most widely utilized means of voting." Doc.41-9, Damschroder Decl., PageID#1167. "In person absentee voting is the least-utilized." *Id.* In the last mid-term, only about 3.3% of African-Americans and 2.8% of whites voted early in-person. Doc.41-3, Trende Decl., PageID#1040. Compare Ohio with North Carolina, where the district court rejected similar claims. In 2010, 36% of African-American voters and 33.1% of white voters voted early in-person in North Carolina. *McCrory*, 997 F. Supp. 2d at 372 n.64.

At day's end, what the Supreme Court said about Illinois's expansion of absentee ballots fits this case to a tee: "Ironically, it is [Ohio's] willingness to go further than many States in extending the absentee voting privileges . . . that has provided [Plaintiffs] with a basis for arguing that the provisions seem to operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise." *McDonald*, 394 U.S. at 810-11. But rather than use that

as a basis to invalidate the law, the Supreme Court said the regime represented a "laudable state policy." *Id.* at 811. The same is true here.

II. PLAINTIFFS' FAILURE TO IDENTIFY AN OBJECTIVE BENCHMARK AGAINST WHICH TO MEASURE OHIO'S EARLY-VOTING SCHEDULE SHOWS THAT THEY ARE NOT LIKELY TO PROVE THEIR SECTION 2 CLAIM.

For Plaintiffs' Section 2 claim, the parties *agree* on the general framework. As Ohio noted (at 34-37), Section 2 requires a plaintiff to prove *first* that a practice disparately harms a racial group, and *second* that the totality of circumstances shows that this practice makes the political processes unequally open to that group. Plaintiffs identify (at 39-40) the same two-step. The parties *disagree* on the first of the steps—whether Plaintiffs have shown that Ohio's early-voting schedule disproportionately harms African-Americans. Ohio illustrated (at 37-48) that Plaintiffs failed to prove a disparate harm because: (1) they did not identify an *objective benchmark* against which to compare Ohio's schedule; (2) they compared Ohio's *new* schedule to its *old* one under an improper "retrogression" analysis; (3) their reading would mean that the Congress that amended Section 2 outlawed all voting regimes on enactment; and (4) statutory canons favor Ohio.

Plaintiffs respond with three points. They start (at 42-46) with largely irrelevant factual claims. They next argue (at 46-50) that Ohio's *previous* voting schedule qualifies as an objective benchmark. Finally, Plaintiffs offer (at 50-54) cursory answers to Ohio's use of canons. Each point lacks merit.

A. Even Assuming That African-Americans Use Early In-Person Voting More Than Others, That Does Not Prove That Ohio's Early-Voting Schedule Has A Discriminatory Result.

Plaintiffs first assert (at 42-46) that the district court properly credited their expert's conclusion that African-Americans use early in-person voting more than other groups. Whether right or wrong (*but see* Ohio Br. 55-56), this is beside the point. Plaintiffs cannot use the district court's alleged "avalanche of factual findings" (at 46) to cover up the legal error below. The *factual* question whether African-Americans may use early voting more than others is irrelevant to the *legal* question whether Plaintiffs have identified a proper benchmark against which to compare Ohio's early-voting schedule.

That legal question is outcome-dispositive. On one hand, Plaintiffs would not have shown a disparate impact if the proper benchmark is an early-voting schedule with *fewer* options than Ohio's generous schedule. In that respect, Plaintiffs take no issue with Ohio's claim (at 38) that its generous schedule provides more early-voting options than most States. Doc.41-3, Trende Decl., PageID#1021. On the other hand, to show a disparate impact, Plaintiffs must identify a benchmark that provides even *greater* opportunities than Ohio does. That is precisely why Plaintiffs zero in on Ohio's *previous* schedule. And even then, they invoke not Ohio's schedule, but five counties' schedules in 2008 and 2010, not 2012. They cite the previous schedule *explicitly* (at 50), and use it as the

benchmark *implicitly* whenever they say that Ohio's "elimination" of that schedule's options disparately harms African-Americans. Pls.' Br. 43 (discussing "eliminations"); 44 (same); 45 (same), 47 (same).

