No. 16-3561

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

OHIO DEMOCRATIC PARTY, et al.,
*Plaintiffs-Appellees*,

v.

JON HUSTED,
in his Official Capacity as Secretary of State of the State of Ohio, et al.,

*Defendants-Appellants*

On Appeal from the United States District Court
for the Southern District of Ohio (Eastern Division)
District Court Case No. 2:15-cv-1802

# BRIEF OF THE BUCKEYE INSTITUTE AND THE JUDICIAL EDUCATION PROJECT AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL


CHAD A. READLER
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215
(614) 469-3939
careadler@jonesday.com

MICHAEL A. CARVIN
*Counsel of Record*
ANTHONY J. DICK
STEPHEN A. VADEN
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com

*Counsel for Amici Curiae*

## CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for *amici curiae* certifies that the Buckeye Institute and the Judicial Education Project have no parent corporation, and that no publicly held corporation holds 10% or more of their stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

## TABLE OF AUTHORITIES
**(continued)**

**Page(s)**

**STATUTES**



**OTHER AUTHORITIES**

## RULE 29 STATEMENT

The Buckeye Institute was founded in 1989 as an independent research and educational institution — a think tank — to formulate and promote solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, including electoral reform; compiling and synthesizing data; formulating policies; and marketing those public policy solutions for implementation in Ohio and replication across the country.

The Judicial Education Project ("JEP") is a non-profit organization dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers, which creates a federal government of defined and limited power, is dedicated to the rule of law, and is supported by a fair and impartial judiciary.

Amici support the defendants-appellants in this matter and urge reversal of the decision below. No party or party's counsel authored the brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

Because all parties have granted consent, the filing of this brief is authorized under Fed. R. App. P. 29(a).

## INTRODUCTION

Section 2 of the Voting Rights Act prohibits "impos[ing]" any voting practice that "results in a denial or abridgment of the right . . . to vote on account of race or color," which occurs when the electoral system is "not equally open to participation" by racial minorities because they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(a)-(b). Thus, under the plain text, a Section 2 violation occurs only if a practice "imposed" by the "State or political subdivision" "results" in a system that is not "equally open" because the State gives minorities "less opportunity" than others to "participate in the political process." In the decision below, the district court serially violated each of these textual limitations. Contrary to the court's interpretation, Section 2 neither mandates the alteration of race-neutral laws to *maximize* minorities' opportunity to vote, nor condemns voting processes that are "equally open" simply because minorities fail to vote as frequently as non-minorities. This is particularly true if the disparity "results" from underlying socio-economic factors, rather than any burden imposed by the state.

Section 2 contemplates two types of claims: a "vote-denial" claim, which alleges denial of opportunity to "*participate* in the political process" by casting ballots; and a "vote-dilution" claim, which alleges that a districting practice denies

minorities an equal opportunity "to *elect* representatives of their choice." This is a vote-denial case.

In the vote-denial context, the difficulty of showing a discriminatory denial of voter "opportunity" depends on the nature of the law being challenged. With a law "establish[ing] *qualifications*" to vote—*i.e.*, "*who* may vote" in elections—the showing is relatively easy to make. *Arizona v. Inter-Tribal Council of Ariz., Inc.,* 133 S. Ct. 2247, 2257 (2013) (first emphasis added). A voting qualification by definition "den[ies]" unqualified people the "opportunity" to vote. By contrast, it is far more difficult to challenge a law that merely "regulate[s] *how* . . . elections are held" by setting forth the time, place, and manner of voting. *Id.* Ordinary, race-neutral, regulations of the time, place, and manner of voting do not "deny or abridge" anyone's *opportunity* to vote; they merely regulate when, where, and how that opportunity must be exercised. *See id.* at 2253 (Regulation of the "Times, Places and Manner" of elections include "regulations relating to 'registration.'" (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932))).

The decision below embodies a radically different and unprecedented theory. The district court construed Section 2 to authorize the federal judiciary to dictate the time, place, and manner of voting—including the number of days of early voting and the timing of voter registration—in order to maximize voting opportunities and ameliorate disparities in minority participation rates.

Specifically, the court concluded that even if a State's voting procedures are "equally open to participation" and provide the same "opportunity" to all voters, the State's voting laws nonetheless violate Section 2 if minorities are less likely to vote due to underlying socio-economic inequalities. Consequently, the court held that Ohio's race-neutral election process violates Section 2 and must be replaced with a system that maximizes minority voting participation to overcome the underlying inequalities. But Section 2 plainly does not condemn voting practices merely because they "result" in statistically disparate *outcomes*. It condemns only those practices that "result" in minorities having "*less opportunity*" because the voting process is not "*equally open*" to them. This is clear from Section 2's plain language, as well as Supreme Court precedent identifying the sort of discriminatory "results" that the law proscribes.

