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No. 16A-223

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.

EMERGENCY APPLICATION TO STAY SIXTH CIRCUIT JUDGMENT PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

**DIRECTED TO THE HONORABLE ELENA KAGAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT**

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Supreme Court Rule 29.6, the undersigned states that none of the Applicants has a parent corporation, and no publicly held corporation holds 10 percent or more of any Applicant's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Applicants respectfully request an emergency order staying the August 23, 2016 judgment of the United States Court of Appeals for the Sixth Circuit pending the timely filing and disposition of a petition for a writ of certiorari. Applicants moved the Sixth Circuit to stay its mandate pending disposition of a certiorari petition, but the Sixth Circuit denied that motion on August 30, 2016. *See* Appendix ("App.") 175a.

"'[H]aving once granted the right to vote on equal terms'—such as expanding early voting opportunities—'the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another'—for example, by making it substantially harder for certain groups to vote than others." *Ohio St. Conf. of NAACP v. Husted*, 768 F.3d 524, 542 (6th Cir. 2014) ("*NAACP*") (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)), *stayed*, 135 S. Ct. 42, *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). The period known in Ohio as "Golden Week" grew of the 2004 general election fiasco, in which "Ohio voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day," resulting in "many voters [being] effectively disenfranchised and unable to vote." *Id.* at 530-31 (internal quotations and citations omitted). Ohio adopted several measures to prevent such electoral trainwrecks in the future,

including a 35-day period for early in-person ("EIP") voting that significantly reduced the number of voters having to show up at the polls on Election Day itself.

Because registration in Ohio closes 30 days prior to Election Day, voters were able to register and vote at the same time during the first five days—the "Golden Week"—of the EIP voting period. This period has played an exceptional, historic role in promoting voter registration and turnout in the past two Presidential elections, especially in minority communities. Over 60,000 Ohioans voted during Golden Week in the 2008 Presidential election, and over 80,000 did so during Golden Week in the 2012 Presidential election. App. 79a–80a. Over 13,000 registered and voted during Golden Week in 2008; over 14,000 did so in 2012. *Id.* at 83a–84a. A strikingly disproportionate percentage of these were minorities. *Id.* at 80a; *see infra* p. 21. And so Ohio, with Senate Bill 238 (enacted in 2013), eliminated Golden Week.

After a ten-day bench trial, the district court declared last May that SB 238 violates the Fourteenth Amendment to the United States Constitution and Section 2 of the Voting Rights Act of 1965 ("VRA"), as amended, 52 U.S.C. § 10301(a). The district court found that the burdens imposed by SB 238 outweigh the various justifications proffered by the State, that these burdens fall with disproportionate force on minority voters, and that these burdens predictably will suppress the minority vote. *See* App. 86a–92a. The district court permanently enjoined respondents from "enforcing and implementing SB 238's amendments . . . reducing

the early in-person voting period from thirty-five days before an election to the period beginning the day following the close of voter registration." App. 164a.

Three months after the district court entered its permanent injunction, the Sixth Circuit reversed the district court's decision requiring the reinstatement of Golden Week, and terminated Golden Week only *five weeks* before it was set to commence on October 4, 2016. The Sixth Circuit characterized the district court's injunction as an example of federal courts impermissibly "becom[ing] entangled, as overseers and micromanagers, in the minutiae of state election processes." App. 2a. And it dismissed the disparate reliance on Golden Week by minority voters as a matter of "variable *personal preferences*," so that any "burden" on those voters resulting from the elimination of Golden Week "clearly results more from a '*matter of choice* rather than a state-created obstacle.'" App. 13a (both emphases added, citation omitted).

The Sixth Circuit's decision conflicts with relevant decisions of this Court and of several other Circuits in at least three important respects that warrant this Court's plenary consideration:

First, the Sixth Circuit gave inordinate deference to the State's asserted justifications for eliminating Golden Week, including by treating those justifications as "legislative facts" that are subject only to rational basis review. App. 15a–16a. That approach squarely conflicts with this Court's decisions holding that "*even rational restrictions on the right to vote*" must fall unless "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v.*

Marion Cnty. Bd. of Elections, 553 U.S. 181, 189-90 (2008) (emphasis added, citation omitted). And just two months ago, this Court emphasized that federal courts "retain[] an independent constitutional duty to review [legislative] factual findings where constitutional rights are at stake." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016), as revised (June 27, 2016) (citation omitted).

Second, the Sixth Circuit erroneously reviewed the district court's detailed and carefully annotated findings regarding the magnitude and racially disproportionate nature of SB 238's burdens on voting rights and the strength of the State's interests in SB 238 using a *de novo* standard of review, *see* App, 10a, rather than under the clear-error standard dictated by this Court's precedent. *See, e.g,. Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). This squarely conflicts with the standard of review applied by this Court as well as other Courts of Appeals in recent voting rights litigation, including the Fourth and Fifth Circuits just this summer. *See N.C. St. Conf. of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033, at *8–9, *18 (4th Cir. July 29, 2016); *Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at *5 (5th Cir. July 20, 2016) (en banc).

Third, the Sixth Circuit's opinion conflicts in multiple respects with decisions by this Court and other Circuits regarding the proper framework for analyzing vote-denial claims under Section 2 of the VRA. Among other things, the panel erroneously rejected the two-part framework established by earlier Sixth Circuit decisions and adopted by the Fourth and Fifth Circuits. *See NAACP*, 768 F.3d at

554; *Veasey*, 2016 WL 3923868, at *17; *League of Women Voters of N.C. v. N.C.*, 769 F.3d 224, 240 (4th Cir. 2014) ("*LWV of N.C.*"). Under the panel's "clarification" of this standard, courts effectively would be foreclosed from considering the background social and historical conditions that are necessary to establish a violation of Section 2 and that form the "totality of circumstances" inquiry required by the statute. *See* 52 U.S.C. § 10301(b); App. 25a.

A stay pending this Court's consideration of a certiorari petition would not materially harm the State while avoiding irreparable injury to Applicants and the public interest at large. It has been over *thirteen weeks* since the district court ordered that Golden Week proceed and over *eleven weeks* since the district court denied the State's stay motion "[w]ith respect to the November 8, 2016 general election." App. 173a (Jun. 9, 2016). The State could have asked the Sixth Circuit (or this Court, for that matter) at any time since early June to stay the implementation of Golden Week for the 2016 general election pending further review, but chose not to. Instead, the availability of Golden Week has been heavily publicized and promoted over the past several months and has been expected to begin just over a month from now. Applicants and the public interest at large will be irreparably injured if this decision is allowed to go into effect pending review by this Court, while any harm to the State in allowing the long-scheduled Golden Week to proceed would be negligible *at most*. The balance of equities tilts decisively in favor of a stay pending consideration by this Court.