Which benchmark should the Court choose? In "the search for a benchmark," it should remember that *Plaintiffs*—not *Ohio*—must prove that an objective benchmark exists and must provide a "principled reason" for choosing one over another. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (Kennedy, J., op.); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (plaintiffs bear burden of proof). The injunction must be reversed if Plaintiffs have failed to do so now—even if other plaintiffs could posit a non-arbitrary benchmark for early-voting schedules.

B. Plaintiffs And The United States Err By Relying On Ohio's Previous Early-Voting Schedule As Their Objective Benchmark.

Plaintiffs argue (at 47-51) that Ohio's previous schedule may serve as the benchmark because Ohio's contrary analysis confuses the distinction between Section 2's discrimination test and Section 5's retrogression test. The United States' *amicus* brief argues (at 17-23) for Ohio's prior schedule on the different ground that Section 2 adopts a "totality of the circumstances" test. Both Plaintiffs and the United States argue that a formal benchmark is necessary only in vote-dilution cases. These three positions are wrong.

1. Plaintiffs overlook that Section 2 and Section 5 use different benchmarks, and that the district court incorporated Section 5's retrogression benchmark.

Plaintiffs distinguish Section 2 and Section 5 in this way: Section 2 asks whether a challenged state practice has a disparate impact along racial lines *compared to nothing else*; Section 5 asks whether a challenged state practice has a disparate impact along racial lines *compared to the prior practice*. *See* Pls.' Br. 47-48 (citing *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) ("*Bossier II*")). Their own case says their view "makes no sense." *Bossier II*, 528 U.S. at 334. It is impossible to decide whether "a voting practice 'abridges' the right to vote" (i.e., has a disparate impact) "without some baseline with which to compare the practice." *Id.* That is true whether the claim falls under Section 2 or Section 5.

Section 2 and Section 5 are distinguishable not because Section 2 lacks a benchmark and Section 5 possesses one; the two sections are distinguishable because they incorporate *different* benchmarks. *See id.* at 333-34. Because Congress passed Section 5 to "uniquely deal only and specifically with *changes* in voting procedures," *id.* at 334, "[t]he baseline for comparison is present by definition; it is the existing status," *Holder*, 512 U.S. at 883 (Kennedy, J., op.).

Under Section 2, by contrast, "[r]etrogression is not the inquiry." *Id.* at 884 (Kennedy, J., op.); *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard."). Instead, a

Section 2 plaintiff must "postulat[e] a reasonable alternative voting practice to serve as the benchmark." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("*Bossier I*"). That reasonable alternative is what the "right to vote *ought to be*" as an abstract matter. *Bossier II*, 528 U.S. at 334; *see Holder*, 512 U.S. at 880 (Kennedy, J., op.) (noting that the benchmark gives the courts "an idea in mind of how hard it *should be* for minority voters to elect their preferred candidates under an *acceptable* system" (emphases added; internal quotation marks omitted)).

Thus, Plaintiffs correctly say (at 48) that "changes to the status quo may also be challenged under Section 2." *See Bossier II*, 528 U.S. at 334. But that does not help them. Courts must still compare the new law to a benchmark to determine whether it disparately harms African-Americans. *Holder*, *Bossier I*, *Bossier II*, and *Georgia* show that the benchmark is not the *old* number of early-voting options but a *hypothetical* number that Ohio "ought" to have. *Bossier II*, 528 U.S. at 334. Whatever that hypothetical "should be" number is, Ohio's *generous* schedule exceeds it. After all, it exceeds the schedule of 41 other States. At the least, Plaintiffs' claim fails because they have not carried their burden to identify the proper benchmark. *See Holder*, 512 U.S. at 881-82 (Kennedy, J., op.).

2. The United States mistakenly relies on the totality-of-the-circumstances test.

The United States provides (at 17-23) an alternative reason to use Ohio's previous schedule as the benchmark: It says that historical practices are relevant

under Section 2's "totality of the circumstances" test. But the United States' *immediate* jump to the totalities departs from the two-step approach to Section 2 (first, identify a disparate harm; second, consider all circumstances). *See Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986).

