Nos. 16-3603, 16-3691

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE NORTHEAST OHIO COALITION FOR THE HOMELESS, et al.,

Plaintiffs-Appellees,

v.

JON HUSTED,
in his Official Capacity as Secretary of State of the State of Ohio, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Ohio (Eastern Division)
District Court Case No. 2:06-cv-896

BRIEF OF THE BUCKEYE INSTITUTE AND THE JUDICIAL EDUCATION PROJECT AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for *amici curiae* certifies that the Buckeye Institute and the Judicial Education Project have no parent corporation, and that no publicly held corporation holds 10% or more of their stock.

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RULE 29 STATEMENT

The Buckeye Institute was founded in 1989 as an independent research and educational institution — a think tank — to formulate and promote solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, including electoral reform; compiling and synthesizing data; formulating policies; and marketing those public policy solutions for implementation in Ohio and replication across the country.

The Judicial Education Project ("JEP") is a non-profit organization dedicated to strengthening liberty and justice by defending the Constitution as envisioned by its Framers, which creates a federal government of defined and limited power, is dedicated to the rule of law, and is supported by a fair and impartial judiciary.

Amici support the Defendants-Appellants in this matter and urge reversal of the decision below. No party or party's counsel authored the brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

Because Plaintiffs-Appellees have refused to grant consent, this brief is accompanied by a motion for leave to file in accordance with Fed. R. App. P. 29(a).

INTRODUCTION

Section 2 of the Voting Rights Act prohibits states from "impos[ing]" any voting practice that "results in a denial or abridgment of the right . . . to vote on account of race or color," which occurs when the electoral system is "not equally open to participation" by racial minorities because they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(a)-(b). Thus, under the plain text, a Section 2 violation occurs only if a practice "imposed" by the "State or political subdivision" "results" in a system that is not "equally open" because the challenged practice causes minorities to have "less opportunity" than others to "participate in the political process."

Under the "results" test, Section 2 contemplates two types of claims: a "vote-denial" claim, which alleges denial of equal opportunity to "*participate* in the political process" by casting ballots; and a "vote-dilution" claim, which alleges that a districting practice denies minorities an equal opportunity "to *elect* representatives of their choice." In a vote-denial case like this one, the difficulty of showing a discriminatory denial of voter "opportunity" depends on the nature of the law being challenged. With a law "establish[ing] *qualifications*" to vote—*i.e.*, "*who* may vote" in elections—the showing is relatively easy to make. *Arizona v. Inter-Tribal Council of Ariz., Inc.,* 133 S. Ct. 2247, 2257 (2013) (first emphasis

added). A voting qualification by definition "den[ies]" unqualified people the "opportunity" to vote. By contrast, it is far more difficult to challenge a law that merely "regulate[s] *how* . . . elections are held" by setting forth the time, place, and manner of voting. *Id.* Such ordinary, race-neutral regulations do not "deny or abridge" anyone's *opportunity* to vote; they merely regulate when, where, and how that opportunity must be exercised.

In the decision below, the district court adopted a radically different theory. The court held that even though Ohio has greatly expanded voter opportunity beyond the traditional baseline by adopting provisional and no-excuse-absentee balloting, the State nonetheless violates Section 2 because it could modify those procedures to enhance minority voting convenience *even further*. In other words, the court held that Section 2 not only prohibits the State from "impos[ing]" a discriminatory "result[]" on voter opportunity, but requires the State to rearrange its race-neutral voting laws and take affirmative steps not only to *enhance*, but to *maximize* minority voting. In particular, the court concluded that under Section 2, Ohio must (1) allow poll-workers to provide *unsolicited* assistance to voters in filling out absentee and provisional ballots, instead of helping only those who ask; (2) allow a period of 10 days instead of 7 days to "cure" deficient absentee and provisional ballots; and (3) allow voters to cast absentee and provisional ballots without accurately providing their address and some form of non-photo ID—which

is among the *least* restrictive identification requirements in the country. According to the district court, Ohio must adopt these alternative procedures because they would do *even more* to ameliorate underlying socio-economic inequalities that purportedly make voting less convenient for minorities.

In reaching this stunning result, the district court disregarded Section 2's most basic threshold requirements—that plaintiffs must rely on an *objective* benchmark to show a meaningful disparity in voter "*opportunity*," which is *proximately caused* by (i.e., "results" from) a challenged voting practice. Contrary to the court's holding, Section 2 does not condemn voting practices merely because they "result" in disparate outcomes. Instead, Section 2 condemns only those practices that "result" in minorities having "*less opportunity*" because the voting process is not "*equally open*" to them. This is clear from Section 2's plain language, as well as Supreme Court precedent identifying the sort of discriminatory "results" that the law proscribes.

