No. 16-3561

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO DEMOCRATIC PARTY; DEMOCRATIC PARTY OF CUYAHOGA COUNTY; MONTGOMERY COUNTY DEMOCRATIC PARTY; JORDAN ISERN; CAROL BIEHLE; BRUCE BUTCHER, Plaintiffs-Appellees, v. JON HUSTED, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF OHIO; MIKE DEWINE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF OHIO, 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

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

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In their opening brief, Defendants ("State" or "Ohio") showed that the district court wrongly invalidated an Ohio law ("Early-Voting Law") removing a week from Ohio's expansive early-voting calendar. *First*, Ohio's calendar satisfies the Fourteenth Amendment's "*Anderson-Burdick*" test. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Ohio's laws trigger rational-basis review because they minimally burden voting, and Ohio has many reasons justifying them. Ohio Br. 17-31. The district court, however, misapplied the *Anderson-Burdick* test by, among other things, measuring the burdens of Ohio's laws only as applied to some voters, by using a "retrogression" analysis comparing Ohio's new calendar to its old one, and by invoking heightened scrutiny for only modest burdens. Ohio Br. 31-39.

Second, Ohio's expansive calendar does not "result" in the "abridgment" of the right to vote under Section 2 of the Voting Rights Act. Its calendar *helps* African Americans as compared to the only "reasonable benchmark"—Election Day voting. Ohio Br. 41-43, 47-52; *Holder v. Hall*, 512 U.S. 874, 881 (1994) (Kennedy, J., op.). And Ohio's calendar has not caused its political processes to be "[un]equally open" because African Americans and whites register and vote at the statistically same rates. Ohio Br. 43-46, 52-55; *Frank v. Walker*, 768 F.3d 744, 753-54 (7th Cir. 2014). The district court again erred by refusing to apply Section

2's benchmark element, ignoring Ohio's generally equal participation, and tying Section 2's causation test to socioeconomic disparities. Ohio Br. 55-60.

In response, Plaintiffs ("Democratic Parties") nowhere dispute that Ohio retains one of the longest early-voting calendars in this nation. And they nowhere dispute that the only record-based statistics show that African Americans and whites have participated at similar rates in recent elections. In addition, perhaps recognizing the weakness of the district court's constitutional analysis, the Democratic Parties depart from its decision by focusing on Section 2 before the Fourteenth Amendment. Yet their interpretation of those provisions lacks merit, no matter the order in which they are presented.

I. THE DEMOCRATIC PARTIES CANNOT RELY ON VACATED OPINIONS OR FACTUAL FINDINGS TO JUSTIFY THEIR MISTAKEN LEGAL ARGUMENTS

For both claims, the Democratic Parties wrongly invoke vacated decisions and/or factual findings to insulate mistaken legal arguments from de novo review.

Vacated Decisions. Over 40 times, the Democratic Parties cite *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), treating it as "precedent," Appellees' Br. 24, establishing what "this Court" has held, *id.* at 2, 13, 17, 31. Not so. *Bell v. Johnson*, 308 F.3d 594, 612 (6th Cir. 2002) ("statements contained in [a vacated] opinion lack precedential value"); *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975). The Supreme Court's stay also calls *NAACP* into doubt. While the Democratic Parties claim that "[t]he Supreme Court

did not address the merits," Appellees' Br. 12, a stay requires "a significant possibility that the Court would reverse," *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers).

The Democratic Parties' unbending reliance on *NAACP* even comes at the expense of *actual* precedent. Take two examples. For Section 2, they claim that "this Court" has found that the objective-benchmark requirement applies only in vote-dilution cases. Appellees' Br. 30 (citing *NAACP*, 768 F.3d at 556). But a *non-dilution* case noted that "a comparison must be made between the status quo and a hypothetical alternative." *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 366 (6th Cir. 2002). For the Fourteenth Amendment, they find it "well established" that courts cannot compare one State's laws to another's. Appellees' Br. 54 (citing *NAACP*, 768 F.3d at 546). Yet this Court has done just that. *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589-90 (6th Cir. 2006).

Aside from *NAACP*, the Democratic Parties repeatedly cite *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006). Appellees' Br. 17-18, 24. They fail to note that it, too, was vacated. 473 F.3d 692 (6th Cir. 2007).

Factual Findings. The Democratic Parties assert that the district court's decision was "heavily grounded in [its] underlying factual determinations." Appellees' Br. 20. Those findings cannot shield its *legal* errors from this Court's correction. The district court itself did not think so. Its stay order clarified that it

rejected Ohio's legal arguments because of "the guidance provided by" *NAACP*, and conceded that "[t]he Sixth Circuit may decide to change course." Order, R.125, PageID#6304.

The Democratic Parties' highlighted findings confirm this point. As one example, they note that the district court found that "African Americans disproportionally used Golden Week and [early in-person] voting." *E.g.*, Appellees' Br. 20. Nothing in this appeal hinges on overturning that finding. If true, Ohio's calendar disproportionately *helps* African Americans as compared to any reasonable Section 2 benchmark. And even if the Early-Voting Law's change had a disparate impact, the Fourteenth Amendment requires discriminatory intent. *United States v. Blewett*, 746 F.3d 647, 659 (6th Cir. 2013) (en banc).