The Supreme Court's vote-dilution cases, which consider challenges to state redistricting plans, confirm this. Those cases repeatedly mandate the same two-step. A plaintiff must "initially establish" *Bossier I*, 520 U.S. at 479-80, three "preconditions" (emphasis on "pre"), *Holder*, 512 U.S. at 880 (Kennedy, J., op.). These *pre*conditions are designed to prove whether an alternative benchmark exists in the redistricting context—that is, they show whether the minority voters have identified a *valid alternative* plan against which to compare the challenged plan.

To be sure, a plaintiff must "*also* demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive." *Bossier I*, 520 U.S. at 480 (emphasis added). Nevertheless, "*only* when a party has established [the initial preconditions] does a court proceed to analyze whether a violation has occurred based on *the totality of the circumstances*." *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009) (Kennedy, J., op.) (emphasis added). At that *later* stage, of course, one of the boundless factors may well be historical practices. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 439 (2006) ("*LULAC*"). But courts *never* reach that step if the plaintiffs do not meet the preconditions. Without

the initial showing, "there neither has been a wrong nor can be a remedy." *Growe v. Emison*, 507 U.S. 25, 41 (1993).

Indeed, the Supreme Court has criticized a court for doing what the United States asks of this Court—"proceed[ing] directly to the 'totality of circumstances' test" without satisfying Section 2's vote-dilution preconditions. *Id.* at 38. *Growe* held that the preconditions are necessary both "to establish that the minority has the potential to elect a representative of its own choice" (i.e., that an objective alternative plan exists) and "that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population" (i.e., that a disparate impact exists from the current plan as compared to that alternative plan). *Id.* at 40. The United States' effort to cloak its retrogression in the "totalities" does not make it any less mistaken retrogression.

3. Plaintiffs and the United States mistakenly claim that Section 2 requires a benchmark only in vote-dilution cases.

Because vote-dilution cases support Ohio, Plaintiffs (at 49) and the United States (at 18-20) attempt to limit the objective-benchmark requirement to those cases. They fail to give a valid reason for doing so.

Plaintiffs say (at 49) that courts have not applied the objective-benchmark requirement in vote-denial cases. But "[v]ote-denial claims under Section 2 have thus far been relatively rare." *McCrory*, 997 F. Supp. 2d at 346. Further, the reason that vote-dilution cases adopt a benchmark shows that it applies to all

voting *practices*, not simply *redistricting plans*. *Bossier II* said "[i]t makes no sense to suggest that a voting practice"—not simply a redistricting plan—"'abridges' the right to vote without some baseline with which to compare the practice." *Bossier II*, 528 U.S. at 334. The need for this comparator exists whatever the practice at issue.

The United States adds (at 20) that the concern with "standardless or arbitrary" benchmarks is not present in the vote-denial context. This case proves it wrong. Neither Plaintiffs nor the United States have provided *any* explanation why Ohio's prior schedule (again, the schedule from select counties) coincidentally represents the exact amount of early voting that "ought to be." *Bossier II*, 528 U.S. at 334. As Justice Kennedy noted when discussing the size that a governmental entity ought to be, there are an equally "wide range of possibilities" for early-voting days and hours, which "makes the choice inherently standardless." *Holder*, 512 U.S. at 885 (Kennedy, J., op.) (citation omitted). Here, as there, "[o]ne gets the sense that [Plaintiffs] and the United States have chosen a benchmark for the sake of having a benchmark." *Id.* at 882. Perhaps they chose that possibility, among the "wide range of possibilities," to better suit their arguments, but they have yet to give an *objective* reason for their chosen number over any other.

C. Plaintiffs And The United States Do Not Adequately Respond To The Problems Their Interpretation Creates.

As Ohio explained (at 42-48), because Section 2 does not make an old-to-new comparison, Plaintiffs' claim that Ohio's previous schedule sets the benchmark would (1) invalidate most States' laws both now and in 1982 when Congress amended Section 2; and (2) raise constitutional and federalism concerns. The responses of Plaintiffs (at 50-54) and the United States (at 14-16, 23-25) do nothing to allay these concerns.

