No. 12A338

In The Supreme Court Of The United States

JON HUSTED, ET AL.,

Applicants,

v.

OBAMA FOR AMERICA, ET AL.,

Respondents,

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

OPPOSITION TO EMERGENCY APPLICATION FOR A STAY PENDING CERTIORARI

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INTRODUCTION

This Court does not "grant certiorari to consider fact-bound contentions that may have no effect on other cases." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers). But that, at bottom, is all the applicants are asking the Court to do. The application does not meet this Court's criteria for granting a stay (let alone for granting certiorari). It should be denied.

At the conclusion of an erratic and conflicting set of legislative enactments, the State of Ohio settled on a voting procedure unheard of in any other State in the Nation: it has allowed local election boards to open their polling places to some qualified voters over the last three days prior to Election Day, while precluding those boards from permitting other voters to access those same polling places during the same period. Two federal courts have found that this arbitrary and unprecedented change to the *status quo ante* should be enjoined, because it would significantly burden tens of thousands of Ohio voters, and would likely violate the Equal Protection Clause. Applicants seek an emergency stay of that injunction, but have utterly failed to carry their burden of showing that a stay is warranted, because they have satisfied none of the equitable factors required to justify such extraordinary relief—applicants have not demonstrated that they would suffer any irreparable harm if the injunction remains in place, any possible injury to applicants would be vastly outweighed by the substantial harm to the voting public occasioned by the State's inequitable regime, and this Court is in any event unlikely to grant certiorari or reverse the court below. The application should be denied.

First, no irreparable harm can possibly flow from the district court's

preliminary injunction. The Ohio system that the courts below enjoined is as arbitrary as it is unique: nowhere else in the country will an eligible voter be turned away from a single, open polling place because the polling place is open for some voters, but not for that particular voter. The preliminary injunction merely enables all otherwise eligible voters—rather than just a subset of them—to vote at open polling places during certain hours the three days before Election Day. As the courts below found, early voting on these three days will facilitate a smooth and well-functioning process on Election Day for voters and local election officials by permitting some voters to vote who would otherwise add to the length of lines and the burdens on election officials on Election Day. Applicants cannot credibly assert that permitting eligible voters to vote at a time that polls will otherwise be open constitutes irreparable harm. And, as the courts below further emphasized, the very category of voters—members of our military—that the State expresses particular concern for are fully protected under the injunction in effect. In fact, the district court found that the injunction served to *secure* military voting access over this period above and beyond what applicants' theory of the case would provide.

To the extent applicants continue to argue, as they did before both lower courts, that the preliminary injunction will "burden" local election officials—and that this burden now constitutes irreparable harm—the district court expressly found as a matter of fact, after a hearing and examination of the evidence submitted, that any such burden would be minimal, and would be offset by the reduced burdens on Election Day. The court of appeals affirmed this finding. This

Court disturbs the factual findings of two lower courts in only the most extraordinary of circumstances, none of which is presented here.

Applicants' contention that severe and irreparable harm will arise from continued enforcement of the preliminary injunction is simply not credible. That injunction merely restores the *status quo ante* that existed in Ohio for the last two elections, in 2008 and 2010, both of which ran smoothly by all accounts—and much more smoothly than 2004, precisely because these more recent elections involve large-scale early voting. Applicants introduced no evidence below that local election boards had been significantly burdened by early voting in the three days before these past two elections. While the injunction restores to local boards the discretion in determining polling days and hours that they have had since 2005, it does *not* allow the exclusion of a subset of voters from *already open polling places*.

Indeed, applicants assert a burden on local boards that the boards themselves have not asserted. Not a single county election board filed a brief or affidavit stating that the preliminary injunction would impose any burden. To the contrary, the election boards in some of Ohio's large counties filed amicus briefs or issued public statements affirming that they are better off under the injunction because the reduced burden on Election Day would more than compensate for any minimal burden from the three days of early voting. And even if applicants can demonstrate some minimal harm, that harm is far outweighed by the harm to voters who are arbitrarily denied the right to vote on the same terms as their fellow citizens—and to the public generally, which will be the victim of the confusion

caused by undoing an established voting protocol at this late hour.

Second, this Court is unlikely to grant certiorari and reverse. This case possesses none of the ordinary characteristics that would warrant the Court's review. The decision below is quintessentially fact-bound: it turns on the unique and confused legislative history in Ohio, involving the interplay between an amalgam of state statutes and a voter-qualified referendum that resulted in the bizarre scheme at issue, including two provisions with completely different and conflicting early voting deadlines for military and overseas voters. Consistent with the fact-intensive nature of the underlying issues, much of the application merely disputes facts found by and relied upon by two courts below—indeed, by all of the lower court judges to have reviewed the case. Relatedly, the decision below does not implicate a legal question of national importance, because the Ohio procedure at issue here is entirely unique. The Sixth Circuit's decision below therefore will have no impact beyond Ohio's borders, or, in all likelihood, beyond the upcoming election. Moreover, there is no conflict among lower courts on the issues involved. The application affords no basis for this Court's review.

Regardless, the Court would not likely reverse the decision below, because that decision is correct. The court of appeals properly applied the long-established and "flexible" standard this Court elaborated in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and recently applied in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). Based on the district court's findings of fact, the court of appeals held that the Ohio system burdened

voters, and that applicants were thus required to present justifications for that system sufficient to overcome the burden. Applicants attempt to argue that a different, more deferential standard should apply, but their arguments misread this Court's cases, and are premised on a requirement that this Court revisit facts conclusively found by two courts below.

There is no basis for the extraordinary relief applicants seek. The application for an emergency stay should be denied.

STATEMENT OF THE CASE

In 2004, before the advent of early voting in Ohio, voting machine malfunctions and other administrative breakdowns led to Election Day lines up to twelve hours long, effectively depriving thousands of the opportunity to cast their ballots. *See Northeast Coalition for the Homeless v. Husted*, No. 12-3916, slip op. at 4 (Oct. 11, 2012);[1] *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008). To prevent the recurrence of that situation, the General Assembly reformed the electoral system in Ohio by introducing, among other reforms, in-person early voting, which it viewed and administered as an expanded "window" of Election Day voting. Under the early voting system, any duly qualified voter could cast a ballot in-person at a designated polling location, during the 35-day period leading up to Election Day. In the 2008 presidential election, approximately

[1] *Northeast Coalition for the Homeless* involved an equal protection challenge to a different provision of Ohio voting law, under which deficient provisional ballots are rejected even when the deficiency is caused by poll-worker error. Slip op. at 6. A unanimous panel of the Sixth Circuit held that the Ohio system runs afoul of the Equal Protection Clause, applying the same *Anderson-Burdick* legal standard the Sixth Circuit applied to sustain the injunction below. *See* slip op. at 16-24; *infra* at 13-15.

100,000 Ohioans cast their ballots in-person in the three days preceding Election Day. R.3-3 (Data Compiled by Norman Robbins) at 2.