First, ordinary race-neutral voting regulations do not "*deny or abridge*" anyone's right to vote as long as they impose nothing more than the "usual burdens of voting." *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (Stevens, J.). If minorities are free to vote subject only to the usual burdens of voting imposed on everyone, then state law gives them a full and fair "opportunity" to vote, and they cannot possibly claim that the law gives them any *less*

opportunity than others. Thus, at the threshold, plaintiffs bringing this sort of Section 2 "results" claim must establish that the challenged practice exceeds the ordinary burdens of voting in a way that diminishes minority voting opportunity, and gives them "less opportunity" than others to cast a ballot.

By ignoring this threshold requirement, the district court interpreted Section 2 in a way that would "swee[p] away almost all registration and voting rules." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). Under the court's holding, plaintiffs could eliminate virtually *any* voting requirement and require affirmative state assistance based on the finding that it is more difficult for racial minorities to vote because they "are less likely to own a car or have access to child care, more likely to be employed in hourly-wage, inflexible jobs," "more likely to suffer health problems," "move more frequently than whites," and "have lower levels of educational attainment than whites," which is "correlated" to "low literacy." Op. 104-05. Plaintiffs could even insist that state election officials go door-to-door filling out and collecting ballots, based on the finding that, unless minorities receive affirmative "assistance," they "face disproportionately more challenges filling out the forms" required to vote. *Id.* at 105. Section 2 has never been interpreted in such a radical manner, which would imperil every ordinary voting law.

Second, the district court compounded its error by ignoring yet another fundamental limitation: As the Supreme Court has long recognized, Section 2 applies only to disparate effects that "result" from *state voting practices*, and thus the law "only protect[s] racial minority vote[r]s" from exclusionary effects that are "proximately caused by" the challenged practice. *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). This vindicates the principle that "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination." *Frank*, 768 F.3d at 753, 755. In short, Section 2 requires states to avoid *imposing* disparate burdens. It does not require affirmative action to ameliorate underlying socio-economic disparities that might make minority voters less equipped to navigate the "usual burdens of voting." *Crawford*, 553 U.S. at 198. The district court disagreed, and instead held that the State has an affirmative duty to ameliorate underlying socio-economic "inequalities, rooted in historical discrimination against African-Americans," which "combine to create an inequality in their opportunities to participate in the political process." Op. 105. Accepting that holding would fundamentally transform the Voting Rights Act into a sweeping affirmative-action statute.

Third, the district court further erred by ignoring the requirement for plaintiffs to identify an "*objective*" "benchmark" of voter opportunity to measure their Section 2 claim. As the Supreme Court has explained, courts cannot find an

"abridgement" of the right to vote simply by comparing a challenged practice to a hypothetical alternative that would better *enhance* or *maximize* minority voter participation. *Holder v. Hall*, 512 U.S. 874, 881 (1994) (Kennedy, J.). Otherwise, plaintiffs could obliterate virtually any voting practice by comparing it to a hypothetical alternative that would better enhance voter convenience by ameliorating socio-economic disparities among racial groups. Moreover, unlike Section 5, Section 2 does not impose an "anti-retrogression" requirement that measures a challenged law against the prior status quo. But here, the district court ignored this basic rule and invalidated the challenged voting practices based on a forbidden combination of minority-maximizing alternatives and comparison to Ohio's "past voting practices." Op. 97 n.21.

Fourth, and finally, if the district court's boundless interpretation were adopted, it would render Section 2 unconstitutional. By jettisoning the three limitations discussed above, the district court's reading not only prohibits states from *causing* racial disparities in voter opportunity, but requires states to rearrange their laws to take affirmative measures to *assist* minority voters and *enhance* minority participation to the maximum possible extent. That would exceed Congress's power to enforce the Fifteenth Amendment's prohibition against intentional discrimination. Indeed, requiring States to alter their race-neutral election laws to enhance the voting prospects of particular racial groups would

itself be a form of intentional discrimination. So interpreted, Section 2 would plainly violate the Equal Protection Clause, even if motivated by the "benign" intent to overcome underlying socio-economic disparities among the races.

ARGUMENT

I. THE COURT BELOW MISINTERPRETED THE "RESULTS" TEST OF SECTION 2

Congress enacted Section 2 pursuant to its power to enforce the Fifteenth Amendment. Originally, Section 2 prohibited States from "impos[ing] or appl[ying]" any voting practice "to den[y] or abridge[] . . . the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a). Because that language parallels the Fifteenth Amendment, which prohibits only "purposeful" discrimination, the Supreme Court concluded that Section 2 likewise prohibited only purposeful discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality op.). In 1982, however, Congress revised the law to make a showing of purposeful discrimination unnecessary. It amended what is now subsection (a) to prohibit States from imposing or applying voting practices "in a manner which *results* in a denial or abridgment of the right . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphasis added).