1. Plaintiffs' view has far-reaching implications.

As Ohio noted (at 42-44), Plaintiffs' reliance on Ohio's previous schedule would, if applied broadly, establish a discriminatory "result" for most States today and for all 50 States in 1982. *Cf. McCrory*, 997 F. Supp. 2d at 351-52; *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1254 (M.D. Fl. 2012). Plaintiffs and the United States offer competing responses to this problem.

For Plaintiffs, it is no problem at all. They say (at 51-52) both that "the legality of a practice" does not "depend on national averages" and that it is "irrelevant" that no State in 1982 had such generous options. This ignores that "reasonable statutory interpretation must account for . . . 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (citation omitted). For example, circuits have held that Section 2 does not reach felon-disenfranchisement laws because those laws were "a well-known and

accepted part of the voting landscape" in 1982. *Simmons v. Galvin*, 575 F.3d 24, 40 (1st Cir. 2009); *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1234 (11th Cir. 2005). Just as Congress surely did not mean to invalidate those ubiquitous laws, it likewise did not mean to invalidate the longstanding rule of voting only on Election Day.

For the United States, it at least recognizes the devastating effects its view could have, and so attempts to divine a limiting principle. It again invokes (at 23-25) the totalities, claiming that each State should have its *own* benchmark such that Ohio's rigorous benchmark may not be suitable for New York, California, or any other State. That view sounds a lot like a *subjective* benchmark, nothing like an *objective* one. It conflicts with Supreme Court cases and raises even greater constitutional concerns.

As for Supreme Court cases, the Court has set one-size-fits-all rules in the vote-dilution context. In all 50 States, a plaintiff must meet the "threshold conditions" illustrating that an objective alternative redistricting plan exists. *Growe*, 507 U.S. at 40. The Court has adopted uniform rules because of "the need for workable standards and sound judicial and legislative administration." *Bartlett*, 556 U.S. at 17 (Kennedy, J., op.). For example, the "majority-minority rule"—the precondition that a plaintiff show that a minority group *could* make up a majority if placed in a single-member district under an alternative plan—"provides

straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Id.* at 18. Nowhere has the Court suggested that this precondition is suited for only some States.

As for constitutional concerns, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), invalidated Section 5's coverage formula because of the "'fundamental principle of *equal* sovereignty' among the States." *Id.* at 2623 (citation omitted). "[D]espite the tradition of equal sovereignty," the Court noted, Section 5's coverage formula "applie[d] to only nine States." *Id.* at 2624. "While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process." *Id.* The United States' position that Section 2 assesses the *same* practices against 50 *different* benchmarks raises identical concerns. Ohio must have 35 days of early voting including in the evenings and on weekends; Michigan must have none.

2. Plaintiffs' view conflicts with canons of interpretation.

As Ohio showed (at 44-48), Plaintiffs' reading of Section 2 conflicts with the canon of constitutional avoidance and the federalism clear-statement rule. In response, Plaintiffs and the United States put up a united front.

As for the avoidance canon, Plaintiffs (at 54 & nn.17-18) call it a "hail-mary." *See also* U.S. Br. 14-15. The Supreme Court has not considered it such.

It, for example, read Section 2 to require the "majority-minority rule" in the redistricting context to "avoid[] serious constitutional concerns under the Equal Protection Clause" from a less demanding benchmark. *Bartlett*, 556 U.S. at 21 (Kennedy, J., op.); *see LULAC*, 548 U.S. at 446 (Kennedy, J., op.). The Court's concern that it "must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions" applies here. *Bartlett*, 556 U.S. at 18 (Kennedy, J., op.). For example, the district court's finding that "African Americans" as a class "are distrustful of the mail" makes such a race-based prediction. Doc.72, Order, PageID#5901. That broad conclusion would invalidate those state laws that require voting *only by mail*. Doc.41-3, Trende Decl., PageID#1020. The conclusion is also belied by Cuyahoga County's *amicus* brief, which asserts that 30.9% of African-Americans cast their votes by mail in 2010. *See* Cuyahoga Cnty. *Amicus* Br., Salling Decl., Ex. B, p.6.

