No. 16A223

In the Supreme Court of the United States

OHIO DEMOCRATIC PARTY,
DEMOCRATIC PARTY OF CUYAHOGA COUNTY,
MONTGOMERY COUNTY DEMOCRATIC PARTY,
JORDAN ISERN, CAROL BIEHLE, AND BRUCE BUTCHER,

Applicants,

v.

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

Respondents.

OPPOSITION TO EMERGENCY APPLICATION FOR STAY

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INTRODUCTION

Plaintiffs (the "Democratic Parties") ask this Court to stay a Sixth Circuit judgment that upheld an Ohio election law. That law retained 23 days of in-person absentee voting and absentee voting anytime by mail over four weeks, but eliminated an absentee-voting week beginning 35 days before Election Day during which voters could register and vote at the same time. *See* S.B. 238 ("Early-Voting Law"). The Court has seen this law before. While a stay is reserved for "'extraordinary cases,'" *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation omitted), the Court held that a decision *enjoining* the law was "extraordinary" enough to merit a stay for the 2014 election. *Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42 (2014) (staying *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014)). Under the reduced schedule for that election with the law reinstated, African Americans and whites registered and voted at the *statistically same* rates. App'x 25a. In a spirit of compromise after that election, Ohio then settled with the NAACP by adding another Sunday of voting to its already broad calendar. If the Sixth Circuit's previous decision *invalidating* the Early-Voting Law (under a *less* expansive schedule) satisfied the relevant stay criteria, it makes no sense to suggest that the Sixth Circuit's present decision *upholding* that law (under a *more* expansive schedule) also does so. The Court should deny a stay.

Ohio remains "a national leader when it comes to early voting opportunities." App'x 2a. By starting its voting schedule on the day after registration's close (some 30 days before an election), the State offers the tenth-longest schedule in the nation.

Trende Rep., R.127-14, PageID#6609-11. Many States, from New York to Kentucky, require voters to vote only on Election Day. *Id.* Ohio's 23 days of early *in-person* voting—including two Saturdays, two Sundays, and evening hours—also rank Ohio within the top ten. *Id.* PageID#6612, 6629. In some respects, Ohio's schedule even surpasses its schedule before the Early-Voting Law. For the 2016 presidential election, it will offer *more* nontraditional voting hours (on evenings and weekends) than it did for the 2012 presidential election. *Id.* PageID#6630.

Despite Ohio's voting leadership and settlement with the NAACP, the Democratic Parties again attacked the Early-Voting Law. While the district court granted an injunction against that law, it relied almost entirely on the Sixth Circuit's stayed and vacated *NAACP* decision. App'x 73a-100a. The court even "commended" Ohio for its "leadership in voting," but said it was the "province" of the Sixth Circuit to disavow *NAACP*. App'x 167a, 169a. The Sixth Circuit reversed, holding that Ohio's voting laws comported with the Constitution and Section 2 of the Voting Rights Act. App'x 7a-27a. The Democratic Parties now ask the Court for an expedited stay that would require Ohio to comply with an injunction for the 2016 election that a circuit court has found to be unlawful after briefing and argument.

Both the equities and the law require the Court to deny the Democratic Parties' request. Starting with the equities, the Democratic Parties argue that the Sixth Circuit's decision—issued *over 40 days before* the beginning of the court-imposed schedule—comes too late for the 2016 election. Democratic Parties' Emergency Appl. ("ODP Appl.") 5, 34-35. Yet this Court stayed an injunction

against the Early-Voting Law *on the day before*—indeed, on the afternoon before—a court-imposed schedule was set to begin in 2014. *Husted*, 135 S. Ct. at 42. Not only that, the Democratic Parties took no position on Ohio's motion to expedite its appeal, which asked the Sixth Circuit to issue a *final judgment* by late August or early September and thus made a temporary stay pending that final judgment unnecessary. *See* Mot. to Expedite, 6th Cir. R.9, at 2. If the Democratic Parties thought that Ohio's proposed schedule left too little time before the start of voting, they should have opposed the motion to expedite.

Other equities also support Ohio. Whenever a government "'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). A stay with that effect "warrants cautious review." *Doe v. Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers). No irreparable injury, by contrast, befalls the other side. The Democratic Parties cannot identify a single voter who would be unable to vote under Ohio's "progressive voting system," App'x 10a; the district court could say only that its system imposes a *modest* burden on a small class of voters, App'x 92a. Indeed, if the tenth-longest schedule causes irreparable injury, most voters in this country who have far fewer voting options are suffering that type of harm.

Turning to the law, this Court will not rule in favor of claims that it found "extraordinary" enough to justify a stay. With respect to the Constitution, the Sixth Circuit rightly rejected the Democratic Parties' "one-way ratchet" approach—under

which States may "add to but never subtract from" voting practices—because it "would discourage states from ever increasing early voting opportunities, lest they be prohibited by federal courts from later modifying their election procedures in response to changing circumstances." App'x 2a-3a. That logic follows from *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), which rejected challenges to absentee-voting laws based on a State's "willingness to go further than many States in extending the absentee voting privileges." *Id.* at 810. When a State passes a law "beyond the requirements" of the Fourteenth Amendment, it is later "free to return" to the constitutional standard. *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 542 (1982). If, for example, a State protects gun rights more than the Second Amendment demands, the Fourteenth Amendment would not cement those greater firearm protections. In the same way, the Fourteenth Amendment does not cement Ohio's expansive voting laws simply because it has gone further than most States in encouraging voting.

With respect to Section 2, the Sixth Circuit engaged in the analysis that this Court undertook when reversing a finding of a Section 2 violation in *Thornburg v. Gingles*, 478 U.S. 30 (1986). There, the Court held that a lower court had "erred, as a matter of law, in ignoring the sustained success black voters ha[d] enjoyed" in a district that the court found diluted. *Id.* at 77. The district court here made the same error. It ignored the sustained success of African Americans in registering and voting at the *statistically same rates* as whites in all recent Ohio elections.

App'x 25a. By doing so, it departed from the rule that "[f]ailure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).

STATEMENT

A. Ohio, Like Every Other State, Traditionally Required Most Citizens To Vote Only On Election Day

States have traditionally allowed voting on one day—Election Day. Absentee voting did not exist during most of the 1800s, and many state constitutions required voting at the polls. *See* M.C. Dransfield, Annotation, *Validity of Absentee Voters' Laws*, 97 A.L.R.2d 218 § 2 (1964). During the Civil War, many States temporarily experimented with absentee voting, but only for the *military*. Josiah Henry Benton, *Voting in the Field: A Forgotten Chapter of the Civil War* 4 (1915). State constitutional attacks were lodged against these laws, *e.g., People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865), but the constitutional question became moot once most States discontinued them at the war's end, Benton, *supra*, at 314-16.

Civilian absentee voting slowly developed during the 1900s. By 1924, most States offered some form of *excuse-based* absentee voting. P. Orman Ray, *Absent-Voting Legislation, 1924-1925*, 20 Am. Pol. Sci. Rev. 347, 347 (1926). "Most of these laws were limited." John Fortier & Norman Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J. L. Reform 483, 504 (2003). Ohio permitted absentee voting for those who could show an "unavoidable absence." 107 Ohio Laws 52, 52 (1917). States gradually expanded the laws in the 1900s, adding, among others, disability as a qualifying "excuse." *See McDonald*, 394 U.S. at 809-11 & nn.8-9. *No-excuse* absentee voting did not exist in this country

until relatively recently. *See* Robert Stein & Greg Vonnahme, *Early, Absentee, and Mail-In Voting, in Handbook of Electoral Behavior* 183 (Jan Leighley ed., 2010).

