No. 16-___

IN THE

Supreme Court of the United States

NORTHEAST OHIO COALITION FOR THE HOMELESS, COLUMBUS COALITION FOR THE HOMELESS, AND OHIO DEMOCRATIC PARTY,

Petitioners,

v.

JON HUSTED AND THE STATE OF OHIO,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly permitted aggrieved individuals and groups to bring suit under federal statutes protecting the right to vote regardless of whether those statutes expressly authorize such suits. One such statute is 52 U.S.C. § 10101, enacted originally as part of the Act of May 31, 1870, 16 Stat. 140. This statute was enforced by private litigants for decades before a 1957 amendment also authorized enforcement by the Attorney General.

The courts of appeals are divided over the following important question:

Can private parties sue to enforce 52 U.S.C. § 10101?

PARTIES TO THE PROCEEDING

Petitioners Northeast Ohio Coalition for the Homeless (NEOCH), the Columbus Coalition for the Homeless (CCH), and Ohio Democratic Party (ODP) were the Plaintiff-Appellees/Cross-Appellants below. Respondents State of Ohio and Ohio Secretary of State Jon Husted were the Defendant-Appellants/Cross-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Northeast Ohio Coalition for the Homeless (NEOCH), the Columbus Coalition for the Homeless (CCH), and Ohio Democratic Party (ODP) ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is published at 837 F.3d 612. The district court opinion (Pet. App. 114a) is unpublished but available at 2016 U.S. Dist. LEXIS 74121.

JURISDICTION

The Sixth Circuit issued its opinion on September 13, 2016. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on October 6, 2016 (issuing an order with written dissents, recommended for publication, on October 13, 2016). Pet. App. 267a. On December 27, 2016, Justice Kagan extended the time to file this petition through March 3, 2016. No. 16A426. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. *42 U.S.C. § 1983* provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...."

2. The full text of 52 U.S.C. § 10101 is reproduced in Appendix D to this petition. Pet. App. 287a-298a. Relevant portions are also set forth below:

§ 10101(a)(2)(B):

"No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election."

§ 10101(c):

"Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order."

§ 10101(d):

"The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have

exhausted any administrative or other remedies that may be provided by law."

§ 10101(e):

"In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice."

§ 10101(g):

"In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceeding authorized by this subsection, it shall be the duty of the chief judge of the district . . . immediately to designate a judge in such district to hear and determine the case . . . ."

3. Relevant portions of Ohio law include the following:

Ohio Rev. Code § 3509.06(D)(3):

"An identification envelope statement of voter shall be considered incomplete if it does not include all of the following:

(i) The voter's name;

(ii) The voter's residence address or, if the voter has a confidential voter registration record, as described in

section 111.44 of the Revised Code, the voter's program participant identification number;

(iii) The voter's date of birth. The requirements of this division are satisfied if the voter provided a date of birth and any of the following is true:

(I) The month and day of the voter's date of birth on the identification envelope statement of voter are not different from the month and day of the voter's date of birth contained in the statewide voter registration database.

(II) The voter's date of birth contained in the statewide voter registration database is January 1,1800.

(III) The board of elections has found, by a vote of at least three of its members, that the voter has met the requirements of divisions (D)(3)(a)(i), (ii), (iv), and (v) of this section,

(iv) The voter's signature; and

(v) One of the following forms of identification:

(1) [*sic*] The voter's driver's license number;

(II) The last four digits of the voter's social security number; or

(III) A copy of a current and valid photo identification, a military identification, or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of voter registration mailed by a board of elections, that shows the voter's name and address.

(b) If the election officials find that the identification envelope statement of voter is incomplete or that the information contained in that statement does not conform to the information contained in the statewide voter registration database concerning the voter, . . . [and if the voter provides] the necessary information to the board of elections in writing and on a form prescribed by the secretary of state not later than the seventh day after the day of the election. . . . and the ballot is not successfully challenged on another basis, the voter's ballot shall be counted in accordance with this section."

Ohio Rev. Code § 3509.07:

If election officials find that any of the following are true concerning an absent voter's ballot or absent voter's presidential ballot and, if applicable, the person did not provide any required additional information to the board of elections not later than the seventh day after the day of the election, as permitted under division (D)(3)(b) or (E)(2) of section 3509.06 of the Revised Code, the ballot shall not be accepted or counted:

(A) The statement accompanying the ballot is incomplete as described in division (D)(3)(a) of section 3509.06 of the Revised Code or is insufficient;

(B) The signatures do not correspond with the person's registration signature;

(C) The applicant is not a qualified elector in the precinct;

(D) The ballot envelope contains more than one ballot of any one kind, or any voted ballot that the elector is not entitled to vote;

(E) Stub A is detached from the absent voter's ballot or absent voter's presidential ballot; or

(F) The elector has not included with the elector's ballot any identification required under section 3509.05 or 3511.09 of the Revised Code.

Ohio Rev. Code § 3505.183:

(B)(1) . . . The following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

(a) The individual's printed name, signature, date of birth, and current address;

(b) A statement that the individual is a registered voter in the precinct in which the provisional ballot is being voted;

(c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

(B)(4)(a) Except as otherwise provided in division (D) of this section, if, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section and comparing the information required under division (B)(1) of this section with the elector's information in the statewide voter registration database, the board determines that any of the following applies, the provisional ballot envelope shall not be opened, and the ballot shall not be counted:

(i) The individual named on the affirmation is not qualified or is not properly registered to vote.

(ii) The individual named on the affirmation is not eligible to cast a ballot in the precinct or for the

election in which the individual cast the provisional ballot.

(iii) The individual did not provide all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.

…

(viii) The last four digits of the elector's social security number or the elector's driver's license number or state identification card number are different from the last four digits of the elector's social security number or the elector's driver's license number or state identification card number contained in the statewide voter registration database.

(ix) Except as otherwise provided in this division, the month and day of the elector's date of birth are different from the day and month of the elector's date of birth contained in the statewide voter registration database.

This division does not apply to an elector's provisional ballot if either of the following is true:

(I) The elector's date of birth contained in the statewide voter registration database is January 1, 1800.

(II) The board of elections has found, by a vote of at least three of its members, that the elector has met all of the requirements of division (B)(3) of this section, other than the requirements of division (B)(3)(e) of this section.

(x) The elector's current address is different from the elector's address contained in the statewide voter registration database, unless the elector indicated that the elector is casting a provisional ballot because the elector has moved and has not submitted a notice of change of address, as described in division (A)(6) of section 3505.181 of the Revised Code.

Ohio Rev. Code § 3505.182:

Each individual who casts a provisional ballot under section 3505.181 of the Revised Code shall execute a written affirmation. The form of the written affirmation shall be printed upon the face of the provisional ballot envelope and shall be as follows:

…

I understand that, if the information I provide on this provisional ballot affirmation is not fully completed and correct, if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, or if the board of elections determines that I have already voted in this election, my provisional ballot will not be counted.

STATEMENT OF THE CASE

The Materiality Provision of the Civil Rights Act of 1964, currently codified at 52 U.S.C. § 10101(a)(2)(B),[1] prohibits denying an individual the right to vote due to any "error or omission on any record or paper relating to any application, registration or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." Petitioners have challenged Ohio statutes that either permit or require boards of elections to reject ballots cast by otherwise eligible voters who make such immaterial errors or omissions. The courts of appeals are in direct conflict over whether private plaintiffs, such as petitioners, can sue to enforce the Materiality Provision.

1. Section 10101 has its origins in section 1 of the Act of May 31, 1870,[2] enacted to "enforce the Right of Citizens of the United States to vote in the several States of this Union." 16 Stat. 140. That statute has

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[1] Section 10101 was initially codified as Rev. Stat. § 2004, and then recodified (as amended) at 8 U.S.C. § 31, and then (as amended) at 42 U.S.C. § 1971. The Materiality Provision was first added in 1964. *See* Pub. L. 88-352, § 101, 78 Stat. 241, 241. In 2014, the Office of the Law Revision Counsel transferred the voting-rights provisions of 42 U.S. Code to a new Title 52. *See* http://uscode.house.gov/editorialreclassification/t52/index.html. Petitioners will use the current statutory section number throughout the petition wherever possible.

[2] Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-42 (1870) (partially repealed 28 Stat. 36 (1894)). Section 1 of the Act was not repealed.

been amended and recodified over the past century and a half, but it remains a central tool for safeguarding the right to vote.

During the first half of the twentieth century, affected citizens prevailed in numerous cases brought under predecessor versions of Section 10101. *See, e.g.*, *Smith v. Allwright*, 321 U.S. 649, 651 (1944); *Chapman v. King*, 154 F.2d 460, 464 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924, 926 (5th Cir. 1946); *Rice v. Elmore*, 165 F.2d 387, 392 (4th Cir. 1947). But enforcement purely by private parties proved insufficient. Accordingly, Congress amended the statute in 1957 to authorize the United States Attorney General to file civil actions on behalf of the United States and seek injunctive relief.[3] That provision is currently codified at 52 U.S.C. § 10101(c).

The Attorney General, who introduced the legislation, testified before Congress that the new enforcement provision would not impair the ability of private individuals to bring suit under the Act: "We are not taking away the right of the individual to start his own action . . . . Under the laws amended if this program passes, private people will retain the right they have now to sue in their own name."[4]

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[3] *Civil Rights Act of 1957*, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38 (1957). *See also South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

[4] *Civil Rights Act of 1957: Hearings on S. 83, an amendment to S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. Con. Res. 5 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong. 73, 203, 1; 60-61, 67-73 (1957) (statement and testimony of the Hon. Herbert Brownell, Jr., Attorney General of the United States).

Accordingly, private plaintiffs continued to sue under the Act following the 1957 amendment. *See, e.g.*, *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Coalition for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000); *Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm.*, No. 12-927, 2012 U.S. Dist. LEXIS 110681, *21-22 & n.3 (C.D. Cal. Aug. 7, 2012); *Davis v. Commonwealth Election Comm'n*, No. 1-14-002, 2014 U.S. Dist. LEXIS 69723, *31-34 (D. N. Mariana Isl. May 20, 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016).

2. Ohio laws SB 205[5] and 216,[6] with one limited exception,[7] require county elections boards to reject absentee and provisional ballots unless the voters have perfectly filled in five fields of information on the forms accompanying the ballots: name, address, birthdate, identification, and signature. They do so even if elections boards can determine the voter's identification and eligibility to vote despite any errors

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[5] Act of Feb. 19, 2014, Ohio No. 64, ftp://sosftp.sos.state.oh.us/free/publications/SessionLaws/130/130-SB-205.pdf (codified in scattered sections of Title 35 of Ohio Rev. Code).

[6] Act of Feb. 28, 2014, Ohio No. 67, ftp://sosftp.sos.state.oh.us/free/publications/SessionLaws/130/130-SB-216.pdf (codified in scattered sections of Title 35 of Ohio Rev. Code).

[7] The exception is that elections boards have discretion to accept a provisional ballot where a voter writes in the wrong birth-month or day if the other fields are complete, but they are not required to accept it. Ohio Rev. Code § 3505.183(B)(4)(a)(ix)(II).

or omissions. *See* Ohio Rev. Code §§3509.06(D)(3), 3509.07, 3505.181, 3505.182, 3505.183. *See also, e.g.,* R.666, PageID#31148 (assistant Secretary of State testifying that "that's the law").

These "Perfect Form" requirements, enacted in 2014, have been in effect for three general elections held while this litigation has been pending. Evidence from the 2014 and 2015 general elections show that these Perfect Form requirements disenfranchised thousands of voters—for errors as trivial as using cursive writing rather than print (even where the cursive is legible), omitting a zip code from an otherwise accurate and ascertainable address, and writing the current date rather than a birthdate. *See* Pet. App. at 11a, 154a-155a; R.687-2, PageID#33549.

For example, 87-year-old Sally Miller, who has macular degeneration, missed one digit of her social-security number on her absentee envelope. All the other information on her ballot was correct, and her signature on the envelope matched the signature on her ballot application. Nonetheless, the elections board discarded her ballot, even though she had already provided the requisite information when she correctly filled in the absentee-ballot application, and even though board officials had enough information to verify her eligibility to vote. *See* R. 672-15, PageID#31510; R.753-3, PageID#49796-49798 (ballot form and application); R.657, PageID#29019-29020; *see also* Pet. App. 150a-154a.

3. Petitioners NEOCH, CCH, and ODP challenged the new laws on October 30, 2014, in a second supplemental complaint in their preexisting lawsuit against Respondents. Pet. App. 124a. The

basis for jurisdiction was 28 U.S.C. § 1331 (federal question).