As another example, the Democratic Parties note that the district "court credited testimony that African Americans in Ohio are distrustful of voting by mail." Appellees' Br. 39. Whether such "distrust" can qualify as a burden that could trigger anything but rational-basis review is a legal question, not a factual one. *Cf. Weber v. Shelley*, 347 F.3d 1101, 1104, 1106-07 (9th Cir. 2003) (holding that "distrust of a system" did not justify heightened scrutiny).

In sum, this appeal turns on law, not fact. And the Court must adopt the proper reading of Section 2 and the Fourteenth Amendment unconstrained by the vacated decisions on which the Democratic Parties rely.

II. THE DEMOCRATIC PARTIES TRANSFORM SECTION 2'S EQUALITY MANDATE INTO AN UNCONSTITUTIONAL ANTI-RETROGRESSION RULE REQUIRING MINORITY MAXIMIZATION

The Democratic Parties assert that Section 2 has two elements: (1) "the court examines whether the challenged practice has a [racially] disparate impact" and, if so, (2) the court "assess[es] whether 'that burden [is] in part caused by or linked to "social and historical conditions" that have or currently produce discrimination against members of the protected class.'" Appellees' Br. 17-18 (quoting *NAACP*, 768 F.3d at 554). Under this test, they argue, the Early-Voting Law violates Section 2 because (1) its change disproportionately burdens African Americans, and (2) that impact is linked to socioeconomic disparities. *Id.* at 19.

The Democratic Parties misread Section 2. At step one, they assert a disparate impact only by comparing Ohio's current calendar to its previous one, rather than a hypothetical alternative. At step two, they replace the statute's language with a test of their own design. Finally, at both steps, they mistakenly argue that Section 2 should be liberally construed.

A. The Democratic Parties Can Show A Disparate Impact Only By Using A Section 5 *Retrogression* Analysis, Not The Required Section 2 *Benchmark* Analysis

As Ohio explained (Ohio Br. 47-52), Section 2 requires a plaintiff to identify an alternative practice with which to compare the challenged one, and the only *objective* alternative with which to compare Ohio's schedule is Election Day

voting. The Democratic Parties respond that they need not identify an alternative to prove a disparate impact, but still compare Ohio's current calendar to its old one. Appellees' Br. 19, 30-32. Both arguments are mistaken.

Benchmark. The Democratic Parties say that the requirement to "identify an objective benchmark is only applicable in the vote-*dilution* context." *Id.* at 30. This argument conflicts with Section 2's text, which prohibits *abridgements* of the *right to vote*. "It 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*). Under Section 2, that baseline is "what the right to vote *ought to be*." *Id.* That logic extends to *all* "practice[s]," not just redistricting. *Id.*

This argument also conflicts with precedent. *Moore* used a benchmark "rationale" *outside* the dilution context to hold that Section 2 did not bar a change from an elected system to an appointed one for school boards. 293 F.3d at 366. The Democratic Parties relegate *Moore* to a footnote, finding it "irrelevant" because it "held that Section 2 does not apply to appointive systems." Appellees' Br. 30 n.5. Yet *Moore*'s logic governs. Just as the appointed system did not violate Section 2 because the plaintiffs had "no authority for their implied conclusion that they ought to have the right to elect" school boards, 293 F.3d at 366, Ohio's calendar does not violate Section 2 because the Democratic Parties

have no authority for their implied conclusion that they ought to have 35 voting days, *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807-08 (1969).

The Democratic Parties relatedly claim that the "text" requiring an external benchmark in *legislative-districting* cases includes a built-in benchmark in *voting-process* cases: "'under the challenged law or practice, how do minorities fare in their ability "to participate in the political process" as compared to other groups of voters?'" Appellees' Br. 30 (quoting *NAACP*, 768 F.3d at 556). Yet they never answer that question, which compares African-American participation under Ohio's *current calendar* with white participation under that *current calendar*. African Americans and whites registered and voted at the statistically same rates in the only election under that calendar (indeed, under a less expansive one preceding the *NAACP* settlement). Hood Rebuttal, R.127-18, PageID#7366-67.

Retrogression. The Democratic Parties instead answer a different question—comparing African-American participation under Ohio's *new* calendar with that participation under the *old* calendar after the "elimination" of an early-voting week. Appellees' Br. 31. The header for their argument confirms they seek a retrogression rule: "Ohio's *Elimination* Of Golden Week Violated The VRA." *Id.* at 16 (emphasis added). Yet Section 2 focuses on "standard[s], practice[s], or procedure[s]," 52 U.S.C. § 10301(a); a legislative *change* does not count. Rather, plaintiffs must challenge the practice *resulting* from that change (e.g., the new

voting period) by comparing it to an objective benchmark. A comparison to the old law is reserved for Section 5, which "uniquely deal[s] only and specifically with *changes* in voting procedures." *Bossier II*, 528 U.S. at 334.