Notably, the Court's decision yesterday to deny a stay in *North Carolina v. North Carolina Conf. of NAACP*, No. 16A168, 2016 WL 4535259 (Aug. 31, 2016), is easily distinguishable. Aside from the obvious point that these cases raise different merits issues, the Fourth Circuit's decision in that case was issued three and a half weeks before the Sixth Circuit opinion at issue here, while Golden Week would start 16 days before early voting in North Carolina will start. *See N.C. St. Conf. of the NAACP v. McCrory*, No. 16-1468, Order at 7 (4th Cir. Aug. 4, 2016) (ECF No. 156) (early voting will begin in North Carolina on October 20). Relative to the start of voting, there is thus a nearly *six week* difference between the two cases. This case also involves a court order *restricting* voting rights, while that case involved the reinstatement of means of accessing the franchise. In addition, North Carolina had represented to the Fourth Circuit that it could comply with an order issued by late July and taken significant steps to comply with the Fourth Circuit's order by the time the State sought a stay from this Court. *See Id*; Resp. of N.C. St. Conf. of NAACP et al. to Applicants' Em. Mot. for Recall and Stay of Mandate at 1-2 (Aug. 25, 2016) (No. 16A168).

OPINIONS BELOW

The Findings of Fact, Conclusions of Law, and Order of the District Court are not yet reported but are available at 2016 WL 3248030. *See Ohio Organizing Collaborative v. Husted*, No. 15-1802, ___ F. Supp. 3d ___, 2016 WL 3248030 (S.D. Ohio May 24, 2016). The order of the District Court granting in part and denying in part the respondents' motion for a stay pending appeal is not yet reported or available on WESTLAW. The opinion of the Sixth Circuit is not yet reported but is

available on WESTLAW at 2016 WL 4437605. *See Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605 (6th Cir. Aug. 23, 2016). The District Court opinion is reproduced at App. 45a; the District Court stay order is reproduced at App. 165a; and the Sixth Circuit opinion is reproduced at App. 1a.

JURISDICTION

The Sixth Circuit issued its opinion on August 23, 2016. Applicants filed a motion to stay the mandate with the Sixth Circuit on August 27, 2016. That request was denied August 30, 2016. *See* App. 174a. This Court has jurisdiction to enter a stay of the Sixth Circuit's judgment or to grant certiorari and vacate the judgment. *See* 28 U.S.C. §§ 1254(1), 2101(e). Certiorari may issue "before or after" judgment. *See id.* The Court may stay the judgment in any case where the judgment would be subject to review on writ of certiorari. *See id.* § 2101(f).

STATEMENT OF THE CASE

A. Relevant Background

1. Ohio's electoral system collapsed in the 2004 general election. Some Ohioans waited up to 12 hours to vote. *See League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 468 (6th Cir. 2008) ("*LWV of Ohio*") (discussing allegations of "wait times from two to twelve hours"); *cf.* App.66a–67a. As a result, "many voters in the 2004 general election were effectively disenfranchised and unable to vote." *NAACP*, 768 F.3d at 531; *see LWV of Ohio*, 548 F.3d at 468–69 (reviewing allegations that "[i]nsufficient voting machines and long wait times caused 10,000 Columbus voters [alone] not to vote; caused voters to wait for hours in the rain;

caused one voter to faint in line; and caused many voters to leave without voting to attend work, school, or provide care to family members").

Ohio thereafter adopted several reforms to improve its electoral system, including the 35-day no-excuse absentee voting period in issue here, during which voters could vote by mail or "EIP" at designated locations. App. 66a; Ohio Rev. Code § 3509.01(B)(2)–(3). Because Ohio law requires voters to be registered at least 30 days before an election, its citizens could register and vote on the same day during the first five days of this period, known as "Golden Week." *NAACP*, 768 F.3d at 531; Ohio Const. § 5.01; Ohio Rev. Code § 3503.01(A).

2. The district court below found that, despite the implementation of Golden Week and other reforms following the 2004 general election, "voters in Ohio's largest counties still waited in significantly long lines to vote early and on Election Day in 2008 and 2012." App. 67a. But Golden Week made a major contribution in alleviating congested voting lines and encouraging turnout. During Golden Week in 2008, more than 60,000 voters cast their ballots and more than 12,000 registered. During Golden Week in 2012, more than 80,000 voted and more than 14,000 registered. *See* App. 79a–80a, 83a–84a.

Over the past decade, the EIP voting and same-day registration ("SDR") reforms have facilitated the political participation of historically disadvantaged voters. The district court found that "usage rates of EIP voting were far higher among African Americans than among whites in 2008, 2010, 2012, and 2014." App. 80a; *see, e.g., id.* at 81a (crediting evidence that "in 2008, 19.9% of Ohio's African

American voters made use of EIP voting compared to only 6.2% of whites[, and] [i]n 2012, 19.6% of blacks used EIP voting versus 8.9% of whites"). For Golden Week specifically, the district court found, based on a comparison of homogeneous African-American and white census blocks, that early voting rates among African Americans were between three and a half and five times greater than those for whites. *Id.* at 81a. These numbers were confirmed by substantial additional statistical evidence and fact-witness testimony. *Id.* at 80a–86a.

The district court found this sharply disproportionate reliance on EIP voting and SDR stems directly from the ongoing socioeconomic effects of past discrimination that significantly increase the costs of voting, with the result that African-American voters "have greater time and resource limitations that may prevent them from waiting in line on Election Day and are less likely to vote absentee." App. 83a. "[T]he costs of registering and voting at separate times, the cost of voting in general, and evidence that African Americans fare worse in various socio-economic measures also reduces the viability of Election Day voting as an alternative." App. 89a, *see also id.* at 86a ("[G]reater levels of transience may result in more frequent changes of address, which in turn requires individuals to update their registration more frequently. SDR provided an opportunity to do so and vote at the same time. As such, African Americans disproportionately make up the group that benefits the most from SDR, and the elimination of that opportunity burdens their right to vote").

3. African Americans in recent election cycles have exerted growing political influence in Ohio, a key battleground state that voted for President Obama in 2008 and 2012 with overwhelming support from African-American voters. After Republicans took control of the Governor's office and both houses of the Ohio General Assembly in 2010, they began a series of efforts to curtail or repeal a variety of registration and voting mechanisms relied upon disproportionately by African Americans. After an initial omnibus effort, the Republican majority enacted a series of restrictive measures in 2013, including the repeal of Golden Week through SB 238. *See generally* App.46a; *Ne. Ohio Coal. for the Homeless v. Husted*, No. 06-896, 2016 WL 3166251, at *55 (S.D. Ohio June 7, 2016) ("*NEOCH*"); *Obama for Am. v. Husted*, 697 F.3d 423, 427 (6th Cir. 2012) ("*OFA*").