NEOCH and CCH are non-profit organizations dedicated to improving the lives of homeless people, including through advocacy and organizing efforts to ensure homeless people can vote. ODP is a political party comprising 1.2 million members dedicated to, among other goals, advancing the interests of the Democratic Party. For all three organizations, protecting the right to vote for their members and other constituents, including the right to have one's vote be counted, is crucial. And homeless people, a high percentage of whom are illiterate, often have difficulty filling out forms. *See* Pet. App. 126a–134a.

The district court conducted a 12-day bench trial in March 2016 with lay, expert-witness, and disenfranchised voters' testimony. *See* Pet. App. 11a, 125a.

At trial, numerous officials on county elections boards testified that they were able to identify voters and confirm their eligibility to vote even when fewer than all five fields were filled out completely and correctly. *See, e.g.*, Pet. App. 214a-215a. *See also* R.657 (Manifold/Franklin), PageID#29017-29020;[8] R.656 (Burke/Hamilton), PageID#28856-28859; R.660 (Scott/Lucas), PageID#29832-29833; R.660 (Bucaro/Butler), PageID#29668; R.663 (Reed/Carroll), PageID#30299; R.663 (Larrick/Noble), PageID#30313–30414; R.663 (Bear/Harrison), PageID#30357-58, 30361–30362; R.663 (Osman/Adams), PageID#30448-30449; *see also* R.656

[8] The parentheticals indicate the witness and the relevant county.

(Perlatti/Cuyahoga), PageID#28755-28760; R.661 (Sauter/Summit), PageID#30031-30032, 30038; R.657 (Adams/ Lorain), PageID#29079-29080, 29103-29104, 29124; R.658 (Morgan/Miami), PageID#29255-29256, R.663 (Crawford/Paulding), PageID#30327; R.663 (Passet/Wyandot), PageID#30479; Edwards Dep., R.644, (Cuyahoga), PageID#27162, 27169-80.

Indeed, the fact that the State could in fact "determin[e]" that the voters whose ballots were discarded were "qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), is further proved by the fact that elections boards—recognizing voters' eligibility—gave voters "credit" for having voted, to prevent them from being purged from voter lists because of inactivity. *See, e.g.*, PageID#30076 (Sauter); PageID#29838-29839 (Scott); PageID#30142 (Ward); *see also* R.751-1, Cuyahoga "Provisional Reasons and Flags Summary," PageID#48978-48979; Edwards Dep., R.644, PageID#27168.

Respondents struggled to identify a rationale that could justify disenfranchising eligible voters based upon immaterial errors or omissions. Respondent Husted's representative at trial, Assistant Secretary of State Matthew Damschroder, admitted that the risk of fraud was "infinitesimal" and did not justify the five-fields requirement as to either absentee ballots or to provisional ballots. *See* R.665, PageID#31051–31052. He also admitted that the State's proffered rationale for the perfection requirement on provisional-ballot forms—to promote voter registration—did not justify disenfranchising otherwise eligible already-registered voters. *See* R.665, PageID#31049.

On June 7, 2016, the District Court issued its Final Judgment. Regarding petitioners' claim under the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), it held that despite the "thorough reasoning" of the Eleventh Circuit decision in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), it was bound by Sixth Circuit precedent holding that the statute contains no private right of action, s*ee McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), to dismiss petitioners' claim. Pet. App. at 260a. The court nonetheless entered judgment against respondents on two other claims (undue burden under the Fourteenth Amendment, and discriminatory impact under Section 2 of the Voting Rights Act). Pet. App. at 207a–221a, 238a-258a. It therefore enjoined Ohio's enforcement of its Perfect Form requirements "to the extent they require full and accurate completion" of the absentee-ID envelope and provisional-ballot affirmation form "before an otherwise qualified elector's ballot may be counted," and "to the extent they prohibit poll workers from completing voters' absentee or provisional ballot forms unless voters provide a specific reason for seeking assistance." Pet. App. 264a-265a.[9]

4. A divided Sixth Circuit panel largely reversed the district court's injunction. Pet. App. 3a. Regarding the Materiality Provision claim, the panel majority, like the district court, acknowledged *Schwier*'s reasoning, but held that circuit precedent bound it to hold that petitioners lacked a cause of action for violations of Section 10101. Pet. App. 30a-

[9] The court also ruled against Petitioners on their Equal Protection claim regarding election boards' widely different treatment across counties of identical errors. *Id.* at 224a-227a.

31a. The court left in place only the prohibition on requiring full and accurate completion of two fields (address and birthdate) by absentee voters. Pet. App. 35a-41a. By reversing the remainder, the court permitted elections boards to continue to disenfranchise voters for technical errors in the name and identification fields on the absentee form, as well as in any of the fields on the provisional-ballot form. This included discarding a ballot where the voter had written his or her name in legible cursive rather than in roman print. The court reached this result despite acknowledging that the State had no legitimate concern about fraud. Pet App. 37a-40a. The court did not address Defendants' admission that the voter-registration rationale they were touting did not justify disenfranchising *already-registered* otherwise eligible and identifiable voters. *See above,* at 19.

Judge Damon Keith wrote a 37-page dissent. Pet. App. 50a-113a.

5. Petitioners sought en banc review, including on the Materiality Provision issue, pointing to the conflict among the circuits. On October 6, 2016 (with an order recommending publication on October 13, 2016), the Sixth Circuit denied review on a nine-to-seven vote, over dissents by Chief Judge Cole and Judge Donald and panel Judge Keith's vote for a rehearing. Pet. App. 267a.[10] Petitioners' motion for a stay of the mandate pending final disposition of a

[10] Circuit Judge Alice Batchelder simultaneously denied, without explanation, Petitioners' motion for her recusal. *See* Pet. App. 267a. Her husband was Speaker of the Ohio House at the time the challenged legislation was enacted, co-sponsored SB 205, voted for both SB 205 and SB 216, and, as Speaker, shepherded the statutes into law.

certiorari petition from this Court was also denied. *NEOCH v. Husted*, 837 F.3d 612 (6th Cir. Oct. 14, 2016) (No. 16-3603), ECF No. 81-2.

6. Petitioners timely filed a motion for emergency stay in this Court on October 25, 2016, which was denied on October 31, 2016. *See* Ord. Denying Stay, No. 16A405.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision below further entrenched an existing conflict between the Sixth and Eleventh Circuits on the issue of whether private plaintiffs can sue to enforce their rights under 52 U.S.C. § 10101. This question implicates not only enforcement of the Materiality Provision, *id.* § 10101(a)(2)(B), but also enforcement of the longest-standing statutory prohibition on denying or abridging the right to vote, *id.* § 10101(a)(1), and the central civil provision prohibiting interfering with the right to vote through intimidation, threat, or coercion, *id.* § 10101(b).

Given the fundamental right to vote at stake, including the right to have one's ballot be counted, the issue is an important and recurring one, particularly in light of the range of recently enacted state laws restricting the counting of ballots.

This case also presents an ideal vehicle for resolving the Circuit split. The evidence presented at trial established that thousands of Ohio voters were disenfranchised solely because of immaterial errors or omissions on "a paper relating to" their ballots, directly contravening Section 10101(a)(2)(B). Because the Attorney General has not filed a civil action, Ohio voters will continue to be disenfranchised in future elections in violation of federal law if this case cannot go forward.

Finally, the court of appeals erred in refusing to recognize a private right of action to enforce Section 10101. 42 U.S.C. § 1983 provides petitioners with a private right of action to sue under Section 10101's rights-creating provisions when, as here, the putative

defendants were acting under color of state law. Petitioners could also sue directly under Section 10101. The text and structure of Section 10101 show that the Attorney General is not the statute's sole enforcer. This Court's decisions involving implied private rights of action under statutes protecting voting rights reinforce the conclusion that a right of action to enforce Section 10101 furthers Congress's purpose. The legislative history of the 1957 amendment providing for enforcement by the Attorney General, and the doctrine against implied repeal, also reinforce the conclusion that the preexisting private right of action continued unabated after the amendment.

I. There is a mature, entrenched conflict over whether private parties can sue to enforce Section 10101.

The courts of appeals are split on the question of whether private parties can sue to enforce their rights under Section 10101.

1. The Sixth Circuit's analysis of the issue is so cursory that it is easier to quote than to summarize:

> The district court correctly dismissed this claim [under 42 U.S.C. § 1971(a)(2)(B)] for lack of standing. Section 1971 is enforceable by the Attorney General, not by private citizens. *See* 42 U.S.C. § 1971(c); *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996).

McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000). *Willing*, in turn, relied on a sole district court decision, *Good v. Roy*, 459 F. Supp. 403 (D. Kan.

1978), which asserted without explanation or citation to any authority that "the unambiguous language of Section 1971 will not permit us to imply a private right of action." *Id.* at 406. *Good* was the first decision to suggest that the 1957 amendment adding Attorney General enforcement somehow stripped private plaintiffs of a right to sue they had previously exercised for decades because the new provision contained "no mention of enforcement by private persons." *Id. Willing* was only the second decision to take that approach. *Good* and *Willing* took that position despite the fact that for twenty years after the 1957 amendments other courts had entertained private suits to enforce Section 10101. *See above,* at 15–16 (citing cases). Neither *McKay*, *Good* nor *Willing* considered whether a private right of action existed to bring suit under Section 1971.

2. The Eleventh Circuit, by contrast, has held that private plaintiffs can sue to enforce Section 10101. Its analysis is laid out most fully in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). There, it explicitly rejected the Sixth Circuit's contrary conclusion. *See id.* at 1294.

The Eleventh Circuit began its analysis by noting that this Court had twice held that private parties could enforce other provisions of the Voting Rights Act despite the express authorization for enforcement by the Attorney General. *See id.* at 1294, citing *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality opinion).

Turning to Section 10101, the Eleventh Circuit pointed to the long history of private enforcement prior to the 1957 authorization of suits by the

Attorney General, during which "plaintiffs could and did enforce the provisions of § 1971 under § 1983." *Schwier*, 340 F.3d at 1295 (citations omitted). The court found that the 1957 amendment's legislative history provided no support for eliminating this private right of action; to the contrary, the bill's purpose was "'to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States.'" *Schwier*, 340 F.3d at 1295 (quoting H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1977) (emphasis in *Schwier*).

The Eleventh Circuit also pointed out that Congress also amended the statute in 1957 to eliminate any requirement to exhaust administrative remedies. The court reasoned that this change could only have impacted lawsuits filed by private plaintiffs, and not civil actions filed by the Attorney General, to which administrative exhaustion would not have applied in any event. *Id.* at 1296. On these bases, the Eleventh Circuit held that "neither § 1971's provision for enforcement by the Attorney General nor Congress's failure to provide for a private right of action expressly in § 1971 *require* the conclusion that Congress did not intend such a right to exist." 340 F.3d at 1296 (emphasis in original).

Using the frameworks set forth in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) and *Blessing v. Freestone*, 520 U.S. 329 (1997) for determining whether plaintiffs could use 42 U.S.C. § 1983 to enforce Section 10101, the Eleventh Circuit held that they could. The court pointed to "the right-creating language" contained in Section 10101: "the focus of the text," it explained, is "the protection of each

individual's right to vote." *Schwier*, 340 F.3d at 1296. That language was both sufficiently specific and sufficiently mandatory to support a private right of action. *See id.* at 1296-97. "Thus, we hold that the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983." *Id.* at 1297.

3. In addition to the Eleventh Circuit, the Second, Fifth, and Eighth Circuits have adjudicated private claims brought under Section 10101 without expressly addressing the issue whether that section permits a private right of action. *See, e.g., Coalition for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958); *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000).

When the many conflicting district-court decisions are also taken into account,[11] it is clear that there is a mature and entrenched split over whether private parties can bring suit to enforce Section 10101's protections.

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[11] *Compare, e.g., Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm.,* 2012 U.S. Dist. LEXIS 110681, *21-22 & n.3 (C.D. Cal. Aug. 7, 2012)*; Brooks v. Nacrelli*, 331 F. Supp. 1350, 1351-52 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3rd Cir. 1973); *Davis v. Commonwealth Election Comm'n,* 2014 U.S. Dist. LEXIS 69723, *31-34 (D. N. Mariana Isl. May 20, 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016) (all holding that private parties can sue to enforce the guarantees of Section 10101) *with McKay v. Altobello,* 1996 U.S. Dist. LEXIS 16651, *3-4 (E.D. La. Oct. 31, 1996) and *Estes v. Gaston,* 2012 U.S. Dist. LEXIS 180214, *14 (D. Nev. Nov. 26, 2012) (each holding that private parties cannot sue to enforce Section 10101).