The Democratic Parties respond that "Section 2 and Section 5 *both* apply to election law changes." Appellees' Br. 31. Section 2, of course, permits plaintiffs to challenge any practice—whether it has existed for 100 years or 100 hours. But Section 2 does not permit plaintiffs to prove a *violation* by showing "backsliding" (a disparate impact based on a comparison to the old practice). *Bossier II*, 528 U.S. at 335. Instead, the two sections use different benchmarks. Under Section 5, "[t]he baseline for comparison is present by definition; it is the existing status" (before the change). *Holder*, 512 U.S. at 883 (Kennedy, J., op.). Not so under Section 2. Plaintiffs 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) (*Bossier I*).

The Democratic Parties counter that their old-to-new comparison falls within Section 2's "totality-of-the-circumstances analysis." Appellees' Br. 32. Yet plaintiffs must identify the benchmark before this jump to the "totalities." *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009) (plurality op.); *Growe v. Emison*, 507 U.S. 25, 38, 41 (1993). And their approach departs from precedent. It is one thing to recognize past discrimination when deciding whether a practice's disparate impact

(as compared to a benchmark) has made a State's political processes unequally open under the totality of the circumstances (the approach the cases suggest). *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436, 439 (2006) (*LULAC*). It is quite another to use a past practice as the benchmark to find a disparate impact (the approach the Democratic Parties urge). The latter must be recognized for what it is—retrogression.

B. The Democratic Parties Depart From Section 2's Text By Seeking To *Maximize*, Not *Equalize*, Minority Opportunity

As Ohio explained (Ohio Br. 43-46), plaintiffs must prove that the *specific* practice with a disparate impact at the *micro* level "results in" (i.e., causes) a State's "political processes" to be "[un]equally open" at the *macro* level. No such result has occurred because African Americans and whites have registered and voted at the statistically same rates, and Ohio's expansive calendar could not possibly have caused any general disparities. *Id.* at 52-55. The Democratic Parties' responses at both levels lack merit.

Macro-Level Requirement. The Democratic Parties disclaim any need for "a 'macro' showing of inequality." Appellees' Br. 26. They offer no textual hook. Section 2(b) requires plaintiffs to show that a State's "political processes are not equally open." 52 U.S.C. § 10301(b). Thus, it is "essential to look at everything (the 'totality of the circumstances,' § 2(b) says) to determine whether there has been [a disparate] impact." *Frank*, 768 F.3d at 754.

The Democratic Parties respond that *Frank* is "the only case law that supports" this approach. Appellees' Br. 26. But *Frank* follows from the Supreme Court's command that Section 2 does not require States "to maximize" minority participation as compared to participation by other groups. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994); *Bartlett*, 556 U.S. at 23 (plurality op.). If Section 2 "sweep[s] away [any] registration and voting rules" with disparate impacts *at the micro level* even when equality exists *at the macro level*, the result will be illegal maximization. *Frank*, 768 F.3d at 754.

The Democratic Parties next distinguish *Frank*, noting that it disclaimed the notion that "as long as blacks register and vote more frequently than whites, a state is entitled to make changes for the purpose of curtailing black voting." *Id.*; Appellees' Br. 28. That offers them no help. Section 2(a) bars *intentional* discrimination without need to resort to Section 2(b)'s disparate-impact test. "A balanced bottom line does not foreclose proof of discrimination along the way." *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992); *Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991). Here, however, the Democratic Parties "failed to show a discriminatory purpose." Op., R.117, PageID#6237. While they assert—"in a footnote no less"—that the Court should find intentional discrimination, their "bare-bones assertion does not suffice to make, much less preserve, an appellate argument." *Burger v. Woods*, 515 F. App'x 507, 509 (6th

Cir. 2013) (citing *United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006)); Appellees' Br. 34 n.7. That a district court in another case (on appeal as *NEOCH v. Husted*, No. 16-3603) "almost" found discrimination offers no basis for overturning the district court's conclusion that none existed.

The Democratic Parties lastly nitpick Ohio's data. Appellees' Br. 29. They note that Ohio's expert claimed only that African Americans and whites registered and voted at the statistically same rates when accounting for *margins of error*. Hood Rebuttal, R.127-18, PageID#7366-67. Yet, given their mistaken view of Section 2, they introduced no contrary statistics. Indeed, their expert believed that this equal-participation data was not "useful" for a statute considering whether there is equal participation. Timberlake Tr., R.100, PageID#4562. Contrary to the Democratic Parties' claim, moreover, "the candidacies of President Obama" cannot explain equal rates *in 2014*. Appellees' Br. 28. And their suggestion that African Americans voted at reduced rates in 2014 compared to 2012 (despite turning out in the *statically same* numbers as whites) confirms that they seek a *maximization* rule. After all, African-Americans voted at *higher* rates than whites in 2012. Hood Rebuttal, R.127-18, PageID#7367. More fundamentally, the Democratic Parties bore the burden of proof. *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993). Their failure to make any macro-level showing invalidates their claim.

Micro-Level Requirement. At the micro level, the Democratic Parties argue for *NAACP*'s causation test, Appellees' Br. 18, asking whether a disparate burden is partly "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *NAACP*, 768 F.3d at 554. This test, too, has no basis in Section 2's text. That text requires the relevant *voting practice* to cause abridgements—i.e., unequally open processes. Yet the Democratic Parties ask merely whether *socioeconomic conditions* caused the voting practice's specific disparate impact.