*First*, contrary to the decision below, Section 2 does not prohibit an ordinary race-neutral voting regulation merely because it results in statistically disparate participation rates. Such regulations do not "*deny or abridge*" anyone's right to vote as long as they impose nothing more than the "usual burdens of voting." *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.). If minorities are free to vote subject only to the usual burdens of voting imposed on everyone, then state law gives them a full and fair "opportunity" to vote, and they cannot possibly claim that the law gives them any *less* opportunity than non-

minorities. Thus, at the threshold, plaintiffs bringing this sort of Section 2 "results" claim must establish that the challenged practice exceeds the ordinary burdens of voting in a way that affords minorities "less opportunity" to cast a ballot.

By ignoring this threshold requirement, the district court interpreted Section 2 in a way that would "swee[p] away almost all registration and voting rules." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). Under the court's holding, plaintiffs could eliminate virtually *any* traditional voting requirement based on the finding that it is more difficult for minority voters to register and vote because they "are more likely to be subject to economic, transportation, time, and childcare constraints." Op. 40. Plaintiffs could eliminate registration requirements altogether, since disadvantaged minority groups "are generally more transient," "result[ing] in more frequent changes of address, which in turn requires [them] to update their registration more frequently." *Id*. at 40-42. Plaintiffs could even insist that state election officials go door-to-door filling out and collecting ballots, because minorities are not only "less likely to be able to take time off of work, find childcare, and secure reliable transportation to the polls," but are also purportedly "distrustful of voting by mail," and have difficulty bearing the "costs and relatively complex requirements" of "correctly filling out an absentee ballot" or "paying

postage." *Id*. at 40-44. Section 2 has never been interpreted in such a radical manner, which would imperil every ordinary voting law.

*Second*, the district court compounded its error by ignoring yet another fundamental limitation: As the Supreme Court has long recognized, Section 2 applies only to disparate effects that "result" from *state voting practices*, and thus the law "only protect[s] racial minority vote[r]s" from exclusionary effects that are "proximately caused by" the challenged practice. *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). This vindicates the principle that "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753, 755. In short, Section 2 requires states to avoid *imposing* disparate burdens. It does not require affirmative action to ameliorate underlying socio-economic disparities that might make minority voters less equipped to navigate the "usual burdens of voting." *Crawford*, 553 U.S. at 198. The district court's contrary holding would fundamentally transform the Voting Rights Act.

*Third*, the district court further erred by ignoring the requirement for plaintiffs to identify an "*objective*" "benchmark" of voter opportunity that they claim has been abridged; they cannot simply rely a hypothetical alternative that would *enhance* or *maximize* minority voter participation. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (Kennedy, J.). Unlike Section 5, Section 2 does not impose an

"anti-retrogression" requirement that measures a challenged law against the prior status quo. Nor does it allow plaintiffs to simply hypothesize an alternative that would better mitigate the underlying "time and resource limitations" faced by minority voters. Op. 39. Otherwise, plaintiffs could obliterate virtually any time limitation, and demand 40, or 50, or 100 days of early voting. Here, the district court ignored that requirement and did not even *purport* to rely on any objective benchmark. *Id*. at 97. Instead it relied on forbidden notions of anti-retrogression, holding that Section 2 requires the State of Ohio to revert to its previous voting procedures because they would better *enhance* minority voters' participation rates.

*Fourth*, and finally, if the district court's boundless interpretation were adopted, it would render Section 2 unconstitutional. By jettisoning the three limitations discussed above, the district court's reading not only prohibits states from *causing* racial disparities in voter opportunity, but affirmatively requires states to rearrange their laws to *enhance* minority participation. That would exceed Congress's power to enforce the Fifteenth Amendment's prohibition against intentional discrimination. Moreover, requiring States to alter their race-neutral election laws to enhance the voting prospects of particular racial groups would *itself* be a form of intentional discrimination. So interpreted, Section 2 would plainly violate the Equal Protection Clause, even if motivated by the "benign" intent to overcome underlying socio-economic disparities among the races.

## ARGUMENT

### I. PLAINTIFFS MISINTERPRET THE "RESULTS" TEST OF SECTION 2

Congress enacted Section 2 pursuant to its power to enforce the Fifteenth Amendment. Originally, Section 2 prohibited States from "impos[ing] or appl[ying]" any voting practice "to den[y] or abridge[] . . . the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a). Because that language parallels the Fifteenth Amendment, which prohibits only "purposeful" discrimination, the Supreme Court concluded that Section 2 likewise prohibited only purposeful discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality op.). In 1982, however, Congress revised the law to make a showing of purposeful discrimination unnecessary. It amended what is now subsection (a) to prohibit States from imposing or applying voting practices "in a manner which *results* in a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added).