The United States also wrongly suggests (at 15 n.4) that the Eleventh Circuit's decision upholding felon-disenfranchisement laws invoked the avoidance canon based "entirely" on the Fourteenth Amendment's express allowance for those laws. That court cited "additional reasons" for the canon, including the *same* reasons Ohio identified here that there was no historical record of discrimination through the challenged practice. *Johnson*, 405 F.3d at 1230-31.

As for the federalism clear-statement rule, the United States argues (at 15-16) that Section 2 shows an intent to intrude on state authority. True enough. But the question is *how far* did Congress intend to go? Section 2 does not clearly answer *that* question. *Johnson*, 405 F.3d at 1232 n.35. And Plaintiffs' reading would show extraordinary intrusion, one certainly not mandated by Section 2's language, as courts could easily pick an objective benchmark far shorter than Ohio's prior early-voting schedule. The United States also asserts (at 16) that the National Voter Registration Act's authorization for States to have thirty days between registration and voting does not help Ohio because that Act says it does not authorize violations of the Voting Rights Act. But the two laws should be interpreted to be compatible. Because the latter "was passed 11 years after the amendment to Section 2, it is difficult to conclude that Congress intended that a State's adoption of a registration cut-off before Election Day would constitute a violation of Section 2." *McCrory*, 997 F. Supp. 2d at 352. It is an odd reading to interpret an ambiguous statute as prohibiting what a clear statute permits.

Finally, Plaintiffs wrongly suggest (at 54 n.17) that Ohio waived resort to canons. Ohio raised the statutory-interpretation question below, and its citations to these canons is no different from citing additional cases or dictionaries. *Cf. Felter v. Kempthorne*, 473 F.3d 1255, 1261 (D.C. Cir. 2007). Ohio has waived nothing.

III. PLAINTIFFS NEITHER ACKNOWLEDGE CASES DISFAVORING LAST-MINUTE INJUNCTIONS, NOR JUSTIFY THEIR DELAY IN SEEKING ONE.

Ohio showed (at 56-60) that the equities tipped its way. Plaintiffs ignore the presumption against late injunctions and mistakenly balance the equities.

A. Plaintiffs Ignore Cases Disfavoring Last-Minute Injunctions.

"As a general rule, last-minute injunctions changing election procedures are strongly disfavored." *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012) ("*SEIU*"). Plaintiffs assert (at 56) that this presumption means only that *appellate* courts should give deference to *district* courts about whether to grant last-minute injunctions. The only case they cite—*Purcell v. Gonzalez*, 549 U.S. 1 (2006)—is not so limited.

Plaintiffs' reading of *Purcell* conflicts with this Court's reading. This Court has twice cited *Purcell* to *overrule* a district court's injunction. In 2006, the Court cited it to note that "court orders affecting elections can themselves result in voter confusion and cause the very chilling effect that plaintiffs claim they seek to avoid." *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) (granting stay). In 2012, the Court again cited *Purcell* to reverse an injunction, *SEIU*, 698 F.3d at 345-46, and refused to vacate that order after the appeal became moot because it continued to offer "guidance on injunctive relief as it concerns last-second changes." *Serv. Emps. Int'l Union v. Husted*, 531 F. App'x 755, 756 (6th Cir. 2013).

Plaintiffs' reading of *Purcell* also conflicts with the decision itself. To be sure, *Purcell* recognized that the circuit court *in that case* had failed to give proper deference to the district court. 549 U.S. at 4-5. But the district court there had *declined* to issue an injunction and the circuit court had *imposed* one despite its last-minute nature. *Id.* That *Purcell reversed* the circuit court's injunction shows the importance of appellate courts restoring state election law—even if it means invalidating a lower court's injunction. *Id.* at 5-6.