But in June 2011, the system was arbitrarily changed through a confused and conflicting flurry of legislative enactments, repeals, and technical corrections. The State initially sought to eliminate all early voting over this three-day period, but instead subjected military and overseas (UOCAVA) voters to conflicting deadlines, one allowing for early in-person voting through the election, and the other ending such voting as of 6 p.m. the Friday before Election Day. The deadline for all other (non-UOCAVA) citizens was that same Friday, eliminating the possibility of voting during the three ensuing days for all other eligible voters throughout the State. Thus, as a by-product of the unique circumstances of a technical correction, a referendum, and a repeal, the State created different deadlines for UOCAVA voters, on the one hand, and all other (non-UOCAVA) voters, on the other.

A. Factual Background

1. Ohio's system of in-person early voting was introduced after the State's troubled experience during the 2004 General Election, which was marked by "long lines and wait-times that, at some polling places, stretched into the early morning of the following day." App. 4a. In response to that widespread breakdown, the Ohio General Assembly introduced legislation to expand the vote in Ohio.[2] Following the

[2] On April 20, 2005—the day that no-fault, in-person absentee voting was first introduced in the State Assembly—Kevin DeWine, the lead sponsor of H.B. 3 (the predecessor of H.B. 234), said "the plan is designed to address voting-related

creation of early voting in Ohio, any registered voter could cast an early ballot, in-person, at the site designated by the local elections office, and thereby avoid the risk of losing the vote because of Election Day mishaps.

In-person early voting was a distinct component of the post-2004 reforms that was considered separate from extensions of traditional absentee voting by mail. 74 Ohio Report No. 36, Gongwer News Service, Inc. (Feb. 23, 2005). Rather, the advent of early voting was intended as a way of extending the availability of traditional Election Day voting. As Republican Senator Gary Cates, the sponsor of Substitute House Bill 234, 126th General Assembly (Oct. 19, 2005)—the in-person early voting bill—explained it: "We're expanding Election Day by a 35-day window." Carrie Spencer Ghose, *Senate Committee Recommends Absentee Voting Bill*, Associated Press, Oct. 12, 2005.[3] Or in the words of the Ohio Supreme Court, "[t]he general election encompasses the in-person casting of absentee ballots for the election, which is manifestly part of the general election, even though some of it may occur before November 4." *State ex rel. Stokes v. Brunner*, 898 N.E.2d 23, 28 (Ohio 2008) (per curiam).

Following its implementation, a substantial number of voters responded by voting early in-person. "Early voting peaked during the 2008 election, when

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issues that arose before, during and after the 2004 presidential election." 74 Ohio Report No. 77, Gongwer News Service, Inc. (Apr. 20, 2005).

[3] As Senator Cates later explained: "The concept of a no-fault ballot is something that the general public overwhelmingly supports. It would give voters more flexibility, encourage increased participation in voting, and help alleviate long lines at the polls." Statement of Senator Gary Cates, *available at* http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=111489&startTime=260&autoStart=True (October 18, 2005 at 5:15).

approximately 1.7 million Ohioans cast their ballots before Election Day, amounting to 20.7% of registered voters and 29.7% of the total votes cast." App. 4a. Of those, approximately 100,000 voters cast in-person ballots in the three days leading up to Election Day. *Id.* "In 2010, approximately 1 million Ohioans voted early, and 17.8% of them chose to cast their ballots in person." *Id.*

As the Sixth Circuit noted below (affirming a finding of the district court), in-person early voting tends to be used by voters with a substantially different demographic makeup than those who cast their ballots on Election Day:

> Voters who chose to cast their ballots early tended to be members of different demographic groups than those who voted on election day. Early voters were "more likely than election-day voters to be women, older, and of lower income and education attainment." (R. 34-31 (Pls.' Ex. 27) at 1.) Data from Cuyahoga and Franklin Counties suggests that early voters were disproportionately African-American and that a large majority of early in-person votes (82% in Franklin County) were cast after hours on weekdays, on the weekend, or on the Monday before the election.

App. 5a.

2. Notwithstanding the heralded success of early voting in Ohio, in July 2011, Governor Kasich signed into law Amended Substitute House Bill Number 194. H.B. 194, 129th General Assembly (June 29, 2011). This omnibus bill "made broad changes to Ohio election law," App. 5a, including adding new language to Ohio Rev. Code § 3509.01 to end early voting for non-UOCAVA voters on the Friday preceding Election Day at 6 p.m. Likewise, the Legislature amended § 3511.10 to eliminate the Monday deadline for UOCAVA voters, thus placing those voters on the same footing as non-UOCAVA voters. But the Legislature failed to amend the

two preexisting Monday deadlines in the Code: § 3509.03 (for non-UOCAVA voters) and § 3511.10 (for UOCAVA voters). Thus, the result of H.B. 194 was to create inconsistent early-voting deadlines for both UOCAVA and non-UOCAVA voters.

In an attempt to fix these discrepancies, the General Assembly enacted Amended Substitute House Bill Number 224, which made "technical corrections to the laws governing elections." H.B. 224, 129th General Assembly (July 13, 2011). H.B. 224 corrected the deadlines in §§ 3509.03 and 3511.10 for both UOCAVA and non-UOCAVA voters, bringing consistency for both groups of voters and making Friday the uniform deadline for in-person voting prior to Election Day.

Before H.B. 224 went into effect, however, a referendum petition was filed by more than 300,000 Ohioans to reject H.B. 194 and its early voting restrictions, and instead to retain the existing in-person early voting regime. The effect of this successful petition drive was to suspend the implementation of the law for this election cycle, allowing the voters to pass judgment by casting their ballots for or against the law on the November 2012 General Election ballot. Yet "[w]ith HB 194 on hold, HB 224 served to continue the legislative confusion with conflicting and unclear deadlines." App. 40a.

In May 2012, in an unprecedented move, the General Assembly preempted a vote on the referendum by repealing H.B. 194 through Substitute Senate Bill Number 295. *See* S.B. 295, 129th General Assembly (May 8, 2012). But the Legislature neglected to take any action on H.B. 224, which had included the technical corrections to the original errors in H.B. 194. As a result, after all of the

legislative maneuvering, the Ohio Revised Code reflected H.B. 224's technical corrections—and *only* the technical corrections—which established the Friday before the election as the deadline for non-UOCAVA voters but left two separate deadlines for UOCAVA voters: one on Friday and one on Monday. Moreover, this meant that although the State purported to avoid the November referendum by "repealing" H.B. 194 and restoring the *status quo* prior to enactment, the changes to early voting at issue in this case slipped past the voters and became Ohio law.

3. In recognition of the legislative oversight and likely confusion, the Secretary of State issued Advisory 2011-07 in October 2011. R.34-18 (Advisory 2011-07). The Advisory provided that, notwithstanding the pending referendum of H.B. 194, early voting for non-UOCAVA voters would end on the Friday before the election. UOCAVA voters, however, would be permitted to continue voting through Election Day. R.34-18 (Advisory 2011-07). The Secretary denied subsequent efforts by local boards of elections to extend the in-person early voting deadline for non-UOCAVA voters. *See* R.34-21 (Letter from Secretary Husted to the Director and Deputy Director of the Montgomery County Board of Elections (Oct. 25, 2011); R.34-22 (Letter from Secretary Husted to the Director of the Darke County Board of Elections) (Oct. 27, 2011).

