No. 14A336

In the Supreme Court of the United States

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

Applicants,

v.

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

Respondents.

ON APPLICATION FOR STAY FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

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

In their Application for Stay, Ohio Secretary of State Jon Husted and Attorney General Michael DeWine ("Ohio" or "State") showed both that this Court would grant certiorari to reverse the panel decision's unprecedented reasoning under the Equal Protection Clause and Section 2 of the Voting Rights Act, and that the balance of equities favored Ohio's early-voting schedule over the last-minute injunction. Nothing in Plaintiffs' Response undercuts those two assertions.

To begin with, Plaintiffs lead with the equities (and minimize the law) because their legal arguments are unprecedented. Plaintiffs nowhere dispute that Ohio's early-voting schedule provides more expansive early-voting options than most States. *See* Doc.41-3, Trende Decl., PageID#1022, 1024. The panel decision's conclusion that this schedule still violates the law *either* calls all of those state regimes into question *or* engages in an improper "retrogression" analysis that targets Ohio's current schedule simply because it is not as expansive as prior schedules. Notably, moreover, the Seventh Circuit recently denied a petition for rehearing en banc (by an equally divided vote) of a stay *permitting* Wisconsin to proceed with implementing its new photo-ID legislation. *See Frank v. Walker*, No. 14-2058, Order (7th Cir. Sept. 26, 2014); *Frank v. Walker*, 2014 WL 4494153, at *1 (7th Cir. Sept. 12, 2014). That case raises similar constitutional and statutory claims against Wisconsin's photo-ID requirements—requirements that can only be described as *more* burdensome than Ohio's schedule allowing voters to vote on 19 weekdays, two Saturdays, one Sunday, a 13-hour Election Day, and 24/7 by mail.

Yet Ohio welcomes Plaintiffs' focus on equities, as its equities case is as strong as its merits case. Plaintiffs' assertion that they merely seek to preserve the status quo is mistaken on two levels. As a matter of timing, Plaintiffs obtained a last-minute *September* change that *upset* the status quo existing since *February*. It is unfair to claim that this disruptive September injunction (which Ohio has sought to overturn at every turn) represents a new status quo—to be locked down the morning after it issued. As a matter of history, Plaintiffs mistakenly suggest that their court-ordered change to Ohio's early-voting schedule long existed in Ohio. The change cherry-picks, at most, a *few* counties' schedules from 2008 and 2010. And the change is not justified by any need to protect the right to vote, because the district court conceded that no evidence showed that a single voter would be prevented from casting a vote.

I. THE EQUITIES FAVOR OHIO, BECAUSE ITS FEBRUARY SCHEDULE REPRESENTS THE STATUS QUO, NOT A LAST-MINUTE INJUNCTION.

Ohio showed (at 34-37) that the equities tipped its way because its democratically passed laws have been enjoined; Plaintiffs' delay caused the last-minute nature of that injunction; and Ohio officials have been scrambling to implement the different voting rules ever since. Plaintiffs' responses lack merit.

Enjoining State Law. As Ohio noted (at 34), its irreparable injury is straightforward. "'*[A]ny time* a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (emphasis added) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434

U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring). Plaintiffs say (at 24) these cases are distinguishable on their facts, but not in the way they suggest. *New Motor Vehicle Board* involved regulations governing car-dealership locations, 434 U.S. at 1345; this case involves regulations governing how the State chooses its government. The cases are not close. Indeed, the Court has recognized "the unique nature of state decisions that 'go to the heart of representative government.'" *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (citation omitted). An injunction against election rules imposes serious harms on the State.

Timing. Everyone agrees that last-minute injunctions before an election are a bad idea. Ohio said it (at 34-37); Plaintiffs say it (at 29); most important, this Court said it, *Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006). Yet Plaintiffs claim this as a reason to *deny* Ohio a stay (at 29) because, "[a]t this final hour, a stay would . . . confuse elections officials, and punish voters." That has it backwards. Denying a stay merely invites more last-minute injunctions like the one *Purcell* criticized.

