No. 16A223

IN THE
SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

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

Respondents.

REPLY IN SUPPORT OF 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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September 12, 2016

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INTRODUCTION

Respondents correctly emphasize that "[t]his Court has rejected late *judicially imposed* changes to election laws because '[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.'" Opp. to Em. Appl. for Stay ("Opp.") at 37–38 (emphasis in original; quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006)); *see also id.* at 39. But this principle does not help Respondents; on the contrary, it weighs heavily in favor of a stay. The Sixth Circuit's decision eliminating Golden Week plainly was a "late *judicially imposed* change[]"—coming just over a month before the start of Golden Week—that conflicted with the district court's order from last spring restoring Golden Week. This case therefore involves precisely the sort of last-minute judicial zig-zagging that is likely to result in voter confusion and a consequent incentive for voters to remain away from the polls—and that *Purcell* sought to prevent. *See, e.g.*, *Frank v. Walker*, 135 S. Ct. 7 (2014). Respondents could have promptly sought a stay from the Sixth Circuit and this Court last spring, but they chose not to do so. A stay is appropriate here for these reasons alone.

On the merits, Respondents' brief is perhaps most notable for what it does *not* say and for the points in Applicants' opening brief that it does *not* address. Respondents do not and cannot dispute that large numbers of Ohioans used Golden Week in the past two presidential general elections. App. 79a–80a, 83a–84a. They do not and cannot dispute the district court's finding that African Americans have been far more likely than whites to rely on early voting generally and Golden Week

in particular, and that this disproportionate reliance results directly from the ongoing effects of discrimination. *Id.* at 80a, 83a, 86a, 89a. Respondents do not attempt to defend the Sixth Circuit's holding that minority voters' reliance on Golden Week was a matter of "variable personal preferences." *See* Em. Appl. to Stay ("Opening Br.") at 23–24 (discussing same). And Respondents avoid any reference to the district court's findings that "voters in Ohio's largest counties still waited in significantly long lines to vote early and on Election Day in 2008 and 2012," and that "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." App. 67a, 82a.

Respondents also do not attempt to defend the Sixth Circuit's holding that their asserted justifications for eliminating Golden Week are "legislative facts." *See* Opening Br. 19 n.4 (discussing same). While Respondents again offer these same justifications for the elimination of Golden Week, they do not dispute that the district court considered them at length and found that, "while they may be legitimate, [they] are minimal, unsupported, or not accomplished by S.B. 238"; they "were either not supported by evidence or did not withstand logical scrutiny"; and they were "tenuous." App. 100a, 150a–151a. Further, Respondents do not mention the en banc Ninth Circuit's holding earlier this month in *Public Integrity Alliance v. Tucson*, No. 15-16142, 2016 WL 4578366 (9th Cir. Sept. 2, 2016), which deepens the conflict among the circuits regarding the proper application of the *Anderson-*

Burdick test and further demonstrates that the approach to that test taken by the court below is at odds with this Court's precedent. For these reasons and those set forth below, the Court is likely to grant certiorari and to reverse the judgment of the Sixth Circuit.

I. Respondents Have Failed to Rebut the Showing that There Is a Reasonable Probability the Court Will Grant Certiorari and Reverse

A. The Court Is Likely to Grant Certiorari and Reverse Because the Sixth Circuit's Holding that the State's Justifications Are Entitled to Excessive Deference Is at Odds with Decisions of This Court and Other Circuits

As set forth in Applicants' opening brief, the Sixth Circuit, in its assessment of whether the elimination of Golden Week unduly burdens the fundamental right to vote, was excessively deferential to the State's asserted interests, creating a conflict between the Sixth Circuit's decision and decisions of both this Court and the Fourth Circuit. *See* Opening Br. 3–4, 17–19. Respondents appear to acknowledge that the Sixth Circuit's approach is inconsistent with *Crawford*'s language, but they dismiss this language as coming from "only one *Anderson-Burdick* case." Opp. 20. This Court, of course, need not repeat itself to create precedent that binds lower courts. Regardless, Respondents are only able to make even this claim by selectively quoting *Crawford*, *see id.*,[1] while ignoring its statements—derived directly from earlier decisions of this Court—that "[h]owever slight" the burden from a voting