Accordingly, the new Section 2 "results" test does not require a showing of intentional discrimination. Rather, regardless of motivation, the law forbids the State from "impos[ing]" a voting practice that causes ("results in") the "political processes" to not be "equally open to participation" by minority voters because they have "less opportunity" than others to participate. *Id.* § 10301(a)-(b). Under this "results" test, the question is not whether minorities *proportionally participate*

in voting, but whether the state procedures are "equally open" to participation. The question is not whether minorities proportionally *avail themselves* of the equal opportunity to vote, but whether state law gives them "*less* opportunity" to vote.

### A. Plaintiffs Must Show That The Challenged Laws Result In "Less Opportunity" For Minority Voters

As the Supreme Court has explained, "the ultimate right of § 2 is equality of *opportunity*." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) (emphasis added). It does not require proportional representation, or "electoral advantage" or "maximiz[ation]" for minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 20, 23 (2009). The opportunity to vote does not become unequal merely because minorities "are less likely to *use* that opportunity," whether it be due to a lack of interest, socio-economic conditions, or any other reason. *Frank*, 768 F.3d at 753.

By prohibiting the state-imposed denial of equal "opportunity," Section 2(b) implements the prohibition contained in Section 2(a), which prohibits practices that "result[] in a *denial or abridgment of the right . . . to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphases added). The plain language of Sections 2(a) and 2(b), particularly when read together, makes clear that Section 2 does not prohibit ordinary, race-neutral regulations of the time, place, and manner of voting.

First, such regulations do not "deny or abridge" anyone's right to vote. "Election laws will invariably impose some burden upon individual voters,"

because the State must determine when and where voting must occur, how voters must register and establish eligibility, what kind of ballots they must use, and so on. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Shouldering these "usual burdens of voting" is an inherent part of voting. *Crawford*, 553 U.S. at 198. And because such baseline requirements are an inherent *part of* the right to vote, they cannot be said to *abridge* the right to vote.

Second, as detailed below, the concept of "abridgement" inherently requires asking the question, "abridge compared to what?" *See infra* pp. 15-16. Section 2(b) explicitly answers that question by stating the relevant comparison is to the opportunity afforded non-minorities. Section 2 is violated only if minorities have "less opportunity" than others to vote because the system is not "equally open" to them. Thus, minorities' right to vote is not "abridged" merely because minorities do not *use* the equally open voting process to the same extent as others, or because the voting system provides less than the *maximum feasible* "opportunity."

Section 2(b) therefore confirms that "a showing of disproportionate racial impact alone does not establish a *per se* violation" of Section 2. *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986). Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank*, 768 F.3d at 753. For example, the fact that voter registration makes voting less convenient and might lower minority turnout does not make registration requirements subject to

attack under Section 2. A race-neutral law cannot "abridge" minorities' right to vote unless it imposes a *disparate* burden beyond the *ordinary* burdens of voting.

The legislative history confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder*, 512 U.S. at 933 (Thomas, J., concurring); *e.g.*, *id.* at 956 (Ginsburg, J., dissenting); *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring). The original version of the 1982 amendments proposed by the House of Representatives would have prohibited "all discriminatory 'effects' of voting practices," but "[t]his version met stiff resistance in the Senate," which worried that it would "lead to requirements that minorities have proportional representation, or . . . devolve into essentially standardless and ad hoc judgments." *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). Senator Dole proposed a compromise. *See Gingles*, 478 U.S. at 96 (O'Connor, J., concurring in the judgment). He assured his colleagues that, as amended, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting . . . , or registering . . . ." 128 Cong. Rec. 14133 (1982). This confirms that Section 2 applies only where the State denies "equal *access*" by "throw[ing] up" barriers beyond the usual, uniform burdens of voting.

Equally significant is what the legislative history does *not* say. Under the decision below, Section 2 would outlaw ordinary voting procedures, from Election Day to pre-registration requirements, whenever plaintiffs can hypothesize a less-burdensome alternative. Yet nowhere in Section 2's legislative history is there any hint that Section 2 would have this radical effect. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

In sum, the district court's interpretation fundamentally rewrites Section 2. It revamps a law about disparate *denial* of voter opportunity into a law assuring proportional *utilization* of voter opportunity. It converts a prohibition on *abridging* minorities' right to vote into a mandate for *boosting* minority participation. It replaces a ban on *state-imposed barriers* to minority voting with an affirmative duty of *state facilitation* of minority voting. And it transforms a guarantee of equal *access* into a guarantee of equal *outcomes*.