B. Ohio Has Used No-Excuse Absentee Voting Since 2006

By 2004, Ohioans could vote absentee if they asserted one of several reasons. Ohio Rev. Code § 3509.02(A)(1)-(8) (2004). These ballots were available 35 days before Election Day, 145 Ohio Laws (Part I) 1389, 1406 (1993), which made them available five days before the end of registration (some 30 days before an election), Ohio Rev. Code § 3503.06. That left an overlap between when absentee voters could vote and when all voters had to register. Absentee voters could cast ballots by mail or in person at county boards of elections. *Id.* § 3509.05(A).

Following the 2004 presidential election, during which Ohio experienced long lines at the polls, the State passed a law permitting "[a]ny qualified elector [to] vote by absent voter's ballots at an election." 151 Ohio Laws (Part III) 5267, 5276 (2005) (amending Ohio Rev. Code § 3509.02(A)). Under this "no-excuse" absentee voting, all voters may vote by mail or in person. Ohio Rev. Code § 3509.05(A). The change did not adjust the existing timelines for absentee voting, and it appears that Ohio's General Assembly did not contemplate what the proper voting calendar should be.

Between 2006 and 2012, Ohio's county boards of elections adopted conflicting times for *in-person* absentee voting. Damschroder Tr., R.104, PageID#5411. Many officials, both Democrats and Republicans, called for uniformity and a shorter absentee-voting calendar. In 2012, the Ohio Association of Elections Officials ("OAEO")—whose trustees include 10 Democrats and 10 Republicans from large, medium, and small counties—urged a 21-day schedule. Ward Tr., R.103,

PageID#5300, 5308, 5313, 5321-22. When voters register, an OAEO task force reasoned, boards mail them acknowledgment cards to confirm their address. *Id.* PageID#5310. Many cards come back as undeliverable, and those voters must vote provisionally because they may be ineligible. *Id.* PageID#5310, 5312. Yet voters who register and vote at the same time would vote before boards would receive the cards back from "undeliverable" addresses. *Id.* PageID#5313. The OAEO suggested starting voting nine days after registration's close because most undeliverable cards would be returned by then. *Id.* Ohio passed a comprehensive voting law in 2012 setting a schedule along these lines, but repealed the law after it became subject to a referendum. *See Obama for Am. v. Husted*, 697 F.3d 423, 427 (6th Cir. 2012).

In 2013, another OAEO task force recommended shortening absentee voting so that it started on the day after registration's close (rather than 21 days before the election). Ward Tr., R.103, PageID#5317-18. This task force, comprised of four Republicans and four Democrats, "was a bipartisan group where we basically took off our R hat and our D hat, put on our election official [hat], and decided what's best for the voters." *Id.* PageID#5316. It reached this number of absentee-voting days as a compromise. *Id.* PageID#5317-18. As one Democratic elections official testified, "I saw the problems that [the schedule] was giving to some of my smaller contemporaries across the state and so I agreed to compromise and was hoping that they would also agree to compromise." Anthony Tr., R.96, PageID#3781.

Many reasons supported the change. Boards have many time-sensitive duties at this time. Ward Tr., R.103, PageID#5303-04. They are processing

registrations, completing registration rolls, finalizing ballots, testing voting machines, and processing absentee applications. *Id.* PageID#5303-09. Same-day registration and voting also required boards to hire temporary staff or have staff work overtime. Poland Tr., R.104, PageID#5359; Munroe Tr., R.102, PageID#4942. And officials viewed this time as increasing fraud potential. Ward Tr., R.103, PageID#5329.

In 2014, Ohio passed the Early-Voting Law, which adopted the OAEO's recommendation that voting begin on the day after registration's close thirty days before the election. Ohio Rev. Code § 3509.01(B)(2). In 2014, the Sixth Circuit upheld a preliminary injunction against the law, *NAACP*, 768 F.3d at 561, but this Court stayed that injunction, *Husted*, 135 S. Ct. at 42. The panel vacated its decision as moot. *Ohio State Conference of NAACP v. Husted*, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014). During the 2014 election with the Early-Voting Law's changes, African Americans and whites registered and voted at the statistically same rates. Hood Rebuttal, R.127-18, PageID#7366-67. *NAACP* then settled; Ohio added another Sunday of voting. Settlement, R.127-14, PageID#6775. After the settlement, Ohio's 2016 calendar is more expansive than its 2014 calendar, and, as to weekend and evening hours, more expansive than even its 2012 calendar.

C. All Ohioans Have Many Options To Cast A Ballot

Ohioans have two voting options: Election Day voting or absentee voting. Ohio Rev. Code § 3509.02(A). On Election Day, voters may vote from 6:30 a.m. until 7:30 p.m. *Id.* § 3501.32(A). This remains "the mode of voting that most voters still

use." Damschroder Tr., R.104, PageID#5393, 5419. In recent elections, at least two-thirds of voters cast votes on Election Day. Hood Rep., R.127-15, PageID#7260.

Absentee voting begins after registration's close. Ohio Rev. Code § 3509.01(B)(2). This creates a 27-day period for 2016 because registration remains open until 28 days before the election (days 29 and 30 are a holiday and a Sunday). Damschroder Tr., R.104, PageID#5478-79. To vote absentee, voters must submit applications by a few days before the election. Ohio Rev. Code § 3509.03. Those applications are widely available. Damschroder Tr., R.104, PageID#5397. The Secretary mailed them to almost all registered voters in the last two federal elections (and has again done so for 2016), *id.* PageID#5397-98, placing Ohio nearly alone in reaching out to voters in this way, Trende Rep., R.127-14, PageID#6685. Voters may mail the applications to the board, personally return them, or have anyone else return them. *Id.* PageID#5406.

Absentee voters may vote by mail or in person. Ohio Rev. Code § 3509.05(A). In recent elections, at least two-thirds of absentee voters voted by *mail*. Hood Tr., R.99, PageID#4333; Hood Rep., R.127-15, PageID#7260. Voters may obtain their absentee ballots by mail or at boards of elections. Damschroder Tr., R.104, PageID#5406, 5408. They may return the ballots by mail, in person, or through a family member. *Id.* PageID#5407. Mail voters may also track their ballots at board websites. *Id.* PageID#5421. Absentee *in-person* voting, by contrast, remains the least-used option. Hood Rep., R.127-15, PageID#7260. For the 2016 election, voters

may vote *in person* on 23 days, including on two Saturdays, on two Sundays, and on weekday evenings. Calendar, R.127-14, PageID#6769-70.

D. The District Court Enjoined The Early-Voting Law, But The Sixth Circuit Reversed

Waiting until after *NAACP* settled, the Democratic Parties sued to challenge the Early-Voting Law. They also challenged state laws regarding the number of absentee-voting locations per county; the number of voting machines per county; and the requirements for filling out absentee and provisional ballots. App'x 46a.

1. After a bench trial, the district court invalidated the Early-Voting Law, but rejected all other claims. App'x 164a. To invalidate the Early-Voting Law, the district court relied primarily on the stayed *NAACP* decision. It first held that the Early-Voting Law's *changes* violated the Fourteenth Amendment. App'x 75a-101a. It found that those changes had a disparate, albeit "modest," impact on African Americans. App'x 79a-86a. Ohio's other options did not alleviate these burdens, the court reasoned, because "anecdotal evidence" showed that African Americans "are distrustful of voting by mail," which requires postage. App'x 87a-88a. The court then held that Ohio's interests (such as reducing administrative burdens or deterring fraud) did not outweigh those modest burdens. App'x 92a-101a.