[1] Respondents' argument that, in a facial challenge, the burdens must be assessed across all voters, rather than those particularly burdened by it, Opp. at 15, is incorrect. *Crawford* makes clear that voting restrictions can be invalidated based on the burdens they impose on subgroups, *see* 553 U.S. at 186, 191, 198, but that the record *in that case* made it impossible to assess the burden on any subgroup, *id.* at 200, 202. *See also id.* at 217–22, 237 (Souter, J., dissenting); *id.* at 207 (Scalia, J., concurring); *Public Integrity Alliance*, 2016 WL 4578366, at *3 n.2.

restriction may appear, "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation,'" *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)), and that, "[r]ather 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 (discussing *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983)). *See also* Opening Br. 17–18.[2]

Respondents' attempt to limit the pertinent holdings from *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), as revised (June 27, 2016), to the abortion context, Opp. 21, also fails. The *Whole Woman's Health* Court was clear that federal courts "retain[] an independent constitutional duty to review [legislative] factual findings where *constitutional rights* are at stake." *Id.* at 2310 (emphasis added). And the Court's language in that case is directly in accord with *Crawford*'s statements that courts considering voting restrictions must "identify *and evaluate* the interests put forward by the State" and "make the 'hard judgment' that our adversary system demands." 553 U.S. at 190 (emphasis added); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014) (Roberts, C.J., plurality op.)

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[2] The Sixth Circuit and Respondents assert that application of this law would result in a "one-way ratchet" that would preclude states from retreating from any expansion of voting rights. App. 2a–3a, 11a, 20a; Opp. at 3–4. That claim is mystifying. The *Anderson-Burdick* test does not bar states from enacting laws that burden voting rights; rather, it prevents them from enacting such laws *without adequate justification*.

("There is no right more basic in our democracy than the right to participate in electing our political leaders."); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). The district court's meticulous 120-page opinion lived up to this obligation; the Sixth Circuit's astounding conclusion that "[t]he district court demanded too much," App. 16a, did not.

Respondents further err in arguing that there is no circuit split regarding the proper application of the *Anderson-Burdick* test. Opp. 21–22. While effectively acknowledging that the Fourth Circuit's analysis in *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215 (4th Cir. 1995), is at odds with the Sixth Circuit's approach here, Respondents contend that the relevant language in *McLaughlin* was dicta. Opp. 21–22. But this overlooks that *McLaughlin*'s rejection of the rational-basis test was part of a broader discussion of the *Anderson-Burdick* standard that bears little resemblance to the standard described in the Sixth Circuit's opinion. *Compare McLaughlin*, 65 F.3d at 1221 ("election laws are usually, but not always, subject to ad hoc balancing"; where strict scrutiny does not apply, "the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests"), *with* App. 16a ("[A]t 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.").[3]

Additionally, the en banc Ninth Circuit's unanimous September 2, 2016 ruling in *Public Integrity Alliance*, 2016 WL 4578366, is plainly inconsistent with the Sixth Circuit's reasoning. In *Public Integrity Alliance*, the Ninth Circuit noted that its "case law has not always accurately described the *Burdick* test" and pointed to a case in which it "stated that where plaintiffs can demonstrate a 'slight' or '*de minimis*' impairment of their rights, they bear 'the burden of demonstrating that the regulations they attack have no legitimate rational basis.'" *Id.* at *4. "But *Burdick* calls for neither rational basis review nor burden shifting," the Ninth Circuit explained, and it thus overruled the prior case "[t]o the extent [it] prescribed a different standard from the one articulated . . . in *Burdick*." *Id.*[4] That squarely conflicts with what the Sixth Circuit has ruled here. *See* App. 16a ("For regulations that are not unduly burdensome, the *Anderson-Burdick* analysis never requires a state to actually *prove* the sufficiency of the evidence.") (internal quotation marks

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[3] To the extent that Respondents suggest that the Fourth Circuit now applies rational-basis review to challenges to certain voting restrictions or that *McLaughlin* is no longer good law, Opp. 22, they are mistaken. The case cited by Respondents, *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708 (4th Cir. 2016), in no way questions *McLaughlin* and quotes *Anderson*'s statements that courts must "'identify and evaluate the precise interests put forward by the State'" and "'determine the legitimacy and strength of each of those interests,'" and that "[t]his balancing test requires 'hard judgments'—it does not dictate 'automatic' results." *Id.* at 716 (quoting *Anderson*, 460 U.S. at 789–90).