### B. Plaintiffs Must Show That Any Disparity in Voter Opportunity Is Proximately Caused By The Challenged Law

To violate Section 2, a voting practice must proximately cause racial inequality. The law applies only if a voting practice "*imposed* . . . by [the] *State*" "*results in* a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphases added). Thus, if the alleged "abridgement" "results" from something *other* than the *state-imposed practice*,

Section 2 does not reach it. Section 2 prohibits states from *imposing* racial inequalities in voting, but does not require affirmative action to ameliorate underlying socio-economic disparities to *enhance* minority voting prospects.

In *Gingles*, Justice Brennan's majority opinion emphasized that Section 2 "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17. Applying this basic rule in the vote-dilution context, *Gingles* held that plaintiffs were required to show, as a "necessary precondition[]," that the disparate exclusion of minority candidates from office was caused by the state's multi-member districting practice, and was not attributable to the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* Absent that showing, the state-imposed "*multi-member form* of the district cannot be responsible for minority voters' inability to elect its [sic] candidates." *Id*. And if the *voting procedure* "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "*not assure racial minorities proportional representation*" but only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17.

Thus, in the vote-*denial* context, *Gingles* requires plaintiffs to show, as a necessary "precondition," that an alleged deprivation is proximately caused by a

*state-imposed* voting practice rather than underlying socio-economic factors such as fewer minority voters having cars or photo ID. The Supreme Court recently reaffirmed this causation requirement in a related context, emphasizing that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies *causing* that disparity." *Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (emphasis added). Without the "safeguard[]" of a causation requirement "at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and would almost inexorably lead governmental or private entities to use numerical quotas, and serious constitutional questions then could arise." *Id*.

This Court applied Section 2's proximate-cause requirement in *Wesley*, 791 F.2d at 1262, which upheld Tennessee's felon-disenfranchisement law because "the disproportionate impact suffered by black Tennesseeans d[id] not 'result' from the state's qualification," but rather resulted from other factors that the state did not cause. Other circuits have recognized the same point. For example, the Ninth Circuit recently explained that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc)

(emphasis added) (citation omitted), *aff'd sub nom. Arizona v. Inter Tribal Council of Az., Inc.*, 133 S. Ct. 2247 (2013). Similarly, the Fourth Circuit rejected a Section 2 challenge against Virginia's decision to choose school-board members by appointment rather than election because, although there was a "significant disparity . . . between the percentage of blacks in the population and the racial composition of the school boards," there was "no proof that the appointive process caused the disparity." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989).

Because Section 2 reaches only racial disparities caused by the challenged *voting practice*—not even other *governmental* discrimination—it plainly does not reach disparities attributable to *private*, *societal* discrimination. Since "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination," courts must "distinguish discrimination by the defendants from other persons' discrimination." *Frank*, 768 F.3d at 753, 755. Of course, Section 2 contemplates that a challenged practice may "*interact*[] with social and historical conditions to *cause* an inequality," *Gingles*, 478 U.S. at 47 (emphases added). But to violate Section 2, the challenged practice must be the *proximate* "cause" of the inequality. It is not enough for a challenger to rely on socio-economic inequalities that *generally* affect voting participation.

Here, the district court could not and did not find that any Ohio voting practice proximately causes the disparate exclusion of minority voters. Rather, it stated only that various *socio-economic phenomena*—such as an irrational "distrust[] of voting by mail" and a disproportionate lack of access to childcare on voting days—cause minorities to not use the State's "equally open" voting processes with equal frequency. Thus, Ohio's challenged practices are not the proximate cause of any disproportionate participation.

### C. Plaintiffs Must Show That The Challenged Laws Harm Minority Voters Relative to an Objective Benchmark

Section 2 requires an "objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Holder*, 512 U.S. at 881 (Kennedy, J.). This requirement of an "objective" benchmark follows from Section 2(a)'s text, which prohibits practices that result in the discriminatory "denial or abridgement" of voting rights. The concept of "abridgement" "necessarily entails a comparison." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*). "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* In Section 2 cases, "the comparison must be made with . . . what the right to vote *ought to be*." *Id.*; *see Holder*, 512 U.S. at 880-81 (Kennedy, J.). The benchmark must be "objective"; it cannot be purportedly superior only because it enhances minority voting prospects. *Id*. And for some voting practices,

there is "no objective and workable standard for choosing a reasonable benchmark by which to evaluate [the] challenged voting practice," and thus "the voting practice cannot be challenged . . . under § 2." *Id.* at 881.