Thornburg v. Gingles, 478 U.S. 30 (1986), also contradicts the Democratic Parties' test. Its three dilution preconditions ask whether a State's line-drawing practices—*not* socioeconomic conditions—have "'proximately caused'" the alleged electoral inequalities. *Gingles*, 478 U.S. at 50 n.17 (citation omitted); *Mallory v. Ohio*, 173 F.3d 377, 382 (6th Cir. 1999). The Democratic Parties seek to prove instead that socioeconomic conditions caused the inequalities—the very causal disconnect that, under *Gingles*, would doom a dilution claim.

The Democratic Parties also fail adequately to distinguish other cases that have required Section 2 plaintiffs to prove that the challenged practice—not socioeconomic conditions—caused the relevant inequalities. Appellees' Br. 25 n.4 (citing *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306 (3d Cir. 1994); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir.

1989)). They distinguish *Ortiz*'s voter-maintenance statute on the ground that the "cause of minorities being purged from voter rolls was not the statute, but voters' decision not to vote." Appellees' Br. 25 n.4. That logic applies here: The cause of any minorities who do not vote over Ohio's many early-voting weeks is not that expansive calendar, but their "decision not to vote." *Id.*

The Democratic Parties lastly argue that the nine *Gingles* factors are useful outside the dilution context, and criticize *Frank* for saying otherwise. Appellees' Br. 18-20, 23, 27. Yet the Senate Report took those factors directly from pre-1982 cases analyzing whether *apportionment* schemes *diluted* minority voting. *White v. Regester*, 412 U.S. 755 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973). When Congress amended Section 2, therefore, no court had "thought of using, let alone actually used, the *White-Zimmer* factors to strike down" laws like those here. *Hayden v. Pataki*, 449 F.3d 305, 338 (2d Cir. 2006) (en banc) (Sack, J., concurring). Most factors make no sense in this context. For example, that African Americans in Ohio "vote overwhelmingly for Democrats" says nothing about whether its processes are equally open. Op., R.117, PageID#6224.

Even if these factors matter, the Democratic Parties misuse them. The factors apply *only if* a State has unequal outcomes and *only if* the outcomes result from the voting practice. The factors thus serve as final guideposts for deciding a State's ultimate liability. *Bossier I*, 520 U.S. at 480. If, by contrast, a plaintiff

does not prove the earlier elements, "there neither has been a wrong nor can be a remedy." *Growe*, 507 U.S. at 41.

C. The Democratic Parties Mistakenly Argue That Section 2 Should Be Liberally Construed

The Democratic Parties insist that the Voting Rights Act should "'be interpreted in a manner that provides the broadest possible scope in combating racial discrimination.'" Appellees' Br. 28 (quoting *Chisom*, 501 U.S. at 403). Yet *Chisom* was quoting the Court's prior statements about the *1965* act, not the 1982 amendment. Since *Chisom*, moreover, courts have repeatedly invoked the constitutional-avoidance canon and the clear-statement rule to interpret that amendment *narrowly*. *E.g.*, *Bartlett*, 556 U.S. at 21 (plurality op.); *LULAC*, 548 U.S. 445-46 (plurality op.); *Hayden*, 449 F.3d at 315-16; *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc).

The Democratic Parties respond that these canons do not apply because Section 2 *unambiguously* extends to every "standard, practice, or procedure," including early-voting calendars. Appellees' Br. 32-33. But the question here is not whether an early-voting calendar is a "standard, practice, or procedure"; it is what a plaintiff must prove to establish that a calendar "results" in the "abridgement" of the "right to vote" by creating "[un]equally open" processes. That text is at least ambiguous, so the Court should adopt Ohio's reading.

The Democratic Parties also mistakenly cite an "unbroken" line of cases suggesting that Section 2 is constitutional even under their view. Appellees' Br. 33. Aside from *NAACP*, no case involves anything like Ohio's expansive calendar. Whether or not Section 2 raises constitutional concerns in *other* contexts, it raises grave concerns as *(mis)applied* here. Just as felon-disenfranchisement laws were not historically used to discriminate, *Johnson*, 405 F.3d at 1231-32, neither were early-voting calendars. It is thus unlikely that Congress's Fourteenth Amendment enforcement powers would reach the Democratic Parties' boundless reading of Section 2. *Id.* And their "maximization" reading raises doubts under the Equal Protection Clause. *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995).

Finally, in response to the clear-statement rule, the Democratic Parties say that their reading would not radically affect the States because the "'focus is on the internal processes of a single State.'" Appellees' Br. 33-34 (quoting *NAACP*, 768 F.3d at 559); *id.* at 25-26. But their view permits liability merely by showing that socioeconomic disparities cause the relevant disparate impact. Their expert admitted that those disparities are "virtually certain" to exist in all 50 States. Timberlake Tr., R.100, PageID#4565. That this case concerns Ohio also speaks volumes. It has the statistically same rates of registration and voting, has one of the country's most expansive early-voting laws, and has always lacked the

"record[] of voting discrimination" that triggers Section 5. *Mixon v. Ohio*, 193 F.3d 389, 407 (6th Cir. 1999); Hood Tr., R.99, PageID#4394.