B. Proceedings Below

1. Respondents filed suit in the U.S. District Court for the Southern District of Ohio on July 17, 2012. R.1 (Compl.). That same day, respondents filed a motion for preliminary injunction, seeking to prohibit the State from implementing or enforcing the "technical amendments" to Ohio Rev. Code § 3509.03 made by H.B.

224 and S.B. 295, thereby restoring equal ballot access for UOCAVA and non-UOCAVA voters during the three days preceding Election Day. R.2 (Mot. for P.I.). Applicants opposed the motion.

Cuyahoga County, the most populous county in the state, filed a brief as *amicus curiae* advocating the need for early voting during the final three days preceding the election. R.38. As Cuyahoga County explained, such voting defrays costs to the County by absorbing a volume of voting that would occur on Election Day and that would strain Election Day machinery and systems. The County explained that the cancellation of early voting during the final three days preceding the election raised the "risk of voting problems on Election Day" that would "interfere[] with th[e] fundamental right" to vote. *Id*. at 4.[4]

2. On August 15, 2012, the district court conducted a hearing on respondents' motion. While the litigation was pending, Secretary Husted suddenly decided to issue a directive setting "uniform business hours" for all Ohio Election Boards during the early voting period up to the last three days prior to Election Day; that uniform schedule eliminated *all* weekend hours during that time period, including for UOCAVA voters. R.40-1 (Directive 2012-35). In so doing, Secretary

[4] The record in the case also includes the Master Plan used by Franklin County to prepare for the election. The Master Plan shows that permitting in-person early voting on an equal basis would not compromise the County's ability to prepare for Election Day. R.57-2 (Franklin County Letter). On the contrary, the vast majority of the tasks that the Board has to perform are, in fact, completed by the weekend before the election. R.42-4 (Franklin County Calendar). Still another county issued a public statement supporting the restoration of in-person early voting in the last three days prior to the election for all voters. *See, e.g.*, R.57-1 (Mahoning County Press Release).

Husted asserted that he had decided to "level the playing field on voting days and hours during the absentee period in order to ensure that the Presidential Election in Ohio will be uniform, accessible for all, fair and secure." *Id.*

That directive did not instruct election boards to be open the weekend prior to Election Day for UOCAVA voters. But at the August 15 hearing, the State now took yet another position: that local election boards have discretion to determine the extent of ballot access for UOCAVA voters during the three days leading up to Election Day. R.43. Applicants subsequently reiterated that position, stating in a supplemental memorandum filed with the district court that, "[w]hether to be open those three days for in-person absentee voting by UOCAVA voters remains in the discretion of the individual county boards of election . . . [unless] the Secretary exercises his authority to issue a future directive." R.44 (Defs' Resp. to Pls' Supp. Mem.). No such directive has been issued.

3. The district court granted the preliminary injunction. The court found that the challenged law, as interpreted by the Secretary of State, burdened the right to vote without sufficient justification. In short, the State had, by "arbitrary and disparate treatment, value[d] one person's vote over that of another." App. 56a. Moreover, the district court specifically found that the justifications offered *post hoc* by applicants could not be credited in light of the record evidence that (a) the State had not acted at any time to secure the alleged interests of military voters, whose access to polling places was left to the discretion of each County Board; and (b) the State had failed to substantiate its claim that counties would be unable to provide

for early voting over this period while preparing for Election Day, both of which they did to general acclaim in 2008. Accordingly, the district court enjoined the operation of § 3509.03 to the extent it created a different deadline for non-UOCAVA voters, and restored early voting for such voters at open polling places during the three days preceding Election Day. App. 58a. The injunction had no effect on the pre-existing rights of military voters and their families to vote in-person in the three days prior to Election Day. Indeed, the district court made clear that its order did not contract in any way the access of military voters to weekend early voting. App. 56a. To the contrary, the order secured it, which the Secretary of State declined to do in leaving UOCAVA voting over this period to the discretion of county boards. The effect of the district court's injunction was to restore the *status quo* that existed before the legislative confusion, such that the upcoming elections would operate just as the highly successful election of 2008 and 2010 did.

4. Instead of moving to implement the district court's order or seeking a stay of that order, the Secretary of State chose to disregard the orders of the district court by issuing a directive prohibiting county boards of election from establishing any business hours in the three days prior to Election Day. R.50-1 (Directive 2012-40). Respondents filed an emergency motion to enforce the district court's preliminary injunction. R.50 (Pls.' Emergency Motion to Enforce Judgment). The district court immediately scheduled a hearing at which it instructed the Secretary to appear in person. R.52. In response, the Secretary issued an apology, rescinded the directive (R.54), and subsequently moved the district court to stay its own order

pending appeal. The district court denied the stay request. R.60 (Order Denying Motion for Stay). Defendants appealed to the U.S. Court of Appeals for the Sixth Circuit, but did not ask that court to stay the district court's order.

5. a. On October 5, 2012, a panel of the Sixth Circuit affirmed the district court's grant of a preliminary injunction, agreeing that respondents were likely to succeed on the merits of their equal protection claim. Relying on a body of well-established Sixth Circuit law, and this Court's decision in *Bush v. Gore*, the court noted that "'[t]he right to vote is protected in more than the initial allocation of the franchise,'" the court explained that "'[e]qual protection applies as well to the manner of its exercise.'" App. 4a (quoting *League of Women Voters,* 548 F.3d at 477, in turn quoting *Bush v. Gore,* 531 U.S. 98, 104 (2000)).[5] The court of appeals concluded, based on facts found by the district court, that the burden on voters from the Ohio in-person early voting system was "significant." App. 51a; *see also* App. 11a. Because the court found a burden on voters, it applied the *Anderson-Burdick* standard, under which applicants were required to show a sufficient justification for the burden on voters. App. 8a-11a. And based on factual findings concerning the Ohio system's burden on voters, the court rejected applicants' contention that a lesser standard of review applies. App. 10a-12a.

Applying the *Anderson-Burdick* standard, the court of appeals found that applicants failed to justify the burden on voters. App. 12a-18a. As to applicants'

[5] The district court also held that respondents themselves "will suffer irreparable injury if in-person early voting is not restored the last three days before the Election Day." App. 57a.

representation that the cancellation of early voting for non-UOCAVA voters was "necessary to give local county boards of elections enough time to prepare for Election Day" (App.13a), the court of appeals concluded: "[w]ith no evidence that local boards of elections have struggled to cope with early voting in the past, no evidence that they may struggle to do so during the November 2012 election, and faced with several of those very local boards in opposition to its claims, the State has not shown that its regulatory interest in smooth election administration is 'important,' much less 'sufficiently weighty' to justify the burden it has placed on non-military Ohio voters." App. 15a. The court of appeals also rejected applicants' argument that challenges faced by military service members—who, as explained, are not burdened in any way by the preliminary injunction—justified the turning away of other voters from the ballot box. *See* App. at 15a-16a.