4. SB 238 and other laws were challenged in *Ohio State Conference of the NAACP v. Husted*, 14-404 (S.D. Ohio). The district court in that case found that the reductions in the EIP voting period and in EIP evening and Sunday voting hours likely violated both the Fourteenth Amendment and Section 2 of the VRA, and issued detailed preliminary injunctive relief. *See* 43 F.Supp.3d 808, 852-53 (S.D. Ohio 2014). The Sixth Circuit affirmed the preliminary injunction on both *Anderson-Burdick* and Section 2 grounds. *See NAACP*, 768 F.3d at 524, 538–50, 550–60.

Shortly after the Sixth Circuit's decision in *NAACP v. Husted*, this Court stayed enforcement of the order pending a petition for certiorari. *See Husted*, 135 S. Ct. 42 (2014). This Court did not address the merits of the case. *Id.*; App. 79a.

Because the preliminary injunction applied by its terms only to the 2014 election, the Sixth Circuit then vacated the injunction. *See NAACP*, 2014 WL 10384647, at *1; App. 73a–74a. The parties subsequently settled the litigation in April 2015 without restoring Golden Week.[1]

Although the Sixth Circuit vacated its September 2014 decision in *NAACP v. Husted*, other Circuits have relied upon its persuasive force on both the *Anderson-Burdick* and Section 2 issues. *See, e.g., Veasey*, 2016 WL 3923868, at *17; *LWV of N.C.*, 769 F.3d at 240; *see also* App. 167a n.1 ("although the Sixth Circuit's opinion was ultimately vacated, the Court gives it highly persuasive effect, as it was vacated for reasons other than the merits").

B. Procedural History

1. Applicants brought this action in May 2015 challenging the elimination of Golden Week and several other recently adopted Ohio voting restrictions under the United States Constitution and Section 2 of the VRA.[2] The litigation proceeded on

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[1] Under the settlement agreement, Ohio agreed to provide EIP voting on the final two Saturdays and Sundays before the presidential general election in November 2016, and evening EIP voting hours until 7 p.m. during the final week before the election. *See* Settlement Agreement, *Ohio St. Conf. of NAACP v. Husted*, No. 14-404 (S.D. Ohio Apr. 17, 2015) (ECF No. 111-1).

[2] In addition to SB 238's reduction of the EIP voting period and elimination of SDR, Applicants challenged new measures (1) limiting each county to one EIP voting location regardless of population or size; (2) reducing the minimum number of direct recording electronic voting machines ("DRE machines") that counties must maintain if they use DREs as their primary voting device; (3) imposing new restrictions on unsolicited absentee ballot mailings, including by BOEs; (4) adding new categories of information required to be provided on absentee ballot envelopes and provisional ballot affirmation forms; (5) reducing the cure period for provisional ballots cast due to a lack of identification and prohibiting elections officials from completing on a voter's behalf a provisional ballot affirmation form; and (6) failing

an expedited basis and was tried in November and December 2015. "Over the course of a ten day bench trial, the district court weighed evidence from eight expert witnesses and nineteen lay witnesses, from statistical analyses to testimony of Get Out the Vote efforts, ultimately making determinations of credibility that led to its conclusion that S.B. 238 disproportionately burdens African Americans." App. 36a–37a (Stranch, J., dissenting).

On May 24, 2016, the district court issued its 120-page Findings of Fact, Conclusions of Law and Final Judgment declaring that the elimination of Golden Week violated the Fourteenth Amendment and Section 2 of the Voting Rights Act and permanently enjoining the State "from enforcing and implementing" SB 238. App. 164a–165a. The district court found in favor of the State on all of Applicants' remaining challenges. App. 46a.

2. The State promptly moved the district court to stay its injunction for both an August 2, 2016 special election and the November 8, 2016 general election. The district court issued an order on June 9 staying its permanent injunction for the August special election but refusing to stay the implementation of Golden Week for the November general election, which at that point was still five months' distant. The district court explained:

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to require BOEs to consolidate poll books at multi-precinct voting locations to alleviate the chance that voters would have their ballots rejected for being cast in the wrong precinct. *See* App.46a. Another judge of the Southern District of Ohio presiding over a separate suit enjoined the provisions related to absentee and provisional ballots after the district court's decision here. *See NEOCH*, 2016 WL 3166251, at *55, *appeals pending in* Sixth Cir. Nos. 16-3603 and 16-3691.

> While it is not unreasonable for the Court to accept the assertion that BOEs would have difficulty implementing Golden Week for the [August] special election in under one month, Defendants have provided no evidence establishing that BOEs will be significantly burdened by having to implement Golden Week in the November 8, 2016 election, for which the EIP voting period remains five months away. Indeed, the BOEs of the three largest counties in Ohio were aware of the potential to reinstate Golden Week, as their officials testified during trial. Moreover, any administrative burdens would be mitigated by the fact that BOEs will have planned for the remainder of the EIP voting period, that BOEs have experience in administering Golden Week previously, and that Golden Week would presumably take place during times when BOEs are already open for business. Further, five months before an election is a far cry from the time periods in recent cases where the Supreme Court acted to prevent last minute alterations to election procedures. . . . Notably, the assertion that a change to election laws in May of 2016 would cause irreparable harm is belied by the fact that Defendants initially proposed a trial date of April 11, 2016 [rather than the accelerated schedule imposed by the court resulting in a late-2015 trial].

App. 171a–172a. (internal citations omitted).

The State did *not* appeal the district court's denial of its motion to stay the implementation of Golden Week for the November 2016 general election. Nor did the State take any other steps to postpone Golden Week while expedited appeals proceeded. Over the next several months, Ohio's county BOEs and the media publicized the availability of the upcoming Golden Week. *See infra* p. 34–35 & nn.8 & 9.

3. On August 23, 2016, a divided Sixth Circuit panel reversed the district court's permanent injunction. In so doing, the panel majority applied *de novo* instead of clear-error review to the district court's factual findings, applied rational-basis review instead of the sliding scale required by *Anderson-Burdick*, and departed, without addressing the reasoning, from the formulation of the two-part

test governing Section 2 vote-denial claims set forth in *NAACP v. Husted*, *Veasey*, and *LWV of N.C.* *See* App. 10a–17a (applying *de novo* review); *id.* at 15a–16a (applying rational basis), *and id.* at 23a (holding that "the first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process").