As Ohio explained (at 35-36), *Purcell* is best read as disfavoring late injunctions by any courts, not as favoring appellate deference to a district court's late injunction. The Court's action in *Purcell* illustrates as much—it *lifted* a circuit court's injunction, even though this Court's order was *closer* to the election, and even though it allowed a voter-identification system that had been temporarily cancelled to go into effect. 549 U.S. at 4-5. Indeed, the ongoing litigation in North

Carolina by the NAACP and ACLU shows that even they do not believe that *Purcell* is about deference to district courts. They ask the Fourth Circuit to *impose* an injunction changing North Carolina's early-voting schedule after a district court declined to do so. *See* Appellants' Br. at 15, *N.C. State Conference of the NAACP v. McCrory*, No. 14-1856 (4th Cir. Sept. 19, 2014), *available at* https://www.aclu.org/sites/default/files/assets/055_br__of_appellants_3.pdf.

Delay. This case's calendar shows that Plaintiffs delayed, while Ohio has been as diligent as possible to retain its early-voting schedule. Ohio's early-voting schedule was set in *February*, but Plaintiffs sought an injunction on *June 30*, consuming four of the seven months available before September 30. Further, in response to the "voluminous exhibits" that allegedly took Plaintiffs four months to develop (at 28), Ohio responded in five weeks with three expert reports, two rebuttal reports, five depositions, several declarations, an opposition brief, and document production. *See* Doc.61-1, Ex. List, PageID#2228-31.

Notwithstanding this four-month delay, Plaintiffs claim (at 22) that *Ohio* caused the need for this late intervention. That is simply untrue. It was the *last-minute* injunction on September 4 that did so. Ohio appealed that injunction and moved to expedite the appeal within days. The Sixth Circuit granted expedition, but, on September 12, it denied Ohio's motion for a temporary stay pending its decision on the merits. Plaintiffs mistakenly say (at 22) that, at this point, Ohio "could have immediately petitioned to have their stay denial reheard *en banc*." Sixth Circuit rules forbid en banc review of stay orders. *See* Sixth Circuit I.O.P.

35(g). And since the Sixth Circuit had denied a stay but agreed to expedite, a stay pending that decision would have placed Ohio exactly where it is now—seeking a stay pending certiorari following the panel decision. Further, Ohio sought en banc review within hours of the Sixth Circuit's merits decision, and sought this stay the next day. All of this goes back to what the Court said in *Purcell*: Courts should "give[] some weight to the possibility that the nonprevailing parties would want to seek [further appellate] review." 549 U.S. at 5. The last-minute hurried briefing arising now confirms the injunction should not have been entered in the first place.

Status Quo. Plaintiffs repeatedly say that the court-ordered schedule restores Ohio's status quo. Resp. 1 ("process . . . under the injunction is the very same process Ohio counties have been using for almost a decade"), 26 ("Ohio counties have had no difficulty maintaining these electoral opportunities for nearly a decade"), 27 ("injunction did nothing more than ensure that longstanding electoral practices remain in place"). But that is not true for most of Ohio's counties with respect to anything but the prior statutory week of same-day registration. The court-ordered schedule forces *all* 88 counties statewide to have a schedule that at most *only* a few counties had in 2008 and 2010, and that no county had in 2012. In 2012, the *only* weekend hours were on the weekend before Election Day. Doc.72, Order, PageID#5857. The injunction adds Sunday, October 26, and the Secretary's Directive already added another Saturday, October 25. In 2010, over 80 of Ohio's 88 counties did *not* include evenings or weekends; only a few had such hours. Doc.72, Order, PageID#5856 ("during the 2008 and 2010 elections, only a handful of Ohio's

88 counties offered" Sunday hours); *id.* at PageID#5907 ("such voting opportunities have been successfully offered by individual counties in past elections"); Doc.41-9, Damschroder Decl., PageID#1169 (most counties had normal business hours with one Saturday). It is also important to remember that the Directive differentiates between presidential and mid-term elections and the injunction imposes a *broader* schedule than even a presidential year for a mid-term election. In sum, the injunction uses improper "retrogression" to find a constitutional and statutory violation, but then remedies the alleged violation for most counties not by blocking the change and restoring the status quo, but by "restoration plus," which forces all Ohio counties to have the schedule only a few did in older years.