Finally, the court of appeals affirmed the district court's findings that the balance of equities favored respondents. *See* App. at 19a.

b. Judge White wrote separately, "join[ing] in the affirmance but arriv[ing] there by a different route." App. 21a. She concluded that against the backdrop of Ohio's notoriously troubled 2004 elections, and in light of the widespread reliance on early voting in the years since its adoption in Ohio, these "eleventh-hour changes to remedial voting provisions that have been in effect since 2005" were "properly considered as a burden in applying *Anderson/Burdick* balancing." *Id.* at 27a-28a. Accordingly, she found that the State's "legitimate regulatory interests do not outweigh the burden on voters whose right to vote in the upcoming election would

be burdened" by the change in law. *Id.* at 29a.

6. Applicants failed to seek a stay of the district court's preliminary injunction pending a petition for a writ of certiorari to this Court. Instead, they filed the instant application, seeking extraordinary stay relief from Justice Kagan in the first instance.

REASONS FOR DENYING A STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 130 S. Ct. 705, 709-10 (2010). Further, "[t]he conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*." *Barnes v. E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (emphasis in original). "It is ultimately necessary, in other words, 'to "balance the equities"—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Id.* at 1305 (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (citations omitted)). "Denial of . . . in-chambers stay applications" pending the filing of a petition for certioriari "is the norm; relief is granted only in 'extraordinary cases.'" *Conkright v. Frommert*, 556 U.S. 1401 (2009) (Ginsburg, J., in chambers) (citing *Rostker*, 448 U.S. at 1308). The "party requesting a stay bears the burden of showing that the circumstances justify" such extraordinary relief. *Nken* v. *Holder*,

556 U.S. 418, 433-34 (2009).

Apart from the familiar balancing of equitable factors, stay applications in this Court are subject to an additional requirement: Rule 23.3 mandates that "[a]n application for a stay shall set out with particularity why the relief sought is not available from any other court or judge." Moreover, "[e]xcept in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof." *Id.* The State has disregarded the requirements of Rule 23.3.

Because applicants have failed to carry their burden of justifying the extraordinary relief they seek, their application should be denied.

I. THE APPLICATION SHOULD BE DENIED BECAUSE APPLICANTS FAILED TO SEEK A STAY BELOW, AND FAILED TO DEMONSTRATE THE EXISTENCE OF "THE MOST EXTRAORDINARY CIRCUMSTANCES"

The application for a stay pending certiorari fails at the threshold because applicants failed to seek this relief "in the appropriate court or courts below or from a judge or judges thereof." Sup. Ct. R. 23.3. It is well established that, "[b]efore seeking a stay from the Supreme Court or from a single Justice, a stay *must* first be requested from the court below or a judge thereof." Eugene Gressman et al., Supreme Court Practice 860 (9th ed. 2007) (hereinafter "Supreme Court Practice") 771 (emphasis added); *see id.* (characterizing Rule 23.3 as "mandatory as to this"); *cf. Conforte* v. *C.I.R.*, 459 U.S. 1309, 1312 n.2 (1983) (Rehnquist, J., in chambers) ("Applicant's failure to seek a stay in the Court of Appeals provides an alternative

ground for denial of the stay."). Applicants freely concede that they did not seek a stay pending certiorari from the Sixth Circuit. Appl. 21 n.5.

Failure to seek relief below is excused only in "the most extraordinary circumstances." Sup. Ct. R. 23.3. Applicants do not satisfy that exacting standard. Their only explanation, proffered in a footnote, is that "it would have been both impractical and futile" to seek a stay from the court of appeals. Appl. 21 n.5. Applicants rely on *Western Airlines, Inc. v. Teamsters*, 580 U.S. 1301 (1987), but the circumstances there were truly extraordinary—the Ninth Circuit enjoined a corporate merger a mere 12 hours before the merger was scheduled to take place. *Id.* at 1304. Here, in stark contrast, the Sixth Circuit issued its opinion on October 5—more than a month before the election, and concerning an issue pertaining only to the last three days before Election Day—leaving ample time for applicants to seek a stay from the court of appeals in the first instance.

Applicants similarly fail to support their claim that any stay request in the Sixth Circuit was foredoomed to fail. *See* Appl. 21 n.5. They argue that such a request would have been "futile" because it would have been governed by the "same" standard that the court of appeals used to review the district court's preliminary injunction. *Id.* But the sole authority they cite on this point does not address the Sixth Circuit's standard for a stay *pending certiorari*—it states only that whether to grant a stay pending appeal or a preliminary injunction turns on the same equitable factors. *See Michigan Coalition for Radioactive Material Users, Inc.* v. *Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). But it cannot possibly be true that the

requirements of Rule 23.3—that a stay must be sought below "[e]xcept in the most extraordinary circumstances"—is inapplicable in every case involving injunctive relief.

This Court's rules and practice nevertheless require, with only the slimmest of exceptions, that applicants first seek a stay from the court of appeals—*i.e.*, that applicants must argue to the court of appeals not only that certiorari is likely to be granted, but that there is a fair likelihood that the court of appeals will be reversed. Applicants' supposition that they would not have obtained relief from the Sixth Circuit cannot excuse their failure to comply with the plain dictates of this Court's Rules.

II. THE APPLICATION SHOULD BE DENIED BECAUSE APPLICANTS HAVE FAILED TO SATISFY THE STANDARD FOR A STAY

Even if applicants could satisfy Rule 23's "most extraordinary circumstances" test, the application should be denied because it fails to satisfy the standard that would justify a stay: certiorari is unlikely to be granted; even if it were granted, the decision below is unlikely to be reversed; applicants will suffer no irreparable harm in the absence of a stay; and the balance of equities strongly favors denying a stay.

A. This Court Is Unlikely To Grant Certiorari

This case lacks any of the ordinary factors that would counsel in favor of certiorari. Applicants seek highly fact-bound error correction in a circumstance unique to Ohio—and there is no error. Indeed, applicants' dispute, at its core, is with the sound concurrent findings of fact of the two courts below, thus rendering the grant of certiorari particularly unwarranted.

Applicants do not allege a conflict among the courts of appeals. On the contrary, they present an intensely fact-bound challenge to the decision below. Applicants' disagreement with the Sixth Circuit's decision turns in large part not on questions of law, but on disputes concerning underlying facts determined by both the district court and the court of appeals. Applicants' central dispute is with the district court's finding, affirmed by the court of appeals, that "Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." Appl. 28 (quoting App. 11a). Applicants discuss at considerable length the merits of reports and studies lodged with the district court concerning the effect of in-person early voting on voter turnout, *see id.* at 29-31, and list the alternatives to in-person early voting offered to Ohio voters, *see id.* at 32-34. But there was a place for such evidence to be considered, and that was in the district court. As the finder of fact, the district court reviewed the record and concluded, on the particular facts of this case, that voters would be burdened by the curtailment of early voting. The Sixth Circuit reviewed that finding for clear error and, finding none, affirmed. That should end the inquiry, because, as noted earlier, this Court does not "grant certiorari to consider fact-bound contentions that may have no effect on other cases." *Philip Morris USA Inc.*, 131 S. Ct. at 3 (Scalia, J., in chambers).