[4] The holding in *Public Integrity Alliance* does not mean that states must establish their interests through "elaborate, empirical verification." Opp. at 20. But where, as here, the record evidence shows that the asserted state interests are not furthered by the provision at issue, *see, e.g.*, App. 96a–99a, the state plainly has not met its burden.

omitted). The conflict among the courts of appeals is therefore even deeper now than it was when Applicants' opening brief was filed.

Respondents' other arguments are even weaker. Their contention that there is no right to receive absentee ballots (and that rational-basis review should thus apply), Opp. 15-16, fails for a number of reasons. To begin with, Respondents principally rely on *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), in which this Court held that Illinois was not required to send absentee ballots to unsentenced inmates. *Id.* at 803–05. But that case did not bar all future challenges to restrictions on absentee voting; "[e]ssentially the Court's disposition of the claims in *McDonald* rested on failure of proof." *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974); *accord Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) ("*OFA*"). Early voting also plays a fundamentally different role in today's election systems than it played in elections that took place decades ago. *See, e.g.*, Elliott B. Fullmer, "Early Voting: Do More Sites Lead to Higher Turnout?" 14 *Election L.J.* 81, 81 (2015) ("While fewer than 10% of voters cast early ballots in 1992, . . . the percentage increased to over 30% of the electorate in both 2008 and 2012 . . . ."). In Ohio specifically, early voting was adopted not simply to provide a convenience to voters but as a measure necessary to prevent the recurrence of the disastrous events of the 2004 election. *See* Opening Br. 7–8, 22, 33 (the 2004 election featured racially disparate wait times for voting of up to 12 hours; 10,000 voters in Columbus alone did not vote due to insufficient voting machines and long wait times). Respondents' effort to treat early voting as different in kind from other aspects of

the fundamental right to vote therefore ignores the vital role that early voting plays in modern elections generally and in avoiding chaos in Ohio in particular.

Further, Respondents' position that rational-basis review necessarily applies to restrictions on early voting is fundamentally inconsistent with the tenets of the *Anderson-Burdick* test already discussed—namely, that there are no litmus tests or automatic results and that courts must instead make the hard judgments required by our adversary system. And, this argument forgets that "'having 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).

Respondents are also wrong in asserting that the Sixth Circuit's excessive deference was "not outcome dispositive." Opp. 19. To be sure, the Sixth Circuit said in passing that it would find "Ohio's proffered interests . . . 'sufficiently weighty' to justify" the elimination of Golden Week even if the court had accepted the district court's characterization of the burden at issue, "which may conceivably trigger a slightly less deferential review." App. 16a. But the Sixth Circuit never conducted even a mildly searching assessment of the justifications offered for the elimination of Golden Week. *See id.* at 16a–19a. The only court to do so—to evaluate the

proffered justifications and to make the hard judgment that our adversary system demands—was the district court. And its detailed analysis *of the facts presented in this case* revealed that the State's "justifications for S.B. 238, while they may be legitimate, are minimal, unsupported, or not accomplished by S.B. 238." App. 100a; *accord id.* at 150a–151a ("the justifications offered in support of the elimination of Golden Week were either not supported by evidence or did not withstand logical scrutiny"; "S.B. 238 was passed based upon tenuous justifications").[5]

Consideration of the anti-fraud rationale for the elimination of Golden Week illustrates this point. Although the Sixth Circuit credited the State's assertion that the elimination of Golden Week decreases the opportunity for fraud, the court nowhere explained *how* Golden Week *even theoretically* has facilitated fraud. This was a critical error. The only theoretical linkage between same-day registration and fraud is that, because of same-day registration, "elections officials may not have enough time before Election Day to verify the registration." App. 94a. But that concern cannot justify the elimination of Golden Week because that change *did not affect the registration deadline*. Thus, as the district court explained, even without Golden Week, "a voter can register on the last day of the registration period and