County Burdens. Given the expanded rules, the injunction burdens most Ohio counties, who have not prepared for these last-minute impositions. The district court admitted that some counties pointed to cost increases as high as 20% for temporary workers, but insisted that those could be "managed." Doc.72, Order, PageID#5904-05. It should be indisputable that "more hours means more money." Doc.41-18, Walch Decl., PageID#1253; *see also, e.g.,* Doc.68-2, Ward Decl., PageID#5124 ("increased early voting hours in the evenings and on weekends [would] increase the costs and administrative burdens").

Plaintiffs' Burdens. While the above equities weigh against the injunction, Plaintiffs' claim to protecting voting rights cannot tip the scales the other way. Plaintiffs argue (at 27-28) that Ohio's early-voting schedule would impose burdens on thousands of Ohio voters. Yet they do not dispute the district court's admission

that "it is impossible to predict whether" Ohio's chosen schedule "will actually reduce voter turnout" or whether voters will simply "vote during a different time." Doc.72, Order, PageID#5897. And the burdens that Plaintiffs identify from Ohio's schedule are *less* than the burdens imposed on most Americans. After all, under Ohio's early-voting schedule, its voters still have *more* opportunities to vote than the vast majority of voters who reside in States with less expansive early-voting options. *See* Doc.41-3, Trende Decl., PageID#1022, 1024.

II. PLAINTIFFS HAVE NOT AND CANNOT JUSTIFY THE PANEL DECISION'S BROAD READING OF THE EQUAL PROTECTION CLAUSE.

Ohio showed (at 11-12) that the panel decision cannot be explained under the Court's equal-protection cases because it finds a violation based on a disparate impact on African-American, low-income, and homeless voters without a showing of discriminatory intent. And Ohio illustrated (at 12-21) that the panel decision cannot be explained under the Court's right-to-vote cases because it facially invalidated Ohio's early-voting schedule by applying heightened scrutiny to mere reductions of absentee early voting. To all of this, Plaintiffs respond (at 30, 32-33) that the decision is a mere "fact-bound adjudication." They are mistaken.

First, Plaintiffs rightly abandon any defense of the injunction on general equal-protection principles, arguing (at 37) that the panel "did not base its constitutional holding on a racial disparate impact theory." But that is precisely what the panel did, which is why it was wrong. The panel repeatedly measured the burdens based on their *effect* on a discrete subset of voters. *See, e.g.*, Panel Op. 15, 19, 20 n.4. This violates black-letter law because neither Plaintiffs nor the panel

decision ever identified any discriminatory intent. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Second, Plaintiffs cannot overcome Ohio's showing (at 13-16) that absentee-voting regulations are subject to rational-basis review except where they "absolutely prohibit[] [the challenger] from voting" in any other way. *Goosby v. Osser*, 409 U.S. 512, 521 (1973); *see McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). Plaintiffs characterize (at 39) Ohio's argument as seeking a "categorical exemption" from the *Anderson-Burdick* framework. Not so. Ohio simply says that (under *Anderson-Burdick*'s tiers of scrutiny) rational-basis review applies for most absentee-voting regulations. Those regulations only impose a *substantial* burden on a voter's right to vote when a voter is "absolutely prohibit[ed]" from voting in any other way. *Goosby*, 409 U.S. at 521. Here, however, nothing in Ohio's regulations prevents voters from simply voting on other days. Doc.72, Order, PageID#5897.

Plaintiffs further sidestep *McDonald* (at 39) on the claimed distinction between *expanding* versus *trimming* early-voting options. But this distinction has no basis in the Court's right-to-vote cases. Rightfully so. Such a "retrogression" approach under the Constitution would create a one-way ratchet that would only discourage States from expanding early voting or any other novel voting rules. If anything, it would be worse than retrogression under Section 2 because it would then be constitutionally enshrined and unchangeable by subsequent Congresses. Ohio should not be punished because it is a leader in early voting.

Third, Plaintiffs assert (at 37-38) that Justice Stevens's plurality opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), justifies facial invalidation of Ohio's early-voting schedule based on impacts on certain voters. But, like the panel, Plaintiffs *ignore* Justice Stevens's assertions that the claims there failed because they presented a *facial* challenge based on alleged burdens on only a *subset* of voters. *Id.* at 202-03. That is exactly what the panel decision allowed to happen here. Yet the plurality in *Crawford* explained that a "facial challenge must fail" "where the statute has a 'plainly legitimate sweep.'" *Id.* at 202 (citation omitted). That is, even considering the voters "actually impacted" by Ohio's regulations (Resp. 38), the potential remedy is not facial invalidation of Ohio's schedule for all voters, *Crawford*, 553 U.S. at 203 (Stevens, J., op.).