Accordingly, the new Section 2 "results" test does not require a showing of intentional discrimination. Rather, regardless of motivation, the law forbids the State from "impos[ing]" a voting practice that causes ("results in") the "political

processes" to not be "equally open to participation" by minority voters because they have "less opportunity" than others to participate. *Id.* § 10301(a)-(b). Under this "results" test, the question is not whether minorities *proportionally participate* in voting, but whether the state procedures are "equally open" to them. The question is not whether minorities proportionally *avail themselves* of the equal opportunity to vote, but whether state law gives them "*less* opportunity" to vote.

A. Plaintiffs Must Show That The Challenged Laws Result In "Less Opportunity" For Minority Voters

As the Supreme Court has explained, "the ultimate right of § 2 is equality of *opportunity*." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) (emphasis added). It does not require proportional representation, or "electoral advantage" or "maximiz[ation]" for minority groups. *Bartlett v. Strickland*, 556 U.S. 1, 20, 23 (2009). The opportunity to vote does not become unequal merely because minorities "are less likely to *use* that opportunity," whether it be due to a lack of interest, socio-economic conditions, or any other reason. *Frank*, 768 F.3d at 753.

By prohibiting the state-imposed denial of equal "opportunity," Section 2(b) implements the prohibition contained in Section 2(a), which prohibits practices that "result[] in a *denial or abridgment of the right . . . to vote* on account of race or color." 52 U.S.C. § 10301(a) (emphases added). The plain language of these subsections, particularly when read together, makes clear that Section 2 does not

prohibit ordinary, race-neutral regulations of the time, place, and manner of voting, because such regulations do not "deny or abridge" anyone's right to vote. "Election laws will invariably impose some burden upon individual voters," because the State must determine when and where voting must occur, how voters must establish their identity, what kind of ballots they must use, and so on. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Shouldering these "usual burdens of voting" is an inherent part of voting. *Crawford*, 553 U.S. at 198. And because such baseline requirements are an inherent *part of* the right to vote, they cannot be said to *abridge* the right to vote.

As detailed below, the concept of "abridgement" inherently requires asking the question, "abridge compared to what?" *See infra* pp. 15-19. Section 2(b) explicitly answers that question by stating that the relevant comparison is to the opportunity afforded non-minorities. Section 2 is violated only if minorities have "less opportunity" than others to vote because the system is not "equally open" to them. If minorities have a full and fair opportunity vote subject only to the ordinary burdens of voting that apply to everyone, then they cannot claim to have any *less* opportunity than anyone else. Their right to vote is not "abridged" merely because they do not *use* the equally open voting process to the same extent as others, or because the voting system provides less than the *maximum feasible* opportunity.

Section 2(b) therefore confirms that "a showing of disproportionate racial impact alone does not establish a *per se* violation" of Section 2. *Wesley v. Collins*, 791 F.2d 1255, 1260 (6th Cir. 1986). Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities." *Frank*, 768 F.3d at 753. For example, the fact that an ordinary requirement such as voter registration makes voting less convenient and might even lower minority turnout does not make registration requirements subject to attack under Section 2. A race-neutral law cannot "abridge" minorities' right to vote unless it imposes a *disparate* burden beyond the *ordinary* burdens of voting.

The legislative history confirms that Congress meant what it said. "It is well documented" that the 1982 amendments were the product of "compromise." *Holder*, 512 U.S. at 933 (Thomas, J., concurring); *e.g.*, *id.* at 956 (Ginsburg, J., dissenting); *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring). The original version of the 1982 amendments proposed by the House of Representatives would have prohibited "all discriminatory 'effects' of voting practices," but "[t]his version met stiff resistance in the Senate," which worried that it would "lead to requirements that minorities have proportional representation, or . . . devolve into essentially standardless and ad hoc judgments." *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1010 (1984) (Rehnquist, J., dissenting) (citing H.R. Rep. No. 97-227, at 29 (1981)). Senator Dole proposed a compromise. *See Gingles*,

478 U.S. at 96 (O'Connor, J., concurring in the judgment). He assured his colleagues that, as amended, Section 2 would "[a]bsolutely not" allow challenges to a jurisdiction's voting mechanisms "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting . . . , or registering . . . ." 128 Cong. Rec. 14133 (1982). This confirms that Section 2 applies only where the State denies "equal *access*" by "throw[ing] up" barriers beyond the usual, uniform burdens of voting.

