No. 16-3561

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the
United States District Court
for the Southern District of Ohio
Eastern Division

District Court Case No.
2:15-cv-1802

PLAINTIFFS-APPELLEES' MOTION TO STAY THE MANDATE PENDING DISPOSITION OF A PETITION FOR WRIT OF CERTIORARI

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Rhett P. Martin
Amanda R. Callais
Perkins Coie LLP
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Joshua L. Kaul
Perkins Coie LLP
1 East Main Street, Suite 201
Madison, WI 53703
Telephone: 608. 294.4007
Facsimile: 608. 663.7499

Donald J. McTigue
J. Corey Colombo
Derek S. Clinger
McTigue & Colombo LLC
545 East Town Street
Columbus, OH 43215
Telephone: 614.263.7000
Facsimile: 614.263.7078

Attorneys for Plaintiffs-Appellees

Plaintiffs-Appellees respectfully move this Court, pursuant to Federal Rule of Appellate Procedure 41(d)(2) and Sixth Circuit Rule 41(a), for a stay of this Court's mandate and the reinstatement of Golden Week pending the filing and final disposition of a petition for a writ of certiorari. As demonstrated below, "the certiorari petition [will] present a substantial question and … there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A); *see also Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) ("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").[1]

The certiorari petition will present a substantial question because this Court's August 23, 2016 decision squarely conflicts with controlling Supreme Court precedent and the decisions of numerous other Circuits in at least three important respects: (1) the proper standard for reviewing district court findings of fact regarding the burdens imposed by registration and voting restrictions; (2) the relationship of the rational basis standard of review to the *Anderson-Burdick*

[1] "[J]udges of the lower courts are to apply the same criteria" and conduct the same "judicial inquiry" as the Supreme Court in deciding whether to grant a stay of the mandate pending the filing and disposition of a petition for a writ of certiorari. *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993); *see also* 1994 Advisory Committee Notes to Fed. R. App. P. 41(b).

balancing inquiry; and (3) the proper framework for analyzing vote-denial claims under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. There is a "reasonable probability" the Supreme Court will grant certiorari on one or more of these issues, and a "fair prospect" the Court will reverse this Court's judgment on one or more of these grounds. *Hollingsworth*, 558 U.S. at 190.

There also is "good cause for a stay" pending the Supreme Court's consideration of these important questions. Fed. R. App. P. 41(d)(2)(A). Golden Week has played an exceptional role in promoting voter turnout in the past two Presidential elections in Ohio. Over 60,000 Ohioans voted during Golden Week in the 2008 Presidential election, and over 80,000 of them did so during Golden Week in the 2012 Presidential election. Op., R. 117, PageID# 6157-58, 6161-62. A disproportionate percentage of these voters who benefit from Golden Week are minorities. *Id.*, PageID# 6157-60, 6163-64. Ohio has not held a Presidential election without a Golden Week since the disastrous experience in 2004. 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." Order, ECF No. 125 at 9 (Jun. 9, 2016). The State could have asked this Court at any time since early June to stay the implementation of Golden Week for the 2016 general election pending appeal, 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. Plaintiffs-appellees and the public interest at large will be irreparably injured if this decision is allowed to go into effect pending Supreme Court review, 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 the Supreme Court.

ARGUMENT

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

Before examining the several certworthy issues arising out of this Court's decision, we begin by suggesting, with respect, that a majority of the Supreme Court will not agree with the premise expressed in the opening paragraph of this Court's opinion (and reiterated throughout): that federal courts should be skeptical about "becom[ing] entangled, as overseers and micromanagers, in the minutiae of state election processes." Op. 2. To the contrary, 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 regulatory details 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"). Ensuring that state election processes do not deny or abridge the fundamental right to vote is what federal courts are *supposed* to do.

And as for "defin[ing] spheres of government, state and federal, and their responsibilities for protecting the rights of the people," Op. 1, the controlling definitions are in the Fourteenth and Fifteenth Amendments to the Federal Constitution and Section 2 of the VRA. These sources of federal law *require* federal courts to become "entangled" in state election processes—not as "overseers and micromanagers," but as enforcers of the "supreme Law of the Land." U.S. Const. art. VI, § 2, and of fundamental rights.

A. This Court's Misapplication of the Clear-Error Standard of Review Conflicts With Decisions of the Supreme Court and Other Courts of Appeals

This Court 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* Op. 10, rather than under the clear error standard dictated by Supreme Court precedent. In *Gingles* itself, the Supreme Court reaffirmed that clear-error review applies to "appellate review of a finding of vote dilution." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). 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 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).

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 N.C. State Conf. of NAACP*

v. McCrory, No. 16-1468, 2016 WL 4053033, at *8-*9, *18 (4th Cir. Jul. 29, 2016); *Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868, at *5 (5th Cir. Jul. 20, 2016) (en banc).[2] This Court's failure to apply the clear-error standard of review squarely conflicts with the decisions of the Supreme Court and these other Circuits.[3]

This Court'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* Op. 10-13, the Court 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. Op., R. 117, PageID# 6145. And that was *before* SB 238 eliminated Golden Week.