II. Whether private parties can sue to enforce Section 10101's protections is a recurring and important question.

Section 10101 protects the right to vote against a variety of infringements, ranging from intentional racial discrimination by state actors, 52 U.S.C. § 10101(a)(1), to intimidation or coercion, whether accomplished "under color of law or otherwise," *id.* § 10101(b), to disqualification of a registration application or a ballot for immaterial errors under the Materiality Provision, *id.* § 10101(a)(2)(B). The right to vote includes the right to have one's ballot "counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." *Id.* § 10310(c)(1). For decades, what is now Section 10101 provided the *only* federal statutory protection of the right to vote; today, although there are a number of other federal statutory protections, Section 10101 continues to prohibit several forms of exclusion that are not fully addressed elsewhere in federal law.

That being said, petitioners have been unable to find a single reported case in which the Attorney General brought suit to remedy a violation of the Materiality Provision. Despite Ohio's "Perfect Form" requirements, the Attorney General has never sought to enforce the Materiality Provision against Ohio. And there are many reasons the Attorney General may not bring suit: as this Court recognized in *Allen v. State Board of Elections*, 393 U.S. 544, 556 (1969), "[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state

government." Put simply, if private parties cannot enforce the Materiality Provision, it seems likely that no one will. Given the fact that these laws have disenfranchised thousands of Ohio voters since 2014, and given the certainty that Ohio voters will continue to be so disenfranchised if petitioners' claim cannot go forward (and it cannot go forward without a private right of action), this case raises an important question that merits this Court's review now.

Indeed, both this Court and Congress have repeatedly recognized that full vindication of the right to vote "could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen*, 393 U.S. at 556; *see also Morse v. Republican Party of Va.*, 517 U.S. 186, 231 (1996) (plurality op.). Thus, "Congress depends heavily upon private citizens" to enforce voting guarantees, even with respect to statutes that do not contain express private rights of action. S. Rep. 94-295, 94th Cong., 1st Sess. 40 (1975).

Whether that general principle applies to Section 10101 is an important issue that has recurred repeatedly over the 60 years since the 1957 amendments to the predecessor version of the statute first authorized suit by the Attorney General. There are more than three-dozen reported decisions in which private plaintiffs have invoked Section 10101's protections,[12] and the Ohio litigation of which this

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[12] *Reddix v. Lucky*, 252 F.2d 930 (5th Cir. 1958); *Anderson v. Courson*, 203 F. Supp. 806 (M.D. Ga. 1962); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968);

Mexican-Am. Fed.-Wash. State v. Naff, 299 F. Supp. 587 (E.D. Wash. 1969); *Brooks v. Nacrelli*, 331 F. Supp. 1350 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3rd Cir. 1973); *Shivelhood v. Davis*, 336 F. Supp. 1111 (D. Vt. 1971); *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972); *Brier v. Luger*, 351 F. Supp. 313 (M.D. Pa. 1972); *Ballas v. Symm*, 351 F. Supp. 876 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974); *Toney v. White*, 476 F.2d 203 (5th Cir. 1973), *vacated in part* 488 F.2d 310 (5th Cir. 1973) (en banc rehearing); *Coalition for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Frazier v. Callicutt*, 383 F. Supp. 15 (N.D. Miss. 1974); *Ball v. Brown*, 450 F. Supp. 4 (N.D. Ohio 1977); *Good v. Roy*, 459 F. Supp. 403 (D. Kan. 1978); *Marks v. Stinson*, No. 93-6157, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. Apr. 26, 1994); *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815 (E.D. Mich. 1996); *Cartagena v. Crew*, No. CV-96-3399, 1996 U.S. Dist. LEXIS 20178 (E.D.N.Y. Sept. 10, 1996); *McKay v. Altobello*, N. 96-3458, 1996 U.S. Dist. LEXIS 16651 (E.D. La. Oct. 31, 1996); *Spivey v. Ohio*, 999 F. Supp. 987 (N.D. Ohio 1998), *aff'd sub. nom. Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999); *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000); *Taylor v. Howe*, No. J-C-96-458 (E.D. Ark. filed Mar. 31, 1999) (Lexis/Westlaw citation pending), *aff'd*, 225 F.3d 993 (8th Cir. 2000); *Hoyle v. Priest*, 265 F.3d 699 (8th Cir. 2001); *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271 (E.D.N.Y. 2004); *Hayden v. Pataki*, No. 00-8586, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. June 14, 2004), *aff'd*, 449 F.3d 305 (2d Cir. 2006); *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cty. Elec. Bd.*, 472 F.3d 949 (7th Cir. 2007); *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006); *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006); *Gonzalez v. Arizona*, No. 06-1268, 2006 U.S. Dist. LEXIS 76638 (D. Ariz. Oct. 11, 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007); *Ray v. Abbott*, No. 06-41573, 261 Fed. Appx. 716, 2008 U.S. App. LEXIS 403 (5th Cir. Jan. 9, 2008); *Broyles v. Texas*, 618 F. Supp. 2d 661 (S.D. Tex. 2009), *aff'd*, 381 Fed. Appx. 370 (5th Cir. 2010); *Williams v. Shelby Cty. Elec. Comm'n*, No. 08-2506, 2009 U.S. Dist. LEXIS 80844 (W.D. Tenn. Sept. 4, 2009);

case is one example shows that private plaintiffs are continuing to claim its protections.

III. This case is an ideal vehicle for resolving the question presented.

The question whether private plaintiffs can sue to enforce Section 10101 and its Materiality Provision was squarely presented, and passed upon, by both courts below. *See* Pet. App. 30a-31a, 258a-260a; 267a.

Moreover, the ability of private plaintiffs to sue for violations of the Materiality Provision is a dispositive question in this case. Ohio laws led elections boards to discard absentee or provisional ballots if the form accompanying those ballots had *any* error or omission—even if that error or omission was immaterial because it did not prevent the board from confirming the voter's identity or the voter's eligibility to vote. Election officials from both political parties testified that they were required to disenfranchise voters they knew to be eligible to vote solely because of an immaterial error or omission on the forms accompanying the ballots. *See above,* at 18.

Ohio's practice flatly violates the Materiality Provision. *See* 52 U.S.C. § 10101(a)(2)(B). Thus, if

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Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm., No. 12-927, 2012 U.S. Dist. LEXIS 110681 (C.D. Cal. Aug. 7, 2012); *Estes v. Gaston*, No. 2:12-1853, 2012 U.S. Dist. LEXIS 180214 (D. Nev. Nov. 26, 2012); *Thrasher v. Illinois Republican Party*, No. 4:12-4071, 2013 U.S. Dist. LEXIS 15564 (C.D. Ill. Feb. 5, 2013); *Dekom v. New York*, No. 12-1318, 2013 U.S. Dist. LEXIS 85360 (E.D.N.Y. June 18, 2013), *aff'd*, 583 Fed. Appx. 15 (2d Cir. 2014); *Davis v. Commonwealth Election Comm'n*, No. 1-14-002, 2014 U.S. Dist. LEXIS 69723 (D. N. Mariana Isl. May 20, 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016).

private plaintiffs can bring suit to enforce Section 10101(a)(2)(B), petitioners here will have no difficulty establishing a violation of federal law. At the same time, the Sixth Circuit's decision establishes that no alternative avenue exists that can provide petitioners with the relief they seek. Thus, this case provides the Court with an ideal case in which to resolve the question presented.

IV. Private plaintiffs can bring suit to enforce Section 10101's protections.

The Sixth Circuit erred in holding that private plaintiffs cannot bring suit to enforce Section 10101's voting-rights protections, including the Materiality Provision.

First, 42 U.S.C. § 1983 expressly authorizes private suits in cases, like this one, where the deprivation of rights secured by Section 10101 is perpetrated by government officials.

Second, petitioners can rely on Section 10101 directly to bring suit. The statute's text and structure support the conclusion that private plaintiffs can enforce the rights it provides. This Court's precedent finding an implied right of action under other voting-rights provisions underscores this conclusion. And the legislative history of the 1957 amendment—which gave the Attorney General the right to enforce these protections—shows that his authority supplements, and does not supplant, the longstanding preexisting private right of action. The doctrine against implied repeal confirms that conclusion.

The Sixth Circuit's decision should thus be reversed.

A. Private plaintiffs can use 42 U.S.C. § 1983 to enforce Section 10101's voting-rights provisions.

Private plaintiffs can use 42 U.S.C. § 1983 to enforce federal rights like those protected by the Materiality Provision, when persons acting under color of state law deprive the rights.

This Court has established a two-part test to determine whether Section 1983 can be used. First, "the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). The plaintiff must show that "Congress *intended to create a federal right*," and this right must be "unambiguously conferred." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasis in original).

Second, if the plaintiff makes such a showing, the defendant may rebut the presumption of enforceability under Section 1983 by showing that Congress expressly or impliedly "shut the door to private enforcement." *Id.* at 284 n.4. The most common way for a defendant to make this showing is to prove that Congress "creat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

Applying this test here compels the conclusion that a private right of action exists under Section

1983 to enforce Section 10101's provisions that provide for individual rights. First, Congress intended to confer an unambiguous right on private persons when it enacted the Materiality Provision, which expressly recognizes "the right of any individual to vote in any election" despite "an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B).

Second, as discussed below, Congress's decision to authorize the Attorney General to *also* file civil lawsuits under this statute did nothing to suggest that Congress meant to preclude Section 1983 actions. To the contrary, as discussed next, the text, structure, purpose, and history of Section 10101 support the conclusion that Section 1983 can be used to enforce the private rights Section 10101 protects.

B. Section 10101's text and context demonstrate that both private litigants and the Attorney General may sue to enforce Section 10101's provisions.

Beyond Section 1983's express authorization, private litigants may also rely on Section 10101 directly to protect their rights under that statute. While Section 10101 provides for Attorney General enforcement, nothing in Section 10101 bars private litigants from suing. To the contrary, the language of Section 10101 presupposes that there will be lawsuits brought by parties other than the Attorney General.

Section 10101(a) lays out the primary protections provided by Section 10101, and it does so in language that "focus[es]" on the "individual's right to vote." *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003). In particular, the Materiality Provision protects "the right of any individual to vote" without regard to immaterial mistakes on election-related forms. 52 U.S.C. § 10101(a)(2)(B).

Section 10101(d), which confers jurisdiction on federal district courts to conduct "proceedings instituted pursuant to this section," then directs that the district courts shall exercise that jurisdiction "without regard to whether *the party aggrieved* shall have exhausted any administrative or other remedies that may be provided by law." (Emphasis added). In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court examined similar language in section 12(f) of the Voting Rights Act (now codified at 52 U.S.C. § 10308(f)) and described it as "compatible" with "authorizing private actions." *Id.* at 555 n.18. The Court saw "some force" in the *Allen* plaintiffs' "relying on the language 'a person'" to support the assertion that "private parties may bring suit." *Id.* The same force should apply here to the term "party aggrieved" in Section 10101(d).

But the stronger point focuses not simply on the term "party aggrieved." Rather, that term should be read in conjunction with the directive about exhaustion. Since the Attorney General would never be required to exhaust administrative remedies, this language shows that Congress assumed there would be lawsuits in which the party aggrieved—that is, the voter whose rights under Section 10101(a) were denied—is the plaintiff. And legislative history

supports this understanding. Congress eliminated the administrative-remedy-exhaustion requirement as part of the same 1957 legislation authorizing the Attorney General to file suit—to address a decision that had earlier *required* private plaintiffs to exhaust such remedies. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38; H.R. Rep. No. 85-291, at 10-11 (citing *Peay v. Cox*, 190 F.3d 123 (5th Cir. 1951)).

The understanding that private plaintiffs may sue to enforce their rights under Section 10101 is reinforced by the language of Sections 10101(e) and 10101(g). Section 10101(e) begins with the phrase "In any proceeding instituted pursuant to subsection (c)," and goes on to identify a set of specific remedies for certain pattern and practice cases. That language presupposes that there will be proceedings under Section 10101 *not* "instituted pursuant to subsection (c)"—that is, lawsuits brought by parties other than the Attorney General. Had Congress restricted enforcement of Section 10101 solely to the Attorney General, Section 10101(e) would have stated simply "In any proceeding instituted under this section." A statute should be read to give effect to every word. S*ee, e.g.*, *Lowe v. SEC,* 472 U.S. 181, 207 n.53 (1985). Congress's modifying language in Section 10101(e) reinforces the conclusion that Attorney General-initiated lawsuits under Section 10101(c) are only a subset of the entire universe of potential actions to enforce Section 10101.

Subsection 10101(g) underscores this point with its reference to "any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney

General requests a finding of a pattern or practice of discrimination pursuant to subsection (e)." Here, too, if suits by the Attorney General were the *only* potential suits under Section 10101, Congress would have referred simply to "any proceeding in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e)," without referring to proceedings "instituted by the United States."