Judge Stranch dissented. *See* App. 28a–43a. She argued "[t]he district court applied the correct constitutional and statutory tests and its decision is fully supported by the extensive record resulting from its ten day bench trial." App. 42a–43a. She criticized the panel's incorrect standard of review and its "new tests, unadorned by precedent," that conflict with prior decisions of the Sixth Circuit "and our sister Circuits." App. 28a. Judge Stranch demonstrated that "[n]either our precedent nor that of our sister Circuits supports" the panel's use of de novo rather than plain error review; that the district court had properly applied the *Anderson-Burdick* balancing analysis and that none of the State's "specific (as opposed to abstract) interests justify the burden that eliminating Golden Week imposes on African American voters"; and that the panel had imposed "an inappropriately strict threshold for Section 2 claims" that conflicts with prior Sixth Circuit decisions as well as with decisions of the Fourth, Fifth (sitting en banc), Ninth, and Eleventh Circuits. App. 37a–38a.

4. Applicants promptly moved the Sixth Circuit for a stay of its mandate pending the filing and final disposition of a petition for a writ of certiorari from this

Court. The panel majority denied that motion on August 30, 2016; the order noted that "Judge Stranch would grant the motion." App. 175a.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an 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).

I. There Is a Reasonable Probability This Court Will Grant Certiorari and a Fair Prospect the Court Will Reverse

The panel majority began its opinion by expressing skepticism about "becom[ing] entangled, as overseers and micromanagers, in the minutiae of state election processes." App. 2a. States unquestionably have broad latitude in conducting their "election processes." But as Judge Stranch emphasized at the outset of her dissent, the panel's skepticism led to a "majority opinion [that] employed an incorrect standard of review and created and applied new tests, unadorned by precedent, instead of those that we and our sister Circuits have found applicable to voter denial cases such as this one." App. 28a (citing *Veasey*, 2016 WL 3923868, at *44 (en banc) (Higginson, J., concurring) ("Such scrutiny should be seen not as heavy-handed judicial rejection of legislative priorities, but as part of a process of harmonizing those priorities with the fundamental right to vote—a topic with which over a quarter of our Constitution's amendments have dealt in one way

or another, and an individual right that cannot be compromised because an adverse impact falls on relatively few rather than many.")).

The Federal Constitution and Voting Rights Act require federal courts to be vigilant in evaluating the "minutiae of state election processes" because of the long and regrettable history of state and local officials abusing those "minutiae" to impose "onerous procedural requirements" that, while racially neutral on their face, "effectively handicap exercise of the franchise by [minorities] although the abstract right to vote may remain unrestricted as to race." *Lane v. Wilson*, 307 U.S. 268, 275 (1939); *see also Holder v. Hall*, 512 U.S. 874, 922 (1994) (Thomas, J., concurring in the judgment) (Section 2 protects "access to the ballot" against "all manner of registration requirements, the practices surrounding registration (including the selection of times and places where registration takes place and the selection of registrars), the locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted").[3]

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[3] Justice Thomas explained that "Congress was concerned in [Section 2] with any procedure, however it might be denominated, that regulates citizens' access to the ballot—that is, any procedure that might erect a barrier to prevent the potential voter from casting his vote." *Holder*, 512 U.S. at 922; *see also Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If . . . a county permitted voter registration for only three hours one day a week, and that made it *more difficult* for blacks to register than whites, blacks would have *less opportunity 'to participate* in the political process' than whites, and § 2 would therefore be violated[.]") (emphasis added). These are the same kinds of electoral "minutiae" as those in issue here.

Ensuring that state election processes do not deny or abridge the fundamental right to vote is what federal courts are supposed to do. As Judge Stranch concluded in rejecting the panel's "unfounded and antiquated" charge that voting rights cases "intrude upon the right of the states to run their own election processes," "[o]ur American society and legal system now recognize that appropriate scrutiny is essential to protection of the fundamental right to vote." App. 43a. (Stranch, J., dissenting).

A. The Sixth Circuit's Excessive Deference to the State's Justifications For Its Elimination of Golden Week Conflicts With Decisions of This Court and Other Courts of Appeals

The Sixth Circuit applied a version of the *Anderson-Burdick* inquiry that fails to exercise any meaningful scrutiny of the State's justifications for registration and voting restrictions. According to the panel:

> The district court demanded too much. For regulations that are not unduly burdensome, the *Anderson-Burdick* analysis never requires a state to actually *prove* "the sufficiency of the 'evidence.'" *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (explaining that a contrary rule "would invariably lead to endless court battles over the sufficiency of the 'evidence'"). Rather, at least with respect to a minimally burdensome regulation triggering rational-basis review, we accept a justification's sufficiency as a "legislative fact" and defer to the findings of Ohio's legislature so long as its findings are reasonable.

App. 16a (citations omitted).

The Sixth Circuit panel's articulation and application of the standard of review sharply conflicts with this Court's decisions and those of other Circuits in voting rights cases. To begin, this Court has emphasized that "*even rational restrictions on the right to vote*" are unconstitutional unless "justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"

Crawford, 553 U.S. at 189, 191 (emphasis added, citation omitted). "Rather than applying any 'litmus test' that would neatly separate valid from invalid restrictions, . . . a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* at 190. This searching inquiry applies "[h]owever slight [the voting] burden may appear." *Id.* at 191. Were it otherwise, the $1.50 poll tax struck down in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), might still be in place. *See also McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 & n.6 (4th Cir. 1995) (explaining that "a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational," and rejecting State's argument that "election laws that impose less substantial burdens need pass only rational basis review").

Just two months ago, this Court reversed the Fifth Circuit's holding, in a case involving abortion regulations, that "the district court erred by substituting its own judgment for that of the legislature" in conducting an "undue burden inquiry." *Whole Woman's Health*, 136 S. Ct. at 2309. The Fifth Circuit had reasoned that "medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Id.* This Court held the Fifth Circuit was "wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue." *Id.* at 2309. Instead, federal courts "retain[] an independent constitutional

duty to review [legislative] factual findings where constitutional rights are at stake." *Id.* at 2310. Yet the Sixth Circuit reversed the district court for doing *precisely* that here.[4]

B. The Sixth Circuit's Misapplication of the Clear-Error Standard of Review Conflicts With Decisions of This Court and Other Courts of Appeals

The Sixth Circuit erroneously reviewed the district court's detailed and carefully annotated findings regarding the magnitude and racially disproportionate nature of SB 238's burdens on voting rights and the strength of the State's interests in SB 238 using a *de novo* standard of review, rather than under the clear error standard dictated by this Court's precedent. *See* App. 10a ("the district court's characterization of the resultant burden as 'modest' is not a factual finding, but a legal determination subject to de novo review"). In *Gingles* itself, this Court reaffirmed that clear-error review applies to "appellate review of a finding of vote dilution." *Gingles*, 478 U.S. at 79. The Court explained that vote-dilution claims under Section 2 of the VRA require "the trial court . . . to consider the totality of the circumstances," conduct "a searching practical evaluation of the past and present reality," and engage in "an intensely local appraisal of the design and impact of the contested electoral mechanisms"; that "[t]his determination is peculiarly dependent upon the facts of each case"; and that "application of the clearly-erroneous standard

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[4] The Sixth Circuit also erred in accepting certain of the State's asserted justifications as a "legislative fact." *See* App. 15a–16a. There are no formal legislative findings regarding SB 238, and the rationales supplied by the State's lawyers plainly are not "legislative facts." *See Whole Woman's Health*, 136 S. Ct. at 2310 ("Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings").

to ultimate findings of vote dilution preserves the benefit of the trial court's familiarity with the indigenous political reality." *Id.* (internal quotation marks omitted). This Court's reasoning applies with the same force to equally fact-intensive vote denial cases, such as this one.