In *Holder*, the Supreme Court rejected a Section 2 challenge asserting that using a single-member instead of a five-member commission "resulted" in vote dilution. Although the five-member alternative clearly would enhance minority voting strength, there was "no principled reason" why this alternative was the proper "benchmark for comparison" as opposed to a "3-, 10-, or 15-member body." *Id*. That was true even though over *90 percent* of commissions in the state had five members. *Id*. at 876-77. *Holder* thus establishes that Section 2 plaintiffs must rely on an "objective" benchmark of voter opportunity, not merely alternatives that would *enhance* opportunity.

Here, the district court failed to require any objective benchmark to support plaintiffs' challenge. This is most clear with respect to the shortening of the early-voting period, as there is no conceivable objective benchmark of how many early-voting days *should* be offered. Sixteen states do not allow *any* early voting, and there is tremendous variation among those that do, ranging from 3 to 46 days. *See* National Conference of State Legislatures ("NCSL"), Absentee and Early Voting, *available at* http://goo.gl/T0KwvI. "The wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J.,

concurring in part). To vividly illustrate the point, while Plaintiffs here claim that Section 2 requires *35* days of early voting, the same plaintiffs' counsel are simultaneously arguing in a separate case that Section 2 requires only *17* days of early voting in North Carolina. *See NAACP v. McCrory*, No. 1:13CV658, 2016 WL 1650774, at *100 (M.D.N.C. Apr. 25, 2016). Plaintiffs' theory of Section 2 thus has no internal consistency, much less any limiting principle.

The district court found that Ohio's voting practices harm minorities *relative to a conceivable alternative that would be better for minorities*, such as allowing more days of early voting and same-day registration. But it is always possible to hypothesize an alternative practice that would increase minority voting rates. For example, *even more* minority voters would vote if Ohio allowed voting year-round, eliminated registration requirements, or allowed everyone to vote by mail like Oregon does. Yet Section 2 plainly does not require Ohio to adopt those alternatives for the same reason that *Holder* did not require a five-member commission: "Failure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).

The district court also found that Ohio's current voting laws are worse for minorities *relative to the State's prior laws*, thus assuming the proper benchmark to be the prior status quo. But that approach wrongly conflates Section 2 with Section 5 of the Voting Rights Act. Section 5 proceedings "uniquely deal only and

specifically with *changes* in voting procedures," so the appropriate baseline of comparison "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, "involve not only changes but (much more commonly) the status quo itself." *Id.* Because "retrogression"—*i.e.*, whether a change makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state *used to have* a particular practice in place does not make it the benchmark for a § 2 challenge. *Holder*, 512 U.S. at 884 (Kennedy, J.). In short, by ignoring any objective benchmark and instead relying on retrogression and minority-maximizing alternatives, the district court did exactly what the Supreme Court prohibited in *Holder*.

### D. Plaintiffs' Interpretation of Section 2 Would Violate the Constitution

The Supreme Court has never "addresse[d] the question whether § 2 . . . is consistent with the requirements of the United States Constitution." *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting); *De Grandy*, 512 U.S. at 1028-29 (1994) (Kennedy, J., concurring in the judgment) (same). And indeed, the district court's boundless interpretation would render it unconstitutional.

**1.** Congress enacted Section 2 to enforce the Fifteenth Amendment, which prohibits "purposeful discrimination," but does not prohibit laws that "resul[t] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265

(1977)). Although Congress may use its enforcement power to proscribe certain discriminatory "results," it may only do so as a "congruen[t] and proportional[] . . . means" to "remedy or prevent" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). The enforcement power does not allow Congress to "alter[] the meaning" of the Fifteenth Amendment. *Id*. at 519. Accordingly, to stay within constitutional bounds, the "results" test must be "limited to those cases in which constitutional violations [are] most likely." *Id.* at 533. It cannot be a freestanding ban on ordinary voting laws that have a racially disparate impact.

Properly interpreted, the "results" test is legitimate enforcement legislation because it prohibits only substantially burdensome voting practices that depart from an "*objective* benchmark" and proximately cause minorities to have "*less opportunity*" to vote than non-minorities. If such practices "remain unexplained," "one can infer . . . that it is more likely than not that [they] [a]re [purposefully] discriminatory." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

In the vote-dilution context, the Supreme Court has carefully limited the "results" test to apply only where there is a strong inference of discriminatory purpose. The first *Gingles* "pre-condition" requires a showing that minority voters could naturally constitute a "geographically compact" majority under "traditional districting principles" *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *see LULAC*,

548 U.S. at 433. Because districts *normally* encompass "geographically compact" groups, failure to draw such a district for a *minority* community creates a plausible inference of intentional discrimination. Conversely, Section 2 does not require States to engage in *preferential* treatment by *deviating* from traditional districting principles in order to *create* majority-minority districts. *LULAC*, 548 U.S. at 434. The same must hold true in the vote-denial context: Section 2 cannot be interpreted to require departure from ordinary race-neutral election laws in order to *enhance* minority voting participation.