Equally significant is what the legislative history does *not* say. Under the decision below, Section 2 would outlaw ordinary voting procedures, and require states to provide affirmative voter assistance, whenever plaintiffs can hypothesize an alternative that would *enhance* or *maximize* minority voting prospects. Yet nowhere in Section 2's legislative history is there any hint that Section 2 would have this radical effect. "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991).

In sum, the district court's interpretation fundamentally rewrites Section 2. It revamps a law about disparate *denial* of voter opportunity into a law assuring proportional *utilization* of voter opportunity. It converts a prohibition on *abridging* minorities' right to vote into a mandate for *boosting* minority participation. It replaces a ban on *state-imposed barriers* to minority voting with an affirmative

duty of *state facilitation* of minority voting. And it transforms a guarantee of equal *access* into a guarantee of equal *outcomes*.

B. Plaintiffs Must Show That Any Disparity in Voter Opportunity Is Proximately Caused By The Challenged Law

To violate Section 2, a voting practice must proximately cause racial inequality. Section 2 applies only if a voting practice "*imposed* . . . by [the] *State*" "*results in* a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a) (emphases added). Thus, if the alleged "abridgement" "results" from something *other* than the *state-imposed practice*, Section 2 does not reach it. Section 2 prohibits states from *imposing* racial inequalities in voting, but does not require affirmative action to ameliorate underlying socio-economic disparities to *enhance* minority voting prospects.

In *Gingles*, Justice Brennan's majority opinion emphasized that Section 2 "only protect[s] racial minority vote[r]s" from denials or abridgements that are "proximately caused by" the challenged voting practice. 478 U.S. at 50 n.17. Applying this basic rule in the vote-dilution context, *Gingles* held that plaintiffs were required to show, as a "necessary precondition[]," that the disparate exclusion of minority candidates from office was caused by the state's multi-member districting practice, and was not attributable to the absence of a minority community "sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* Absent that showing, the state-imposed "*multi-*

member form of the district cannot be responsible for minority voters' inability to elect its [sic] candidates." *Id*. And if the *voting procedure* "cannot be blamed" for the alleged dilution, there is no cognizable Section 2 problem because the "results" standard does "*not assure racial minorities proportional representation*" but only protection against "diminution proximately caused by the districting plan." *Id.* at 50 n.17.

Thus, in the vote-*denial* context, *Gingles* requires plaintiffs to show, as a necessary "precondition," that an alleged deprivation is proximately caused by a *state-imposed* voting practice rather than underlying socio-economic factors such as minorities' being disproportionately "employed in hourly-wage, inflexible jobs." Op. 104. The Supreme Court recently reaffirmed this causation requirement in a related context, emphasizing that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies *causing* that disparity." *Tex. Dep't of Hous. & Cmty. Aff. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (emphasis added). Without the "safeguard[]" of a causation requirement "at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and would almost inexorably lead governmental or private entities to use numerical quotas, and serious constitutional questions then could arise." *Id*.

This Court applied Section 2's proximate-cause requirement in *Wesley*, 791 F.2d at 1262, which upheld Tennessee's felon-disenfranchisement law because "the disproportionate impact suffered by black Tennesseans d[id] not 'result' from the state's qualification," but rather resulted from other factors that the state did not cause. Other circuits have recognized the same point. For example, the Ninth Circuit recently explained that "a § 2 challenge based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification *causes* that disparity, will be rejected." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (emphasis added) (citation omitted), *aff'd sub nom. Arizona v. Inter Tribal Council of Az., Inc.*, 133 S. Ct. 2247 (2013). Similarly, the Fourth Circuit rejected a Section 2 challenge against Virginia's decision to choose school-board members by appointment rather than election because, although there was a "significant disparity . . . between the percentage of blacks in the population and the racial composition of the school boards," there was "no proof that the appointive process caused the disparity." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358 (4th Cir. 1989).

Because Section 2 reaches only racial disparities caused by the challenged *voting practice*—not even other *governmental* discrimination—it plainly does not reach disparities attributable to *private*, *societal* discrimination. Since "units of government are responsible for their own discrimination but not for rectifying the

effects of other persons' discrimination," courts must "distinguish discrimination by the defendants from other persons' discrimination." *Frank*, 768 F.3d at 753, 755. Of course, Section 2 contemplates that a challenged practice may "*interact*[] with social and historical conditions to *cause* an inequality," *Gingles*, 478 U.S. at 47 (emphases added). But to violate Section 2, the challenged practice must be the *proximate* "cause" of the inequality. It is not enough for a challenger to rely on socio-economic inequalities that *generally* affect voting participation.