The Democratic Parties seek to minimize Ohio's expansive calendar on the ground that it permits only one early-voting location per county, Ohio Rev. Code § 3501.10(C), which they claim requires voters to "wait in untenably long lines." Appellees' Br. 26. But the district court held that one early-voting location per county did not "impose any burden on African Americans." Op., R.117, PageID#6220. The Democratic Parties did not cross-appeal, so this fact does not distinguish Ohio from other States. Further, other than the generic statement that voters in Ohio's largest counties waited in long lines to vote early and on Election Day in 2008 and 2012, *id.*, PageID#6145, the district court did not offer *specific* findings about the length of those waits or compare them to waits in other States. Yet the Democratic Parties' expert noted that the average wait time in 2008 in the majority of precincts in Franklin County (the county with Columbus) was "less than 5 minutes," and that only a "few voters" had to wait longer than an hour. Yang Rep., R.128-44, PageID#10251. And a GAO report suggested that Ohio's wait times in 2012 averaged 10 minutes. Trende Rep., Doc.127-14, PageID#6707.

In short, the Democratic Parties' bald, unreasoned disclaimer that this case involves only Ohio offers no comfort to the many States with far fewer voting

options, including every other State in this Circuit. The grave consequences for all States trigger the clear-statement rule.

* * *

On the afternoon of this reply brief's filing, the en banc Fifth Circuit issued a "gravely fractured" decision holding, by a 9-6 vote, that Texas's photo-identification requirement violated Section 2. *Veasey v. Abbott*, No. 14-41127, slip. op. at 169 (5th Cir. July 20, 2016) (en banc) (Smith, J., dissenting). That opinion does nothing to change the proper result here.

First, *Veasey* does not affect Ohio's initial argument because that case involved a photo-identification requirement, not an early-voting calendar. Thus, Texas did not assert (and the majority opinion says nothing on) the "objective benchmark" requirement for deciding the hypothetically "correct" number of early-voting days. *See Veasey*, slip op. at 34-72; *cf. Holder*, 512 U.S. at 880 (Kennedy, J., op.) (noting that for some laws "the benchmark for comparison" "is obvious").

Second, for Ohio's additional argument, the opinion adopts the two-part approach taken by the vacated *NAACP* decision. *Veasey*, slip. op. at 36-46. That was legally mistaken for the reasons described. Asking whether *socioeconomic conditions*—rather than the *voting practice*—cause the relevant inequalities departs from Section 2's text and from Supreme Court cases interpreting it. *See id.* at 154 (Jones, J., dissenting) (majority's decision "does not correlate with the statute"); *id.*

at 155 (Jones, J., dissenting) ("It is the challenged regulation . . . rather than 'socieconomic conditions' or a 'history of discrimination,' that must cause the disparate impact"). Indeed, in response to the dissent, the majority opinion insists that its test would not dismantle state election regimes, noting that the challenged law was "'the [s]trictest [l]aw in the [c]ountry' in a State with a fairly extensive history of official discrimination." *Id.* at 41-42 & n.37. Yet the district court here, applying the same test, invalidated a top-ten voting calendar in Ohio, not Texas. This decision below legitimates the dissent's prediction that "[v]irtually any voter regulation that disproportionately affects minority voters can be challenged successfully" under the *NAACP* test. *Id.* at 153 & n.54 (Jones, J., dissenting).

Third, even on the opinion's own terms, this Court should reverse. Unlike the district court, which simply ignored macro-level data, the *Veasey* majority at least found that data "relevant." *Id.* at 65. The opinion highlighted how "the record contain[ed] evidence that minority voters generally turn out in lower numbers than non-minority voters and that State-sponsored discrimination created socioeconomic disparities, which hinder minority voters' general participation in the political process" in Texas. *Id.* African-American turnout has been similar to white turnout in Ohio, and the district court made no findings that Ohio's discrimination caused socioeconomic disparities.

III. THE DEMOCRATIC PARTIES INTERPRET THE FOURTEENTH AMENDMENT AS A ONE-WAY RATCHET THAT MEASURES VOTING "BURDENS" BASED ON OLD-TO-NEW COMPARISONS AND REQUIRES STATES TO PROVE THE NECESSITY OF EVEN MODEST CHANGES

The Democratic Parties argue that *Anderson-Burdick* measures disparate impacts from voting *changes*, and requires States to prove the necessity of even modest amendments. Appellees' Br. 36-50. Their analysis of voting "burdens" and state "interests" regurgitates the district court's mistakes.

A. The Democratic Parties Wrongly Seek Heightened Scrutiny Based On A Voting Change's Modest Impacts On Some Voters

Ohio showed that its expansive calendar imposed minimal burdens, and that the district court mistakenly applied heightened scrutiny. Ohio Br. 23-27, 32-35. The Democratic Parties' responses fail.

Modest v. Minimal Burdens. The Democratic Parties argue that heightened scrutiny can apply even to modest burdens. Appellees' Br. 36. Yet an important-regulatory-interest test applies to laws imposing "modest burdens," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008), and that test is "akin to rational-basis review," *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 338 (6th Cir. 2016); C*itizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998). Ignoring *Ohio Council*, the Democratic Parties depend on an out-of-circuit footnote. Appellees' Br. 36 (citing *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995)). *McLaughlin*, however, 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.