Thus, the most plausible textual reading of Section 10101 is that Congress expected dual enforcement of the provision by both the Attorney General and aggrieved private parties like the petitioners here.

C. This Court has consistently held that private parties can enforce their rights under statutes protecting voting rights despite the fact that the Attorney General, and not private parties, were expressly authorized to bring suit.

This Court has repeatedly recognized private rights of action with respect to the provisions now codified in Subtitle I of Title 52, which expressly permit the Attorney General to file suit but do not expressly permit private parties to file suit. The same analysis this Court applied to Sections 5, 2, and 10 of the Voting Rights Act of 1965 should apply here.

Allen, 393 U.S. 544, concerned Section 5 of the Voting Rights Act of 1965 (now codified at 52 U.S.C. § 10304). The private plaintiffs in *Allen* filed suit to compel the states to seek preclearance of changes in their election laws. Although Section 5 "does not

explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act" and the Act does expressly authorize the Attorney General to bring suit, *see* 52 U.S.C. § 10308(d),(e) (then codified at 42 U.S.C. § 1973j(d), (e)), this Court found that private parties could bring suit. *See Allen*, 393 U.S. at 554-58.

Noting that the Act's purpose was "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens," the Court explained that this purpose would be frustrated if the only party who could enforce the Act was the Attorney General:

> The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.... The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.

Allen, 393 U.S. at 556-57; *see also id.* at 555 (1969) (finding private right of action "in light of the major purpose" of Voting Rights Act). Thus, this Court did not merely hold that a private right of action can exist alongside an Attorney General right of action—it also explained that having both enforcement mechanisms furthered Congress's purpose.

This Court has also repeatedly held in favor of private plaintiffs in cases brought under Section 2 of

the Voting Rights Act (now codified at 52 U.S.C. § 10301). *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991); *LULAC v. Perry*, 548 U.S. 399 (2006). As with Section 5, Section 2 provides no express cause of action for individual citizens whose right to vote has been denied or diluted. Nonetheless, this Court has stated that "'the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965,'" and this Court has accordingly "entertained cases brought by private litigants to enforce § 2." *Morse*, 517 U.S. at 232 (plurality opinion) (quoting S. Rep. No. 97–417, at 30).

Finally, *Morse* concerned Section 10 of the Voting Rights Act (now codified at 52 U.S.C. § 10306), which condemns poll taxes. Section 10 contains an express authorization for suits by the Attorney General, *id.* § 10306(b), but no mention of a right for affected individuals to sue. Nevertheless, this Court held that private individuals could bring suit under Section 10 to challenge poll taxes. *See Morse*, 517 U.S. at 230-34.

Pointing to precedent holding that in evaluating congressional action, the Court "must take into account [the action's] contemporary legal context," *id.* at 230 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 698–99 (1979)), the Court noted that the Voting Rights Act had been enacted during a period in the 1960s (a year after the Materiality Provision was enacted) when this Court had consistently found private rights of action "notwithstanding the absence of an express direction from Congress." *Morse,* 517 U.S. at at 230. Congress, it noted, acted against the "backdrop" of those decisions. *Id.* at 231 (citations omitted).

The Court further explained that the rationale set forth in *Allen*—namely, that the law's purpose would be frustrated if the Attorney General were the only party permitted to sue to enforce the law—applied equally to Section 10. *Id*. at 231.

The Court also pointed out that in 1975, Congress explicitly added language to the Voting Rights Act making it clear that not only the Attorney General, but also "an aggrieved person" could sue under *any statute* meant to enforce the Fifteenth Amendment. Because Section 10 was designed to enforce the guarantees of the Fourteenth and Fifteenth Amendments, the Court reasoned, Congress must have intended it to provide private remedies. *Id.* at 233–34 & n.45 (citing S. Rep. No. 94-295, at 40) ("In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. . . . The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing private rights.").

The Court found it similarly compelling that Congress added an attorneys'-fees provision, to be awarded to the "'prevailing party, *other than the United States*,' in any action 'to enforce the voting gurantees of the fourteenth or fifteenth amendment.'" *Id.* at 234 (emphasis in original); *see also id.* at 234 n.46 (citing S. Rep. No. 94-295 at 40, stating that "in voting rights cases . . . , Congress depends heavily upon private citizens to enforce the fundamental rights involved").

The Sixth Circuit never identified any reason why the approach this Court has taken with respect to Sections 2, 5, and 10 should not apply equally to

Section 10101.[13] The "contemporary legal context," *Morse*, 517 U.S. at 230, surrounding Section 10101's enforcement provision was the same as the Voting Rights Act's. Section 10101's amendments had the same purpose as the Voting Rights Act—namely, to fortify the Fifteenth Amendment's guarantees in the wake of "unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *id.* at 313 (chronicling Congress's efforts to "cope with the problem by facilitating case-by-case litigation against voting discrimination," such as by authorizing suits by the Attorney General and outlawing disqualification tactics). And Congress's 1975 amendments adding the "an aggrieved person" and attorneys'-fees language to the Voting Rights Act apply to Section 10101 just as *Morse* found they did for Section 10 of the Voting Rights Act.

As with the provisions of the Voting Rights Act of 1965, it would frustrate Section 10101's purpose to preclude a private right of action. And just as "[i]t would be anomalous . . . to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language," *Morse,* 517 U.S. at 232, so here, it would be anomalous to hold that private parties can sue to enforce rights-creating provisions of the Voting

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[13] *See also* Daniel P. Tokaji, *Symposium: Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 140 (2010) ("Without exception, the decisions [assuming private parties cannot sue under Section 10101] fail to apply the tests established by the Supreme Court, either for an implied right of action or for a § 1983 right of action").

Rights Act but not rights-creating provisions of Section 10101.

D. Section 10101's legislative history confirms the availability of a private right to enforce its provisions.

The Sixth Circuit's entire analysis hinges on the 1957 amendment that authorized the Attorney General to bring suit to enforce the guarantees of Section 10101. *See McKay v. Thompson,* 226 F.3d 752, 756 (6th Cir. 2000). But nothing about that amendment provides support for the Sixth Circuit's decision to wipe out the preexisting ability of private parties to bring suit.

1. To the contrary, the legislative history makes clear that Congress intended to keep, rather than eliminate, private individuals' existing ability to sue under Section 10101. Then-Attorney General Brownell—whose department proposed the legislation—testified to exactly this point:

> [S]ome of these actions can be brought by private individuals. *That stays in the law*. . . . We are not taking away the right of the individual to start his own action. . . . Under the laws amended if this program passes, *private people will retain the right they have now to sue in their own name.*

Civil Rights Act of 1957: Hearings on S. 83, an amendment to S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. Con. Res. 5 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong. 73, 203, 1; 60-61, 67-73 (statement and testimony of the Hon. Herbert

Brownell, Jr., Attorney General of the United States) (emphasis added); *see also id.* at 3 ("Congress passed many years ago statutes, now title 42, United States Code, sections 1971 and 1983, under which private persons claiming that they had been deprived of the right to vote on account of race or color by persons acting under color of State law have been able to bring civil suits for damages and preventive relief.").

Indeed, between the statute's original enactment in 1870 and its 1957 amendment, private plaintiffs had filed numerous lawsuits to enforce its provisions and protect their right to vote. *E.g.*, *Kellogg v. Warmouth*, 14 F. Cas. 257, 1872 U.S. App. LEXIS 1362 (C.C.D. La. 1872); *Anderson v. Myers*, 182 F. 223 (C.C.D. Md. 1910), *aff'd*, 238 U.S. 368 (1915); *Smith v. Allwright*, 321 U.S. 649 (1944); *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924 (5th Cir. 1946); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947); *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948).

And when Congress amended the statute, it acknowledged these suits:

> Under the present language of section 1971 of title 42 United States Code, provision is made for a legislative declaration of the right to vote at any election without distinction as to race, color, or previous condition of servitude. However, there is no sanction expressed. *Section 1983 of title 42 United States Code has been used to enforce the rights, legislatively declared in the existing law, as contained in Section 1971 of the same title.* . . . Recoveries have been made pursuant to that remedy for deprivation of the right to vote (*Chapman v. King* (154 F.2d 460)).

> An injunctive relief was secured in *Brown v. Baskin* (78 F. Supp. 933) (1948, 80 F. Supp. 1017 (1948), affirmed 74 F.2d 391 (1949).

H.R. Rep. No. 85-291, at 12 (1957) (emphasis added). Later Congresses confirmed that understanding. A House Report accompanying the 1982 amendments to the Voting Rights Act explained not only that "citizens have a private cause of action to enforce their rights under Section 2," but went on to explain that that cause of action was "not intended to be an exclusive remedy for voting rights violations, *since such violations may also be challenged by citizens under 42 U.S.C. §§ 1971*, *1983,* and other voting rights statutes." H.R. Rep. No. 97-227, at 32 (1981) (emphasis added).

2. This Court should not read into the 1957 amendment an implied repeal of the preexisting private right to bring suit. "The cardinal rule is that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *see also Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132-33 (2003) ("Inferring repeal from legislative silence is hazardous at best. . . ."). A later act will only repeal an earlier act by implication if their provisions are "in irreconcilable conflict" with each other, or if the later act "is clearly intended as a substitute." *Posadas*, 296 U.S. at 503. Even then, the earlier act will only be repealed if Congress clearly and manifestly intended to do so. *Id*.

None of these requirements is met here. As explained above, this Court's decisions regarding private rights of action under the Voting Rights Act each recognize that private rights of action and

Attorney General enforcement actions actually complement one another. The 1957 amendments plainly were intended as a supplement to, not a substitute for, the statute, including the existing ability of private parties to bring suit. Nothing in the legislative history suggests that Congress intended to eliminate the existing private right of action, much less that it "clearly and manifestly intended to do so." To the contrary, Congress stated that its intention was to "strengthen[] ... the enforcement of existing rights." H.R. Rep. No. 85-291, at 5 (1957); *see also id.* at 1 (stating that the bill's purpose was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States") (emphasis added).

It is not plausible that Congress intended to take away this right of action but simply neglected to make any statement to that effect. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[W]e are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history .... Congress' silence in this regard can be likened to the dog that did not bark.").

The fact that Congress authorized the Attorney General to seek only injunctive relief, *see* 52 U.S.C. § 10101(c), further shows that it did not intend to eliminate the existing private right of action, under which private plaintiffs had recovered damages.[14] In

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[14] *See, e.g.,* H.R. Rep. No. 85-291, at 12 (1957) (citing *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946)).

fact, as part of the same legislation, Congress amended 28 U.S.C. § 1343(a)(4) to provide district courts with jurisdiction over actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Civil Rights Act of 1957, Pub. L. No. 85-315, § 121, 71 Stat. 634, 637. It would be senseless for Congress to include this provision if it intended to eliminate the existing private right of action and the ability to recover damages.

And given that the statute's purpose is to protect the fundamental right to vote, it would further be anomalous to conclude that Congress intended to impliedly repeal an existing means of enforcing that right when it was passing legislation to strengthen that right. *See, e.g., Chisom*, 501 U.S. at 404 ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection. Today we reject such an anomalous view . . . . "); *Morton v. Mancari*, 417 U.S. 535, 548 (1974) ("It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment . . . at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference.").

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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March 3, 2017

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 16-3603/3691

NORTHEAST OHIO COALITION FOR THE HOMELESS; COLUMBUS COALITION FOR THE HOMELESS; OHIO DEMOCRATIC PARTY,
Plaintiffs-Appellees/Cross-Appellants,

v.

JON HUSTED, in his official capacity as Secretary of the State of Ohio,
Defendant-Appellant/Cross-Appellee,

and

STATE OF OHIO,
Intervenor-Appellant/Cross-Appellee.

BUCKEYE INSTITUTE; JUDICIAL EDUCATION PROJECT,
Amici Supporting Defendants-Appellants/Cross-Appellees.

Appeal from the United States District Court for the Southern District of Ohio, at Columbus. Algenon L. Marbley, District Judge. (2:06-cv-00896)

Argued: August 4, 2016 Decided: September 13, 2016

Before KEITH, BOGGS, and ROGERS, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Boggs delivered the opinion, in which Judge Rogers joined. Judge Keith delivered a separate dissenting opinion.

ARGUED: Stephen P. Carney, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants/Cross-Appellees. Subodh Chandra, THE CHANDRA LAW FIRM, LLC, Cleveland, Ohio, for Appellees/Cross-Appellants. **ON BRIEF:** Stephen P. Carney, Eric E. Murphy, Michael J. Hendershot, Ryan L. Richardson, Zachery P. Keller, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants/Cross-Appellees. Subodh Chandra, Sandhya Gupta, THE CHANDRA LAW FIRM, LLC, Cleveland, Ohio, Caroline H. Gentry, Ana P. Crawford, PORTER, WRIGHT, MORRIS & ARTHUR LLP, Dayton, Ohio, Donald J. McTigue, Jr., Corey Colombo, Derek S. Clinger, MCTIGUE

MCGINNIS & COLOMBO, Columbus, Ohio, for Appellees/Cross-Appellants.