Indeed, the application is not merely fact-bound, but asks this Court, with early voting already underway in Ohio and on the eve of a presidential election, to reverse facts found by the district court and adopted by the court of appeals. Yet this Court does not "undertake to review concurrent findings of fact by two courts

below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *see Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi v. District Director, Immigration & Naturalization* Service, 385 U.S. 630, 634 (1967); Supreme Court Practice 4.14, at 271. As detailed below, the findings of the courts below contain no error, let alone a "very obvious and exceptional" one.

Nor do applicants attempt to demonstrate that the question they would present in their petition for certiorari is a recurring one worthy of this Court's review. Even if applicants' dispute with the Sixth Circuit did not turn on factual questions, this case would still have no broad significance beyond the specific facts here, because the Ohio procedure at issue is one of a kind. No other State has sought to enact or implement a scheme remotely similar to Ohio's, allowing polls to be open for early voting for some of its citizens, while disallowing access to those same open polls for others. Indeed, applicants make no effort to demonstrate that any other State in the Nation has ever instituted, or is likely ever to institute, a voting procedure resembling the highly unique (and highly arbitrary) Ohio procedure at issue here. While applicants assert that States such as Texas and Georgia have experimented with various in-person early voting procedures (Appl. 5), none of those statutes exhibits the harm identified by the decision below: offering in-person early voting to some citizens while denying it to others.[6] Indeed, this case

[6] In any event, the voting regimes in Texas, Georgia, New York, or Pennsylvania that the application describes (Appl. 5) could not possibly be affected by a decision of the *Sixth* Circuit.

could plausibly have implications beyond Ohio only if applicants were to succeed in pressing the highly dubious and unprecedented proposition that States must be afforded leeway to allow some citizens but not others into open polling places.

Thus, while the question whether Ohio voters are allowed to vote on the same terms as their fellow citizens is obviously an important one, the *legal* question the application presents—whether the idiosyncratic Ohio voting procedure at issue here offends the Equal Protection Clause in light of the preliminary factual findings of the courts below—is too inextricably intertwined with the singular and unusual facts of this case to warrant this Court's review.

Even if this Court believed the Sixth Circuit's decision was incorrect, that would not ordinarily afford a basis for granting certiorari. *See* Sup. Ct. R. 10. In any event, for the reasons that follow, the Sixth Circuit's decision was correct, and there is no cause to disturb it.

B. This Court Is Unlikely To Reverse The Judgment Below

The Court is unlikely to reverse the decision below because it is correct. The Equal Protection Clause prohibits states from providing differential access to the ballot box on arbitrary terms. Yet that is precisely what is threatened by the statute under review. On October 2, 2012, 35 days before Election Day, polling places opened across Ohio for all voters.[7] But absent the district court's injunction, on the final three days before Election Day, those polling places will close for

[7] Indeed, as noted, the Ohio Supreme Court has explained that, as a matter of state law, the in-person casting of absentee ballots constitutes part of the general election even though some of it may occur before Election Day. *State ex rel. Stokes* , 898 N.E.2d at 28 (Ohio 2008) (per curiam).

some—but not all—voters. That selective access to voting, unique to Ohio, has no justification. Rather, it is the consequence of a muddled legislative process marked by incoherence and confusion.

This arbitrary and irrational discrimination between voters violates the Equal Protection Clause. In light of Ohio's troubled history of election administration, the State made the decision to expand the period in which voters may cast their ballots in person. Having done so, the State may not arbitrarily exclude some voters, but not others, from the polling place on any day during the voting period. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

In the absence of any legitimate basis on which to distinguish among voters who will be allowed into polling places on the days leading up to Election Day, and those that will be barred from those same polling places, both courts below concluded that respondents are likely to succeed on the merits of their equal protection challenge to Ohio's two-deadline system and that the equities favor a preliminary injunction. There is no cause to disturb that determination.

1. The Court has long recognized that the right to vote is fundamental. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (the right to vote is "preservative of all rights"). It "'rank[s] among our most precious freedoms,'" *Anderson*, 460 U.S. at 787-88 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)), for "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The Constitution safeguards not only the abstract right to vote, but also the

integrity of the electoral process: "The right to vote is protected in more than the initial allocation of the franchise." *Bush v. Gore*, 531 U.S. at 104. "Equal protection applies as well to the *manner of its exercise*." *Id.* (emphasis added). Every "citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665-70 (1966).

The governing principle behind this Court's jurisprudence has long been that when the State provides access to the ballot on unequal terms, the discriminatory treatment must be justified as furthering a significant governmental policy. So central is access to the ballot that all government restrictions must demonstrate some rationale that a state is seeking to implement. Even where the challenged rule is an "'evenhanded restriction'" aimed at "protect[ing] the integrity and reliability of the electoral process itself," *Crawford*, 553 U.S. at 189-90 (plurality opinion of Stevens, J., joined by Roberts, C.J., and Kennedy, J.) (quoting *Anderson*, 460 U.S. at 788, n.9), where that neutral rule burdens voters differently, courts assess the "'precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). However slight the burden on voters, "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (plurality op.) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Where, as here, the challenged restriction is *not* evenhanded, that disparate

treatment itself requires justification. *See, e.g.*, *Harper*, 383 U.S. at 667-70.[8] Put differently, the decision of the State to turn away some voters and not others from an open polling place itself imposes a burden on the exercise of the franchise. *See Bush v. Gore*, 531 U.S. at 104 (emphasizing the "equal weight accorded to each vote and the equal dignity owed to each voter"). "Having once granted the right to vote on equal terms, the State may not, by later *arbitrary and disparate* treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. at 104-05 (emphasis added). Accordingly, the restriction presently before the Court cannot be sustained absent a relevant, legitimate justification. *See Crawford*, 553 U.S. at 189-90; *Burdick*, 504 U.S. at 434.

The justification required from the State depends on the extent of the burden it imposes on voters. Over a series of cases, this Court has articulated the "flexible" standard, under which

> [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiffs' rights."

Burdick, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789); *see also Crawford*, 553 U.S. at 189-90; *id.* at 204 (Scalia, J., concurring).

Further, the State cannot meet this burden merely by articulating some made-up, post-enactment justification developed by its lawyers in the course of

[8] *See also Crawford*, 553 U.S. at 205 (Scalia, J., concurring in judgment) (distinguishing between "nonsevere, nondiscriminatory" restrictions on voting, to which lesser review applies, and those requiring more stringent scrutiny).

litigation.[9] Indeed, this Court has *never* upheld a restriction on the right to vote or a law providing differential access to the ballot on the basis of *post hoc* rationalizations alone. The reason for this is apparent: in regulating elections, the State "is not a wholly independent or neutral arbiter … [but] is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring). For this reason, while the State has considerable discretion in designing its elections, where it allocates access to the ballot on unequal terms, there is "cause for concern that those in power may be using electoral rules to erect barriers to electoral competition." *Id.* In those cases, judicial scrutiny ensures that restrictions on the vote "are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions." *Id.* Yet what applicants claim in this case is wide, and entirely novel, latitude under the Constitution to identify specified groups of citizens who will be offered selective access to polling places not open to others.