The Democratic Parties also accuse Ohio of "semantics" because the district court defined "modest" as something more than "minimal" but less than "significant." Appellees' Br. 55 (citing Op., R.117, PageID#6156-57). Precedent shows, however, that even "modest" burdens trigger the important-regulatory-interest test, not the generic balancing reserved for heftier burdens. *Wash. State Grange*, 552 U.S. at 452. Regardless, whether a burden is minimal (triggering rational-basis review), significant (triggering general balancing), or something else is a legal question. The Supreme Court has repeatedly determined a burden's size (and the review standard) without deferring to lower courts. *E.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363-64 (1997) (rejecting appellate court's finding of "severe" burdens); *Burdick*, 504 U.S. at 439 (finding burdens "slight"); *cf. Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000) (reviewing de novo an ineffective-assistance claim's two prongs). The district court wrongly found these burdens anything but minimal.

The Democratic Parties argue that the *reduction* in Ohio's early-voting period creates more than minimal burdens. Appellees' Br. 37. They cite no case approving this "retrogression" approach. The relevant question is whether Ohio's *existing* options impose minimal burdens. For 2016, those options include a 27-

day early-voting period because registration does not end until 28 days before the election (days 29 and 30 are a Sunday and a holiday). Damschroder Tr., R.104, PageID#5478-79; Ohio Rev. Code § 1.14. Over this month, voters have 23 days of in-person voting, including two Saturdays and Sundays, and mail voting anytime. Calendar, R.127-14, PageID#6769-70. These expansive options do not burden the right to vote; indeed, early voting does not even fall within that right, which historically was exercised only on Election Day. *McDonald*, 394 U.S. at 807-08.

The Democratic Parties also claim that the requirement to register and vote on separate occasions creates more than minimal burdens. Appellees' Br. 37-38. They ignore precedent upholding the requirement 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). They ignore that this burden is "ordinary and widespread," *Clingman v. Beaver*, 544 U.S. 581, 593 (2005), as most States require separate registration and voting, Trende Rep., R.127-14, PageID#6635. And they agree that a tiny fraction of voters (in 2012, 5,844 out of over 5.6 million votes cast) used the eliminated week to vote and *newly* register. Hood Rep., R.127-15, PageID#7262, 7289; Appellees' Br. 38. (Most voters who *updated* addresses during this week could vote *provisionally* even if they had not updated their addresses before registration's close. Ohio Rev. Code §§ 3503.16, 3505.183(B)(3)(f).)

Neutral v. Discriminatory. The Democratic Parties contend that *McDonald* does not foreclose heightened scrutiny for early voting based on *Obama for America v. Husted*, 697 F.3d 423 (6th Cir. 2012). Appellees' Br. 50-51. They "gloss over a vital distinction." *Lawrence v. Blackwell*, 430 F.3d 368, 373 (6th Cir. 2005). In *Obama for America*, the law *discriminated* between military and non-military voters. "If the State had enacted a generally applicable, nondiscriminatory voting regulation that limited in-person early voting for all Ohio voters, its 'important regulatory interests' would likely be sufficient to justify the restriction." 697 F.3d at 433-34 (citation omitted). *Obama for America* even distinguished a case applying "a rational basis standard" to early-voting laws on this very ground—the laws were "generally applicable, nondiscriminatory election regulations." *Id.* at 431 n.4 (distinguishing *Gustafson v. Ill. State Bd. of Elections*, 2007 WL 2892667 (N.D. Ill. Sept. 30, 2007)). Finally, while not important for the neutral Early-Voting Law, *Obama for America* arose in a *non-binding* preliminary posture, and absentee-voting classifications favoring the military date to the Civil War. Ohio Br. 6-7; *cf. Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 652 F.3d 607, 626 (6th Cir. 2011), *overruled by Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

Nor is *McDonald* distinguishable based on that plaintiff's failure to present evidence that the State barred him from voting on Election Day. Appellees' Br.

50. Later cases clarify that heightened scrutiny might apply to an absentee-ballot denial only where the State *itself* "physically prevent[s] [a voter] from going to the polls," such as by incarcerating the voter. *O'Brien v. Skinner*, 414 U.S. 524, 533 (1974) (Marshall, J., concurring). But where *non-state-imposed* burdens—such as a voter's travel plans—make Election Day voting hard, rational-basis review still applies to the absentee-ballot denial. *Fidell v. Bd. of Elections of N.Y.*, 343 F. Supp. 913, 915 (E.D.N.Y.), *aff'd* 409 U.S. 972 (1972).

The Democratic Parties also assert that this Court has rejected Ohio's view that rational-basis review applies when a law "does not facially discriminate among Ohio's voters." Appellees' Br. 52 (citing *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580 (6th Cir. 2012) (*NEOCH*)). In *NEOCH*, however, Ohio argued that the law fell *outside Anderson-Burdick* because the law did not classify among voters. 696 F.3d at 592. Ohio makes no such claim here. Instead, it argues that rational-basis review applies *within Anderson-Burdick*, which authorizes strict scrutiny for severe burdens, rational-basis review for modest burdens, and a general balancing test in between. *Ohio Council*, 814 F.3d at 335. Burdens routinely fall on the minimal side when the challenged law is neutral. *Id.* at 335-36; C*itizens for Legislative Choice*, 144 F.3d at 921 ("If the regulations burden voting rights incidentally, or impose only 'reasonable, nondiscriminatory restrictions,' they receive a rational basis review." (citation omitted)).