**2.** Interpreting Section 2 to require states to boost minority voting participation also would violate the Constitution's equal-treatment guarantee. Subordinating "traditional race-neutral districting principles" to enhance minority voting strength violates the Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (citation omitted). Section 2 thus cannot displace ordinary race-neutral voting practices for the "predominant" purpose of maximizing minority voter convenience. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This is especially true because, under Plaintiffs' interpretation, any ordinary voting law that is less convenient for minority voters constitutes a discriminatory "result," and Section 2's text flatly prohibits all such "results," *regardless* of the State's justification. Plaintiffs' interpretation would thus prioritize race above all else, banning even the most strongly justified electoral procedures unless all racial groups find it equally

convenient to comply. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

Moreover, requiring states to adjust race-neutral voting laws to compensate for underlying social inequalities would violate the constitutional requirement that race-based remedial action must be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added). "[R]emedying past societal discrimination does not justify race-conscious government action." *Parents Involved v. Seattle*, 551 U.S. 701, 731 (2007). But Plaintiffs' interpretation would require just that.

**3.** Because the district court's sweeping interpretation raises such serious constitutional questions, it must be rejected if "fairly possible." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (citation omitted). That is particularly true because the Constitution expressly grants the states the power to establish the time, place and manner of holding elections (and enforce voter qualifications). *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. Because the district court's reading of the law would dramatically intrude on this realm and rearrange "the usual constitutional balance of federal and state powers," it must be rejected unless Congress's intent to achieve this result is "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted).

Congress did not remotely provide any clear indication that it meant Section 2 to sweep as broadly as the decision below.

## II. SIXTH CIRCUIT PRECEDENT DOES NOT SUPPORT PLAINTIFFS' INTERPRETATION

To support its sweeping interpretation, the district court relied heavily on the panel's decision at an earlier stage in this case in *Ohio State Conference of NAACP. v. Husted*, 768 F.3d 524 (6th Cir. 2014), which affirmed a preliminary injunction. The Supreme Court, however, stayed the injunction, 135 S. Ct. 42 (2014) (mem.), and this Court subsequently vacated the panel opinion, *see* Order, *NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). That stay and vacatur eliminate any claim the panel's previous decision may have to precedential force. Although the district court stated that the panel opinion "was vacated for reason unrelated to the merits," Op. 30, that is incorrect. The decision was vacated only because the Supreme Court issued a stay, which requires "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Thus, because the grant of a stay reflects a judgment that a majority of the Justices likely "would . . . set the order aside," *I.N.S. v. Legalization Assistance Project of L.A. Cty. Fed'n Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers), it indicates that the Supreme Court disagrees with the panel's analysis.

In any event, even the panel's now-vacated decision recognized that the first threshold "element[]" of a vote-denial claim is that "the challenged standard, practice, or procedure *must impose* a *discriminatory burden* on members of a protected class, meaning that members of the protected class have *less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." *Husted*, 768 F.3d at 554 (emphases added) (citation omitted). This test incorporates the threshold requirements discussed above since it requires establishing a "state-imposed" "burden" that is "discriminatory" because it affords minority voters "less opportunity" than non-minorities to cast a vote. Since it is clear that Plaintiffs have not established any such "burden," much less a "discriminatory" one (*see supra* pp. 8-11), there is no need to reach the second "element," to determine whether that nonexistent "burden . . . [is] caused by or linked to social and historical conditions that have or currently produce discrimination against" minorities. *Id.* (citation omitted). Plaintiffs have already failed the first element

The second "element" of the *NAACP v. Husted* test simply asks, *after* plaintiffs establish that the state-imposed burden provides them "less opportunity," whether that unequal "burden" is linked to societal discrimination. Such a showing is necessary to show that the challenged practice "abridges" voting opportunities "on account of *race.*" *Id*. at 558 (emphasis added). Consequently, the second

element serves a purpose similar to the "Senate Report factors" or "totality of circumstances" analysis that is conducted after the *Gingles* preconditions have been established. The plaintiffs must *first* establish that the challenged practice "result[s] in unequal access to the electoral process" by showing that it causes an unequal ability to elect, and the Section 2 inquiry *then* becomes whether the proven inequality is linked to racial discrimination. *Gingles*, 478 U.S. at 46-51.