C. Plaintiffs Must Show That The Challenged Laws Harm Minority Voters Relative to an Objective Benchmark

Section 2 requires an "objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice." *Holder*, 512 U.S. at 881 (Kennedy, J.). This requirement of an "objective" benchmark follows from Section 2(a)'s text, which prohibits practices that result in the discriminatory "denial or abridgement" of voting rights. The concept of "abridgement" "necessarily entails a comparison." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (*Bossier II*). "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* In Section 2 cases, "the comparison must be made with . . . what the right to vote *ought to be*." *Id.*; *see Holder*, 512 U.S. at 880-81 (Kennedy, J.). The benchmark must be "objective"; it cannot be purportedly superior only because it enhances minority voting prospects. *Id*. And for some voting practices,

there is "no objective and workable standard for choosing a reasonable benchmark by which to evaluate [the] challenged voting practice," and thus "the voting practice cannot be challenged . . . under § 2." *Id.* at 881.

In *Holder*, the Supreme Court rejected a Section 2 challenge asserting that using a single-member instead of a five-member commission "resulted" in vote dilution. Although the five-member alternative clearly would enhance minority voting strength, there was "no principled reason" why this alternative was the proper "benchmark for comparison" as opposed to a "3-, 10-, or 15-member body." *Id*. That was true even though over *90 percent* of commissions in the state had five members. *Id*. at 876-77. *Holder* thus establishes that Section 2 plaintiffs must rely on an "objective" benchmark of voter opportunity, and cannot merely rely on alternatives that would *enhance* minority voting opportunity.

Here, the district court ignored the objective-benchmark requirement and held that Ohio's voting laws violate Section 2 because they compare unfavorably to alternatives that would better enhance minority voting convenience. For example, the court held that Section 2 requires Ohio to provide 10 days instead of 7 days to cure "deficient ballots," ignoring the obvious problem that there is no objective benchmark for how many days a state *should* provide. The court reasoned that 10 days is better than 7 because a longer "cure" period better ameliorates socio-economic disparities and enhances minority voting convenience.

But by the same logic, 13 days would be better than 10, and 16 better than 13. "The wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J., concurring in part). Without any objective benchmark to determine whether minorities' right to vote has been "abridged," there is no stopping point short of requiring every state to *maximize* voter convenience in every possible respect. The district court's line of reasoning is thus flatly contrary to Supreme Court precedent, which holds that "[f]ailure to maximize cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994).

The district court also found that Ohio's current voting laws are worse for minorities *relative to the State's prior laws*, thus assuming the proper benchmark to be the prior status quo. But that approach wrongly conflates Section 2 with Section 5 of the Voting Rights Act. Section 5 proceedings "uniquely deal only and specifically with *changes* in voting procedures," so the appropriate baseline of comparison "is the status quo that is proposed to be changed." *Bossier II*, 528 U.S. at 334. Section 2 proceedings, by contrast, involve challenges "not only [to] changes" in voting laws, "but (much more commonly) [to] the status quo itself." *Id.* Because "retrogression"—*i.e.*, whether a change makes minorities worse off—"is not the inquiry [under] § 2," the fact that a state *used to have* a particular practice in place does not make it the benchmark for a § 2 challenge. *Holder*, 512

U.S. at 884 (Kennedy, J.). Whether plaintiffs are challenging a change in law or the status quo, the relevant question under Section 2 is whether the State's current voting laws create an *existing* inequality of voter opportunity compared to what would exist under an objective benchmark of "what the right to vote *ought to be*." *Bossier II*, 528 U.S. at 334 (emphasis in original).

To be sure, the district court purported to be relying on an objective benchmark by "simply" comparing "the ability of other groups of voters to participate in the political process compared to African-Americans' ability to do so." Op. 96. But while this snippet of the opinion nominally focuses on the correct comparison—minority opportunity relative to non-minority opportunity—the court plainly did not ever make this comparison in any intelligible way. The challenged laws indisputably provide minority voters with the same "ability" to vote as others, and the district court never made any findings suggesting otherwise. It did not deny that Ohio's neutral laws provide minorities precisely the same "opportunity" as others or, indeed, that minority voters *proportionately use* those equal opportunities. *See* State Br. 49 (minority voter turnout undisputedly equal to or greater than white turnout in recent elections). Rather, as detailed below, the sum total of the district court's criticism was that current Ohio law gives minorities less opportunity or ability to vote "compared to" plaintiffs' preferred maximizing alternatives, including the alternatives that the Ohio legislature previously enacted.