Appellate courts reviewing fact-intensive findings in the vote denial and undue burden contexts routinely have applied the clear-error standard, including both the Fourth and Fifth Circuits in recent weeks. *See McCrory*, 2016 WL 4053033, at *8–9, *18 (rejecting district court's factual findings with respect to past discrimination as clearly erroneous and holding that "the ultimate findings of the district court regarding the compelling nature of the State's interests are clearly erroneous"); *Veasey*, 2016 WL 3923868, at *5 (en banc) (whether legislation was passed with a discriminatory purpose in violation of the Constitution and Section 2 is reviewed for clear error); *LWV of N.C.*, 769 F.3d at 252; (whatever the wisdom of district court's factual findings about early voting and same-day registration, "they are not clearly erroneous").[5] The Sixth Circuit's failure to apply the clear-error standard of review squarely conflicts with the decisions of this Court and these other Circuits.[6]

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[5] *See also Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir. 1995); *Pilcher v. Rains*, 853 F.2d 334, 337 (5th Cir. 1988); *see generally Anderson v. City of Bessemer*, 470 U.S. 564, 571–76 (1985) (explaining why clear error review for claim of intentional race discrimination "is the rule, not the exception"); *Pullman-Standard v. Swint*, 456 U.S. 273, 290–93 (1982) (discriminatory intent is a factual matter subject to clear error review).

[6] Indeed, the Sixth Circuit's failure to apply clear-error review conflicts with other decisions by that Circuit in voting rights cases. *See, e.g., Mich. St. A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 2016 WL 4376429, at *4–5 (6th Cir. Aug.

Here, the district court made numerous detailed fact findings explaining the burdens the elimination of Golden Week places on voters, and African American voters in particular. As the district court found, over 60,000 Ohioans voted during Golden Week in the November 2008 election, and over 80,000 did so in the November 2012 election. App. 79a–80a. Over 13,000 registered and voted during Golden Week in 2008; over 14,000 in 2012. *Id.* at 83a–84a. A strikingly disproportionate percentage of these voters who have relied on Golden Week are minorities, a consequence of the increased "costs of registering and voting at separate times" and "cost of voting in general" faced by African Americans because of socio-economic inequalities. *Id.* at 80a. The panel here ignored all of this evidence, waving it off as a matter of mere "preference" on the part of African Americans. App. 10a, 13a.

In addition, the Sixth Circuit's failure to apply the correct clear-error standard of review caused the Court to make numerous clear errors of its own. For example, in adopting the State's talking point that "it's easy to vote in Ohio," *see* App. 10a–13a, the Sixth Circuit did not consider the extensive *contrary* evidence in the record regarding the experience of actual voters in Ohio. As the district court found, that evidence shows, among other things, that "voters in Ohio's largest counties still waited in significantly long lines to vote early and on Election Day in 2008 and 2012[,]" with lines reaching up to six hours in length. App. 67a. And that was *before* SB 238 eliminated Golden Week.

17, 2016); *OFA*, 697 F.3d at 431–32; *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593–95 (6th Cir. 2012).

The Sixth Circuit also erred in giving significant weight to how Ohio's early voting system compares to those of other states. *Compare* App. 10a–12a *with Gingles*, 478 U.S. at 78 (Section 2 cases require "an intensely local appraisal of the design and impact" of the challenged electoral practice). This case illustrates why such comparisons do more harm than good. In Ohio, the pre-SB 238 early voting period was adopted not to provide voters with a convenience but as a necessity borne of the disastrous 2004 Presidential election, which featured racially disparate wait times lasting up to 12 hours. *See LWV of Ohio*, 548 F.3d at 468 (noting "wait times from two to twelve hours"); cf. App.66a–67a. Moreover, early voting is much less accessible in Ohio than in other states, as Ohio limits early voting to one location per county. *See* App. 101a.

The Sixth Circuit erred further in concluding that the district court was mistaken in "considering the changes effected by SB 238, rather than by examining Ohio's election regime as a whole." App. 9a. As a factual matter, that is simply incorrect: the district court specifically considered the other "opportunities to cast a ballot in Ohio, including vote by mail, in person on Election Day, and on other EIP voting days," the settlement in the *NAACP v. Husted* case, and the results of the 2014 election; and it found that none of these considerations ameliorated the burdens imposed by SB 238. *See* App. 86a–92a. To the extent the Sixth Circuit's decision suggests that the district court should *only* have considered Ohio's election regime as a whole, *see* App. 12a ("State officials are defending a liberal absentee voting practice that facilitates participation by all members of the voting public."),

that position would lead to the untenable conclusion that any change to election law, no matter how burdensome or irrational, should be upheld so long as the court finds the election regime as a whole to be satisfactory.

In addition, the Sixth Circuit erred in concluding that "[t]he district court placed inordinate weight on its finding that some African-American voters may prefer voting on Sundays, or avoiding the mail, or saving on postage, or voting after a nine-to-five work day" and that any burden "impacting such preferences . . . results more from a matter of choice rather than a state-created obstacle." App. 13a (internal quotation marks omitted). As the dissent points out, "[t]his is based on surmise, not record evidence." App. 35a. Worse, the district court's fact findings demonstrate that the disproportionate use of Golden Week by African Americans is *not* a matter of mere "preference" but rather a direct legacy of Ohio's history of discrimination and election maladministration. *See* App. 151a ("Having considered all of the Senate Factors and the totality of the circumstances, the Court . . . concludes that S.B. 238 interacts with the historical and social conditions facing African Americans in Ohio to reduce their opportunity to participate in Ohio's political process relative to other groups of voters[.]"); *see also McCrory*, 2016 WL 4053033, at *17 ("[r]egistration and voting tools may be a simple 'preference' for many white North Carolinians, but for many African Americans, they are a necessity"); *Frank v. Walker*, 773 F.3d 783, 792 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) ("The panel opinion does not discuss

the cost of obtaining a photo ID. It assumes the cost is negligible. . . . Not everyone is so fortunate.").