The district court avoided this rule by skipping the first element and distorting the second. Rather than asking whether there was any discriminatory state-imposed "*burden*" linked to race, the court framed the question as whether there was an unequal electoral *outcome* due to underlying racial disparities. Thus, based on the finding that underlying racial inequality makes it less convenient for minorities to navigate the ordinary burdens of voting, the court held that Ohio's voting procedures violate Section 2 even though they afford all voters perfectly equal opportunity to vote and do not impose any unequal "burden" on minorities. That holding has no basis in law.

The district court's interpretation would create an irreconcilable conflict with the square holdings of the Supreme Court and this Court that Section 2 (and disparate-impact claims generally) only reach disparities "proximately caused" by the challenged voting procedure, not those attributable to general "social and historical conditions." *Gingles*, 478 U.S. at 47, 50 n.17; *Inclusive Cmtys. Project*,

135 S. Ct. at 2523; *see also Wesley*, 791 F.2d at 1262 (6th Cir. 1986) (upholding felon disenfranchisement under Section 2 because "the disproportionate impact suffered by black Tennesseeans does not 'result' from the state's" practice). The only way to respect those precedents is to conclude that Section 2 is a negative prohibition against *state-imposed* inequality. It is not an affirmative-action statute that requires states to *enhance* minority voting prospects by rearranging their ordinary race-neutral election laws to ameliorate the effects of underlying socio-economic inequalities.

## III. THE CHALLENGED LAWS COMPLY WITH SECTION 2

1. Under the standards discussed above, Plaintiffs' Section 2 claims fail for three reasons. First, the challenged laws are reasonable, race-neutral regulations of the time, place, and manner of holding elections, and do not impose anything more than the usual burdens of voting. As the district court itself recognized, holding four weeks of early voting instead of five and requiring registration prior to voting is a "less than significant burden." Op. 34-35. Ohio law thus provides all voters with a full and fair "opportunity" to vote on the same equal terms, free from any "significant burden," much less any *discriminatory* burden prohibited by Section 2.

Second, even if it were possible to identify any racial disparity in voter "opportunity," any such disparity is not the proximate result of Ohio's voting

practices. The closest the district court came to making a finding on this point was that "Ohio had facially discriminatory voting laws between 1802 and 1923." *Id*. at 102. That can hardly be the proximate cause of any voting inequality *today*. And the State cannot reasonably be blamed for the underlying socio-economic inequalities that the district court found make it less convenient for some minority groups to navigate the ordinary burdens of voting under Ohio's race-neutral procedures. Indeed, the district court itself found that no matter what the State might do, "the cost of voting *in general*" is higher for minorities because they "fare worse in various socio-economic measures," which makes them less capable of voting either in person or by mail. *Id*. at 45 (emphasis added). Given this background inequality caused by *other* factors, which would persist under *any* voting regime, the ordinary voting procedures challenged here—such as requiring pre-registration and allowing four weeks of early voting instead of five—cannot be deemed the *proximate cause* of any voting inequality.

Third, as noted, the district court failed to identify any objective benchmark to measure Plaintiffs' Section 2 challenge. *Supra* pp. 15-18.

2. While each of these errors is fatal in isolation, in combination they convert Section 2 into a minority-maximization mandate at odds with the statute's plain language and Supreme Court precedent. By transforming Section 2's prohibition against voting practices which impose a disparate burden relative to an

objective benchmark into a prohibition against equally open practices merely because of disparate minority participation attributable to socio-economic factors, the district court imposes a naked, minority-maximization regime in all circumstances. Since minority voters' socio-economic status purportedly makes it more difficult for them to comply with *all* ordinary voting requirements "in general" —including pre-registration, voting within four weeks instead of five, traveling to the polls to vote in person, "filling out an absentee ballot" or even "paying [for] postage" to vote by mail *(id.* at 40, 44)—Section 2 purportedly condemns virtually *any* voting requirement as unlawfully "discriminatory."

Under the district court's maximization regime, because the same general socio-economic disparities persist in every state, *no* State may, for example, forgo early voting and limit balloting to Election Day. Yet Election Day has long been an entrenched feature of voting in the United States. Since 1875, Congress has endorsed limiting presidential elections to a single day by providing that "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as *the day* for the election." 18 Stat. 400, codified at 2 U.S.C. §§ 1, 7 (emphasis added). Nearly all states had a single election day when the Section 2 "results" test was passed in 1982, and the innovation of "early voting" did not become popular until the 1990s. Even now, 16 States, such as New York, continue to limit balloting to a single day, and *40* states offer fewer days of early voting than

Ohio. *See* NCSL, Absentee and Early Voting, *available at* http://goo.gl/T0KwvI. Indeed, even the handful of states with 35 or more days of early voting would violate Section 2 under the district court's theory because minorities' difficulty in voting within *that* time period is a discriminatory "result" that can be cured by a 45- or 50-day period. Indeed, other than its erroneous "retrogression" analysis (*see* pp. 29-30, *infra*), the district court did not even attempt to explain why a 35-day period is not impermissible relative to a 42-day-alternative, just as 28 days is impermissible relative to 35.