As noted, such minority-maximization and anti-retrogression principles are not proper Section 2 benchmarks under Supreme Court precedent.

D. The District Court's Interpretation of Section 2 Would Violate the Constitution

The Supreme Court has never "addresse[d] the question whether § 2 . . . is consistent with the requirements of the United States Constitution." *Chisom*, 501 U.S. at 418 (Kennedy, J., dissenting); *De Grandy*, 512 U.S. at 1028-29 (1994) (Kennedy, J., concurring in the judgment) (same). And indeed, the district court's boundless interpretation would render it unconstitutional.

1. Congress enacted Section 2 to enforce the Fifteenth Amendment, which prohibits "purposeful discrimination," but does not prohibit laws that "resul[t] in a racially disproportionate impact." *City of Mobile*, 446 U.S. at 63, 70 (quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977)). Although Congress may use its enforcement power to proscribe certain discriminatory "results," it may only do so as a "congruen[t] and proportional[] . . . means" to "remedy or prevent" the unconstitutional "injury" of intentional discrimination. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). The enforcement power does not allow Congress to "alter[] the meaning" of the Fifteenth Amendment. *Id*. at 519. Accordingly, to stay within constitutional bounds, the "results" test must be "limited to those cases in which constitutional

violations [are] most likely." *Id.* at 533. It cannot be a freestanding ban on ordinary voting laws that have a racially disparate impact.

Properly interpreted, the "results" test is legitimate enforcement legislation because it prohibits only substantially burdensome voting practices that depart from an "*objective* benchmark" and proximately cause minorities to have "*less opportunity*" to vote than non-minorities. If such practices "remain unexplained," "one can infer . . . that it is more likely than not that [they] [a]re [purposefully] discriminatory." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978).

In the vote-dilution context, the Supreme Court has carefully limited the "results" test to apply only where there is a strong inference of discriminatory purpose. The first *Gingles* "pre-condition" requires a showing that minority voters could naturally constitute a "geographically compact" majority under "traditional districting principles" *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *see LULAC*, 548 U.S. at 433. Because districts *normally* encompass "geographically compact" groups, failure to draw such a district for a *minority* community creates a plausible inference of intentional discrimination. Conversely, Section 2 does not require States to engage in *preferential* treatment by *deviating* from traditional districting principles in order to *create* majority-minority districts. *LULAC*, 548 U.S. at 434. The same must hold true in the vote-denial context: Section 2 cannot be

interpreted to require departure from ordinary race-neutral election laws in order to *enhance* minority voting participation.

2. Interpreting Section 2 to require states to boost minority voting participation also would violate the Constitution's equal-treatment guarantee. Subordinating "traditional race-neutral districting principles" to enhance minority voting strength violates the Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (citation omitted). Section 2 thus cannot displace ordinary race-neutral voting practices for the "predominant" purpose of maximizing minority voter convenience. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This is especially true because, under the district court's interpretation, any ordinary voting law that is less convenient for minority voters constitutes a discriminatory "result," and Section 2's text flatly prohibits all such "results," *regardless* of the State's justification. The district court's interpretation would thus prioritize race above all else, banning even the most strongly justified electoral procedures unless all racial groups find it equally convenient to comply. *Cf. Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

Moreover, requiring states to adjust race-neutral voting laws to compensate for underlying social inequalities would violate the constitutional requirement that race-based remedial action must be justified by "some showing of prior discrimination by the *governmental unit* involved." *Wygant v. Jackson Bd. of*

Educ., 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added). "[R]emedying past societal discrimination does not justify race-conscious government action." *Parents Involved v. Seattle*, 551 U.S. 701, 731 (2007). But the district court's interpretation would require just that.

3. Because the district court's sweeping interpretation raises such serious constitutional questions, it must be rejected if "fairly possible." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (citation omitted). That is particularly true because the Constitution expressly grants the states the power to establish the time, place and manner of holding elections (and enforce voter qualifications). *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2259. Because the district court's reading of the law would dramatically intrude on this realm and rearrange "the usual constitutional balance of federal and state powers," it must be rejected unless Congress's intent to achieve this result is "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). Congress did not remotely provide any clear indication that it meant Section 2 to sweep as broadly as the decision below.