[5] This is one of the reasons that *Marston v. Lewis*, 410 U.S. 679, 680–81 (1973), and *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973), are distinguishable. In contrast to the record here, the evidence in those cases supported the states' interests and refuted the plaintiffs' alleged injuries. *See Burns*, 410 U.S. at 686–87 ("[t]he State offered extensive evidence to establish the need" and "Plaintiffs introduced no evidence"); *Marston*, 410 U.S. at 681 (upholding Arizona's residency requirement "[o]n the basis of the evidence before the District Court" and "uncontradicted testimony"). Those cases are also distinguishable because Applicants are not challenging Ohio's registration deadline.

cast an in-person ballot the very next day before the mail-verification process has been completed." App. 94a–95a; *accord NAACP*, 768 F.3d at 547 ("[T]he specific concern [the State] expressed regarding voter fraud—that the vote of an EIP voter would be counted before his or her registration could be verified—was not logically linked to concerns with voting and registering on the same day, but rather has more to do with the registration process and verification of absentee ballots.") (internal quotation marks omitted).

In fact, Golden Week ballots—and only Golden Week ballots—have been segregated from other ballots until the related registration has been confirmed. App. 96a; 12/2/2015 Tr. Trans., PageID# 5380–81 (ECF No. 104). The ballot of a fraudulent Golden Week registrant therefore would not be counted, meaning that there is no plausible connection between the elimination of Golden Week and the prevention of fraud. By refusing to engage in any meaningful scrutiny of this asserted interest, the Sixth Circuit overlooked this point and improperly credited the State's anti-fraud rationale.[6] Because this failure to provide scrutiny pervades the Sixth Circuit's opinion and is inconsistent with *Crawford* and case law from the Fourth and Ninth Circuits, the Sixth Circuit's judgment should be stayed and Golden Week should be reinstated pending disposition of the petition for certiorari.

[6] The Sixth Circuit also ignored the district court's finding that the record "includes evidence that Golden Week *aids* in election administration in that it (1) provided boards more time to mail out and process absentee ballots, and (2) relieved pressure on the polls on Election Day." App. 99a n.18 (emphasis added; internal citations omitted).

B. The Court Is Likely to Grant Certiorari and Reverse Because the Sixth Circuit's Application of *De Novo* Review Was Improper and in Conflict with Decisions of This Court and Other Circuits

Respondents have also failed to rebut Applicants' showing that the Sixth Circuit erred in applying *de novo* review to the district court's assessment of the burdens on voting and state interests at stake. While acknowledging that a number of courts have applied clear-error review to district court findings in voting-rights cases, Respondents assert that "[m]ost of [Applicants'] cases do not involve *Anderson-Burdick*" and that the "[t]he *logic* of many" *Anderson-Burdick* cases suggests that *de novo* review applies. Opp. at 22. This argument fails.

Although many of the voting-rights cases applying clear-error review that are cited in Applicants' opening brief are not *Anderson-Burdick* cases, a number of them are. *See Pilcher v. Rains*, 853 F.2d 334, 337 (5th Cir. 1988); *Mich. St. A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 2016 WL 4376429, at *4–*5 (6th Cir. Aug. 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). *See generally* Opening Br. 20 nn.5-6. Moreover, Respondents' argument ignores the fact-bound nature of the *Anderson-Burdick* test and its similarities in this respect with the VRA analysis. As previously explained, the *Gingles* Court held that appellate courts should review findings of vote dilution for clear error because of the fact-intensive nature of such findings and because clear-error review "preserves the benefit of the trial court's familiarity with the indigenous political reality." Opening Br. 19 (quoting *Thonburg v. Gingles*, 478 U.S. 30, 79 (1986)). Likewise in the *Anderson-Burdick* context, trial courts must evaluate "the character and magnitude of the asserted injury to the rights protected by the

First and Fourteenth Amendments that the plaintiff seeks to vindicate," *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); "identify and evaluate the interests put forward by the State," *Crawford*, 553 U.S. at 190; take into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights," *Burdick*, 504 U.S. at 434; and "make the 'hard judgment' that our adversary system demands," *Crawford*, 553 U.S. at 190. As the district court's opinion in this case exemplifies, these are fact-intensive inquiries. And they are better resolved by a trial court that has heard extensive live testimony and had the opportunity to assess witnesses' credibility than by an appellate court working with a cold and voluminous trial record.