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[2] *See also League of Women Voters of N.C. v. N. C.*, 769 F.3d 224, 252 (4th Cir. 2014) ("*LWV*"); *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); *Pullman-Standard v. Swint*, 456 U.S. 273, 290–93 (1982).

[3] Indeed, the Court's failure to apply clear-error review conflicts with other decisions by this Circuit in voting rights cases. *See, e.g., Mich. State A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 2016 WL 4376429, at *4–*5 (6th Cir. Aug. 17, 2016); *Obama for America v. Husted*, 697 F.3d 423, 431–32 (6th Cir. 2012) ("*OFA*"); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593–95 (6th Cir. 2012).

The Court also erred in giving significant weight to how Ohio's early voting system compares to those of other states. *Compare* Op. 11-12, *with Stewart v. Blackwell*, 444 F.3d 843, 878 (6th Cir. 2006) ("[C]laims under the Voting Rights Act require 'an intensely local appraisal of the design and impact' of the challenged electoral practice." (quoting *Gingles*, 478 U.S. at 78)), *vacated* (July 21, 2006), *superseded*, 473 F.3d 692 (6th Cir. 2007). 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 10 hours. *See* Plaintiff-Appellee's Brief, ECF. No. 46 at 6-7 ("Pls.' Br.") Moreover, early voting is much less accessible in Ohio than in other states, as Ohio limits early voting to one location per county. *Id.* at 28-29.

This Court 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." Op. 9. 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* case, and the results of the 2014 election; and it found that none of these considerations ameliorated the burdens imposed by SB 238. Op., R. 117, PageID#6164-70. To the extent this Court's decision suggests

that the district court should only have considered Ohio's election regime as a whole, *see* Op. 12 ("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 Court 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." Op. 13 (internal quotation marks omitted). As the dissent points out, "[t]his is based on surmise, not record evidence." Op. 35. 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. Op., R. 117, Page ID#6223-29; *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 Court'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, *see* Pls.' Br. 9-14, 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.[4]

B. This Court's Application of the Rational Basis Standard of Review to the *Anderson-Burdick* Balancing Inquiry Conflicts With Decisions of the Supreme Court and Other Courts of Appeals

This Court erred in applying rational-basis review to the State's asserted justifications for eliminating Golden Week. Op. 15-16.[5] The Supreme Court has emphasized that courts must not "apply[] any 'litmus test' that would neatly separate valid from invalid restrictions" and instead must "make the 'hard

[4] The Court also erred in writing that "the Secretary of State mailed absentee ballot applications to almost every registered voter in the state in the past two elections and plans to do so in the 2016 election." Op. 13. In fact, the Secretary's mailing is not sent to over one million registered Ohio voters. PageID# 9876-9879.

[5] The Court also erred in accepting certain of the State's asserted justifications as a "legislative fact." Op. 15-16. There are no formal legislative findings regarding SB 238, and the rationales supplied by the State's lawyers plainly are not "legislative facts." *See generally Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016), as revised (June 27, 2016). ("Unlike in *Gonzales*, the relevant statute here does not set forth any legislative findings").

judgment' that our adversary system demands," *Crawford*, 553 U.S. at 190 (controlling op.); *accord OFA*, 697 F.3d at 429; *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, the Supreme 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 v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), as revised (June 27, 2016). The Fifth Circuit had reasoned that "medical uncertainty underlying a statute is for resolution by legislatures, not the courts." *Id.* The Supreme 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 this Court reversed the district court for doing precisely that.

C. This Court's Section 2 Framework of Analysis Conflicts With Decisions of the Supreme Court and Other Courts of Appeals

This Court made several errors in analyzing Plaintiffs-Appellees' claims under Section 2. First, this Court has 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 *Ohio St. Conf. of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) ("*NAACP II*"), and the decisions of several other Circuits. Following the Seventh Circuit's much-criticized decision in *Frank v. Walker*, this Court held 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." Op. 23 (citing *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014)).

However, as the dissent explained, "[t]his extra requirement is unnecessary." Op. 40 (Stranch, J., dissenting). "As the text of Section 2 states, 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*.

For this reason, other Circuits have expressly rejected the Section 2 framework adopted in this Court's opinion and instead adopted the elements as outlined by another Sixth Circuit panel in *NAACP II*, 768 F.3d at 554. *See Veasey* , 2016 WL 3923868, at *17 (adopting *NAACP II*'s two-part analysis in which the first inquiry asks whether the "challenged standard, practice, or procedure … impose[s] 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"); *LWV*, 769 F.3d at 240 (using almost identical language to describe an impermissible burden on the right to vote). 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 Court also erred in focusing on overall voting participation rates between African Americans and whites in 2014 after the elimination of Golden Week. *See* Op. 26. This misses the point of the Section 2 analysis, and has been

rejected by other courts: "[W]e decline to require a showing of lower turnout to prove a Section 2 violation. 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." *Veasey*, 2016 WL 3923868, at *29.