Fourth, Plaintiffs endorse (at 34) the panel's approach to assessing burdens and justifications: asking why the State's regulations "could not" include the injunction's new schedule. Yet this Court has "never required a State to make a particularized showing of [harms] . . . prior to the imposition of reasonable restrictions on ballot access." *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986). That is why *Crawford* upheld Indiana's photo-ID law despite no evidence of any such fraud actually occurring in Indiana. 553 U.S. at 194 (Stevens, J., op.). Plaintiffs' only response is to reframe the question in a way that points back to their error about the burden. They ask (at 40) why the State eliminated voting options that thousands used in the past. Asking the question answers it. Almost any change in voting regulations will take away an option some have used. When

Indiana passed a voter-ID law, it removed an option that *all voters* previously used (voting without showing the required identification). Similarly, when States moved to all-mail voting, *see* Doc.41-3, Trende Decl., PageID#1020, they removed options almost all voters used in the past (voting at the polls on Election Day).

The key question remains whether the burden is significant. On that point, Plaintiffs have no response to the proposition that voting by mail, or on one of 22 days before Election Day, or on Election Day itself during 13 hours is a burden of constitutional dimension. Compare the burden on Indiana voters of "gather[ing] documents" and making a "trip to the BMV" or of making a return trip to a clerk after voting provisionally. *Crawford*, 553 U.S. at 198, 200 (Stevens, J., op.). Any burdens imposed by Ohio are less than those rejected as inadequate in *Crawford*.

III. BECAUSE PLAINTIFFS REPEATEDLY COMPARE OHIO'S NEW EARLY-VOTING SCHEDULE TO ITS OLD EARLY-VOTING SCHEDULE, THEY ENGAGE IN IMPROPER RETROGRESSION NOT SUITED FOR SECTION 2.

As Ohio illustrated (at 21-34), the panel mistakenly found that Ohio's generous early-voting schedule violates Section 2 because: (1) the panel never identified an objective benchmark against which to compare Ohio's schedule; (2) the panel adopted an old-to-new "retrogression" comparison reserved for Section 5; (3) the panel immediately considered the totality of circumstances; (4) the panel's reading would have meant that the statute invalidated all state laws immediately upon enactment; and (5) the panel misapplied two canons of construction. Plaintiffs largely make the same mistakes as the panel decision—most of which are covered in Ohio's application and only a few of which need mention here.

Objective Benchmark. Plaintiffs argue (at 46-49) that they need not show an objective benchmark against which to compare Ohio's early-voting schedule because Section 2 "considers the relative burdens that a challenged measure imposes on minority voters as compared to white voters" *in the abstract*. But again, "[i]t makes no sense to suggest that a *voting practice* 'abridges' the right to vote without some baseline with which to *compare the practice*." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("*Bossier II*") (emphases added); *Holder v. Hall*, 512 U.S. 874, 880 (1994) (Kennedy, J., op.). Section 2 requires a comparison between the *challenged* voting practice and a *different* voting practice to determine whether the challenged practices abridges the right to vote; it does not just compare how separate races fare under the challenged practice.

In this respect, the *legal question* of which benchmark to choose is outcome-dispositive. On the one hand, Plaintiffs would *not* have shown a disparate impact on African-American voters if the proper benchmark is an early-voting schedule with *fewer* options for early voting than Ohio's generous schedule. Further, Plaintiffs take no issue with Ohio's assertion that its generous schedule provides more options than most States. Doc.41-3, Trende Decl., PageID#1022, 1024. If measured against these many schedules, Ohio's schedule could only be described as *expanding* the right to vote; in no way could it be described as *abridging* that right.

On the other hand, to show a disparate impact, Plaintiffs must identify a benchmark that provides even *greater* opportunities than Ohio's current schedule. That is why Plaintiffs zero in on Ohio's *previous* schedule (or, at least, a schedule

from certain counties). For example, Plaintiffs say (at 44) that African-Americans disproportionately used the voting practices "eliminated" by the Statute and Directive, and thus that the new schedule abridges the right to vote as compared to the *older* schedules. They also note that the benchmark should be "Ohio's early voting system *without* the *newly-enacted* rules banning same-day registration, evening voting and Sunday voting." Resp. 49 (second emphasis added).