BOGGS, Circuit Judge. In 2014, Ohio enacted Senate Bills 205 and 216. Among other changes to Ohio election law, they (1) required county boards of elections to reject the ballots of absentee voters and provisional voters whose identification envelopes or affirmation forms, respectively, contain an address or birthdate that does not perfectly match voting records; (2) reduced the number of post-election days for absentee voters to cure identification-envelope errors, and provisional voters to present valid identification, from ten to seven; and (3) limited the ways in which poll workers can assist in-person voters. The district court held that all three provisions impose an undue burden on the right to vote and disparately impact minority voters.

We affirm the plaintiffs' undue-burden claim only as it relates to the requirement imposed by Senate Bill 205 that in-person and mail-in absentee voters complete the address and birthdate fields on the identification envelope with technical precision. We reverse the district court's finding that the other provisions create an undue burden. We also reverse the district court's finding that the provisions disparately impact minority voters. We affirm the district court's other holdings.

I. Background

Ohioans need not queue on Election Day to exercise

the right to vote. The State accepts absentee ballots by mail and, on designated early-voting days, in person. Ohio Rev. Code §§ 3509.01(B), 3509.05(A). A voter who declares that he or she is registered but whose name does not appear on a precinct's list of eligible voters can cast an in-person provisional ballot on either an early-voting day or Election Day. *Id.* § 3505.181(A)(1), (B)(2).

In 2014, the Ohio General Assembly enacted Senate Bills 205 (SB 205) and 216 (SB 216), amending state election provisions that govern absentee and provisional voting. The laws have been in effect since early June 2014.

A. SB 205

Any eligible voter can apply for an absentee ballot. Ohio Rev. Code § 3509.03. Completing the application involves providing a name, signature, registration address, date of birth, and a form of identification. *Id.* § 3509.03(A)-(E). Acceptable identification includes: a driver's license number; the last four digits of a Social Security number; or a copy of a valid photo ID, valid military ID, current utility bill, bank statement, government check, paycheck, or other government document (excluding a registration notice) showing the voter's name and address. *Id.* § 3509.03(E). The same are acceptable forms of identification when casting an absentee ballot. *Id.* § 3509.05(A). Applicants can request and receive an absentee ballot through the mail by providing a mailing address. *Id.* § 3509.03(I).

When voting, mail-in and some in-person absentee voters must complete an "identification envelope" along with their ballots.[1] The identification envelope contains fields for the voter's name, signature, voting residence, and birthdate. The county boards of elections may preprint the voter's name and address on the identification envelopes of mail-in voters. *Id.* § 3509.04(B). The Secretary of State's 2015 election manual "instruct[s]" the boards to do so in order to "eliminate any chance that a voter's absentee ballot may be rejected for the sole reason" that the voter failed to complete those fields. Before SB 205 went into effect, absentee ballots could be rejected if the identification envelope "accompanying an absent voter's ballot or absent voter's presidential ballot [was] insufficient," if the signatures "d[id] not correspond with the person's registration signature," or if the voter failed to provide identification. Ohio Rev. Code § 3509.07 (2013). In 2010, the Secretary circulated a directive to the county boards of elections stating that the identification envelope *must* include a proper voter name and signature for the corresponding ballot to be counted.

SB 205 added two fields to that list. It specifies that an identification envelope is "incomplete" without

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[1] Some Ohio counties give early in-person voters the option to cast their ballots on a direct-recording electronic-voting machine. Those who do so are not also required to complete the identification envelope.

accurately filled birthdate[2] and address fields. Ohio Rev. Code § 3509.06(D)(3). An "incomplete" identification envelope results in the ballot's rejection unless the voter "provide[s] the necessary information to the board of elections in writing and on a form prescribed by the secretary of state." *Id.* § 3509.06(D)(3)(b).

SB 205 made two other changes to Ohio election law that are at issue. When an absentee ballot contains an error, the board of elections gives the voter notice of the additional information required for the ballot to be counted. SB 205 reduced the window for voters to submit corrections from the ten days after Election Day to the seven days after Election Day. *See id.* In addition, SB 205 prevents election officials from providing "assistance" to voters with the exceptions of voters who "[d]eclare[]" that they are "unable to mark" their ballot due to "blindness, disability, or illiteracy." *Id.* § 3505.24.

B. SB 216

Provisional voters must complete a "provisional ballot

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[2] The birthdate requirement is satisfied if the voter provides a month and day of birth that match the month and day in the registration database, if the birthdate in the registration database is January 1, 1800, or if a majority of the four-member elections board find that the voter has met the name, address, signature, and identification requirements. Ohio Rev. Code § 3509.06(D)(3)(a)(iii).

affirmation" form. Ohio Rev. Code § 3505.182. Before the implementation of SB 216, a provisional ballot was counted if the voter presented valid identification[3] and the affirmation form included the voter's name, signature, and a statement of eligibility. Ohio Rev. Code § 3505.183(B)(1) (2013). The back of the form contained a separate registration application. Provisional voters whose ballots were rejected for failure to register but who completed the application became registered for the next election.

SB 216 added birthdate[4] and address to the list of affirmation-form fields that provisional voters must accurately complete. Ohio Rev. Code § 3505.183(B)(1)(a). The affirmation form now doubles as a registration application, applicable to provisional voters whose ballots are rejected for failure to register. *Id.* § 3505.182(F). The bill also added the word "printed" before "name" in the list of affirmation-form requirements. *Compare Id.* § 3505.183(B)(1)(a), *with* Ohio Rev. Code § 3505.183(B)(1)(a) (2013). This appears to have clarified, rather than modified, existing law. Between

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[3] The identification requirement for provisional voters is similar to that for absentee voters. *See* Ohio Rev. Code § 3505.18(A).

[4] The birthdate requirement for provisional voters has similar exceptions to those for the requirement for absentee voters. *See* Ohio Rev. Code § 3505.183(B)(3)(e).

the 2008, 2010, and 2012 general elections, most counties rejected provisional ballots for failure to include a "printed" name. Furthermore, a 2012 directive from the Secretary instructed elections boards to reject provisional ballots whose affirmation statements lacked "the voter's printed name."

A provisional voter without valid identification may return to the board of elections to cure an otherwise complete ballot by providing a driver's license number, state identification card number, the last four digits of the individual's Social Security number, a photo or military ID, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document (excluding a registration notice) showing the voter's name and address. Ohio Rev. Code § 3505.181(B)(7)(a). SB 216 reduced the period for doing so from the ten days after Election Day to the seven days after Election Day. *Compare* Ohio Rev. Code § 3505.181(B)(8) (2013), *with* Ohio Rev. Code § 3505.181(B)(7).

C. Procedural History

In 2006, the Northeast Ohio Coalition for the Homeless (NEOCH) and the Service Employees International Union sued the Secretary to enjoin the enforcement of voter-identification and provisional-ballot laws.[5] Although perhaps rich source material

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[5] Within days of the plaintiffs' filing suit, Ohio intervened as a defendant. *See* Fed. R. Civ. P. 24(b). With the parties' consent, the Ohio Democratic Party

for a prickly civil-procedure hypothetical, the case's many twists and turns are unnecessary to chronicle here. Suffice it to say, litigation was still proceeding in 2010 when the parties entered a consent decree.

Ohio's eighty-eight counties have four-person boards responsible for administrating local elections. The 2010 decree required the Secretary to inform elections boards to count the provisional ballots of registered voters whose affirmation forms included an accurate name, verified signature, and the last four digits of the voter's Social Security number. It also listed grounds on which provisional ballots could not be rejected, including failure to "provide a date of birth" or "address... tied to a house, apartment or other dwelling [if] the voter indicated that he or she resides at a non-building location."[6] The Secretary

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(ODP) intervened as a plaintiff in 2008. Soon after, the Columbus Coalition for the Homeless (CCH) was added as a plaintiff.

[6] Ohio law requires elections boards to "examine any additional information" in addition to "determin[ing] whether the individual who cast the provisional ballot is registered and eligible to vote in the applicable election" in order to "determine whether a provisional ballot is valid and entitled to be counted." Ohio Rev. Code. § 3505.183(B)(1)-(2). The original complaint alleged that elections boards would not "apply the same standards when...determining whether provisional ballots are eligible to be counted."

was required to give the court notice of changes to the law that would "supersede" the decree.

The decree was in effect for the 2010 and 2012 elections. Although it was originally set to expire on June 30, 2013, the court, on the plaintiffs' motion, extended it through the end of 2016. In September 2014, the Secretary informed the court that SB 216's rejection requirement for imperfect birthdate and address fields, and the three-day reduction in the cure-period, "automatically amended" the decree.

The plaintiffs moved for leave to file a supplemental complaint. *See* Fed. R. Civ. P. 15(d). They petitioned the court to permanently enjoin the Secretary from implementing portions of SB 205 and SB 216. The defendants opposed. In August 2015, the court granted the motion because SB 216 "ero[ded]" the consent decree's protections and because both SB 205 and SB 216 related to the original complaint, which challenged Ohio's voter-identification requirements more generally.

The supplemental complaint asserts ten counts: a viewpoint-discrimination claim under the First and Fourteenth Amendments; claims under the Fourteenth Amendment's Due Process Clause of a fundamentally unfair voting system and violation of procedural due process; claims under the Fourteenth Amendment's Equal Protection Clause of an undue burden, lack of uniform standards, and arbitrary and disparate treatment; a claim of intentional discrimination in violation of the Fourteenth and Fifteenth Amendments; and literacy-test,

immaterial-error, and vote-denial claims under the Voting Rights Act (VRA).

The court presided over a bench trial in March 2016. Over the course of twelve days, it heard the testimony of more than twenty board of elections officials from different counties, two members of the Ohio General Assembly, the Assistant Secretary of State (who also serves as "head of elections"), and two members of the Ohio Association of Election Officials (OAEO), which includes members of the elections boards of every Ohio county and has equal representation from the two major parties. In addition, the record includes declarations of absentee and provisional voters whose ballots were rejected for birthdate and address errors. Several, for example, wrote the current date instead of their birthdates. One transposed the location of the digits indicating the month and day of his birth despite specific language on the form to the contrary because he grew up in a country that follows the date sequence used elsewhere in the world.

The court was also presented with opinion testimony from Dr. Jeffrey Timberlake for the plaintiffs, and Drs. Nolan McCarty and M.V. Hood, III, for the defendants. Because Ohio does not record the race or ethnicity of its voters, Timberlake used county-level data to make inferences about the relationship between voter race and the use or rejection of absentee and provisional ballots. He examined data from the 2008, 2010, 2012, and 2014 general elections.

Timberlake divided counties into "high minority" and "low minority" groups, and performed a regression assessing the correlation between a county's percent minority and absentee and provisional ballot use and rejection. Two of his models controlled for urbanicity, and the age, education, and income of the white population. In those models, Timberlake observed "some evidence, though not very strong evidence, that absentee ballots are used more heavily by voters in high-minority counties." He found "much stronger" evidence of higher rates of absentee-ballot *rejection* among African-American voters. All four elections showed higher use and rejection rates of provisional ballots in higher-minority counties, even when controlling for urbanicity and the three white-population characteristics.

The district court's opinion gave "great weight" to Timberlake's conclusions. It found that the defense expert witnesses did not refute Timberlake's report. The court next considered nine nonexhaustive factors from *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), "that might be probative" of a violation of Section 2 of the VRA. *Id.* at 36; *Id.* at 36-37. In particular, the court concluded that the evidence on the record did not support Ohio's justifications for enacting SB 205 and SB 216.

Ultimately, the court entered judgment for the plaintiffs on their undue-burden and vote-denial claims, and for the defendants on all other counts. It permanently enjoined the enforcement of the portions of SB 205 and SB 216 that: require boards to reject the ballots of absentee and provisional voters who do

not accurately complete the address and birthdate fields; reduce the cure period to seven days; prohibit most forms of poll-worker assistance; and require provisional voters to print their names on the affirmation form.

Ohio appeals the entry of judgment for the plaintiffs on the undue-burden and vote-denial claims. Additionally, it contends that the court improperly approved the supplemental complaint, that the plaintiffs should have been precluded from bringing their challenges, and that they lack standing. The plaintiffs cross-appeal the entry of judgment for Ohio on the uniform-standards, literacy-test, due-process, intentional-discrimination, and immaterial-error claims.