Here, the district court found, based on ample record evidence, that, due to the ongoing effects of racial discrimination, African Americans disproportionately rely on Golden Week. Op., R. 117, PageID# 6158-60. 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*, 769 F.3d at 241–42. The Court 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.*, Op. R. 177, PageID# 6160), by instead focusing on its mistaken belief that the burden was "a matter of choice rather than a state-created obstacle." Op. 13. For the reasons explained above, this reading imports into Section 2's step 1 "disparate impact" analysis an unjustified

causation element and obscures the operative question—whether minorities are disproportionately affected by the law. *See* pp. 11-12 *supra.*

Finally, to the extent this Court's opinion suggests the *Gingles* factors do not apply to vote-denial claims, or that factors such as Senate factor 5 that address the ongoing effects of private discrimination do not apply because the background circumstances must be state-created to be considered as part of the Section 2 analysis, this too is in direct conflict with other courts of appeals. *See* Op. 38 (Stranch, J., dissenting); *Veasey*, 2016 WL 3923868, at *18; *LWV*, 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). Thus, this Court's rejection of the test set forth in *NAACP II* now puts it in direct conflict with the Section 2 jurisprudence of several other Circuits.

II. There Is Good Cause For a Stay of the Mandate and Reinstatement of Golden Week Pending Supreme Court Consideration

There also is "good cause for a stay" of this Court's decision upholding the State's elimination of Golden Week pending the filing and final disposition of a petition for a writ of certiorari. Fed. R. App. P. 41(d)(2)(A). 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 this Court in June or July.

A. The Harms to Plaintiffs-Appellees and the Public Interest

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* Op., R. 117, PageID# 6144-45; *id.* PageID# 6156 ("manifold problems experienced during the 2004 election"); *NAACP II*, 768 F.3d. at 530-31. More than 60,000 people voted during Golden Week in 2008, and more than 80,000 relied on it in 2012. *Id*., PageID# 6157-58. Almost 13,000 voters took advantage of same-day registration in 2008 and more than 14,000 did so in 2012. *Id*., PageID#6161-62. African Americans have used Golden Week at far higher rates than other voters. *Id*., PageID# 6158-60.

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*., PageID# 6160. These kinds of burdens constitute irreparable injury *per se*.[6]

[6] "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, 412 (6th Cir. 2014) ("With regard to the factor of

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.[7] 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

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irreparable injury, for example, it is well-settled that loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quotation omitted).

[7] *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.

the advent of a 35-day Golden Week beginning October 4th.[8] Voters, 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.

Implementing this Court'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. The Supreme Court repeatedly has stayed decisions altering the administration of elections this close to the start of voting.[9]

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[8] *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. 4-11, 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 Aug. 27, 2016.

[9] *See*, *e.g.*, *Veasey v. Perry*, 135 S. Ct. 9 (Oct. 18, 2014) (no injunction against voter ID law 25 days before upcoming election); *Frank v. Walker*, 135 S. Ct. 7 (Oct. 9, 2014) (no reinstatement of voter ID law 53 days before upcoming

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 of the mandate 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. Op., R. 117, PageID# 6171 (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

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election); *N. Carolina v. League of Women Voters of N. Carolina,* 135 S. Ct. 6 (Oct. 8, 2014) (no restoration of same-day registration and out-of-precinct voting 34 days before upcoming election); *Husted v. Ohio St. Conf. of NAACP*, 135 S. Ct. 42 (Sept. 29, 2014) (no restoration of additional early in-person voting 28 days prior to the scheduled commencement of early voting).

[10] If anything, the elimination of Golden Week will make fraud easier. As explained in prior briefing, 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* Pls.' Br. 51-52; *see also* Op., R. 117, PageID# 6173-74.

day, or for that matter than someone who voted very close to the election." *NAACP II*, 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." Op., R. 117, PageID# 6174-75. 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." Op., R. 117, PageID# 6176; *see also NAACP II*, 768 F.3d at 549. Indeed, Golden Week has made election administration *easier* because it "(1) provide[s] boards more time to mail out and process absentee ballots, and (2) relieve[s] pressure on the polls on Election Day." Op., R. 117, PageID# 6177 n.18.

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 this Court's mandate is not stayed pending Supreme Court consideration.

CONCLUSION

For the foregoing reasons, this Court should stay its mandate 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,

DATED: August 27, 2016

PERKINS COIE LLP

By: /s/ *Rhett P. Martin*

Marc E. Elias
Bruce V. Spiva
Elisabeth C. Frost
Rhett P. Martin
Amanda R. Callais
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: 202.654.6200
Facsimile: 202.654.6211

Joshua L. Kaul
1 East Main Street, Suite 201
Madison, WI 53705
Telephone: 608.294.4007
Facsimile: 608.663.7499

Donald J. McTigue
J. Corey Colombo
Derek S. Clinger
McTigue & Colombo LLC
545 East Town Street
Columbus, OH 43215
Telephone: 614.263.7000
Facsimile: 614.263.7078

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August 2016, a copy of this brief was served through the Court's electronic filing system. Electronic service was therefore made upon all counsel of record on the same day.

/s/ Rhett P. Martin
RHETT P. MARTIN