The Sixth Circuit's factual errors also caused it to misapply *Crawford v. Marion Cnty. Bd. of Elections*, 553 U.S. 181 (2008). There is much more evidence regarding the burdens at issue here, App. 81a–86a, than in *Crawford*. The record documents the burdens imposed by SB 238, but in *Crawford* it was not possible "on the basis of the evidence in the record . . . to quantify the magnitude of [that] burden" or determine the extent to which that burden was justified. 553 U.S. at 200.

C. The Sixth Circuit's Section 2 Framework of Analysis Conflicts With Decisions of This Court and Other Courts of Appeals

The Sixth Circuit made several errors in analyzing Applicants' claims under Section 2. First, it adopted an unduly restrictive test for determining violations of Section 2 that is contradicted by the statute's text, the decision of another Sixth Circuit panel in *NAACP v. Husted*, and the decisions of several other Circuits. As discussed above, the Sixth Circuit panel in *NAACP v. Husted*, the *en banc* Fifth Circuit, and the Fourth Circuit have articulated a two-part test for vote-denial claims under Section 2 of the VRA:

> [1] [T]he challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, [and]
>
> [2] [T]hat burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

Veasey, 2016 WL 3923868, at *17 (quoting *LWV of N.C.*, 769 F.3d at 240); *NAACP*, 768 F.3d at 554. "The second part of the two-part framework draws on the Supreme Court's guidance in *Gingles*." *Id.* (citing *Gingles*, 478 U.S. at 47, *LWV of N.C.*, 769 F.3d at 240, and *NAACP*, 768 F.3d at 554).

The panel began by noting that the first element, as articulated in *NAACP*, *Veasey*, and *LWV of N.C.*, "essentially reiterates Section 2's textual requirement that a voting standard or practice, to be actionable, must result in an adverse disparate impact on protected class members' opportunity to participate in the political process." App. 23a. Although none of these prior cases suggested that disparate impact alone is sufficient to establish a Section 2 violation, the panel nevertheless distanced itself from *NAACP*, *Veasey*, and *LWV of N.C.*, cautioning that "this formulation cannot be construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2" and that this standard "warrant[ed] clarification." App. 23a; *see also id.* n.10 (noting "[t]he Fourth and Fifth Circuits have used [*NAACP*'s] framework to evaluate Section 2 claims, but the Seventh Circuit has declined to adopt it."). Then, the panel stated what purported to be a new formulation: "that "the first element of the Section 2 claim requires proof that the challenged standard or practice causally contributes to the alleged discriminatory impact by affording protected group members less opportunity to participate in the political process." App. 23a (citing *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014)); *see id.* ("[P]roof of a disparate impact—amounting to denial or

abridgement of protected class members' right to vote—that *results from the challenged standard or practice* is necessary to satisfy the first element of the test, but is not sufficient to establish a valid Section 2 vote-denial-or-abridgement claim." (emphasis in original)).

The meaning and purpose of this "clarification" is unclear. No court has ever suggested that "adverse disparate impact" alone suffices to make out a Section 2 violation, as the panel here implied. To the contrary, the test as set forth in *NAACP*, *Veasey*, and *LWV of N.C.* requires that after a disparate impact is shown at step one, at step two "that burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *Veasey*, 2016 WL 3923868, at *17 (citing *LWV of N.C.*, 769 F.3d at 240). The second step of the inquiry thus establishes the causal link between the voting practice and the background social and historical conditions necessary to show that the practice disparately impacts the ability of minorities to participate in the political process. *See id.* ("This second part of the framework provides the requisite causal link between the burden on voting rights and the fact that this burden affects minorities disparately because it interacts with social and historical conditions that have produced discrimination against minorities currently, in the past, or both."); *Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."). The panel here

apparently conflated the two steps, and in so doing created an unduly high threshold at step one that precluded it from examining the *Gingles* factors.

As the dissent below explained, "[t]his extra requirement is unnecessary." App. 40a (Stranch, J., dissenting). "As the text of Section 2 specifies, a voting standard or practice may only be invalidated under Section 2 if it results in less opportunity for members of a protected class to participate in the political process than others." *Id.* (citing 52 U.S.C. § 10301). "The existing test is true to this text and contains the necessary causal linkage between an electoral regulation and its interaction with social and historical conditions." *Id.* And, as the Fifth Circuit in *Veasey* explained, this is the appropriate way to frame the first element because, in inquiring "about the nature of the burden imposed and whether it creates a disparate effect in that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice[,]" it "encompasses Section 2's definition of what kinds of burdens deny or abridge the right to vote." 2016 WL 3923868, at *17 (quotation omitted).

The panel's "clarification" led it to make a number of other errors in its "disparate impact" analysis. *First*, by conflating step one (the disparate impact analysis) with step two (the causation inquiry undertaken according to the "totality of circumstances"), the panel created a threshold barrier that precluded it from even considering the *Gingles* factors and Applicants' evidence that established the causal link between the elimination of Golden Week and African Americans' unequal

ability to participate in the political process. *See* App. 26a (claiming that "the second step inquiry regarding the causal interaction of S.B. 238 with social and historical conditions that have produced discrimination is immaterial"). This, in effect, read the *Gingles* factors out of the Section 2 vote-denial test, in direct contravention of the text of Section 2, this Court's precedents, and those of other circuits. *Chisom*, 501 U.S. at 403 (holding that the VRA "should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination" given that Congress enacted it "for the broad remedial purpose of rid[ding] the country of racial discrimination in voting"); *NAACP*, 768 F.3d at 555 (finding "Senate factors one, three, five, and nine particularly relevant to a vote denial claim" but that "[a]ll of the factors . . . can still provide helpful background context to minorities' overall ability to engage effectively on an equal basis with other voters in the political process"); *LWV of N.C.*, 769 F.3d at 240 (Senate Factors "may shed light on whether the two elements of a Section 2 claim are met").

Second, in addition to not even considering the *Gingles* factors, the panel suggested that some factors would be irrelevant to Section 2 claims even under its reformulated version. "Conversely, to apply Section 2 to invalidate a State's innocuous voting regulation based solely on evidence that social and historical conditions resulted in a disparate impact would impermissibly punish a state for the effects of private discrimination." App. 25a. This directly conflicts with *Gingles* and the case law of numerous "sister Circuits," which have considered the *Gingles* factors relevant, even those that relate to private discrimination. App. 38a

(Stranch, J., dissenting); *see Veasey*, 2016 WL 3923868, at *18; *LWV of N.C.*, 769 F.3d at 240; *Gonzalez v. Ariz.*, 677 F.3d 383, 405-06 (9th Cir. 2012) (en banc); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005). It is precisely these "social and historical conditions" that Section 2 requires courts to consider, because state voting regulations may interact with such conditions (even those caused in part by private discrimination) in such a manner as to decrease the ability of minorities to participate in the political process.