II. Claim Preclusion and Standing

Ohio argues that all three plaintiffs, and the Ohio Democratic Party (ODP) at the very least, are bound by the district court's decision in *Ohio Org. Collaborative v. Husted*, No. 2:15-cv-1802, 2016 U.S. Dist. LEXIS 85699, 2016 WL 3248030 (S.D. Ohio May 24, 2016). If claim preclusion prevents ODP from proceeding, Ohio asserts, we should next consider its argument that the remaining plaintiffs, NEOCH and the Columbus Coalition for the Homeless (CCH), lack standing. That one-two punch is too clever by half. Even if ODP were bound by *Ohio Org. Collaborative* (an issue on which we need not

opine),[7] NEOCH and CCH are not. And they have standing to bring suit.

For the first time on appeal, Ohio contends that NEOCH and CCH are precluded from bringing their claims because of a decision in a suit in which ODP was a party that was issued two weeks before the district-court judgment in this case. Even assuming that Ohio did not waive this argument by failing to raise it before the district court, *see Mun. Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1052 n.4 (6th Cir. 1995), it is without merit. "The general rule" of claim preclusion "provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound...'as to every matter which was offered and received to sustain or defeat the claim or demand.'" *Comm'r v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 92 L. Ed. 898 (1948) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L. Ed. 195 (1876)). "[I]n certain limited circumstances," a nonparty is "adequately represented by someone with the same interests who

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[7] In August 2015, plaintiff Ohio Organizing Collaborative moved to substitute three parties in its place, including ODP, and to "drop...claims that overlap with those in" this case. Ohio opposed the latter motion. The court granted the substitution request but denied the motion to amend. *Ohio Org. Collaborative v. Husted*, No. 2:15-cv-1802, 2015 U.S. Dist. LEXIS 181188 (S.D. Ohio Sept. 2, 2015) (opinion and order).

is a party." *Martin v. Wilks*, 490 U.S. 755, 762 n.2, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). However, "to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not adequately represented" would violate due process. *Richards v. Jefferson County*, 517 U.S. 793, 794, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996) (citing *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940)).

An essential element of adequate representation is that "[t]he interests of the nonparty and her representative are aligned." *Amos v. PPG Indus., Inc.*, 699 F.3d 448, 452 (6th Cir. 2012) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 900, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)). Citing *Amos*, Ohio suggests that the "aligned interests" of ODP and the other plaintiffs "are shown by the fact that they co-litigated *this* case with joint pleadings." First Br. 58. The lax approach to nonparty preclusion implied by that reasoning would unmoor the requirement of "adequacy" from the anchor of "representation." "Representative capacity must be established...by private or public appointment"—not by the assertions of a "self-appointed volunteer," and certainly not by acting as co-parties in a *later* suit. 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4454 (2d ed. 2002). ODP did not represent NEOCH and CCH in *Ohio Org. Collaborative*.

Further, mere overlapping interest will not work to preclude a nonparty from litigating a claim that a putative representative tried earlier. *See Becherer v.*

Merrill Lynch, Pierce, Fenner & Smith, Inc., 193 F.3d 415, 424 (6th Cir. 1999) (en banc) (rejecting claim of "virtual representation" when nonparty and supposed representative lacked "legal relationship"). Nor does Ohio point to any indication that "special procedures" were put in place to protect the interests of NEOCH and CCH in *Ohio Org. Collaborative. Amos*, 699 F.3d at 452. NEOCH and CCH are therefore not bound in this case by an earlier judgment against ODP.

Whether a party has standing is a legal question that appellate courts review de novo. *Shearson v. Holder*, 725 F.3d 588, 592 (6th Cir. 2013). When one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999). Because NEOCH has organizational standing, we do not reach Ohio's other arguments regarding NEOCH's and CCH's standing to bring suit.

To establish standing, a plaintiff must show a concrete and particularized injury that is actual or imminent, a causal connection between the injury and the conduct complained of, and likelihood that a favorable decision will redress the injury. *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 616 (6th Cir. 2009). In addition to suing on behalf of its members, an entity may sue "on its own behalf because it has suffered a palpable injury as a result of the defendants' actions." *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 332-33 (6th Cir. 2002).

Ohio points to our recent decision in *Fair Elections Ohio v. Husted*, 770 F.3d 456 (6th Cir. 2014), and argues that NEOCH and CCH have suffered no injury. In that case, we held that an organization that had conducted voter outreach lacked standing to challenge absentee-ballot procedures permitting hospitalized voters to obtain absentee ballots later than jailed voters. *Id.* at 459. The bases offered to support its injury claim—instructing election volunteers who were already being trained in current absentee-voting procedures and speculation that the law compelled the group to divert resources—were insufficient. *Id.* at 459-60.

Unlike the plaintiff organization in *Fair Elections* that challenged then-existing voting law, NEOCH takes issue with newly enacted provisions. That distinction is not just academic. Whereas the *Fair Election* plaintiff merely exhausted "efforts and expense [in] advis[ing] others how to comport with" *existing* law, *Id.* at 460, NEOCH has immediate plans to mobilize its limited resources to revise its voter-education and get-out-the-vote programs on account of SB 205 and SB 216. In the past, NEOCH focused on educating and assisting the homeless with mail-in voting. Given the changes ushered in by SB 205 and SB 216, NEOCH determined that its resources are better spent assisting the homeless in participating in early in-person voting. To that end, it plans to redirect its focus for the 2016 general election by encouraging early in-person voting and driving homeless voters to the polls. It reports that this will require more volunteers, time, and expenditures.

That is not simply the "effort and expense" associated with advising voters how to "comport" with the law, *ibid.*, but an overhaul of the get-out-the-vote strategy of an organization that uses its limited resources helping homeless voters cast ballots. Their injury is imminent, as well as concrete and particularized.

Standing must exist as to each claim, however, and cannot be "dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.4, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). But the record demonstrates that NEOCH has standing for its VRA claims as well. The injury suffered by NEOCH, as noted above, is directly related to SB 205 and SB 216's alleged impact on the opportunity to vote of the African-American community. Because their allegations indicate that the burden would cause them to change significantly their expenditures and operation and a favorable decision would redress that injury, NEOCH has organizational standing here as well. Finally, with regard to the cause of action, the VRA permits suit by the Attorney General or aggrieved voters, *see Allen v. State Bd. of Elections*, 393 U.S. 544, 557, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969), but the Supreme Court has permitted organizations to bring suit in VRA claims, *see Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015).

III. Supplemental Pleadings

The district court did not abuse its discretion by granting the plaintiffs' motion to file a supplemental complaint. A district court may "permit a party to

serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). Rule 15(d) aims "to give the court broad discretion in allowing a supplemental pleading." Fed. R. Civ. P. 15(d) advisory committee's note to 1963 amendment.

We review for abuse of discretion. *See Spies v. Voinovich*, 48 F. App'x 520, 527 (6th Cir. 2002). A district court abuses its discretion by relying on an incorrect legal standard, misapplying the correct legal standard, or judging the outcome based on clearly erroneous factual findings. *Paterek v. Village of Armada*, 801 F.3d 630, 643 (6th Cir. 2015).

Here, the court found that the original and supplemental complaints were sufficiently linked because SB 216 superseded the consent decree's protections and because both provisions allegedly imposed burdens that would impede voting in similar ways as the voter-identification provisions originally challenged. "In essence," the court found, "the 'focal points' of both complaints are the same: ensuring all ballots, but particularly provisional and absentee ballots,...are not unfairly excluded and left uncounted due to illegal voter identification rules."

In so concluding, the court carefully applied the correct legal standard and did not make clearly erroneous factual findings. The supplemental complaint revolved around new election laws that affected the terms of a longstanding consent decree that resolved an even lengthier dispute. So,

Defendants' reliance on *Leisure Caviar*, 616 F.3d at 616, which addressed the issue of newly discovered evidence after entry of judgment, is misplaced. *See* First Br. 56. The district court did not clearly err when it found that the plaintiffs' primary grievance with both sets of provisions was that methods of voter identification caused elections boards to disproportionately reject homeless voters' absentee and provisional ballots. The interest of judicial economy, although not necessarily enough in and of itself, also militates in favor of allowing supplemental pleadings. When a dispute is complicated and protracted, and a new complaint the likely alternative, allowing supplemental pleadings before a court already up to speed is often the most efficient course.

IV. Voting Rights Act Claims

All three VRA claims are contested on appeal. Ohio appeals the judgment on the vote-denial claim. The plaintiffs appeal the judgment on the literacy-test and materiality claims.

A. Vote Denial or Abridgment

1. Legal Framework

We review the district court's legal conclusions de novo and factual findings for clear error. *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 492 (6th Cir. 2005). "Under the clear-error standard, we abide by the court's findings of fact unless the record 'le[aves] [us] with the definite and firm conviction that a

mistake has been committed.'" *United States v. Yancy*, 725 F.3d 596, 598 (6th Cir. 2013) (alterations in original) (quoting *United States v. Gardner*, 649 F.3d 437, 442 (6th Cir. 2011)).[8]

In *City of Mobile v. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980), the Supreme Court held that racially neutral state action did not fall within the ambit of VRA Section 2. Congress countered by amending Section 2. That response "ma[d]e clear" to the Court "that a violation [of Section 2] could be proved by showing discriminatory effect alone." *Gingles*, 478 U.S. at 35. Section 2 now reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

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[8] Although the dissent repeatedly classifies our review as de novo, our approach is consistent with established precedent in reversing the district court where the overall record is inconsistent with the findings. *See, e.g., Indmar Prods. Co. v. Comm'r*, 444 F.3d 771, 778 (6th Cir. 2006) ("[W]hile our review is deferential, it is not nugatory.").

> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301 (Supp. II Vol. III 2015). The statute operates as a "permanent, nationwide ban," *Shelby County v. Holder*, 133 S. Ct. 2612, 2631, 186 L. Ed. 2d 651 (2013), on "even the most subtle forms of discrimination," *Chisom v. Roemer*, 501 U.S. 380, 406, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (Scalia, J., dissenting).

"The essence of a [Section] 2 claim" is the assertion that a challenged provision "interacts with social and historical conditions" to cause an inequality of opportunity for racial minority voters. *Gingles*, 478 U.S. at 47. Evaluating that allegation "requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982)). Section 2 claims

involve either vote denial or vote dilution. Examining a vote-dilution claim in *Gingles*, the Supreme Court embraced nine nonexhaustive factors as relevant in assessing "the totality of circumstances" for establishing a Section 2 violation. Because the Court has yet to consider a Section 2 vote-denial claim after *Gingles*, the standard for such adjudication is unsettled.

In *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014), we stated the analytical framework for Section 2 vote-denial claims as a two-part test: (1) "[T]he challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,'" and (2) "that burden must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *Id.* at 554 (quoting 52 U.S.C. § 10301 (Supp. II Vol. III 2015) and *Gingles*, 478 U.S. at 47). The *Ohio State Conference* panel affirmed an order preliminarily enjoining Ohio from reducing early in-person voting for the 2014 general election. The Supreme Court stayed that order. *Husted v. Ohio State Conference of NAACP*, 135 S. Ct. 42, 189 L. Ed. 2d 894 (2014). Because the injunction applied only to the upcoming election, the panel vacated its opinion—including its articulation of the Section 2 vote-denial test. *Ohio State Conference of the NAACP v. Husted*, No. 14-3877,

2014 U.S. App. LEXIS 24472, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). On remand to the district court, the parties reached a settlement.

Two circuits have since adopted the *Ohio State Conference* test. *See Veasey v. Abbott*, 830 F.3d. 216, 2016 U.S. App. LEXIS 13255, No. 14-41127, 2016 WL 3923868, at *17 (5th Cir. July 20, 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). The district court used it in this case, and a recent Sixth Circuit panel found it "helpful" in determining a Section 2 vote-denial claim. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 2016 U.S. App. LEXIS 15433, 2016 WL 4437605, at * 13 (6th Cir. Aug. 23, 2016) (evaluating a vote-denial claim using the *Ohio State Conference* framework, with additional clarification).

Ohio argues that the two-part test goes awry in two ways. Whether the district court did in fact mischaracterize the test is irrelevant, however. At the very least, a successful Section 2 claim requires the plaintiffs to prove disparate impact. The plaintiffs failed to prove that SB 205 and SB 216 have a disparate impact on African-American voters. Therefore, analysis of any test beyond disparate impact is unnecessary.

2. SB 205 and SB 216

The district court found that "Timberlake's data on disparities in provisional and absentee ballot usage and rejection rates reveal that higher minority population share is correlated to higher rates of

absentee ballot rejection and provisional ballot usage and rejection." Based on that analysis, it concluded that SB 205 and SB 216 make "African-American voters...more likely than white voters to have their absentee or provisional ballots rejected." The record would indicate otherwise.