The court next held that the Early-Voting Law violated Section 2. App'x 137a-152a. It disclaimed any need to "identify an objective benchmark" with which to compare Ohio's schedule. App'x 141a. And while it said it could not use a "retrogression analysis," it "compared" "prior law" to "current law" to find that the Early-Voting Law disparately burdened African Americans. App'x 141a-42a. It

then ticked through the "Senate Factors" from Section 2's legislative history to conclude that the Early-Voting Law made Ohio's political processes unequally open to African Americans. App'x 145a-51. It nowhere considered how African-American registration and voting in Ohio compared to that of other groups.

The court granted a stay for an August election, but not the November election. App'x 173a. It "commended" Ohio's "leadership in voting," App'x 167a, but said it was the "province" of the Sixth Circuit to disavow *NAACP*, App'x 169a.

2. Ohio appealed. The State moved to expedite the briefing and decision, asking the Sixth Circuit to issue a final judgment by late August or early September, which the State viewed as well in advance of any start to the voting calendar. Mot. to Expedite, 6th Cir. R.9, at 1-2. The Democratic Parties took no position on Ohio's motion, *id.* at 2, which the Sixth Circuit ultimately granted.

On August 23, the Sixth Circuit upheld the Early-Voting Law. App'x 27a. Starting with the Fourteenth Amendment, the Sixth Circuit followed this Court's "*Anderson-Burdick* framework," which requires courts to compare the size of a burden from a voting regime against the State's justification for that regime. App'x 8a-9a. The Sixth Circuit disagreed with the district court's legal conclusion that Ohio's schedule *modestly* burdened voting, holding that Ohio has "one of the more generous" schedules in the nation. App'x 11a. The court found any burdens were, at most, minimal. App'x 12a-15a. It next held that, even under middle-level scrutiny, Ohio's reasons for its schedule—fraud and public confidence concerns, and

administrative and cost concerns, among others—justified even modest burdens. App'x 15a-21a.

Turning to Section 2, the court noted that this case involves Section 2(b)'s prohibition against "unequally open political processes." App'x 21a. For such claims, the court clarified the two-part test articulated by its prior *NAACP* decision. App'x 22a-25a. The first element—which requires a challenged standard to impose a discriminatory burden on a protected class—"requires proof that the challenged standard . . . causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process." App'x 23a. Only then should a court proceed to the second, totality-of-the-circumstances inquiry, which might include an analysis of the "Senate Factors." App'x 23a-24a. Under this framework, the court held, the Democratic Parties' claim failed at the first step because they did not prove that the Early-Voting Law caused Ohio's political processes to be unequally open. Rather, statistical evidence from all recent elections showed at least equal participation numbers. App'x 25a-26a.

REASONS FOR DENYING THE STAY

The "[d]enial of . . . in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright*, 556 U.S. at 1402 (Ginsburg, J., in chambers) (citation omitted). That is particularly true where, as here, applicants attack state or federal laws. "[S]tatutes are presumptively constitutional and, absent compelling equities on the other side, . . . should remain in effect pending a final decision on the merits by this Court." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist, J., in chambers). The Court has

identified three requirements for a stay. The "applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Additionally, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

The Democratic Parties cannot meet these standards. The Court has already held that a decision enjoining the Early-Voting Law was sufficiently "extraordinary" to warrant a stay. *Husted*, 135 S. Ct. at 42. A decision *upholding* an even more expansive schedule cannot also meet the stay standards. The Court should deny a stay because the Democratic Parties have not shown a likelihood that it would grant certiorari and reverse the Sixth Circuit's Fourteenth Amendment ruling. *See* Part I. It should deny a stay because they have not shown a likelihood that it would grant certiorari and reverse the Sixth Circuit's Section 2 ruling. *See* Part II. And it should deny a stay because the balance of the equities favors Ohio. *See* Part III.

I. THIS COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE THE SIXTH CIRCUIT'S FOURTEENTH AMENDMENT RULING

The Democratic Parties argue that the Sixth Circuit's constitutional reasoning gave excessive deference to the State and refused to defer to the district court—in conflict with this Court's cases and with cases from other circuits. They are mistaken. The Sixth Circuit undertook a garden-variety application of this Court's precedent, and its ruling comports with all relevant circuit decisions.

A. This Court's Fourteenth Amendment Cases Give States Great Flexibility To Adopt Neutral Voting Rules

Elections raise competing concerns. "[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Yet a right to vote is "implicit in our constitutional system." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973). To balance these concerns, this Court has created a right-to-vote framework often called the "*Anderson-Burdick*" framework after *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). This framework requires courts to balance state interests against voting rights. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (Stevens, J., op.). It follows two steps—courts measure a burden's size and then apply a corresponding review standard.

1. *Measuring The Burden.* To measure a voting burden, this Court's cases identify several relevant factors. They ask whether the burden "falls unequally" on certain groups, *Anderson*, 460 U.S. at 793, or applies neutrally to all, *Burdick*, 504 U.S. at 438. Discriminatory laws impose greater burdens than neutral ones. *Id.*

The Court's cases also stress that a law's effects must be considered *together* with—not in *isolation* from—the State's voting "system" as a whole. *Burdick*, 504 U.S. at 436. For example, a Hawaii law absolutely barring "write-in" votes seemed severe in the abstract, but imposed "limited" burdens when considering that Hawaii "provide[d] for easy access to the ballot." *Id.* at 434-37.

For facial attacks, the Court's cases also "consider only the statute's broad application to all" parties. *Crawford*, 553 U.S. at 202-03 (Stevens, J., op.). Thus, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), a lower court asserted that laws banning "fusion" candidates (those supported by two parties) severely burdened *minor* parties. *Id.* at 360. This Court reversed because these disparate impacts did not prove that the bans imposed severe burdens overall. *Id.* at 362-63.

Finally, the Court considers whether a voting law's burdens are "ordinary and widespread." *Clingman v. Beaver*, 544 U.S. 581, 593 (2005). When the Court upheld the fusion bans, for instance, it noted that fusion had become "the exception" throughout the United States. *Timmons*, 520 U.S. at 356-57.

2. *Review Standard*. After the Court identifies the burden, it applies a standard of review. Strict scrutiny governs laws that impose "severe" burdens. *Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973). In the middle sit laws imposing substantial burdens. For these, courts balance benefits and burdens. *Crawford*, 553 U.S. at 189-91 (Stevens, J., op.). At the other end, laws imposing minimal burdens need only further "'important regulatory interests,'" *Burdick*, 504 U.S. at 434 (citation omitted), and "will be set aside only if no grounds can be conceived" to justify them, *McDonald*, 394 U.S. at 809. Absentee-ballot laws trigger that deferential review because voters have no "right to receive absentee ballots." *Id.* at 807. So when school and work plans forced plaintiffs out-of-state on Election Day, laws denying them absentee ballots did not trigger higher scrutiny. *Fidell v. Bd. of Elections of N.Y.*, 343 F. Supp. 913, 915 (E.D.N.Y.), *aff'd* 409 U.S. 972 (1972).

Instead, higher scrutiny applies only if the State "physically prevent[s] [challengers] from going to the polls and den[ies] them alternative means of casting their ballots." *O'Brien v. Skinner*, 414 U.S. 524, 533 (1974) (Marshall, J., concurring).