Finally, Plaintiffs' reading of *Purcell* conflicts with their position elsewhere. While their counsel seeks to preserve the injunction here, counsel asks the Fourth Circuit to *impose* an injunction against North Carolina despite a district court's refusal. *See* Appellants' Br. at 15, *N.C. State Conference of the NAACP v. McCrory*, No. 14-1856 (4th Cir. Sept. 19, 2014), *available at* https://www.aclu.org/sites/default/files/assets/055_br__of_appellants_3.pdf.

All told, this Court's settled interpretation of *Purcell* tips the scales heavily, if not entirely, toward reversing the last-minute injunction.

B. Plaintiffs Do Not Overcome Ohio's Showing Of Unfairness On The Remaining Equitable Factors.

Plaintiffs' other responses lack merit. They say (at 55-56) the district court reasonably rejected the State's "delay" argument because they needed to use four of the available seven months to draft the injunction and gather evidence. Not so. In January, Plaintiffs had already hired their expert. Doc.61-10, Letter,

PageID#2808. Plaintiffs gathered three affidavits in April and another in May, and have given no reason why they could not have gathered the rest sooner. Doc.18-12, Snyder Decl., PageID#411; Doc.18-14, Simpson Decl., PageID#424; Doc.18-23, Spring Decl., PageID#461; Doc.18-24, Crew Decl., PageID#466. Compare this with the work Ohio completed in five weeks: three expert reports, two rebuttal reports, five depositions, several declarations, an opposition brief, and document production. *See* Doc.61-1, Ex. List, PageID#2228-31.

This very appeal shows Plaintiffs waited too long. They opposed expedition on the ground that not enough time for appellate review remained. Sixth Circuit Doc.16, Pls.' Opp. To Mot. to Expedite, at 5-7 (Sept. 10, 2014). But litigants challenging election laws should recognize that appellate review is a necessary part of the process. As *Purcell* noted, an appellate court might properly "give[] some weight to the possibility that the nonprevailing parties would want to seek en banc review." 549 U.S. at 5. That should be equally true at the trial level where no appellate review has occurred at all. If it is too late for an appellate court's *decision*, it is too late for a district court's *injunction*.

As for the remaining equities, Plaintiffs wrongly rely (at 55) on a lost "right to vote." The district court found it "impossible to predict" whether anyone would be precluded from voting by the elimination of same-day registration and voting. Doc.72, Order, PageID#5897. That makes this case far removed from the case

Plaintiffs cite—where the district court said that legislative changes led to "a significant number of Ohio voters . . . be[ing] precluded from voting." *Obama for Am.*, 697 F.3d at 431.

Plaintiffs are equally wrong (at 55) to discount the public injuries. The district court admitted it was imposing an unbudgeted mandate on counties. Doc.72, Order, PageID#5915. And Plaintiffs ignore the interest of all Ohioans in the enforcement of their democratically passed laws. *Summit Cnty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004).

IV. IF THE COURT AFFIRMS, OHIO REQUESTS A STAY.

Ohio asks the Court, if it affirms, that it at least stay its mandate and the injunction for further appellate review—whether by the en banc Court or the Supreme Court. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (describing factors for stay). Further review is reasonably probable. Indeed, the Supreme Court often addresses emergency election cases, and, whether affirming or reversing, often sides with retaining state law over rewriting it. *See Purcell*, 549 U.S. at 4-5; *Spencer v. Pugh*, 543 U.S. 1301, 1302-03 (2004) (Stevens, J., in chambers). Further, Ohio's arguments here establish at least a "fair prospect" it is correct. *Hollingsworth*, 558 U.S. at 190. Finally, "'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it

suffers a form of irreparable injury.'" *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted).

CONCLUSION

The Court should reverse the district court's preliminary injunction. If it does not, the Court should at least issue a stay to allow Ohio to seek further review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32 (b)(1), the brief contains 6,849 words.

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

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 22th day of September 2014. Electronic service was therefore made upon all counsel of record on the same day.

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