II. SIXTH CIRCUIT PRECEDENT DOES NOT SUPPORT THE DISTRICT COURT'S INTERPRETATION

To support its sweeping interpretation, the district court engaged in reasoning that closely paralleled *Ohio State Conference of NAACP. v. Husted*, 768 F.3d 524 (6th Cir. 2014), which affirmed a preliminary injunction under Section 2

against some of Ohio's other voting practices. The Supreme Court, however, promptly stayed that injunction, 135 S. Ct. 42 (2014) (mem.), and this Court subsequently vacated the panel opinion, *see* Order, *NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). That stay and vacatur eliminate any persuasive force that the *NAACP v. Husted* decision otherwise might have had, because the Supreme Court's stay indicates "a fair prospect that a majority of the Court w[ould] vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Thus, because the grant of a stay reflects a judgment that a majority of the Justices likely "would . . . set the order aside," *I.N.S. v. Legalization Assistance Project of L.A. Cty. Fed'n Labor*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers), it indicates that the Supreme Court disagrees with the reasoning of the *NAACP* panel.

In any event, even the *NAACP* panel recognized that the first threshold "element[]" of a vote-denial claim is that "the 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." 768 F.3d at 554 (emphases added) (citation omitted). This test incorporates the threshold requirements discussed above since it requires establishing a "state-imposed" "burden" that is "discriminatory" because

it affords minority voters "less opportunity" than non-minorities to cast a vote. Since it is clear that Plaintiffs have not established any such "burden," much less a "discriminatory" one (*see supra* pp. 8-12), there is no need to reach the second "element," to determine whether that nonexistent "burden . . . [is] caused by or linked to social and historical conditions that have or currently produce discrimination against" minorities. *Id.* (citation omitted). Plaintiffs have already failed the first element.

The second "element" of the *NAACP v. Husted* test simply asks, *after* plaintiffs establish that the state-imposed burden provides them "less opportunity," whether that unequal "burden" is linked to societal discrimination. Such a showing is necessary to show that the challenged practice "abridges" voting opportunities "on account of *race*." *Id*. at 558 (emphasis added). Consequently, the second element serves a purpose similar to the "Senate Report factors" or "totality of circumstances" analysis that is conducted after the *Gingles* preconditions have been established. The plaintiffs must *first* establish that the challenged practice "result[s] in unequal access to the electoral process" by showing that it causes an unequal ability to elect, and the Section 2 inquiry *then* becomes whether the proven inequality is linked to racial discrimination. *Gingles*, 478 U.S. at 46-51.

The district court avoided this rule by skipping the first element and distorting the second. Thus, based on the finding that underlying racial inequality

makes it more difficult for minorities to navigate the ordinary burdens of voting without affirmative state assistance, the court held that Ohio's voting procedures violate Section 2 even though they afford all voters perfectly equal opportunity to vote and do not impose any unequal "burden" on minorities. That holding has no basis in law.

The district court's interpretation would create an irreconcilable conflict with the square holdings of the Supreme Court and this Court that Section 2 (and disparate-impact claims generally) only reach disparities "proximately caused" by the challenged voting procedure, not those attributable to general "social and historical conditions." *Gingles*, 478 U.S. at 47, 50 n.17; *Inclusive Cmtys. Project*, 135 S. Ct. at 2523; *see also Wesley*, 791 F.2d at 1262 (6th Cir. 1986) (upholding felon disenfranchisement under Section 2 because "the disproportionate impact suffered by black Tennesseans does not 'result' from the state's" practice). The only way to respect those precedents is to conclude that Section 2 is a negative prohibition against *state-imposed* inequality. It is not an affirmative-action statute that requires states to *enhance* minority voting prospects by rearranging their ordinary race-neutral election laws to ameliorate the effects of underlying socio-economic inequalities.

III. THE CHALLENGED LAWS COMPLY WITH SECTION 2

1. Under the standards discussed above, Plaintiffs' Section 2 claims fail because Ohio's laws do not impose anything more than the usual burdens of voting. To the contrary, while many other states across the country have enacted Photo ID requirements, Ohio takes a far more *permissive* approach, allowing voters to use *non*-photo ID, including for absentee and provisional ballots. Moreover, while virtually no state allowed provisional balloting or no-excuse absentee voting in 1982 when the Section 2 "results" test was enacted, Ohio has greatly *expanded* voting opportunity by allowing *both* of these practices. *See* State Br. 3-4, 48. Thus, by any rational measure, Ohio gives voters more than a full and fair "opportunity" to vote, and certainly does not give minorities any *"less* opportunity" than other voters. Nor do Ohio's laws provide less opportunity compared to any *objective* benchmark, or *proximately cause* any disparity in electoral participation.