B. This Court's Framework Compelled The Sixth Circuit To Uphold Ohio's Voting Laws Under The Fourteenth Amendment

1. Ohio's laws trigger a standard akin to rational-basis review because they impose "'reasonable, nondiscriminatory restrictions'" on voting. *Burdick*, 504 U.S. at 434 (citation omitted). *First*, only burdens on *protected* rights count. Just as political parties have no protected "right to have their nominees designated as such on the ballot," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 n.7 (2008), voters have no protected right to absentee ballots, *McDonald*, 394 U.S. at 807-08.

Second, Ohio laws are *nondiscriminatory*. Ohio requires *all* voters to register some 30 days before the election. Ohio Rev. Code § 3503.06(A). It allows *all* voters to vote absentee after the close of registration. *Id.* § 3509.02(A). And it gives *all* voters thirteen hours to vote on Election Day. *Id.* § 3501.32(A).

Third, Ohio's expansive calendar *facilitates* voting. App'x 10a. Any contrary conclusion that its calendar somehow *burdens* voting has no logical end point. As the Seventh Circuit opined, it is "obvious that a federal court [cannot] decree weekend voting, multi-day voting, all-mail voting, or Internet voting" in the Constitution's name. *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (Posner, J.). Or, as the decision below noted, the Constitution cannot require "a regime of judicially-mandated voting by text message or Tweet." App'x 11a.

Fourth, the requirement to register and vote on separate occasions imposes minimal burdens. This Court has already upheld laws requiring voters to register *50 days* before voting. *Marston v. Lewis*, 410 U.S. 679, 680-81 (1973); *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973).

Finally, from a historical or a modern perspective, Ohio laws impose "ordinary" burdens. *Clingman*, 544 U.S. at 593. Historically, States required voters to vote on only one day. Today, Ohio's calendar "is one of the more generous in the nation." App'x 11. "Ironically, it is [Ohio's] willingness to go further than many States in extending the absentee voting privileges . . . that has provided [challengers] with a basis for arguing that the provisions . . . deny them a more convenient method of exercising the franchise." *McDonald*, 394 U.S. at 810-11. Rather than a burden, Ohio's voting regime is a "laudable state policy." *Id.* at 811.

2. Ohio laws further "legitimate state interests 'sufficiently weighty to justify'" them. *Crawford*, 553 U.S. at 191 (Stevens, J., op.) (citation omitted). Even under *Crawford*'s middle scrutiny, the Court does not require States to *prove* their interests. That "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). *Crawford* instead accepted the State's fraud concern even though it identified no fraud ever occurring in the State in the relevant way. 553 U.S. at 194 (Stevens, J., op.). Here, many interests, separately or together, support Ohio's law under minimal or mid-tier scrutiny. App'x 15a-21a.

Administrative Burdens & Costs. Ohio must balance voting options with the burdens on boards of elections. App'x 18a-19a. Those boards have "a lot of things going on" 35 days before an election. Ward Tr., R.103, PageID#5303. They are finalizing ballots. *Id.* They are testing voting machines. *Id.* PageID#5303-04. They are processing the registration wave that arrives near registration's close. *Id.* PageID#5304, 5309. And they are preparing for Election Day. Damschroder Tr., R.104, PageID#5451-52. In addition, Ohio must balance the costs associated with additional early voting (in terms of personnel) with its benefits (in terms of more turnout). In Hamilton County, for example, it cost between $16,000 and $24,000 to have a week of same-day registration and voting. Poland Tr., R.104, PageID#5378. Yet "the bulk [of] the academic literature doesn't" even suggest that more days generate more turnout. Hood Tr., R.99, PageID#4479.

Fraud & Public Confidence. Ohio must balance early-voting options with the risks of fraud—and decreased public confidence—they create. The bipartisan OAEO recommended shortening early voting because overlapping registration and voting raises fraud risk. Ward Tr., R.103, PageID#5329. To take one example, in Hamilton County, two voters who registered and voted on the same day were suspected of voting fraudulently; their votes were rejected and their cases were referred to the prosecutor. Poland Tr., R.104, PageID#5360-61. Ohio's "concrete evidence" of voter fraud here surpasses that in *Crawford*. App'x 17a. Relatedly, while Ohio strives to implement controls to make fraud rare, it has an interest in

safeguarding the public confidence by "eliminating 'even appearances of fraud.'" App'x 17a; *cf. Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671-72 (2015).

Information Asymmetry. Finally, Ohio must balance giving voters early-voting options against ensuring they have relevant information. "As you get further and further away from election day, you increase the chances that some sort [of] game-changing piece of news will occur." Trende Tr., R.103, PageID#5143. Voting weeks early increases the chances that voters will lack that information. *Id.* The report relied upon by *Crawford* acknowledged this concern, and suggested a schedule much shorter than Ohio's to address it. *See* 553 U.S. at 193-94; Report of the Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* at 35-36 (Sept. 2005), http://goo.gl/KFsw1N.

C. The Democratic Parties Fail To Show That The Sixth Circuit's Holding Conflicts With Any Relevant Precedent

In response, the Democratic Parties argue that the Sixth Circuit (1) gave excessive deference to Ohio, and (2) wrongly applied a de novo standard when reviewing the district court's holding. ODP Appl. 17-24. They are wrong.

1. The Democratic Parties argue that the Sixth Circuit mistakenly applied a deferential standard of review after finding that the Early-Voting Law imposed, at most, minimal burdens. ODP Appl. 15-19. For several reasons, the Court will not grant certiorari on this question. *First*, it is not outcome dispositive. To be sure, the Sixth Circuit properly recognized that "a deferential standard of review akin to rational basis" applied. App'x 15a. But it immediately noted that "even if we were to accept the district court's characterization of the burden as

'modest,' which may conceivably trigger a slightly less deferential review under the 'flexible' *Anderson-Burdick* framework, Ohio's proffered interests are still 'sufficiently weight' to justify it." App'x 16a. No matter the standard, the Early-Voting Law passes constitutional muster. *Cf. Kenyeres v. Ashcroft*, 538 U.S. 1301, 1305 (2003) (Kennedy, J., in chambers) (denying a stay despite circuit disagreement on proper standard because the petitioner was "unlikely to prevail in his request for a stay under either of the standards adopted by the Courts of Appeals").

Second, the Democratic Parties wrongly argue that the Sixth Circuit's decision departs from this Court's precedent. ODP Appl. 17-19. They cite only one *Anderson-Burdick* case in support. Specifically, they invoke *Crawford*'s statement that "even rational restrictions on the right to vote are invidious if they are *unrelated* to voter qualifications." 553 U.S. at 189 (emphasis added). Yet *Crawford*—which upheld an "undeniably more burdensome" photo ID law based on less evidence, App'x 14a, 17a—offers strong support for the Sixth Circuit's decision upholding Ohio's voting schedule. The Sixth Circuit even criticized the district court for relying on its *NAACP* decision at *Crawford*'s expense. App'x 19a-20a.

If anything, it is the Democratic Parties that ignore precedent. They do not discuss *Clingman*, *Timmons*, *Burdick*, or *Munro*—all of which show that States must "enact reasonable regulations of parties, elections, and ballots" and need not justify those regulations with "elaborate, empirical verification." *Timmons*, 520 U.S. at 358, 364. Similarly, they do not cite *Marston* and *Burns*, both of which upheld requirements to register 50 days *before* voting. *Marston*, 410 U.S. at 680-81;

Burns, 410 U.S. at 686-87. And they do not cite *McDonald*, which held that rational-basis review applied to absentee-voting laws. 394 U.S. at 807-09. Nor can *McDonald* be distinguished as a relic predating *Anderson-Burdick*. The *Anderson-Burdick* test dates to this Court's poll-tax decision in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966), *see Crawford*, 553 U.S. at 189 (Stevens, J., op.), and *McDonald* cited *Harper* when holding that rational-basis review applied. Indeed, *Anderson-Burdick* and *McDonald* easily coexist: They confirm that a standard akin to *rational-basis review* applies to minimal voting burdens like those here.