Third, in assessing the disparate impact, the panel ignored the evidence establishing that African Americans have disproportionately relied on Golden Week, and instead focused on overall minority participation rates. App. 26a. (claiming "statistical evidence shows that African Americans' participation was at least equal to that of white voters in 2014 under a version of S.B. 238 that afforded even less convenience than the current version.") As an initial matter, the panel was wrong about the evidence with respect to overall participation rates, because even the State's expert conceded that African American turnout went down between 2010 and 2014. *See* Nov. 19, 2015 Tr. Trans. PageID# 4203–04, 4206–08 (ECF No. 98). However, focusing on overall participation rates misses the point of the Section 2 analysis, and, for that reason, has been rejected by other courts.

In *Veasey*, the State of Texas argued that "the district court erred by failing to ask whether [the Texas voter ID law] causes a racial voting disparity, rather than a disparity in voter ID possession." 2016 WL 3923868, at *29. The *en banc* Fifth Circuit rejected this argument:

> The State insists that the district court erred by failing to ask whether SB 14 causes a racial voting disparity, rather than a disparity in voter ID possession. We have never required such a showing. Section 2 asks whether a standard, practice, or procedure results in "a denial or abridgement of the right . . . to vote." 52 U.S.C. § 10301(a). Abridgement is defined as "[t]he reduction or diminution of something," Abridgement, BLACK'S LAW DICTIONARY (10th ed. 2014), while the Voting Rights Act defines "vote" to include "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. § 10101(e). The district court's finding that SB 14 abridges the right to vote by causing a racial disparity in voter ID possession falls comfortably within this definition. Our case law dictates the same outcome

Id. (citations omitted). Thus, the Fifth Circuit declined "to require a showing of lower turnout to prove a Section 2 violation." The Court reasoned that "[a]n election law may keep some voters from going to the polls, but in the same election, turnout by different voters might increase for some other reason. That does not mean the voters kept away were any less disenfranchised." *Id.* "[N]o authority supports requiring a showing of lower turnout, since abridgement of the right to vote is prohibited along with denial." *Id.*

The Fourth Circuit also recently rejected the very reasoning employed by the Sixth Circuit here. In *McCrory*, the Fourth Circuit reversed, among other things, the district court's denial of an injunction of North Carolina's reductions to early voting and elimination of same-day registration. *See* 2016 WL 4053033, at *16. Like the panel here, the district court in *McCrory* dismissed the plaintiffs' claims with the remark "that these provisions simply eliminated a system 'preferred' by African Americans as 'more convenient.'" *Id.* And like the panel here, the district court had focused on aggregate minority turnout to shield these restrictions from invalidation.

The Fourth Circuit's analysis underscores the errors of the Sixth Circuit here. The court explained that "although aggregate African American turnout [in North Carolina] increased by 1.8% in 2014, many African American votes went uncounted[,]" and "thousands of African Americans were disenfranchised because they registered during what would have been the same-day registration period but because of SL 2013–381 could not then vote." *Id.* "Furthermore, the district court failed to acknowledge that a 1.8% increase in voting actually represents a significant decrease in the rate of change. For example, in the prior four-year period, African American midterm voting had increased by 12.2%." *Id.* "In sum, while the district court recognized the undisputed facts as to the impact of the challenged provisions of SL 2013–381, it simply refused to acknowledge their import." *Id.* The same can be said of the panel here.

Moreover, the panel committed error even under its own misguided requirement that a voting law's disparate impact must manifest itself somehow in overall participation rates. It cited the evidence of defense expert Dr. Hood, which was discredited by the district court and which the panel selectively quoted without establishing any clear error on the part of the district court. *See* App.25a–26a; *id.* at 59a–60a (district court affording Dr. Hood's analysis "little weight"). Furthermore, the State's own expert, Dr. Nolan McCarty, found that from 2010 (when Golden Week was in effect) to 2014 (after Golden Week had been eliminated), African-American turnout decreased relative to white turnout. *See* Nov. 19, 2015 Tr. Trans. PageID# 4203–04, 4206–08 (ECF No. 98). Thus, even under the panel's erroneous

legal standard of what is required to show a disparate impact, its conclusion here was contradicted by the evidence.

In contrast, the district court here found, based on ample record evidence, that, due to the ongoing effects of racial discrimination, African Americans disproportionately rely on Golden Week. App. 80a–82a. This is precisely the type of evidence other Circuits have cited in finding violations of Section 2:

> The fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is therefore relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters.

LWV of N.C., 769 F.3d at 241–42; *cf. Chisom*, 501 U.S. at 408 (Scalia, J., dissenting). The Sixth Circuit here ignored this evidence, as well as the evidence of the disparate impacts that will be imposed by the reduced voting opportunities and resulting long lines (*see., e.g.*, App. 82a), by instead focusing on its mistaken belief that the burden was "a matter of choice rather than a state-created obstacle." App. 13a. For the reasons explained above, this reading imports into step one's "disparate impact" analysis an unjustified causation element that should be conducted at step two and obscures the operative question—whether minorities are disproportionately affected by the law. *See supra* p. 21–23.

II. Eliminating Golden Week Just Over a Month Before Its Scheduled Start Will Cause Irreparable Injury to Applicants and the Public Interest

There also is good cause for a stay of the Sixth Circuit's decision upholding the State's elimination of Golden Week pending the filing and final disposition of a

petition for a writ of certiorari. The arguments for a stay are magnified given how close we are to the long-scheduled start of Golden Week, especially given the State's failure to seek a stay from the Sixth Circuit or this Court in June or July.

A. Applicants and the Public Interest Will Be Irreparably Injured Absent a Stay Pending This Court's Consideration

Golden Week has formed an essential part of the election reforms that ameliorated, but did not completely remedy, the long lines, chaos, and confusion that plagued the 2004 Presidential election in Ohio. *See* App. 66a; *id.* at 78a ("manifold problems experienced during the 2004 election"); *NAACP*, 768 F.3d at 530–31. Tens of thousands of Ohio voters have relied on Golden Week during the past two Presidential elections, and African Americans have done so at far higher rates than other voters. *See* App. 79a-84a.