2. In any event, the district court failed to find even any *disparate impact* under any rational understanding of that concept. The district court did not find that Ohio's voting scheme disproportionately burdens or excludes minority voters, since any such finding would be refuted by the equal turnout of minority and non-minority voters in recent elections. Instead, the district court found only that certain targeted *aspects* of Ohio's voting process have a disparate impact—even

though the targeted voting procedures actually *expand* minority voting opportunities overall—solely because these procedures purportedly could be revised to expand opportunities *even more*. Thus, the court condemned Ohio's expansion of voting through provisional and no-excuse-absentee balloting, even though it found that these practices disproportionately *benefit* minority voters, who use these opportunity-expanding devices at disproportionately higher rates. Op. 95-97. Needless to say, this type of opportunity-expanding device that disproportionately *benefits* minorities cannot rationally be characterized as having a disparate adverse impact on minorities. But that is exactly what the district court did.

The district court arrived at its illogical conclusion only by hypothesizing even more generous forms of the minority-enhancing practices of provisional and absentee balloting. It speculated that minority participation would be enhanced even further if local election boards were merely authorized, not required, to reject non-conforming absentee ballots; if provisional ballots did not require the voter's address and Social Security Number or other identifying information; and if poll-worker assistance were provided automatically instead of upon request. This conclusion is legally, logically, and factually flawed.

As a legal matter, since Section 2 does not require *any* efforts to enhance minority voting, it certainly does not require enhancements that maximize minority

voting to the greatest possible extent. Indeed, it is impossible satisfy any such judicial maximization agenda, since it is always possible to hypothesize an even more generous alternative—e.g., a "cure" period of 13 rather than 10 days. This is vividly illustrated by the fact that *all* of the district court's evidence of disparate "rejection rates" occurred under Ohio's *old* voting regime, used in "2008," "2010," and "2012," Op. 95—the very voting regime that the district court ordered as a *remedy* here. *See* Op. 110 (reinstating old laws). Needless to say, *reinstating* a voting regime with an allegedly illegal discriminatory "result" cannot possibly *cure* that unlawful result, but that is the perverse, illogical consequence of the district court's maximization principle.

In any event, as a factual matter, the district court made no finding that the changes to Ohio's voting law had any greater disparate impact than the old voting practices it enshrined as a remedy. To the contrary, it admitted there were no greater rejection rates or lower minority voter turnout in 2014, the only year data was available under the new laws. Op. 95. Moreover, the court's generic platitudes about general socio-economic disparities do not even provide a plausible basis for inferring that the new practices will exacerbate any purported "disparate impact." The court did not find that minority voters are somehow less able to ask for poll-worker assistance if needed. It did not find that minority voters are somehow less capable than whites of providing their address or Social Security

number. It did not find that disparate rejection rates will somehow increase under a neutral system of uniformly excluding non-conforming absentee ballots, rather than one that vests discretion in local election boards. Nor did the court find that minorities somehow have "less opportunity" than whites to cure defective ballots within 7 days, but would have an *equal* opportunity if the period were extended to 10 days. Thus, even under the district court's own boundless understanding of the Section 2 "results" test, the court failed to make any findings that could possibly support its holding.

3. As the foregoing reflects, the district court's analysis can only be understood as finding that Ohio's current laws have a disparate impact compared to Ohio's "past voting practices," because the new laws are a "rollback" of "improvements" that were enacted by the Democratic legislature in 2004. Op. 97 n.21, 105. But this, again, violates the clear rule that retrogression "is not the inquiry [under] § 2." *Holder*, 512 U.S. at 884 (Kennedy, J.); *Bossier II*, 528 U.S. at 334.

The district court attempted to justify its retrogression analysis by averring that "the totality of the circumstances requires attention to past practices." Op. 97 n.21. But under the plain text of the statute, courts are to examine the "totality of the circumstances" to determine whether minorities "have less opportunity than other members of the electorate," not "less opportunity" than under prior law. 52

U.S.C. § 10301. Accordingly, the relative convenience of the State's *past* voting practices says nothing about whether *current* law violates Section 2. That is because the past law says nothing about whether the current law unlawfully deprives minorities of equal voting opportunity *compared to other voters*. In any event, as noted, the district court's *exclusive* focus on the disparate impact of prior laws (in "2008," "2010," and "2012," Op. 94-95) cannot possibly provide any basis for concluding that Ohio's *current* laws have a greater disparate impact.

CONCLUSION

For the foregoing reasons, there is no basis in law or fact to support the district court's holding that any of Ohio's voting practices violate Section 2 of the Voting Rights Act. Because the court's alternative grounds for invalidating the challenged practices are also incorrect as demonstrated in the State's brief, the decision below should be reversed, and all of the challenged practices upheld.

Dated: July 8, 2016

Respectfully Submitted,

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July 8, 2016 /s/ Michael A. Carvin
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2016, I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

July 8, 2016 /s/ Michael A. Carvin
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