Rather than identify a conflict with the Court's *voting* precedents, the Democratic Parties point to an *abortion* case—*Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). But *Whole Woman's Health* applied an "undue burden" standard that uniquely governs abortion. *Id.* at 2309-10. Even there, this Court has applied rational-basis review to laws that do not substantially interfere with abortions. *Maher v. Roe*, 432 U.S. 464, 475-80 (1977). More generally, the Court has long applied rational-basis review to laws that do not "'directly and substantially'" burden fundamental rights. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (citation omitted). Regardless, the Sixth Circuit did what *Whole Woman's Health* teaches—it evaluated the state interests and concluded that those "ample" and "important" interests "justify" any burden on voting. App'x 17a, 18a, 19a.

Third, to claim a circuit split on this issue, the Democratic Parties cite only one case—*McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215 (4th Cir. 1995). ODP Appl. 18. Yet *McLaughlin* upheld the regulation at issue in that case, so its

footnote questioning other courts' use of rational-basis review was dicta. 65 F.3d at 1221 n.6. And the Fourth Circuit has since confirmed that a deferential standard applies to neutral voting laws under *Anderson-Burdick*. *See Libertarian Party of Va. v. Alcorn*, 826 F.3d 708 (4th Cir. 2016).

2. The Democratic Parties alternatively claim that the Sixth Circuit wrongly applied a "*de novo* standard" to the district court's conclusions about the burden's size and the State's interests, rather than a "clear error standard." ODP Appl. 19. For the same reasons, the Court will not grant certiorari on this question.

First, they argue that the Sixth Circuit's standard conflicts with *Gingles*. ODP Appl. 19. But a case about a *statute* offers no aid for a *constitutional* question. Rather, it is the Democratic Parties that again ignore precedent. The *logic* of many cases is irreconcilable with their clear-error claim. In *Burdick*, for example, the district court granted summary judgment to the plaintiff on the ground that a ban on write-in voting was a severe burden. 504 U.S. at 432. This Court affirmed a decision reversing that analysis after the Court *independently* "concluded that the burden [was] slight." *Id.* at 439. If this issue presented a fact question, the Court would have asked whether a genuine issue of fact existed about the burden's size.

Many other cases confirm this point. *E.g.*, *Clingman*, 544 U.S. at 591-93 (affirming finding of a non-severe burden based on an *independent* review that did not reference a clear-error standard); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 571, 582 (2000) (reversing district court's finding, *after a bench trial*, that a burden was not severe without invoking clear-error standard); *Timmons*, 520 U.S. at 363-64

(rejecting appellate court's finding of "severe" burden, based on *independent* review). In short, "independent appellate review" applies to the "ultimate determination" of the burden, even if historical facts are reviewed for clear error. *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (reviewing probable-cause determination de novo). That is the standard that the Sixth Circuit applied here. App'x 10a.

Second, the Democratic Parties fail to identify any conflicting circuit cases. Most of their cases do not involve *Anderson-Burdick*. *Veasey v. Abbott*, 2016 WL 3923868, at *33 (5th Cir. Jul. 20, 2016) (en banc), *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 248 n.7 (4th Cir. 2014), and *Harvell v. Blytheville School District*, 71 F.3d 1382, 1385 (8th Cir. 1995), all considered Section 2 claims. Similarly, *NAACP v. McCrory*, 2016 WL 4053033, at *21 (4th Cir. July 29, 2016), considered a claim of *intentional* discrimination, not an *Anderson-Burdick* claim. It is well-established that the intent finding for that type of claim is subject to the clear-error standard. *Cf. Spurlock v. Fox*, 716 F.3d 383, 397 (6th Cir. 2013). Here, however, the district court *rejected* the Democratic Parties' intentional-discrimination claim. App'x 159a. And *McCrory* cannot possibly support the Democratic Parties' argument that the Sixth Circuit should have deferred to the district court, because the Fourth Circuit there *overturned* a district court's conclusion that no intentional discrimination existed. 2016 WL 4053033, at *2.

II. THIS COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE THE SIXTH CIRCUIT'S SECTION 2 RULING

The Democratic Parties argue that the Sixth Circuit's Section 2 analysis conflicts with cases from this Court and other circuit courts. They are wrong. The

Sixth Circuit's judgment comports with all relevant cases, and the Democratic Parties' claim fails for an independent reason that the court did not consider.

A. The Court's Cases Set A General Framework For Section 2

Section 2 originally mirrored the Fifteenth Amendment by prohibiting only *intentional* discrimination. In 1982, Congress amended the law by retaining "intentional discrimination under § 2(a)," and adding Section 2(b) to cover voting practices that "result" in unequally open political processes. *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 359-60 (7th Cir. 1992). Section 2(b) now prohibits practices "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b); *see* App'x 21a. Since *Gingles*, the Court has repeatedly considered Section 2 "vote dilution" claims. *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*); *Holder v. Hall*, 512 U.S. 874 (1994). In that context, the Court has identified three elements.

Element One: "[A] court must find a reasonable alternative practice as a benchmark against which to measure the [challenged] voting practice." *Holder*, 512 U.S. at 880 (Kennedy, J., op.); *e.g.*, *Bartlett*, 556 U.S. at 28 (Souter, J., dissenting). That is because "[i]t makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*).

Element Two: The court must decide whether the three so-called "*Gingles* preconditions are met." *Holder*, 512 U.S. at 880 (Kennedy, J., op.). When a minority group seeks a "majority-minority district" in a state's redistricting map, those preconditions require challengers to show that (1) the minority group is "'sufficiently large and geographically compact to constitute a majority in a single-member district'"; (2) the group is "'politically cohesive'"; and (3) the majority votes "'sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate'" under the challenged map. *Bartlett*, 556 U.S. at 11 (plurality op.) (citation omitted). This inquiry is designed to establish whether the challenged redistricting practice has *caused* the unequally open political processes of which the group complains.

Element Three: The court considers "whether the totality of the circumstances supports a finding of liability." *Holder*, 512 U.S. at 880 (Kennedy, J., op.). To structure that inquiry for vote-dilution claims, "the Court has referred to the Senate Report on the 1982 amendments . . . , which identifies factors typically relevant to a § 2 claim" involving dilution. *LULAC*, 548 U.S. at 426.

Because Section 2's text is the same for any claim, these elements offer guidance in this context. The Sixth Circuit appropriately reversed the district court based on the second causation element, an element that follows directly from the Court's *Gingles* opinion itself. And while that court did not need to reach the issue, the Democratic Parties' claim here also separately flunks the first element.

B. The Sixth Circuit Followed The Court's Framework By Holding That The Democratic Parties Failed To Prove Causation

The Democratic Parties argue that the Sixth Circuit's causation analysis conflicts with the reasoning of this Court and of other circuit courts because it (1) failed to defer to the district court's factual findings and (2) required a causation test apart from a consideration of the Senate Factors. They are mistaken. The Sixth Circuit's judgment comports with all relevant cases.

1. A plaintiff must prove a causal connection between the challenged practice and unequal political processes

Even if challengers can show that a practice has a racially disparate impact, Section 2's plain language requires challengers to prove that the practice has resulted in a State's "political processes" being "*[un]equally open*" for a racial group "'in that its members have *less opportunity* than other members of the electorate to participate in the political process.'" 52 U.S.C. § 10301(b) (emphases added). This causation element "avoid[s] the serious constitutional questions that might arise" from a disparate-impact test alone. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2522 (2015). The text requires two showings.