All Voters v. Some Voters. The Democratic Parties reiterate the district court's decision to apply heightened scrutiny based on the burdens "with respect to African Americans only." Op., R.117, PageID#6126; Appellees' Br. 37-42. They claim that "this Court"—meaning *NAACP*—has applied heightened scrutiny because of a law's disparate impacts on some voters. *Id.* at 52-53. To the contrary, this Court—meaning binding precedent—has refused to do so. In *Lawrence*, the plaintiffs argued that heightened scrutiny applied to Ohio's early-filing deadlines because they "place[d] significant burdens on independent candidates" as compared to major-party candidates, but this Court rejected that claim because the neutral law imposed modest burdens "considering Ohio's election scheme as a whole." 430 F.3d at 373-74.

The Democratic Parties fail to cite *Lawrence*, and any claim that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), overruled it is wrong. They argue that *Crawford* rejected a challenge to Indiana's photo-identification law because the plaintiffs failed to show, "on the basis of the record that ha[d] been made," that the law imposed burdensome requirements on *any class of voters*. *Id.* at 202 (Stevens, J., op.); Appellees' Br. 53. But *Crawford*'s explained that a "facial challenge must fail where the statute has a plainly legitimate sweep," and that "when we consider only the statute's broad application to all Indiana voters we conclude that it imposes only a limited burden." 553 U.S. at 202 (Stevens, J., op.)

(internal quotation marks omitted). Even "assuming an unjustified burden *on some voters*," the opinion continued, the plaintiffs still had not justified facial relief. *Id.* at 203 (emphasis added). *Crawford* thus reinforces *Lawrence*'s refusal to apply heightened scrutiny based on alleged impacts on some voters.

Indeed, it is particularly mistaken to apply heightened scrutiny because of a voting law's *racially* disparate impacts. The Fifteenth Amendment specifically applies to racial voting discrimination, and it requires proof of discriminatory intent (not merely disparate impact). *Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality op.). Fundamental-rights arguments (like those under *Anderson-Burdick*) generally do not apply where, as here, another provision "'provides an explicit textual source of constitutional protection.'" *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (citation omitted). The Court should not read out the Fifteenth Amendment under the guise of interpreting the Fourteenth.

The Democratic Parties lastly claim that *Anderson* applied heightened scrutiny based on the law's "'impact on a subgroup of voters'" (independents). Appellees' Br. 53 (quoting *NAACP*, 768 F.3d at 543). Again, "[h]owever, [they] gloss over a vital distinction." *Lawrence*, 430 F.3d at 373. Like the law in *Obama for America*, the law in *Anderson* was *not* neutral. By favoring major-party candidates, it "discriminate[d] against [independent] candidates and—of particular importance—against those voters whose political preferences lie outside the

existing political parties." *Anderson*, 460 U.S. at 794. Here, any "burden imposed by Ohio's [laws] is nondiscriminatory." *Lawrence*, 430 F.3d at 373.

Comparison v. Isolation. The Democratic Parties argue that it is "well established" (by which they mean *NAACP* took the position) that this Court *cannot* compare the burdens from Ohio's expansive system to the burdens from other state systems. Appellees' Br. 54. Yet this Court has undertaken multi-state comparisons. *Green Party of Tenn. v. Hargett*, 791 F.3d 684, 695 (6th Cir. 2015); *Libertarian Party*, 462 F.3d at 589-90. And the Democratic Parties fail to explain why the fact that no "litmus test" exists for measuring burdens precludes those comparisons. *Crawford*, 553 U.S. at 191 (Stevens, J., op.). They follow directly from the instruction to analyze whether burdens are "ordinary and widespread." *Clingman*, 544 U.S. at 593. That Ohio's calendar exceeds the calendars in most States confirms that any burdens are "ordinary and widespread." *Id.*

B. The Democratic Parties Seek An Improperly Onerous Standard For Judging Ohio's Interests

As Ohio showed (Ohio Br. 27-31), its interests—reducing administrative burdens and costs, decreasing risks of fraud and reduced public confidence, and ensuring that voters have relevant information—justify its early-voting calendar. The Democratic Parties' responses fail.

They suggest that States cannot rely on general interests and must present "actual evidence" proving that those laws are "'actually necessary'" to accomplish

their interests. Appellees' Br. 43 (quoting *NAACP*, 768 F.3d at 545). Yet requiring States to prove that their laws are "actually necessary" is strict scrutiny. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). That is *not* the test under *Anderson-Burdick* (except for severe burdens). The State need not present "elaborate, empirical verification," *Timmons*, 520 U.S. at 364, because that "would invariably lead to endless court battles over the sufficiency of the 'evidence,'" *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). The Democratic Parties distinguish these cases as involving lesser burdens (even including a pure speech ban). Appellees' Br. 43 (distinguishing *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015)). *Crawford*, however, also involved a voting requirement, and still applied the same general standards. 553 U.S. at 194-96 (Stevens, J., op.).