For starters, Timberlake's regression analysis simply does not support the conclusion that SB 205's address and birthdate perfection requirement, or its limitation on poll-worker assistance, disparately impact minority voters. When controlling for urbanicity and the age, income, and education of the white population, Timberlake found that for every additional one percent minority in a county, use of absentee ballots increased by a small amount in the 2008 and 2010 general elections—134.2 and 195.2, respectively, for every 100,000 voting-age residents—but *decreased* by 99.5 and 96.6 ballots in the 2012 and 2014 general elections.[9] He therefore found that the evidence to support the conclusion that high-minority counties use absentee ballots more heavily was "not very strong."

Certainly additional absentee ballots are rejected on account of the perfection requirement. But there is scant evidence in the record that minority voters are more likely to cast absentee ballots than white voters. It would therefore be illogical to infer that rejecting absentee ballots for failure to accurately

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[9] Timberlake did not separately analyze in-person absentee voting and mail-in absentee voting.

complete address and birthdate fields disproportionately affects minority voters without some other evidence that minority voters are less likely to fulfill those requirements. And, as discussed in more detail elsewhere, the vast majority of absentee-ballot rejections are for reasons other than those challenged here.

The same is true of the limits that SB 205 places on poll workers. To be sure, the provision will impact the hypothetical early in-person absentee voter whose ballot would have been rejected in past elections but for now-prohibited forms of assistance. Yet the record contains no evidence of how many, if any, voters received such additional "assistance." Because evidence of higher minority absentee-ballot usage is weak, and the record does not indicate that minority voters disproportionately benefited from assistance that is now proscribed, plaintiffs have not demonstrated a disparate impact.

On their other Section 2 claims, the plaintiffs fail to show that the challenged provisions will have much of an impact on the right to vote at all. The district court reasoned that reducing the cure period from ten to seven days would burden illiterate voters and voters for whom travelling to cure their ballots presents logistical difficulties. Hypothetically speaking, a scenario could exist where voters showed up in droves to correct absentee-ballot errors and to produce provisional-ballot ID during those three days. But that has not been the case in Ohio. In fact, the single election-board official whose trial testimony the district court cited in support of its

conclusion stated that in Hamilton County, Ohio's third most populous, "very few voters" cured their ballots during that three-day window. The record contains no evidence on the number of absentee or provisional voters who took advantage of the cure days eliminated by SB 205 and SB 216. A law cannot disparately impact minority voters if its impact is insignificant to begin with.

Challenges to SB 216's perfection requirement of provisional voters and its limitation on poll-worker assistance suffer from the same shortcoming. The conclusion that SB 216 disproportionately impacts minority voters is not borne out in the data. For the vast majority of provisional voters whose ballots are rejected, no amount of help would change the result. The record contains provisional voting data for the 2008, 2010, 2012, 2014, and 2015 general elections. In every one of those elections, eighty to ninety percent of provisional voters whose ballots were rejected either had failed to register at all or voted in the wrong place. Placing a minor check on election workers' interactions with in-person voters has no impact on the vast majority of provisional-ballot rejections.

SB 216 has been in effect during the two most recent general elections. The provisional ballots of 247 voters in 2014 and 373 voters in 2015 were rejected for failure to provide an accurate birthdate or address. Respectively, these figures represented about five and three percent of rejected provisional ballots—and less than one percent of all provisional ballots cast. What is more, the 2015 figure does not

account for individuals whose 2014 ballots were rejected for failure to register but who accurately completed the affirmation form and successfully registered for the next election. Presumably, some of those voters would not have registered otherwise, which means that SB 216 has the effect of reducing the number of ballots rejected on the basis of nonregistration in future elections. That impact helps to counter the small impact that SB 216 does have. Given the negligible impact of SB 216's perfection requirement on ballot rejection, the plaintiffs have not shown that the provision disproportionately affects minority voters.

B. Literacy Test

Section 4 of the VRA provides that "[n]o citizen shall be denied" the right to vote "because of his failure to comply with any test or device." 52 U.S.C. § 10501(a) (Supp. II Vol. III 2015). "Test or device" is defined as a requirement that, as a prerequisite to vote or register, a person demonstrate the ability to "read, write, understand, or interpret any matter," demonstrate "educational achievement" or "knowledge" of any subject, "possess good moral character," or have others "vouch[]" for them. *Id.* § 10501(b).

The district court found that § 10501 includes a private right of action before concluding that the challenged provisions do not violate the statute. Even if a private right of action is permitted, we agree with the district court that SB 205 and SB 216 do not impose a "test or device" on Ohio voters.

The plaintiffs equate the requirement that absentee and provisional voters accurately complete address and birthdate fields with the "vague, arbitrary, hypertechnical or unnecessarily difficult" tests cited by Congress as evidence of the urgent need for the VRA. H.R. Rep. No. 89-439, at 13 (1965). However, requiring voters' most basic biographical and personal information bears no similarity to selectively enforced voting tests whose "only real function" is to "foster racial discrimination." *Ibid.*; *see also Id.* at 12 (citing *United States v. Louisiana*, 225 F. Supp. 353, 358 (E.D. La. 1963) (three-judge panel finding a Louisiana Constitution requirement that registration applicants be able to read and "give a reasonable interpretation" of any clause of the Louisiana or United States Constitution violated Fourteenth and Fifteenth Amendments), *aff'd*, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965)); S. Rep. 89-162, pt. III, at 11-12 (1965) (cataloging cases of "discriminatory misuse" of literacy tests and "good moral character" requirements). The address-and-birth-date requirements simply do not fall within the meaning of "test or device," as used in the statute. 52 U.S.C. § 10501(b). To the extent that the House Report censures "'perfect form' requirements," no such prohibition appears in the text of the statute itself. *Compare* H.R. Rep. 89-439, at 13, *with* 52 U.S.C. § 10501. In these circumstances, the unambiguous language of the statute must prevail. *See Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 394 (6th Cir. 2016) (heeding Supreme Court's "admonishment to courts not to add any unexpressed requirements to the language of the statute" (quoting

Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 818 (6th Cir. 2002))).

To the extent that recording birthdate or address proves difficult for some voters, Ohio explicitly permits election officials to assist those who are blind, disabled, or illiterate in marking their ballots. *See* Ohio Rev. Code §§ 3505.24(B), 3505.181(F). The plaintiffs' supposition that the stigma of illiteracy deters some voters from requesting assistance distracts from the focus of the inquiry—state action. To fill the address and birthdate fields, voters need not "demonstrate the ability" to read or write any more so than they do to otherwise complete a ballot.

C. Immaterial Error

The VRA provides that no one acting under color of law may "deny the right of any individual to vote in any election because of an error or omission" on a registration application or voting ballot if the error or omission "is not material" in determining whether the individual is qualified to vote. 52 U.S.C. § 10101(a)(2)(B) (Supp. II Vol. III 2015). A later subsection of § 10101 states that when any person has deprived another of "any right or privilege secured by subsection (a)..., the Attorney General may institute for the United States...a civil action or other proper proceeding for preventive relief." *Id.* at § 10101(c).

We have held that the negative implication of Congress's provision for enforcement by the Attorney General is that the statute does not permit private

rights of action. *See McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000). Another circuit later reached the opposite conclusion. *See Schwier v. Cox*, 340 F.3d 1284, 1294-96 (11th Cir. 2003). It reasoned, in part, that the Supreme Court had found other VRA sections enforceable by private right of action despite their provision for Attorney General enforcement and that before the Attorney General language was appended to the statute, plaintiffs "could and did" bring enforcement actions under 42 U.S.C. § 1983. *Id.* at 1295.

"A panel of this court may not overturn binding precedent because a published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)). McKay v. Thompson therefore binds this panel. The plaintiffs may not bring an action for a violation of § 10101(a).

V. Equal-Protection Claims

Three equal-protection questions are at issue on appeal: Whether the challenged provisions (1) unduly burden the right to vote; (2) result in a lack of uniform standards; and (3) were enacted with a discriminatory purpose. Once again, we review the district court's legal conclusions de novo and factual findings for clear error.

A. Undue Burden

1. Legal Standard

The certainty that every election law places at least some burden on individual voters demands that courts weigh that hindrance against the provision's regulatory justification. On one hand, "voting is of the most fundamental significance under our constitutional structure." *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979). On the other, "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). Acknowledging this tension, the Supreme Court has articulated a "flexible standard" to apply when considering challenges to state election law:

> A court...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 plaintiff's rights."

Id. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)).

In practice, the level of scrutiny into a challenged election law varies based on the severity of its constraint on voting rights. "[S]evere restriction[s]" must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992). At the other end of the spectrum, "minimally burdensome and nondiscriminatory" regulations inevitably result in "a less-searching examination." *Ohio Council 8 Am. Fed'n of State v. Husted*, 814 F.3d 329, 335 (6th Cir. 2016). For regulations that "fall[] somewhere in between the two extremes, 'the burden on the plaintiffs is weighed against the state's asserted interest and chosen means of pursuing it.'" *Ibid.* (quoting *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 546 (6th Cir. 2014)) (alteration omitted). As a general matter, "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788.

In striking portions of SB 205 and SB 216, the district court considered the burdens that the provisions impose on NEOCH's and CCH's homeless and illiterate members. Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst. In *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008), the Supreme Court upheld an Indiana voter-ID law. The plaintiffs urged the Court to consider the burden imposed on the "narrow class of voters" who could not afford or obtain a birth certification and had to

return to the circuit court clerk's office after voting. *Id.* at 200 (opinion of Stevens, J.). The lead opinion refrained from weighing the "special burden" faced by "a small number of voters" because the evidence on the record gave "no indication of how common the problem is," which made it impossible "to quantify...the magnitude of the burden." *Id.* at 200, 202. A concurrence rejected outright the idea of measuring the burden on a subset of voters. "[W]hat petitioners view as the law's several light and heavy burdens," it reasoned, "are no more than the different *impacts* of the single burden that the law uniformly imposes on all voters." *Id.* at 205 (Scalia, J., concurring in the judgment).

In any event, the district court erred by weighing Ohio's regulatory interests against the burden that the challenged provisions uniquely place on homeless and illiterate voters.[10] Even under the controlling opinion's more liberal approach to burden measuring, the record here is devoid of quantifiable evidence from which an arbiter could gauge the frequency with which this narrow class of voters has been or will

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[10] Illiterate voters may request and receive assistance in marking their ballots from nearly "any person of the[ir]...choice," including "two election officials of different political parties." Ohio Rev. Code. § 3505.24. Homeless voters may register their address as "a shelter or other location at which the person has been a consistent or regular inhabitant and to which the person has the intention of returning." *Id.* § 3503.02(I).

become disenfranchised as a result of SB 205 and SB 216. We therefore consider the burden that the provisions place on all Ohio voters.

2. SB 205 and SB 216

Address and Birthdate Requirements. Requiring boards of elections to reject the ballots of absentee and provisional voters who fail to accurately complete birthdate and address fields directly and measurably disenfranchises some voters. As discussed, *see supra* p. 16, in the 2014 and 2015 general elections, 620 provisional ballots were rejected as failing to meet SB 216's address and birthdate perfection requirements, out of a total of 16,942 rejections. Among over 860,000 domestic civilian absentee ballots cast in 2014 and 430,000 in 2015, 1378 ballots were rejected in 2014, and 334 in 2015, for failure to comply with the similar provision in SB 205.[11]

Considering the number of total ballots cast in a general election in Ohio, these figures are small. And yet, as demonstrated through voter declarations and the testimony of board officials, the formal rigidity of the challenged requirements may leave no room for elections boards to make their own judgments on voter eligibility. As a result, identifiable voters may be disenfranchised based only on a technicality. For

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[11] In addition, 633 domestic civilian absentee ballots were rejected in 2014, and 346 in 2015, because the voter ID envelope "[c]ontains [i]nsufficiient [sic] [i]nformation." *Cf.* Ohio Rev. Code § 3509.07(A).

example, transposing the location of the month and year numerals of a birthdate, writing the current date by mistake, and inverting digits in an address have been cited by elections boards as reasons for automatic ballot rejection.

A facial challenge to a state law fails "where the statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (Stevens, J., concurring in the judgments)). For SB 216, the interest in registering provisional voters outweighs the burden of completing the address and birthdate fields. Most provisional-ballot rejections occur in Ohio because the purported voter was not registered. In 2012, a presidential-election year, over 20,000 provisional ballots were rejected for failure to register. Ohio uses the affirmation form to register the unregistered provisional voters who unsuccessfully try to cast ballots each year.