At a "macro" level, challengers must show that a State's political processes—i.e., its entire registration and voting processes—are "not equally open" to certain racial groups. The word "equally" is key. *Bartlett*, 556 U.S. at 20 (plurality op.). The statute does not require every "opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice." *Id.* "Failure to maximize" *one* group's participation "cannot be the measure of § 2" because that would treat *other* groups unequally. *De Grandy*, 512 U.S. at

1017. Section 2 requires equal—not preferential—treatment. *Bartlett*, 556 U.S. at 20 (plurality op.); *cf. id.* at 29 (Souter, J., dissenting) (noting that Section 2 "was passed to guarantee minority voters a fair game, not a killing"). In the dilution context, therefore, this Court held that a Section 2 claim failed as a matter of law when African Americans had repeatedly elected representatives of their choice—a result inconsistent with the claimed unequal processes. *See Gingles*, 478 U.S. at 77.

At a "micro" level, challengers must connect those *general* inequalities to the *specific* challenged practice. *See* App'x 23a-24a. Where factors other than the challenged practice cause any general inequalities, a Section 2 claim must fail. The so-called "*Gingles* preconditions" illustrate this basic point. *See Bartlett*, 556 U.S. at 11 (plurality op.) (citation omitted). In the dilution context, those preconditions determine whether it is the State's challenged redistricting that has "'proximately caused'" the electoral inequities of which the plaintiffs complain. *Gingles*, 478 U.S. at 50 n.17 (citation omitted). If a minority is geographically dispersed because of *socioeconomic factors*, for example, it is those socioeconomic conditions that cause the dilution by making a majority-minority district (in which the minority can elect the candidates of their choice) impossible. *Id.* at 49-50. Notably, moreover, these *Gingles* preconditions "serve[] as . . . gatekeeper[s]" that establish causation *before* reaching the totality of the circumstances. *See Bartlett*, 556 U.S. at 31 (Souter, J., dissenting); *Growe v. Emison*, 507 U.S. 25, 38-42 (1993) (criticizing district court for jumping directly to the totality of the circumstances without considering the *Gingles* preconditions).

2. The Sixth Circuit correctly held that the Democratic Parties failed to make the required causal showing

The Sixth Circuit rightly found that the Democratic Parties failed to prove that the Early-Voting Law *caused* Ohio's political processes to be unequally open to African Americans. App'x 25a-26a. At the *macro* level, statistical evidence (from U.S. Census data) shows that African-American and white registration and voting rates have been "statistically indistinguishable" for all recent elections. *Id.*; *see* Hood Rebuttal, R.127-18, PageID#7366. As the Sixth Circuit held, the district court erred, as a matter of law, in simply ignoring this sustained success. App'x 25a.

In this respect, the Sixth Circuit's logic tracks *Gingles*. There, the Court held that the district court had "erred, *as a matter of law*, in ignoring the sustained success black voters ha[d] enjoyed" in a district that the district court had found to be diluted. 478 U.S. at 77 (emphasis added). That is exactly what the Sixth Circuit held here. As in *Gingles*, it interpreted Section 2 as barring claims that a State's political processes were unequally open when members of a racial group had repeatedly participated in the political processes at similar rates to others. App'x 25a-26a. And similar to *Gingles*, the court found that the district court had committed *legal* error in *ignoring* this equality in participation. 478 U.S. at 77.

The Democratic Parties offered nothing to rebut this macro-level evidence proving that Ohio's "political processes" are "equally open." 50 U.S.C. § 10301(b). Their own expert conceded that he conducted no "analysis linking" any socioeconomic disparities between racial groups to differing rates of "voter participation." Timberlake Tr., R.100, PageID#4559. He claimed that registration

and voting statistics were not even a "useful way" to determine whether Ohio's political processes are equally open. *Id.* PageID#4562. In doing so, he relied on a legally mistaken interpretation of Section 2. *See, e.g.*, *De Grandy*, 512 U.S. at 1014.

The Democratic Parties instead argued only the *micro* level—claiming that African Americans use the *specific* practice (the eliminated week) more than whites. But even accepting that allegation (as the Sixth Circuit did) does not establish liability. Possible disparities in *one* of Ohio's many voting options do not satisfy Section 2—which asks whether the State's *entire* political processes are unequally open. Any other rule is illogical. Whites may use Election Day at higher rates than African Americans; African Americans may vote early at higher rates than whites. But neither disparity matters unless it *causes* disparity in overall "participat[ion]" numbers. 52 U.S.C. § 10301(b). Further, statistics showed that voters who had used the eliminated week in 2010 were just as likely to vote in 2014 as voters who had voted at other times in 2010. McCarty Tr., R.98, PageID#4141-42.

If anything, Ohio's current calendar accommodates African Americans *more* than other States. The Democratic Parties' witnesses suggested that Sunday voting is "very important" to African Americans. Turner Tr., R.96, PageID#3601; Butcher Tr., R.96, PageID#3646-49; Perlatti Tr., R.97, PageID#4029. Ohio's calendar now includes voting on *two* Sundays, Calendar, R.127-14, PageID#6769-70, and Ohio is one of only 13 States that offers *any* Sunday voting, Trende Rep., R.127-14, PageID#6615.

3. The Democratic Parties have not shown that the Sixth Circuit's holding conflicts with any cases

The Democratic Parties argue that the Court should grant a stay because: (a) the Sixth Circuit wrongly failed to apply clear-error review to the district court's conclusions, ODP Appl. 19-21, and (b) that court's causation analysis conflicts with other circuits' views of *Gingles, id.* at 24-32. They are mistaken.

a. The Democratic Parties claim that *Gingles* compelled the Sixth Circuit to apply clear-error review to the district court's liability conclusion. ODP Appl. 19-20. *Gingles* itself rebuts their claim. While it indicated that clear-error "is the appropriate standard" to review a "finding of vote dilution," it clarified that this holding would "'not inhibit an appellate court's power to correct *errors of law*, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" *Gingles*, 478 U.S. at 79 (emphasis added). This Court has never deferred to lower courts on what Section 2 means. Rather, "[w]here 'the ultimate finding of dilution' is based on 'a misreading of the governing law,' . . . there is reversible error." *LULAC*, 548 U.S. at 427 (quoting *De Grandy*, 512 U.S. at 1022).

No circuit court has held the contrary. In the Fifth Circuit's recent *Veasey* decision, for example, it *independently* articulated what it believed to be the governing legal principles for challenges to photo ID laws without deferring to the district court. 2016 WL 3923868, at *17-21. Every other circuit to consider this issue has done the same. *See, e.g.*, *League of Women Voters*, 769 F.3d at 238-41 (articulating legal standards without deferring to district court); *Ortiz v. City of*

Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 309 (3d Cir. 1994) (holding that the question of which factors are relevant for a particular Section 2 challenge is question of law).

b. The Democratic Parties' challenge to the Sixth Circuit's legal framework provides no basis for a stay. ODP Appl. 24-32. *First*, the Democratic Parties claim that the Sixth Circuit's decision about Ohio's early-voting calendar conflicts with the Fifth Circuit's *Veasey* decision about Texas's photo ID law. *Id.* at 24-27. But, whatever the appropriate test is under Section 2, this case is easily distinguishable from that one. Responding to the dissent, the *Veasey* majority insisted that its test would not dismantle state election regimes because the Texas law was "'the [s]trictest [l]aw in the [c]ountry' in a State with a fairly extensive history of official discrimination." 2016 WL 3923868, at *19 n.37 (quoting trial court). This case, by contrast, involves a top-ten voting calendar in a State that has *never* been subject to Section 5 preclearance. The statistics on which the Sixth Circuit relied here, moreover, were absent in *Veasey*. The majority there highlighted "evidence that minority voters generally turn out in lower numbers than non-minority voters" and that "State-sponsored discrimination" hindered minority voters' "participation in the political process." *Id.* at *30.