2. a. The Sixth Circuit, following the district court, found as a matter of fact that the Ohio scheme "treat[s] voters differently in a way that burdens the fundamental right to vote." App. 9a. Accordingly, the court of appeals applied the *Anderson-Burdick* standard described above, and correctly determined that the State's justifications for its in-person early voting scheme did not satisfy the State's

[9] The only pre-enactment justifications that applicants identify go to whether in-person early voting should end for *all* voters on the Friday before Election Day. App. 11-12. Applicants cite nothing pre-enactment that would justify the *disparate treatment* inherent in its in-person early voting procedures.

burden, App. 12a-18a.

b. Applicants do not even attempt to contend that they could satisfy their burden under the *Anderson-Burdick* standard.[10] Instead, they argue, the case is controlled by the lesser standard articulated in *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). Not so.

In *McDonald*, the Court considered whether Illinois was required to provide absentee ballots by mail to unsentenced inmates who were incarcerated awaiting trial. The Court found that there was "nothing in the record to indicate that the Illinois statutory scheme has an impact on [the inmates'] ability to exercise the fundamental right to vote." *Id.* at 807. It found nothing in the absentee statutes, which were "designed to make voting more available," that denied voting rights to the inmates. *Id.* And the Court found that Illinois was permitted to address access to the polls on a piecemeal basis, solving one problem at a time. *Id.* at 809. Accordingly, with no fundamental right affected and no suspect class singled out, the Court held that Illinois' system of absentee ballots was subject only to rational-basis review, which it satisfied. *Id.*

Applicants mistakenly contend that *McDonald*, and not *Anderson-Burdick*, applies here on the ground that "*McDonald* establishes *as a matter of law* that Ohio's modest reduction of up to three days of in-person absentee voting imposes the lowest possible burden on respondents' ability to cast a ballot." Appl. 24

[10] Nor could they. The courts below correctly found that neither post hoc rationalization developed by applicants in the course of the litigation is sufficient to justify the limitation on in-person early voting imposed by Ohio. *See* App. 18a.

(emphasis added). Setting aside the fundamental differences that applicants deny between absentee voting and in-person voting at open polling places, applicants entirely misconstrue the doctrinal import of *McDonald*. Their position appears to be that the *McDonald* standard applies unless respondents demonstrate that "the record shows that the law *absolutely prohibits* non-UOCAVA voters from voting." *E.g.*, Appl. 26. That cannot be correct. To begin, the regulation challenged in *Anderson* itself fell far short of imposing an "absolute prohibition" on voters' rights, yet the Court applied a more rigorous review than in *McDonald* and held the law to be unconstitutional. *See* 460 U.S. at 782, 786. And the plurality opinion in *Crawford* applied *Anderson-Burdick* to a voter ID law that did not "absolutely prohibit" anyone from voting, but nevertheless erected a burden on voters. *Crawford*, 553 U.S. at 189-91, 197-200 (plurality op.). To be sure, under the *Anderson-Burdick* standard, the extent to which a challenged regulation burdens constitutional rights affects the degree of scrutiny courts apply, and the gravity of the countervailing state interests necessary to justify the regulation. But the law contains nothing like the absolute-prohibition rule that applicants appear to advocate.

Rather, as this Court has explained, "the Court's disposition of the claims in *McDonald* rested on *failure of proof*" concerning the burden on voters. *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) (emphasis added); *cf. Crawford*, 553 U.S. 181, 199 (2008) (plurality op.) (examining "evidence in the record and facts of which we may take judicial notice" to assess extent of burden on voters). The question whether a

sufficient burden on voting exists for *Anderson-Burdick* to apply is thus highly fact-bound. Applicants' contention that *McDonald* applies here *as a matter of law* is therefore incorrect.

c. Ample proof of a burden on voters exists here, as the lower courts twice found. The courts below applied the *Anderson-Burdick* standard, rather than the *McDonald* rational basis review, only after finding *as a matter of fact* that the burden on voters from the Ohio system was "significant." App. 51a; *see also* App. 11a. The court of appeals explained that respondents "introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." App. 11a (citing district court record). It further noted that the "district court credited statistical studies that estimated approximately 100,000 Ohio voters would choose to vote during the three-day period before Election Day, and that these voters are disproportionately 'women, older, and of lower income and education attainment.'" *Id.* (quoting district court opinion). For these reasons, the court of appeals cited the district court's conclusion that "'thousands of voters who would have voted during those three days will not be able to exercise their right to cast a vote in person.'" App. 12a (quoting district court opinion). Finally, the court of appeals emphasized that the "State did not dispute the evidence presented by [respondents], nor did they offer any evidence to contradict the district court's findings of fact." *Id.* These extensive factual findings set the instant case apart from *McDonald*, because they establish that the Ohio scheme "has an impact on [Ohioans'] ability to exercise the

fundamental right to vote." *McDonald*, 394 U.S. at 807. As a result, *McDonald*'s rational basis test is inapplicable, and *Anderson-Burdick* controls.

Applicants' challenge to the decision below, distilled to its essence, is thus fundamentally a dispute over facts.[11] Appl. 28-32. As explained above, applicants dispute the district court's finding (affirmed by the Sixth Circuit) that "Ohio voters will in fact be precluded from voting without the additional three days of in-person early voting." Appl. 28 (quoting App. 11a). They describe at length the relative merits and demerits of reports and studies submitted to the district court. Appl. 29-31. But the district court and the court of appeals reviewed all the evidence and arguments presented to them, and found, contrary to applicants' position, that the Ohio system *would* burden voters.

As explained earlier, that these facts were found and accepted by *both* courts below is particularly significant because of this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred." *Branti*, 445 U.S. at 512 n.6. This is not the time—and, more important, this is not the venue—in which to relitigate the factual disputes raised here by applicants.

In sum, there is no merit to applicants' challenge to the decision below. The district court and court of appeals, relying on factual findings made at the

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[11] Applicants contend (Appl. 31 n.8) that the district court's finding that voters would be burdened does not rise to the level of a "finding of fact" under Federal Rule 52(a). Unsurprisingly, applicants cite no support for that proposition. What is more, they failed to raise this issue before the Sixth Circuit—the very court charged with reviewing the district court's findings, *see* App. 6a—and thus the issue is waived and not properly before this Court.

preliminary injunction stage, found that the Ohio voting system would burden voters, and that the *Anderson-Burdick* standard applied. Applicants provide no basis to conclude that the court of appeals decided this mixed question of law and fact incorrectly, and their tardy attack on the lower courts' factual findings is unavailing. Nor do applicants make any effort to argue that the courts below erred in holding that they have provided no adequate justification for the Ohio system's burden on voters under the *Anderson-Burdick* standard. Finally, for the reasons explained below, the district court did not abuse its discretion in the weighing of the equitable factors: applicants will suffer no significant harm from the injunction, while voters and the public at large will be severely harmed if the injunction is lifted. For these reasons, it is unlikely that this Court will reverse the decision below.