Equally illogical and boundless is the district court's revolutionary notion that requiring registration prior to voting somehow violates Section 2. According to the district court, because both registration and voting are more "burdensome" for minorities, these burdens must be ameliorated by allowing both activities on the "same day"—either by allowing voting more than 30 days prior to Election Day or (presumably) by allowing registration up to or on Election Day. For the reasons noted, Section 2 does not mandate 30 (or more) "Election Days," and it is equally clear that it does not mandate same-day registration within 30 days of Election Day. To the contrary, both the Supreme Court and Congress have expressly authorized closing off registration 30 days prior to the day when votes are cast.

The Supreme Court has repeatedly held that States may require registration "30 days" before an election to allow "whatever administrative tasks are necessary

to prevent fraud." *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972); *see also Rosario v. Rockefeller*, 410 U.S. 752 (1973). Congress has taken the same position: The Voting Rights Act Amendments of 1970 allow registration to close "thirty days" before a presidential election. 52 U.S.C. § 10502(d). And the National Voter Registration Act of 1993 contemplates that States may reject voter-registration forms submitted less than "30 days" before a federal election. 52 U.S.C. § 20507(a)(1). It is unthinkable that Congress meant to require same-day registration when it amended the Voting Rights Act in 1982. Indeed, registration prior to voting is currently required in 35 other states, and was required for Ohio's entire history except for the period between 2004 and 2012. *See* NCSL, Same Day Voter Registration, *available at* http:// goo.gl/T0KwvI.

3. Apparently recognizing that 28 days of voting cannot reasonably be portrayed as a burden, much less a *discriminatory* burden relative to an objective benchmark, the district court found that the "current law" was burdensome relative to Ohio's "prior law," despite the clear rule that retrogression "is not the inquiry [under] § 2," *Holder*, 512 U.S. at 884 (Kennedy, J.); *Bossier II*, 528 U.S. at 334; *see also* Op. 97. Before 2004, Ohio never allowed early voting or same-day registration—which nobody ever even *thought* to challenge under Section 2. Yet the district court concluded that Ohio now *must* allow same-day registration, and *must* allow five weeks of early voting, because the State allowed those practices

between 2004 and 2012. This time-dependent, one-way-ratchet analysis is entirely inconsistent with Section 2's requirement of an *objective*, nationwide benchmark of "what the right to vote *ought to be*." *Bossier II*, 528 U.S. at 334.

The district court attempted to justify its retrogression analysis by relying on the vacated panel decision, which stated that "African American[s'] disproportionate[] use[]" of Golden Week "under prior law" is "relevant to an assessment of whether, under the current system, African Americans have an equal opportunity" to vote "compared to other voters." Op. 98 (quoting *NAACP v. Husted*, 768 F.3d at 558). But minorities' participation under "prior law" says nothing about *current* opportunity "compared to *other voters*." It speaks only to their opportunities "compared to" what they enjoyed under prior law—precisely the retrogression analysis the Supreme Court rejected under Section 2. Moreover, as a factual matter, current law does not deny any opportunities even relative to "prior law." The fact that African Americans previously used Golden Week at slightly higher rates does not suggest that they will somehow *stop* participating under the new law. All the minority voters who voted in Golden Week are ready and able to vote in the current four-week period, and there is no evidence suggesting they will not avail themselves of that broad opportunity.

Dated: July 1, 2016

Respectfully Submitted,

/s/ Michael A. Carvin

CHAD A. READLER
JONES DAY
325 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215
(614) 469-3939
careadler@jonesday.com

MICHAEL A. CARVIN
*Counsel of Record*
ANTHONY J. DICK
STEPHEN A. VADEN
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
macarvin@jonesday.com

*Counsel for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) OR 32(a)**
**Type-Volume Limitation, Typeface Requirements, and Type Style Requirements**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a) and the word count limitation of Local R. 29. This brief is written in Times New Roman, a proportionally spaced font, has a typeface of 14 points, and contains 6,999 words (as counted by Microsoft Word 2007), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

July 1, 2016 /s/ Michael A. Carvin
Michael A. Carvin

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of July, 2016, I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

July 1, 2016 /s/ Michael A. Carvin
Michael A. Carvin