Second, the Democratic Parties argue that the Fourth Circuit's *McCrory* decision "rejected" the Sixth Circuit's reasoning—that a Section 2 plaintiff must show unequally open political processes in the aggregate. ODP Appl. 30-31. *McCrory* involved an *intentional-discrimination* claim. 2016 WL 4053033, at *5. It

said nothing about a "results" claim or the proper standards governing such a claim. *Id.* In the intentional-discrimination context, a law violates the Constitution (and Section 2) if a plaintiff shows both a disparate impact and discriminatory intent. *McCrory*, 2016 WL 4053033, at *15-16; *see De Grandy*, 512 U.S. at 1019 ("'A balanced bottom line does not foreclose proof of discrimination along the way'") (citation omitted). But where, as here, a plaintiff *fails* to prove intent and relies on Section 2(b)'s results approach, the plaintiff must show that any disparate impact from a voting practice has made the State's political processes unequally open. Thus, when distinguishing this Court's denial of a stay in *McCrory*, the Democratic Parties *admit* the "obvious point" that *McCrory* "raise[d] different merits issues." ODP Appl. 6. That "intent" case does not undermine the Sixth Circuit's holding in this "results" case.

Third, the Democratic Parties nitpick Ohio's voting data. ODP Appl. 31. They say that the district court discredited the expert who presented the statistics, but it *nowhere* challenged the specific statistics themselves, which came from federal census data. Hood Rebuttal, R.127-18, PageID#7366-67. And their suggestion that African Americans voted at reduced rates in 2014 compared to 2010 (despite turning out in the *statically equal* numbers as whites in 2014) confirms that they seek a *maximization* rule that conflicts with the Court's precedent. *See De Grandy*, 512 U.S. at 1017. More fundamentally, they introduced no contrary statistics. Their failure to make any macro-level showing sinks their claim because they bore the burden of proof. *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993).

C. Alternatively, The Democratic Parties' Asserted Issues Are Not Even Outcome Dispositive Because Their Section 2 Claim Fails For A Reason Unique To Ohio's Expansive Calendar

While the Sixth Circuit did not need to reach this issue, the Democratic Party's claim also fails for an independent reason that is not even applicable to the photo ID cases on which they rely: To identify a racially disparate burden, they improperly invoke a retrogression approach reserved for Section 5.

1. This Court's cases require challengers to identify a benchmark with which to compare a challenged practice

To decide whether a "practice" abridges voting on account of race, a court must compare effect of the practice to the effect of an *alternative* practice. "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Bossier II*, 528 U.S. at 334. For Section 2, the right to vote under the current practice is compared to "what the right to vote *ought to be*." *Id.*; *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in judgment) (asking "how hard it 'should' be" "under an acceptable system"). This has been a mainstay of the Court's dilution cases. In *Holder*, there was "*general agreement*" that "courts must choose" a reasonable alternative as a "benchmark" for comparison. 512 U.S. at 887 (O'Connor, J., concurring in part and concurring in judgment) (emphasis added); *see also Bartlett*, 556 U.S. at 28 (Souter, J., dissenting) (noting that "there must be an identifiable baseline for measuring a group's voting strength").

In many cases, the reasonable benchmark for comparison may be "obvious." *Holder*, 512 U.S. at 880 (Kennedy, J., op.). When a voting qualification—such as a

literacy test or a poll tax—disqualifies voters who fail to meet it, the comparator (or "benchmark") will be a regime *without* that requirement. *Id.* at 880-81. Other times, however, it may prove impossible to identify a "principled reason why one [hypothetical alternative] should be picked over another as the benchmark for comparison." *Id.* at 881. Where the choice is "'inherently standardless,'" the claim fails. *Id.* at 885 (citation omitted). In *Holder*, for example, a "hypothetical five-member commission," *id.* at 881, offered "no objective and workable standard for choosing," *id.*, it over others, and so could not trigger Section 2 liability.

In addition, the Court's cases identify what the benchmark *cannot* be: prior law. Those *old-to-new* comparisons apply to Section 5, which "uniquely deal[s] only and specifically with *changes* in voting procedures." *Bossier II*, 528 U.S. at 334. Under Section 5, "[t]he baseline for comparison is present by definition; it is the existing status." *Holder*, 512 U.S. at 883 (Kennedy, J., op.). But "[r]etrogression is not the inquiry in § 2 dilution cases." *Id.* at 884. A plaintiff instead must "postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997).

2. The Democratic Parties have not identified a reasonable benchmark with which to compare Ohio's calendar

To prove a disparate burden on African Americans, the Democratic Parties compare Ohio's current voting calendar (with some four weeks of voting) to its prior calendar (with some five weeks). They claim that the *change* from the old calendar to the new disparately affects African-American voters because they "disproportionately relied" on the eliminated week. ODP Appl. 29. This is error.

To begin with, the Democratic Parties do not identify an *objective* benchmark with which to compare Ohio's expansive calendar, which is enough to deny relief at this emergency stage. *See Holder*, 512 U.S. at 885 (Kennedy, J., op.). Indeed, if African Americans use early voting more than others (as the Democratic Parties assert), Ohio's current schedule *benefits* them compared to most alternatives. A few examples illustrate. Overall, Ohio's schedule would beat 40 other state schedules in terms of hours. Trende Rep., R.127-14, PageID#6629. Or should the comparison be with the *median* schedule? Here, too, Ohio's is more expansive than those 14 days. *Id.* PageID#6610. As noted, moreover, Ohio's schedule even beats its own *prior* 2012 schedule in terms of *nontraditional* hours. Nor can a plaintiff's preferred "schedule" provide the reasonable alternative. Within a fixed number of days, it could be four or five Saturdays or Sundays, with evening hours up to midnight. In short, "it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place." *Holder*, 512 U.S. at 882 (Kennedy, J., op.). Ohio satisfies Section 2 under any *reasonable* benchmark.

In addition, the Democratic Parties' reliance on Ohio's old schedule as the benchmark (among the infinite possibilities) conflicts with this Court's cases. Section 2 does *not* bar such retrogression. That is Section 5's domain. The Court has consistently "refuse[d] to equate a § 2 vote dilution inquiry with the § 5 retrogression standard." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). "The inquiries under §§ 2 and 5 are different." *Bartlett*, 556 U.S. at 24 (plurality op.). The "*more stringent* § 5 asks whether a *change* has the purpose or effect of"

infringing minority rights. *Id.* at 25 (emphases added). That is not the test under Section 2, which requires a comparison to something other than the old practice.

III. A STAY WOULD IRREPARABLY HARM OHIO, AND THE BALANCE OF THE EQUITIES TIPS AGAINST THE DEMOCRATIC PARTIES

The Democratic Parties claim that they will suffer irreparable injury without a stay, whereas Ohio will not be harmed from keeping the unlawful injunction in place for the 2016 election. ODP Appl. 32-37. They have things backwards.