All told, Plaintiffs continue to ignore their obligation of proposing an "objective and workable standard for choosing a reasonable benchmark" in this context. *Holder*, 512 U.S. at 881 (Kennedy, J., op.). The number of potential early-voting schedules is limitless, and Plaintiffs have not proven that the choice between them is anything but "'inherently standardless.'" *Id.* at 885 (citation omitted).

Retrogression. Even though Plaintiffs compare Ohio's current schedule to select previous ones, they claim that they are not engaging in improper retrogression under Section 2. That is so, they say (at 46), because "changes to the status quo may also be challenged under Section 2." *See Bossier II*, 528 U.S. at 334 (noting that Section 2 "involve[s] not only changes but (much more commonly) the status quo itself"). That is true, but it does not help them. Courts must still compare the *new* law to a *benchmark* to determine whether it disparately harms African-Americans. In Section 5 cases, the benchmark is the prior law proposed to be changed. *See Holder*, 512 U.S. at 883 (Kennedy, J., op.). Not so under Section 2. *Id.* at 884; *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). There, the benchmark is what the "right to vote *ought to be*" as a hypothetical matter. *Bossier II*, 528 U.S. at

334. In short, this Court's cases hold that the Section 2 benchmark is not the *old* number of early-voting options but a *hypothetical* number that Ohio "ought" to have. And whatever that hypothetical "should be" number is, Ohio's generous schedule exceeds it. At the least, Plaintiffs' claim fails because they have not carried their burden to identify the proper benchmark.

Far-Reaching Effects. Plaintiffs claim (at 50-52) that Ohio overstates the panel decision's effects when it says that the decision would invalidate the voting practices in most States, which have fewer early-voting opportunities than Ohio. Yet Plaintiffs provide only one limiting principle tied to retrogression: They distinguish (at 51) the many States' "*failure to create*" early-voting opportunities from Ohio's alleged *retraction* of some opportunities. This approach provides no limiting principle, however, because Section 2 does *not* distinguish between the challenged practice and the prior practice but between the challenged practice and what the "right to vote *ought to be*" as a hypothetical matter. *Bossier II*, 528 U.S. at 334. If Ohio's prior early-voting schedule provides the number of early-voting opportunities that "ought to be," that number would apply to all 50 States.

Aside from its conflict with this Court's Section 2 cases, Plaintiffs' limiting principle also provides negative incentives from the perspective of anyone who wants to expand voting opportunities in all States, as opposed to cherry-picking attacks on Ohio. Any State considering an experiment in expanding early voting—to see if increased turnout or other benefits outweigh the administrative costs—will surely hesitate if any attempted experiment forces that State, by a one-way ratchet,

to keep the expansion forever. Acceptance of a retrogression limiting principle would discourage these States from expanding their early-voting opportunities.

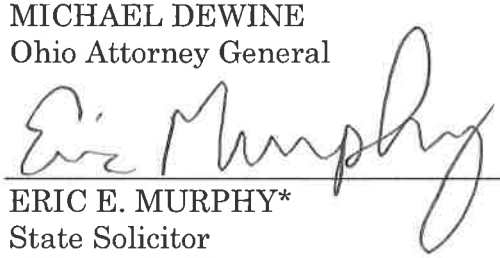
In sum, the narrowest way to resolve this application is on the ground that Plaintiffs have failed to carry their burden of identifying an objective benchmark against which to measure Ohio's generous early-voting schedule. *Holder*, 512 U.S. at 881-82 (Kennedy, J., op.). That allows the Court to leave for another day whether such a benchmark exists or what it should be.

CONCLUSION

The Court should stay the injunction pending certiorari or grant certiorari and vacate the injunction.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



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CERTIFICATE OF SERVICE

I, Eric E. Murphy, counsel of record for Applicants, hereby declare the REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR STAY was served upon the following counsel for Respondents:

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The foregoing document was served by electronic mail and mailing for delivery on Tuesday, September 30, on this 28th day of September, 2014.

Eric E. Murphy, State Solicitor