C. Applicants Will Suffer No Irreparable Harm, And The Balance Of Equities In Any Event Strongly Disfavors A Stay

An application for a stay should be denied if the applicants cannot "show . . . a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth*, 130 S. Ct. at 710; *see also Wise v. Lipscomb*, 434 U.S. 1329, 1333 (1977) (Powell, J., in chambers) ("[T]he party seeking a stay bears the burden of advancing persuasive reasons why failure to grant [a stay] could lead to irreparable harm."). Applicants advance two arguments for why the State would suffer irreparable harm, but the first is contrary to the record evidence and factual findings of both lower courts, and the second is at odds with this Court's own precedents. Moreover, because the record establishes that an emergency stay would

harm the voters of Ohio—including voters in Ohio's most populous counties and voters who are disproportionately older and of lower income and education attainment—the balance of the equities weighs heavily against a stay.

1. Applicants' primary argument for establishing irreparable injury is a factual one based on a supposed increase in administrative burdens. That contention is flatly at odds with the findings below.

Applicants assert that the district court's injunction will leave the State with "inadequate time and resources to prepare for Election Day," which might force a "reallocation of limited state resources" that could "hamper Election Day voting." Appl. 38. This is an extraordinary assertion, given that the relief below simply keeps in place the system under which the 2008 and 2010 elections were administered, and an election system on which the largest and most hard pressed counties (which have supported respondents in this litigation) have come to rely. This question was squarely before the district court and the Sixth Circuit, and both courts found that any additional administrative burden was scant and did not establish irreparable injury. After all, the relief below does not compel that there be particular voting hours or a redirection of resources. Indeed, the preliminary injunction does not interfere with the discretion of local election boards in determining the days and hours of their polling places within three days of Election Day. It simply commands that polling places open during that time period be open to all eligible voters, just as they did in 2008 and 2010.

In granting the preliminary injunction, the district court found that "there is

no definitive evidence before the Court that elections boards will be tremendously burdened." App. 57a. It reached this conclusion only after carefully reviewing the evidence introduced by applicants, and noting that applicants offered "little in support of [its] claim that Ohio election boards cannot simultaneously accommodate in-person early voting and pre-Election Day preparations during the three days prior to Election," *id.* at 52a, as they have done in recent elections. Indeed, the district court recognized that it was the position of Ohio's most populous county that its Election Board was sufficiently equipped from a "work and budget" perspective "to provide equal in-person voting for ***all*** voters." *Id.* at 53a (emphasis in original).

The Sixth Circuit agreed, holding that applicants have "shown no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2006." App. 13a-14a. The court of appeals further found that during the intervening period, "the Ohio boards of elections have effectively conducted a presidential election and a gubernatorial election, not to mention many other statewide and local elections, *all while simultaneously handling in-person early voting during the three days prior to the election*." App. 14a (emphasis added). And it noted that the applicants "introduced no specific evidence to refute" evidence offered by several Ohio counties that contradicted the State's assertions concerning administrative burden. *Id.*

At bottom, applicants' contention that they will suffer irreparable injury is an intensely idiosyncratic dispute concerning factual findings that were made not once,

but twice in the lower courts. Applicants ignore those findings, and seek to relitigate this factual issue by pointing the Court to the same declaration of a State elections official that was twice scrutinized and twice found insufficient below. *See* Appl. 15-16, 38; *see also* App. 57a-58a; App. 13a-14a.

Indeed, as the Sixth Circuit properly recognized, the preliminary injunction merely "restores the *status quo ante*," by preserving the same regime that existed during the 2008 election and up until the flurry of legislative and administrative changes that began in July 2011. App. 20a. Applicants contend that it would work an "irreparable injury" to restore that *status quo*, but that position is untenable. As a factual matter, applicants' position would require this Court not only to upend the factual findings of two lower courts, but also to arrive at its own finding, without any basis in the record, that administering early voting on the final three days preceding Election Day will somehow "be more onerous than the numerous elections that have been successfully administered in Ohio since early voting was put into place in 2005." App. 13a-14a.

Nor can applicants succeed in establishing "irreparable harm" merely on the basis that the State has been "enjoined by a court from effectuating [a] statute[]." App. 37a (internal citation omitted). That language derives from two in-chambers opinions: *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345 (1977) (Rehnquist, J., in chambers), and *Maryland v. King*, -- S.Ct. --, 2012 WL 3064878 (July 30, 2012) (Roberts, C.J., in chambers). Yet in neither of those opinions did the fact of an injunction against a statute *in and of itself* suffice to

satisfy the irreparable harm standard. In *New Motor Vehicle Board*, then-Justice Rehnquist described other irreparable harms to the State of enjoining the statute in question before stating that "[i]t *also* seems to me that any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Id.* at 1351 (emphasis added). Likewise, in *King*, the Chief Justice identified "an ongoing and concrete harm to Maryland's law enforcement and public safety interests" from an injunction preventing Maryland from obtaining DNA samples from "individuals charged but not yet convicted of certain crimes." 2012 WL 3064878 at *1-*2.[12] These independent harms to the State, wholly aside from any sovereignty interest, satisfied the irreparable harm requirement and weighed in favor of a stay in those cases. Here, however, the courts below found that there would be no such harm to the State.

Applicants' argument that the irreparable harm standard is satisfied any time a state statute is enjoined proves far too much: on applicants' apparent view, the equitable factors would warrant a stay *whenever* an injunction of a state statute is involved. There is no support for that proposition. In fact, it conflicts with this

[12] In addition, unlike in the present case, there was a clear basis for the Court to grant certiorari in both of the in-chambers opinions upon which applicants rely for this argument. *See New Motor Vehicle*, 434 U.S. at 1347 ("Because the case presumably will be coming to us by appeal and will therefore be within our obligatory jurisdiction, I feel reasonably certain that four Members of the Court will vote to note probable jurisdiction and hear the case on the merits."); *Maryland v. King*, -- S.Ct. --, 2012 WL 3064878 at *1 ("To begin, there is a reasonable probability this Court will grant certiorari. Maryland's decision conflicts with decisions of the U.S. Courts of Appeals for the Third and Ninth Circuits as well as the Virginia Supreme Court, which have upheld statutes similar to Maryland's DNA Collection Act.").

Court's historic treatment of stay applications of this sort, which routinely weigh the actual, tangible harms to the State, and do not add extra weight based on the fact that a state statute was enjoined below. *See, e.g.*, *Certain Named and Unnamed Non-Citizen Children and Their Parents v. Texas*, 448 U.S. 1327 (1980) (Powell, J., in chambers) (lifting Fifth Circuit stay and thereby reinstating district court's injunction barring, on equal protection grounds, enforcement of state statute that denied free public education to "'undocumented' alien children" without considering impact on sovereign interests in balancing the equities involved); *Blum v. Caldwell*, 446 U.S. 1311, 1316 (1980) (Marshall, J., in chambers) (denying stay to Commissioner of the New York Department of Social Services after weighing the expense to be incurred by the state absent a stay against the harm to respondents if a stay is granted); *cf. Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1315 (1983) (Blackmun, J., in chambers) (denying application from Administrator of Environmental Protection Agency to stay injunction barring enforcement of provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, and finding that no irreparable harm will result). Here, where both lower courts found that applicants would not suffer tangible harm from the district court's injunction, the stay application should be denied.