A. A Stay Would Harm Ohio And Its Citizens By Superseding The Views Of Ohioans About Proper Election Regulations

Ohio would face irreparable harm if the Court grants a stay. "'[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*, 133 S. Ct. at 3 (Roberts, C.J., in chambers) (citation and alterations omitted). An injunction invalidating a state law "frustrates the intent of the elected representatives of the people," *Crawford*, 553 U.S. at 203 (Stevens, J., op.) (internal quotation marks omitted), and "short circuit[s] the democratic process," *Wash. State Grange*, 552 U.S. at 451. Thus, the presumption of constitutionality that attaches to laws "'is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered . . . in balancing hardships.'" *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, C.J., in chambers) (citation omitted) (federal law); *New Motor*, 434 U.S. at 1352 (Rehnquist, J., in chambers) (state law). That is particularly true after an appellate court has found it *improper* to grant relief. In that setting, an injunction request "warrants cautious review." *See Doe*, 546 U.S. at 1309 (Ginsburg, J., in chambers).

In addition, all of the concerns that led Ohio to enact the Early-Voting Law fully apply for this election. Administrative concerns are just as relevant to the 2016 election as for any other. Even the district court acknowledged that the boards are "extremely busy" 35 days out. App'x 98a. The greater risk of error that accompanies a busy schedule will exist in *any* election in which Ohio must keep the schedule. This Court's holding that States may respond to concerns "with foresight rather than reactively" thus applies just as much now. *Munro*, 479 U.S. at 195.

Ohio likewise has a "compelling interest in preserving the integrity of its election process" for the 2016 election. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). As *Crawford* noted, "not only is the risk of voter fraud real but . . . it could affect the outcome of a close election." 553 U.S. at 196 (Stevens, J., op.). The Sixth Circuit, moreover, held that the "concrete evidence" of fraud in this case exceeds the evidence identified in *Crawford*. App'x 17a. Ohio's related interest in maintaining "public confidence" also applies now. *Crawford*, 553 U.S. at 197 (Stevens, J., op.); *cf. Purcell*, 549 U.S. at 4. Indeed, after the Sixth Circuit's decision, an editorial described the voting week eliminated by the Early-Voting Law as a "potentially fraud-fraught voting period." Editorial Board, *Golden Week Comes and Goes*, Columbus Dispatch (Aug. 29, 2016), http://goo.gl/KDDf3t.

Finally, a stay risks voter confusion. This Court has rejected late *judicially imposed* changes to election laws because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and

consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. The Sixth Circuit's judgment was widely reported as allowing Ohio to implement the Early-Voting Law for the 2016 election. *E.g.*, Darrel Rowland, *No More 'Golden Week' For Ohio - Again*, Columbus Dispatch (Aug. 23, 2016), http://goo.gl/1rPnsm; Robert Higgs, *Appellate Court Rules Ohio Early Voting Limits, Loss of Golden Week are Legal*, Cleveland Plain Dealer (Aug. 23, 2016), http://goo.gl/G9DCAx; Jessie Balmert, *Ohio Doesn't Need Extra Voting, Court Says,* Cincinnati Enquirer (Aug. 23, 2016), http://goo.gl/oXExGf. A departure from that ruling could confuse voters *now*.

B. No Irreparable Injury Will Befall The Democratic Parties If The Court Declines Their Requested Stay

The Democratic Parties fail to show any irreparable injury without a stay.

1. The Democratic Parties claim that thousands of voters "relied on" the eliminated week, and these voters will "find it more difficult to vote." ODP Appl. 33. But they could not identify a single person who would be unable to vote under Ohio's broad schedule. *E.g.*, Resp., R.127-8, PageID#6468. And the only evidence on this point—a comparison of voting in 2010 and 2014—showed that those who voted in 2010 on a day that was later eliminated were *just as likely* to vote in 2014 as those who had voted in 2010 on a day not eliminated. App'x 25a. For its part, the district court could not "predict" how many people would vote in future elections, and found only a *modest* burden on *some* African-American voters. App'x 92a. That is not "irreparable" injury. Indeed, if Ohio's top-ten calendar irreparably injures Ohioans, the majority of voters nationwide suffer much starker "irreparable" injury because they live in States with far fewer voting options. *See* App'x 11a.

The Democratic Parties relatedly argue that the new voting calendar could lead to longer lines at the polls. Yet their own expert said that the average wait time in 2008 for most precincts in one urban county was "less than 5 minutes," and that only a "few voters" had to wait more than an hour. Yang Rep., Doc.128-44, PageID#10251. A 2012 survey found that voters waited, on average, ten minutes. Trende Rep., R.127-14, PageID#6707. And, of course, those who want to eliminate any *risk* of an Election Day line can vote by mail at any time. *See* App'x 12a-13a.

2. Citing *Purcell*, the Democratic Parties next assert that the allegedly last-minute nature of the Sixth Circuit's judgment justifies a stay. ODP Appl. 34. They are wrong legally and factually. Legally, they misread *Purcell*. It directs courts to be wary of late *judicially imposed* changes. *See* 549 U.S. at 4-5. Indeed, it *recognizes* the propriety of appellate review, noting that courts should contemplate that "the nonprevailing parties would want to seek" further review. *Id.* at 5. This Court's prior consideration of the Early-Voting Law confirms this point. In 2014, the Court overturned an injunction against the Early-Voting Law *one* day before the court-ordered schedule would begin. *Husted*, 135 S. Ct. at 42. Here, the Sixth Circuit ruled *over 40 days* before that court-ordered schedule would start. App'x 1a.

Factually, the Democratic Parties claim that voters might be confused if the eliminated week is not reinstated now because the injunction "received heavy media coverage." ODP Appl. 34. But the articles that they cite made clear that the district court did not have the last word and that Ohio would or could appeal. *Id.* at 34 n.8 (citing articles). Further, the Sixth Circuit's judgment reinstating the Early-

Voting Law received just as much coverage. *See supra* at 38. And the Early-Voting Law was in effect for elections in 2014 and 2015. Only the short-lived injunction interrupted its effect. Concerns for voter confusion *now* cut against a stay.

The Democratic Parties also claim that some board-of-election websites have created an "expectation" that voting will include the eliminated week by "advertis[ing]" a 35-day period. ODP Appl. 34-35. Yet the Democratic Parties *omit* what these websites say. The website for Cuyahoga County ("Ohio's most populous county," ODP Appl. 35) expressly notes that the eliminated week was "reinstated" via court action, that it remains subject to appeal, and that "these dates and times have NOT been confirmed by the Secretary of State, and are subject to change." *See* http://goo.gl/1vn1e8 (visited Sept. 1 & 7, 2016). Similarly, the Democratic Parties cite to generic FAQ pages in other counties rather than to the pages listing the later start date for *this* election. *See* http://goo.gl/rPI81H (Erie County) (visited Sept. 1 & 7, 2016); http://goo.gl/SGWgCl (Lake County) (visited Sept. 1 & 7, 2016).

3. The Democratic Parties lastly assert that Ohio should have sought a stay from the Sixth Circuit. ODP Appl. 5, 33. But Ohio proposed a schedule asking the Sixth Circuit to resolve the appeal *completely* well ahead of the earliest possible voting day. Mot. to Expedite, 6th Cir. R.9, at 2. If the Democratic Parties disliked the schedule, they should have opposed the motion. Further, any *temporary* stay would have been extinguished at final judgment. Thus, a stay would have *increased* any potential for voter confusion by adding a temporary order for no reason.

CONCLUSION

The Court should deny the application for a stay.

Respectfully submitted,

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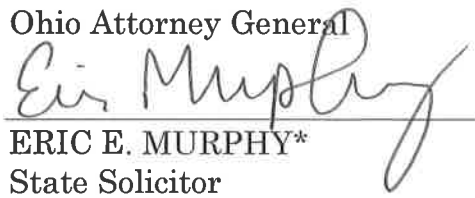

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