C. Respondents Have Failed to Rebut the Showing that There Is a Reasonable Probability the Court Will Grant Certiorari and Reverse the Sixth Circuit's VRA Holding

In holding that the elimination of Golden Week violates Section 2 of the VRA, the district court found that "[t]he elimination of the extra days for EIP voting provided by Golden Week will disproportionately burden African Americans, as expert and anecdotal evidence reflects that African Americans vote EIP, and specifically EIP during Golden Week, at a significantly higher rate than other voters"; that the elimination of Golden Week will result in longer lines to vote that disproportionately burden African Americans; *and* that the elimination of Golden Week's opportunity to register and vote at the same time will disproportionately burden African Americans. App. 80a–83a. The court also found that the elimination of Golden Week "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." *Id.* at 145a–151a; *see also id.* at 83a ("African Americans will disproportionately bear [the burden of longer lines], because . . . they have greater time and resource limitations that may prevent them from waiting in line on Election Day and are less likely to vote absentee."); *id.* at 84a ("[V]oters must now register and vote at separate times, which increases the 'cost of voting,' especially for socioeconomically disadvantaged groups."); *id.* at 145a–152a (discussing Senate Factors). Under the two-step test that has been adopted by the Fourth Circuit and the en banc Fifth Circuit, and that had been applied by the Sixth Circuit, *see* Opening Br. 4–5, 24–25, these findings of fact not only justify but require a holding that the elimination of Golden Week violates Section 2.

Respondents do not appear to dispute that clear-error review applies to the district court's findings of a racially disparate burden resulting from the elimination of Golden Week and of a link between that burden and the ongoing effects of discrimination, *see* Opp. 23, 30–31, and they identify no basis for a finding of clear error. Instead, Respondents implicitly challenge the two-step test by arguing that plaintiffs in a Section 2 case are required to show racial disparities in *overall* voter registration or turnout rates. *See id.* at 26–29; *cf.* App. 25a–26a (giving apparently dispositive weight to registration data from 2008-2014). *See generally* App. 23a (two-part test "warrants clarification"). That argument is without merit.

As the en banc Fifth Circuit explained, "no authority supports requiring a showing of lower turnout [to establish a Section 2 violation], since abridgement of the right to vote is prohibited along with denial." *Veasey v. Abbott*, No. 14-41127,

2016 WL 3923868, at *29 (5th Cir. July 20, 2016); *accord* Opening Br. 29–31. Tellingly, Respondents' claim that macro-level evidence is required relies exclusively on vote-*dilution* case law. Opp. 26–29. In that context, the need for macro data is clear: vote dilution occurs (and is necessarily measured) at the macro level. Vote denial or abridgement, on the other hand, occurs at the individual level. The right to vote can therefore be denied or abridged on account of race without there being a corresponding statistically significant impact on voter registration or turnout numbers. *See also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014) ("*LWV of N.C.*") ("Setting aside the basic truth that even one disenfranchised voter—let alone several thousand—is too many, what matters for purposes of Section 2 is not how many minority voters are being denied equal opportunities but simply that 'any' minority voter is being denied equal electoral opportunities."); *Veasey*, 2016 WL 3923868, at *29 ("An 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.").

Moreover, to the extent it is relevant, the macro-level evidence in this case *supports* a finding of a Section 2 violation. The data on which Respondents and the Sixth Circuit have relied shows that African-American and white registration rates became "statistically indistinguishable" in general elections from 2008–2014. Opp.

27; App. 25a.[7] But given that Golden Week was in place for the 2008, 2010, and 2012 elections, what these data indicate (if anything) is that Golden Week helped African Americans overcome the ongoing effects of discrimination—and that the elimination of Golden Week will have the opposite effect. *See LULAC v. Perry*, 548 U.S. 399, 439 (2006) (finding Section 2 vote-dilution violation where "[t]he changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive"); *see also* Opening Br. 10. Indeed, from 2010 to 2014, African-American turnout decreased relative to white turnout. *See* 11/19/2015 Tr. Trans., PageID# 4203–04, 4206–08 (ECF No. 98). In short, Respondents' arguments with respect to Section 2 are without merit.[8]

II. The *Purcell* Doctrine Strongly Supports Issuance of a Stay

Applicants demonstrated in their opening brief that the *Purcell* doctrine heavily favors issuance of the requested stay. *See* Opening Br. 3, 5–6, 34–35. Respondents point out in response that "[t]his Court has rejected late *judicially imposed* changes to election laws because '[c]ourt orders affecting elections,

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[7] To be clear, the probative value of this evidence is limited, at best, as there is a large margin of error for the African-American registration rate. *See* Hood Rebuttal, PageID# 7366–67 (ECF No. 127-18).