Regardless, the Democratic Parties cannot undermine the State's interests.

Fraud & Public Confidence. The Democratic Parties suggest that existing safeguards—like segregating ballots—adequately addressed fraud concerns. Appellees' Br. 44-45. Yet Ohio identified potential fraud despite those checks. Ohio Br. 28. And the change added another layer of protection by ending a period with a great fraud potential. Ward Tr., R.103, PageID#5329; Hood Rep., R.127-15, PageID#7270. This evidence exceeds that presented in *Crawford*, which found "no evidence of any such fraud actually occurring in Indiana at any time in its history." 553 U.S. at 194 (Stevens, J., op.).

The Democratic Parties distinguish *Crawford* as "'engag[ing] in a rational basis review.'" Appellees' Br. 46 (quoting *NAACP*, 768 F.3d at 548). But *Crawford* engaged in classic "middle" balancing, suggesting that "even rational restrictions" could be invalid. 553 U.S. at 189-91 (Stevens, J., op.). And Ohio's four early-voting weeks cannot be characterized as "more" burdensome than a photo-identification requirement. Appellees' Br. 46.

The Democratic Parties next claim that fraud concerns were not logically linked to the eliminated week because individuals may *still* register on the last day and vote on the first early-voting day while their registration verification remains pending. Appellees' Br. 47. Yet "[a] State need not address all aspects of a problem in one fell swoop." *Williams-Yulee*, 135 S. Ct. at 1668. Ohio also should not be punished for bipartisan compromise—the reason why it did not reduce the period *further* to address the Democratic Parties' concerns. Ward Tr., R.103, PageID#5317-18; Anthony Tr., R.96, PageID#3781.

The Democratic Parties lastly argue that Ohio presented "no evidence" that the eliminated week "undermined the public's confidence." Appellees' Br. 49-50. Yet *Crawford* cited no evidence suggesting that the lack of a photo-identification requirement had led citizens to distrust voting. 553 U.S. at 197 (Stevens, J., op.); *Frank*, 768 F.3d at 750 (noting that *Crawford* took this interest "as almost self-evidently true").

Administrative Burdens/Costs. The Democratic Parties assert that Ohio had to prove that its boards were "'unable to manage'" their tasks under the old calendar. Appellees' Br. 48 (citation omitted). No *Anderson-Burdick* case involving less than strict scrutiny has required that showing. *Crawford* did not require Indiana to prove that it was "unable" to stop fraud through means other than a photo identification. 553 U.S. at 196-97 (Stevens, J., op.). And *Clingman* did not require Oklahoma to prove that it was "unable" to preserve political parties without a semiclosed primary system. 544 U.S. at 594. Ohio need only show that its administrative concerns are "reasonable." *Munro*, 479 U.S. at 195-96. They are. The relevant period was "extremely busy." Op., R.117, PageID#6176.

The Democratic Parties respond that the district court, in a footnote, found that the early-voting reduction *burdened* boards more than it *helped* them by shortening the time to process absentee ballots and increasing the number of Election Day voters. Appellees' Br. 48-49 (citing Op., R.117, PageID#6177 n.18). But the cited footnote made no such cost-benefit "finding"; it simply identified testimony about potential benefits from the eliminated week. Yet it imposed corresponding burdens. Even the Democratic Parties' witness "saw the problems that [the old calendar] was giving to some of [his] smaller contemporaries across the state." Anthony Tr., R.96, PageID#3781. As noted (Ohio Br. 27-28), officials had "many concerns" with the old schedule. Ward. Tr., R.103, PageID#5303. At

bottom, the Democratic Parties fail to explain why this balancing of administrative tradeoffs should be made by federal judges rather than election officials. "The role of this court is not to impose [its] own idea of democracy upon" Ohio. *Libertarian Party*, 462 F.3d at 587.

The Democratic Parties' response to cost concerns shares the same defect. Appellees' Br. 48. Nobody disputes that the additional week cost money or that its elimination saved money. Yet the Democratic Parties argue that these additional costs were too small to justify this change. It is for Ohio to make such policy choices about whether financial savings are "worth it."

Information Asymmetry. The Democratic Parties fail to overcome Ohio's interest in reducing the risk that early voters will lack late-breaking information. Appellees' Br. 49. The district court nowhere found this interest "irrelevant"; it simply ignored it. And, as noted (Ohio Br. 29), Ohio's allegedly irrelevant expert was backed by the report from *Crawford*, which recommended a shorter period "so that all voters will cast their ballots on the basis of largely comparable information." Report of the Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* at 35-36 (Sept. 2005), available at http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF; *Crawford*, 553 U.S. at 193-94. The Democratic Parties identify no cases that have rejected an interest asserted throughout litigation as a "post-hoc justification." *Cf. Dudum v.*

Arntz, 640 F.3d 1098, 1116 n.28 (9th Cir. 2011) (rejecting argument that interest was improperly "post hoc"). And this interest is no more "paternalistic" than others courts have upheld. *Clingman*, 544 U.S. at 594 (voter confusion).

CONCLUSION

The Court should reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32 (b)(1), the brief contains 6,981 words.

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

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 20th day of July 2016. Electronic service was therefore made upon all counsel of record on the same day.

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