2. Furthermore, in deciding whether to grant a stay, it is "necessary" to "balance the equities" by "explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large.'" *Barnes*, 501 U.S. at 1305 (internal quotation marks omitted). Even if applicants could establish

irreparable harm, the equities here would nevertheless weigh heavily against a stay.

First, the district court's injunction has no effect on the pre-existing rights of military voters and their families to vote in-person in the three days prior to Election Day. The district court's preliminary injunction order actually re-affirms those rights, by restoring in-person early voting "on the three days immediately preceding Election Day for *all eligible Ohio* voters," including military voters. App. 58a (emphasis added). Nor does the district court's order or the Sixth Circuit's opinion imperil any of the constitutionally legitimate accommodations and protections for military voters discussed at length in the application. *See* Appl. 9-11. Because the voting rights and protections afforded to military voters are left untouched by the injunction, their interests cannot weigh in favor of a stay.

Second, an emergency stay would cause considerable harm to the public at large, by restricting the franchise of a substantial number of Ohio voters and creating uncertainty and confusion amongst voters on the eve of the election. Courts have consistently held that an abridgement or dilution of the right to vote constitutes irreparable harm.[13] Here, as the lower courts properly found, the

[13] *See, e.g.*, *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 907 (9th Cir. 2003) ("Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury") (citation and internal quotation marks omitted); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (the denial of the fundamental right to vote is unquestionably "irreparable harm"); *Miller v. Blackwell*, 348 F. Supp. 2d 916, 922 (S.D. Ohio 2004) ("Because this Court has found that the Defendants' challenged actions threaten to impair both Plaintiffs' constitutional right to due process and constitutional right to vote, the Court must

provision of early voting expands access to the franchise, and the elimination in these circumstances of early voting for the vast majority of Ohio voters necessarily burdens their right to vote. *See* App. 11a; App. 50a-51a. The ineluctable result of a stay would be to decrease the number of days on which some Ohioans may vote in person, to deny most Ohio voters *any* opportunity to vote in-person on any weekend days, and to substantially increase the burdens on voters and election officials on Election Day. R.40-1 (Directive 2012-35). This burden would fall in part on "approximately 100,000 Ohio voters" who otherwise "would choose to vote during the three-day period before Election Day," voters who "are disproportionately 'women, older, and of lower income and education attainment.'" App. 11a (quoting district court order).

What is more, granting an emergency stay at this late hour would inject uncertainty and confusion into the rapidly approaching election. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006); *see also Summit County Democratic Central & Executive Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the hours immediately preceding the election."). Since August 31, it has been clear to the voters of Ohio that, at the discretion of the local boards and consistent with the system in effect since 2005,

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find that Plaintiffs will suffer an irreparable injury if the temporary restraining order does not issue.").

they would be permitted to vote in-person at open polling places on the Saturday, Sunday, and Monday before Election Day. *See* App. 52a. Granting a stay with just weeks to go before Election Day would upend this return to the 2008 *status quo*, and risk confusing Ohio voters about their voting options and dissuading them from coming to the polls at all. *Purcell*, 549 U.S. at 4-5. Such confusion and uncertainty would plainly prejudice respondents, whose members, supporters, and constituents include millions of Ohio voters. The denial of the application, by contrast, would preserving the *status quo ante* and provide voters with a permanent and predictable schedule of early in-person voting hours.

Third, notwithstanding applicants' position, the record establishes that a stay would do harm to Ohio counties, several of which have vocally asserted their strong interest in preserving early voting for the final three days preceding the election. Ohio's most populous county filed an *amicus curiae* brief in the district court explaining that early voting on the Saturday, Sunday, and Monday before Election Day defrays costs to the County by absorbing a volume of voting that would occur on Election Day and that would strain Election Day machinery and systems. R.38 (Cuyahoga County Brief). The County noted that the cancellation of early voting during the final three days preceding the election raised the "risk of voting problems on Election Day" that would "interfere[] with th[e] fundamental right" to vote. R.38 (Cuyahoga County Brief) at 4.[14] Other counties issued public statements

[14] *See also* R.38 (Cuyahoga County Brief) at 1 ("If anything, denying Ohio voters the right to vote during the three days before the election may end up costing counties additional funds to invest in fixing the problems caused by this

supporting the restoration of in-person early voting in the last three days prior to the election for all voters. *See, e.g.*, R.57-1, (Mahoning County Press Release); R.57-2 (Franklin County letter).

Taken together, and weighed against the negligible evidence of administrative burden advanced by applicants, the harm to respondents and the public that would result from an emergency stay far outweighs any injury asserted by the State. *See Lucas*, 486 U.S. at 1304. The equities strongly counsel against a stay.

III. SUMMARY REVERSAL IS UNWARRANTED

Finally, summary reversal is unwarranted here. To begin, because the decision below is correct on the merits, no reversal is appropriate—summary or otherwise. Moreover, applicants' contention that the decision below is so clearly wrong as to warrant summary adjudication is belied by the complexity of the argument presented in the application itself. Applicants submit that "full briefing and argument would be a waste of time" and would "not aid the Court in resolution of the case" if it were inclined to grant certiorari. Appl. 39 (quoting Supreme Court Practice 344). Yet the application shows that the applicants' arguments for reversal—which have already been rejected by four Article III judges—turn on the knotty history of Ohio's disparate voting regime, the nuances of the burdens it creates, and the particular interests asserted by the State. *See* Appl. 22 (arguing that O.R.C. § 3509.03 should "be upheld given the *de minimis* burden it imposes

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deprivation, including potentially having to purchase additional voting machines and spend continuing resources on having to maintain the machines.").

and the State's important regulatory interests"); *see also id.* at 24-28 (describing burden and interests). This is simply not a situation where the decision below "is so clearly erroneous" (Appl. 39) and the purported basis for reversal so straightforward that the Court may summarily reverse it without the benefits of oral argument, merits briefing, or even a petition for certiorari.[15]

CONCLUSION

The application for a stay should be denied. To the extent the application is treated as a petition for a writ of certiorari, certiorari should be denied.

[15] *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is entirely distinguishable on this point. The operative consideration in that case was that the Ninth Circuit, in enjoining a state voting statute, gave no "deference to the discretion of the District Court," and "fail[ed] to provide any factual findings or indeed any reasoning of its own." *Id.* at 5. Here, the Sixth Circuit affirmed the decision and factual findings of the district court after a lengthy review of those findings, and issued a thoughtful, 20-page opinion explaining its reasoning.

Respectfully submitted,

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