[8] Respondents' alternative argument about the need for an objective benchmark and whether retrogression may be considered under Section 2 also fails. No vote-denial case has adopted Respondents' arguments; but courts have rejected them. *See NAACP*, 768 F.3d at 556–58; *LWV of N.C.*, 769 F.3d at 241–42 (Section 2 has an "eye toward past practices" as part of its totality-of-the-circumstances test); *see also Sanchez v. Colorado*, 97 F.3d 1303, 1325 (10th Cir. 1996) ("'[i]f [a challenged] procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact'") (quoting 1982 U.S.C.C.A.N. at 207, n.117).

especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.'" Opp. 37–38 (quoting *Purcell*, 549 U.S. at 4–5); *see also id.* at 39. As shown in the Introduction, however, this principle does not rebut Applicants' argument but rather confirms that a stay should be issued.

To the extent that Respondents suggest that a stay from *this Court* would be create confusion, they misunderstand *Purcell*. This Court has stepped in to undo problematic last-minute judicial reversals on several occasions. *See* Opening Br. 35. Leaving such late changes in place would encourage rather than deter similar changes by lower courts in the future. In addition, even assuming *arguendo* that there would be confusion regardless of which way the Court rules, that would weigh in favor of a stay. If a stay is issued, voters who are unaware that Golden Week has been reinstated will not be any worse off—and in fact, due to the reduction in lines will be better off—than they would be without Golden Week. Conversely, if a stay is not issued, voters who have been told this past spring and summer that they may rely once again on Golden Week and are unaware that it has been eliminated with only a month to go will need to find a new means of voting and, in likely thousands of cases, of promptly registering in order to vote.[9]

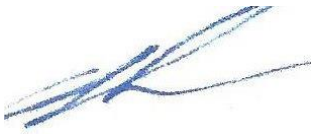
[9] Respondents acknowledge that the websites for certain county boards of elections continued to refer to Golden Week as of September 7. Indeed, Cuyahoga County's website *still* has not been updated to reflect the Sixth Circuit's decision. *See* http://boe.cuyahogacounty.us/pdf_boe/en-US/2016/November2016_194/11082016InHouseVotingHours.pdf (last visited Sept. 12, 2016).

Respondents' attempts to justify their failure to move the Sixth Circuit for a stay pending appeal fare no better. Respondents' assertion that "any *temporary* stay would have been extinguished at final judgment" and that "a stay would have *increased* any potential for voter confusion," Opp. at 40, is strained, at best; the issuance of stay would in fact have made clear to Applicants and voters generally—far in advance of the start of voting—that the court of appeals was likely to reverse the district court's ruling. And this assertion certainly cannot be credited here given that Respondents *did* move for a stay pending appeal—from the district court. *See* Mot. to Stay Pending Appeal, PageID# 10458–61 (ECF No. 129). Likewise, Respondents' argument that Applicants should have *opposed* their motion for expedited resolution of the appeal, Opp. 40, does not add up. Delaying the Sixth Circuit's ruling would have made the *Purcell* problem here worse, not better. In short, Respondents' failure to request a stay pending appeal from the Sixth Circuit at any point this past spring and summer has resulted in a significant *Purcell* problem, and the balance of the equities thus weighs strongly in favor of a stay.

CONCLUSION

For the reasons set forth above, the Court should stay the judgment below.

Respectfully submitted,



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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.

CERTIFICATE OF SERVICE

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

I, Marc E. Elias, a member of the Supreme Court Bar, hereby certify that the original and two copies of the attached Reply in Support of Emergency Application to Stay Sixth Circuit Judgment Pending Disposition of a Petition for a Writ of Certiorari were filed by hand-delivery to the Clerk's Office of the Supreme Court of the United States, and were served via Next-Day Service on the following parties listed below on this 12th day of September, 2016:

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In addition, an Electronic pdf of the Application has been sent today to the following counsel via email:

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