If the State is allowed to eliminate Golden Week now, Ohio's voters—and a disproportionate number of African Americans—will find it more difficult to vote. "Moreover, to the extent the voters who would have voted during Golden Week choose to vote on other early voting days or on Election Day, that will likely result in longer lines at the polls, thereby increasing the burdens for those who must wait in those lines and deterring voting." *Id.* at 82a. These kinds of burdens constitute irreparable injury *per se*.[7]

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[7] "When constitutional rights are threatened or impaired, irreparable injury is presumed. A restriction on the fundamental right to vote therefore constitutes irreparable injury." *OFA*, 697 F.3d at 436. "The public interest . . . favors permitting as many qualified voters to vote as possible." *Id.*; *cf. Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014) ("With regard to the factor of irreparable injury, for example, it is well-settled that loss of First Amendment freedoms, for

Allowing SB 238 to go into effect also will result in even greater voter confusion and run afoul of *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). The district court's May 24 decision reinstating Golden Week received heavy media coverage when it was issued and again when the district court denied the State's motion for a stay until after the November 2016 general election.[8] County Boards of Election have advertised and promoted Golden Week over the past three months. Indeed, as of the date of this filing, some county Boards of Election are *continuing* to advertise the advent of a 35-day early voting period, including Golden Week beginning October 4th.[9] Voters,

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even minimal periods of time, unquestionably constitutes irreparable injury.") (quotation omitted).

[8] *See, e.g.*, Darrel Rowland, *Despite Appeal from* Husted, *Judge Orders Golden Week re-instated for General Elections*, COLUMBUS DISPATCH, June 10, 2016, available at: http://www.dispatch.com/content/stories/local/2016/06/09/despite-appeal-from-husted-judge-orders-golden-week-re-instated-for-general-election.html; Jackie Borchart, *No "Golden Week" Early Voting for August Special Election, Judge Says*, CLEVELAND PLAIN DEALER, June 9, 2016, available at: http://www.cleveland.com/open/index.ssf/2016/06/no_golden_week_early_voting_fo.html; Richard Pérez-Peña, *Ohio's Limits on Early Voting Are Discriminatory, Judge Says*, NYT, May 24, 2016, at A10, available at: http://www.nytimes.com/2016/05/25/us/ohios-limits-on-early-voting-are-discriminatory-judge-says.html?_r=0; Jackie Borchart, *Federal Judge Blocks Ohio Law that Eliminated "Golden Week" Voting*, CLEVELAND PLAIN DEALER, May 24, 2016, available at: http://www.cleveland.com/open/index.ssf/2016/05/federal_judge_blocks_ohio_law.html.

[9] *See, e.g.*, November 8, 2016 General Election Early Voting Hours at the Board of Elections, Cuyahoga County Board of Elections, http://boe.cuyahogacounty.us/pdf_boe/en-US/2016/November2016_194/11082016InHouseVotingHours.pdf (detailing Oct. 4-

parties, candidates, and other stakeholders have made plans over the past several months in the expectation that Golden Week will be in place as advertised, including Cuyahoga County, Ohio's most populous county and the one with the highest number of registered voters.

Implementing the Sixth Circuit's decision now, only a month before Golden Week's scheduled start, will only further confuse Ohio's voters and eliminate a means of voting on which tens of thousands of voters have relied in recent Presidential elections. Pulling the plug on Golden Week now will result in precisely the kind of confusion and "conflicting orders" *Purcell* cautions against. This Court repeatedly has stayed decisions altering the administration of elections shortly before the start of voting. *See, e.g., Veasey v. Perry*, 135 S. Ct. 9 (2014); *Frank v. Walker*, 135 S. Ct. 7 (2014); *N.C. v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014); *Husted*, 135 S. Ct. 42 (2014).

B. The State Will Not Be Harmed by a Stay

The State has a legitimate interest in implementing its enacted legislation. But that interest is outweighed here by the documented burdens on voting caused by SB 238 and the disparate racial impacts of that legislation. Nor would a stay

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11, 2016 "Golden Week" hours for "in-house" early voting); Absentee Voting Information, Erie County Board of Elections, http://electionsonthe.net/oh/Erie/absvote.htm ("You may appear in person at the Board Office, apply and vote approximately 35 days prior to an election."); Absentee Voting, Lucas County Board of Elections, http://co.lucas.oh.us/index.aspx?NID=75 ("Absentee voting begins 35 days before primary and general elections[.]"); Absentee Voting Information, Lake County Board of Elections, http://www.lakecountyohio.gov/lakeelections/AbsenteeVotingInformation.aspx ("Absentee voting begins 35 days before an Election for all Non-Military voters."). All cited websites were last visited Sept. 1, 2016.

harm the State's interest in preventing potential voter fraud. As the district court found, "actual instances of voter fraud during Golden Week are extremely rare[,]" a point even Defendant Husted conceded. App. 93a (citations omitted).[10]

Allowing Golden Week to proceed as ordered last May will give election officials plenty of time to verify a voter's registration.

> [S]ince Ohio law requires that officials segregate absentee ballots and not count them until registration is verified . . . there is no reason to think that the registration of voters who registered and voted on the same day during Golden Week would be any harder to verify than an individual who registered on the last permissible day and then voted the next day, or for that matter than someone who voted very close to the election.

NAACP, 768 F.3d at 547.

There are no costs or administrative burdens that might outweigh the public's interest in Golden Week. "[C]ost savings from the elimination of Golden Week are minimal." App. 96a. And Golden Week does not increase burdens on staff time. County BOEs still remain open until 9 p.m. during the period eliminated by SB 238 to process voter registrations and perform other duties. *See* Ohio Rev. Code § 3501.109(B). Thus, "any BOEs that conduct EIP voting at their offices are unlikely to incur substantial additional overhead costs." App. 98a; *see also NAACP*, 768 F.3d at 549. Indeed, Golden Week has made election administration *easier* because it "(1)

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[10] If anything, the elimination of Golden Week will make fraud easier. Only the ballots of Golden Week registrants have been segregated until the registration-verification process has been completed. If someone now were to attempt to fraudulently register and then vote in the reduced early-voting period, that voter's ballot would not be segregated and thus would be counted, whereas a Golden Week registrant's would have been intercepted and not counted. *See* App. 95a–96a.

provide[s] boards more time to mail out and process absentee ballots, and (2) relieve[s] pressure on the polls on Election Day." App. 99a.

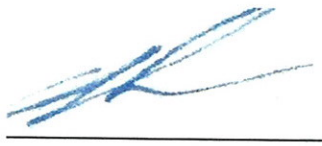
Nor will eliminating Golden Week at this late date do anything to promote voter confidence or decrease voter confusion. To the contrary, these interests will be undermined for all the reasons discussed above if the Sixth Circuit's judgment is not stayed pending consideration by this Court.

CONCLUSION

For the foregoing reasons, this Court should stay the Sixth Circuit's judgment and allow Golden Week to proceed, as scheduled, pending the timely filing

and final disposition of a petition for a writ of certiorari.

Respectfully submitted,



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