The additional fields also help elections boards positively identify provisional voters. For their ballots to be counted, provisional voters must be located in a statewide database of registered voters. Predictably, entering a provisional voter's name and the last four digits of their Social Security number into the database can result in multiple hits. Birthdate and address information can narrow the plausible registered voters and assist in confirming an eligible voter's right to vote (and vice versa). Ohio's important

interests in provisional-voter registration and identification eclipse the small burden of accurately completing the two fields—a burden that actually impacts just a few hundred voters each election, an impact wholly in their own control.

However, we agree with the district court that Ohio has made no such justification for mandating technical precision in the address and birthdate fields of the absentee-ballot identification envelope. Although the burden is small for most voters, its impact is greater than that of SB 216, and none of the "precise interests put forward by" Ohio justifies it. *Burdick*, 504 U.S. at 434 (citation omitted). Ohio first posits that the perfection requirement hampers "rare[]" attempts to cast others' mail-in absentee ballots. First Br. 30. Combatting voter fraud perpetrated by mail is undeniably a legitimate concern. *See Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006) (per curiam). Yet some level of specificity is necessary to convert that abstraction into a definite interest for a court to weigh. The district court found that Ohio did not even "offer[] combatting voter fraud" as a relevant interest. Given the lack of any coherent fraud argument offered at trial, that conclusion is understandable.

Moreover, Ohio's argument collapses under scrutiny. Before SB 205, absentee voters had to clear several hurdles to confirm their identity. In addition to presenting valid identification, a voter needed the signature on the envelope to match the voter's registration signature, and even then, the

information in the identification envelope could be deemed "insufficient." Ohio Rev. Code § 3509.07 (2013); *see also Id.* §§ 3509.05-.06, 3511.09. Like all other ballots, those of absentee voters could be challenged "for cause." *Id.* § 3509.07. Under some circumstances, certain errors in address or birthdate could well constitute "insufficiency." SB 205 altered that provision, *requiring* boards to reject absentee ballots that do not include an accurate address and birthdate for the voter.

Even Ohio recognizes that the downside of rejecting mail-in absentee ballots for address errors overshadows any concern with address falsification. Ohio statute allows, and the Secretary has instructed, boards of elections to complete the address field on mail-in identification envelopes so that ballots are not thrown out "for th[at] sole reason." At bottom, Ohio's interest revolves around the "rare" instances where a fraudster manages to swipe the ballot of a registered absentee voter, forge the signature, and return the ballot to the board of elections with a copy of the voter's identification, driver's license number, or Social Security number, and would have gotten away scot free but for the troublesome birthdate requirement. What is more, Ohio does not explain why its interest in preventing voter fraud by mail makes it "necessary to burden" the plaintiffs' voting rights. *Burdick*, 504 U.S. at 434 (citation omitted). Before SB 205, boards were instructed to strike ballots if the identification envelope contained "insufficient" information and had discretion to "challenge" absent voters "for cause."

Ohio Rev. Code § 3509.07 (2013). That provision gave boards more than sufficient flexibility to investigate birthdate errors for fraud without the heavy-handed requirement of ballot rejection on a technicality.

At trial, the district court was not presented with a shred of evidence of mail-in absentee-voter fraud. That absence of support is corroborated by ample testimony. Halfway through trial, the court held a sidebar where it asked counsel for Ohio whether a fraud argument was "going to be a part of the presentation of...[Ohio's] case in chief,...experts, [or] other witnesses." Counsel stated that the court "w[ould] hear testimony" about the interests motivating the passage of the bills, including fraud. Not only did that never materialize, but, as is apparent from the record, there is no indication of a legitimate fraud concern at all. The Assistant Secretary of State, responsible for managing statewide elections, affirmed upon cross-examination that the possibility of this particular voter fraud is "infinitesimal" and would not have been "an appropriate justification" for SB 205's perfection requirement. None of the officials who testified from nearly a quarter of Ohio's boards of elections were even asked whether requiring perfection on the birthdate field would combat mail-in absentee-voter fraud. At the court's own prodding, several answered questions related to fraud. The few who could relate instances of fraud identified none relating to the specific interest now asserted. This suggests that the fraud interest does not offset the burden of technical

perfection on the identification envelope's address and birthdate fields.

Ohio also asserts an interest in standardizing its identification-envelope requirements. Achieving uniform standards across eighty-eight autonomous county boards of elections is a commendable goal. A court weighing that interest, however, must ask, "Standardization to what end?" For example, a standardized ballot may increase public confidence in the integrity of the electoral process. *See Crawford*, 553 U.S. at 235 (Souter, J., dissenting). According to Ohio, SB 205's perfection requirement "increases efficiency and predictability." First Br. 32.

In support, Ohio cites just two pieces of evidence. During his testimony, the Assistant Secretary of State stated that before the implementation of SB 205, the birthdate field was "a required element on the [identification envelope, but] was not a required element for the Board to determine the validity of the ballot." Although true, that statement does not address whether that distinction was thought by anyone to make election administration less efficient. Ohio also points to a report of the OAEO advising that requiring mail-in voters to complete the address and birthdate fields, among other measures, would "allow election officials to more efficiently process mail-in absentee ballots." However, that document was silent with regard to in-person absentee ballots. Moreover, it was not a recommendation to *reject* ballots containing technical errors, and so cannot support the argument that a uniform *rejection* standard increases efficiency.

Nor does Ohio's interest in uniformity "make it necessary to burden" the right to vote with a technical-perfection requirement. *Burdick*, 504 U.S. at 434 (citation omitted). Even before SB 205, Ohio law instructed boards of elections on the information to include in absentee-voter identification envelopes. *See* Ohio Rev. Code § 3509.04(B) (2013). It would seem that the simple act of amending that provision to more comprehensively describe the information that identification envelopes should contain would have been a less roundabout way to uniformity—and would not have needlessly disenfranchised voters. In addition, Ohio publishes a lengthy manual for election officials with extensive instructions on how to apply its statutory election provisions. It includes a "Reasons to Reject an Absentee Ballot" section. Ohio could include instructions explaining the steps that officials should take to positively identify voters before determining that an identification envelope is sufficient or insufficient. Instead, the legislature enacted a measure that forces elections boards to reject some identifiable ballots. We cannot find that Ohio's stated interests outweigh the burden that the field-perfection requirement places on absentee voters.

Limit on Poll-Worker Assistance. The burden imposed by demarcating the types of assistance that election officials may render voters is minimal. In most cases, poll-worker assistance will not fix the errors that result in the rejection of absentee and provisional ballots. As discussed, most rejected provisional

ballots were not counted because the applicant was not registered at all or tried to vote in a precinct where her or she was not registered. Domestic civilian absentee ballots were usually rejected just for being submitted late—sixty-three percent of rejected ballots in 2014 and over eighty percent in 2015. All voting requirements inevitably encumber some people more than others. Yet Ohio specifically ensures that voters at the greatest risk of making mistakes in marking their ballots—blind, disabled, and illiterate individuals — receive help if it is requested. The onus is on the voter to make the request, but that hardly impinges the right to vote. Any burden is borne only by those who can but do not ask for help or make easily avoidable errors in marking their ballots.

Ohio's legitimate interest in minimizing election-official mistakes by ensuring that they are not overburdened and do not fill in others' personal information justifies the limitation placed on poll-worker assistance.[12] Because Ohio asserts a

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[12] Although not argued by Ohio on appeal, states have an important interest in managing poll-workers' interaction with voters to protect ballot secrecy and prevent coercion. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 206, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992) (plurality opinion) ("[A]ll 50 States, together with numerous other Western democracies...[have] a secret ballot secured in part by a restricted zone around the voting compartments," which "demonstrates that some restricted zone is necessary

legitimate interest, this minimally burdensome regulation does not amount to an unconstitutional abridgment of the right to vote.

Cure-Period Reduction. As discussed, on the basis of the record, reducing from ten to seven the number of days for correcting absentee-ballot errors and presenting provisional-ballot identification imposes a trivial burden on Ohio voters. There is no evidence of the magnitude of the burden and at least one board official testified that few voters even used the final three cure-period days.

That minimal burden on voting is easily outweighed by Ohio's interest in reducing the administrative strain felt by boards of elections before they begin to canvass election returns. The official canvass must begin eleven to fifteen days after Election Day. Ohio Rev. Code. § 3505.32(A). The possibility of unforeseeable post-election issues thrust upon boards is a legitimate concern. Building in a three-day buffer between the cure period and the official canvass is a common-sense solution. Although, as the district court noted, none of the board officials who testified indicated that the ten-day cure period inconvenienced them, a state certainly need not wait for an election issue to arise before enacting provisions to avoid it. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986).

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in order to serve the States' compelling interests in preventing voter intimidation and election fraud.").

Federal law does require that voting equipment give voters the opportunity to correct errors before their ballots are cast and counted. *See* 52 U.S.C. § 21081(a)(1)(A)(ii) (Supp. II Vol. III 2015). But no case mandates any particular length of time that states must provide after Election Day for voters to cure ballot errors. Given the negligible impact of the cure-period reduction on voters, Ohio's reasonable response to a foreseeable problem is not an undue burden.

B. Lack of Uniform Standards

A plaintiff may state an equal-protection claim by alleging that lack of statewide standards results in a system that deprives citizens of the right to vote based on where they live. *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477-78 (6th Cir. 2008). The district court rejected the plaintiffs' argument that the boards of elections used different standards in the two most recent general elections for determining whether to reject absentee and provisional ballots that contained errors or omissions. We agree.

The plaintiffs presented uncontested evidence that, in determining whether to reject a given ballot, the practices of boards of elections can vary, and sometimes considerably. But that does not address the central question in a lack-of-uniform standards claim: whether Ohio lacks "adequate statewide standards for determining what is a legal vote." *Bush v. Gore*, 531 U.S. 98, 110, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) (per curiam). Arguable differences in

how elections boards apply uniform statewide standards to the innumerable permutations of ballot irregularities, although perhaps unfortunate, are to be expected, just as judges in sentencing-guidelines cases apply uniform standards with arguably different results. In fact, that flexibility is part and parcel of the right of "local entities, in the exercise of their expertise, [to] develop different systems for implementing elections." *Id.* at 109. Despite differences in the local application of provisions concerning ballot rejection, the elections boards are guided by clear prescriptive statewide rules that apply equally to all voters. Nor is there any indication that certain categories of provisional or absentee ballots received "preferential treatment." *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 598 (6th Cir. 2012); *see also Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 236 (6th Cir. 2011). Thus, the district court correctly concluded that the plaintiffs did not prove arbitrary treatment.

C. Intentional Discrimination

Facially neutral laws can be motivated by invidious racial discrimination. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). Because of the possibility that discriminatory intent is an underlying motivation, courts must undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Ibid.* Challengers need to show only that discriminatory

purpose was "a motivating factor," not necessarily the law's "dominant" or "primary" purpose. *Id.* at 265-66.

In *Arlington Heights*, the Supreme Court articulated nonexhaustive evidentiary factors to consider in determining whether official action was undertaken with a discriminatory purpose. Those factors include:

> "[T]he historical background of the decision,...particularly if it reveals a series of official actions taken for invidious purposes"; "the specific sequence of events leading up [to] the challenged decision"; "departures from the normal procedural sequence"; "substantive departures,...particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and the "legislative or administrative history,...especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."

Spurlock v. Fox, 716 F.3d 383, 397 (6th Cir. 2013) (quoting *Arlington Heights*, 429 U.S. at 267-68) (alterations omitted).

The record does not reveal that SB 205 and SB 216 were enacted with discriminatory intent. As discussed, the evidence does not demonstrate that minority voters are disproportionately affected by the provisions. Nor did the legislature depart from normal procedural practices when it considered the provisions for several months before their passage. *Cf. N.C. State Conference of the NAACP v. McCrory*,

831 F.3d 204, 2016 U.S. App. LEXIS 13797, Nos. 16-1468, 16-1469, 16-1474, 16-1529, 2016 WL 4053033, at *13 (4th Cir. July 29, 2016) (law passed with discriminatory intent in part due to legislature's "eagerness," after *Shelby County* held unconstitutional Section 5's preclearance requirement, to "rush through the legislative process the most restrictive voting law North Carolina has seen since the era of Jim Crow"). In fact, the basic contours of SB 205 originally appeared in a report of the bipartisan OAEO.

A racially tinged statement by one legislator who allegedly asked during committee debate whether the General Assembly "should...be making it easier for those people who take the bus after church on Sunday to vote" is troubling. *Cf. Ohio State Conference*, 768 F.3d at 539 ("African Americans have come to rely on Sunday voting through 'Souls to the Polls initiatives,' in which churches have leveraged the transportation they already provide to and from church to bring voters to EIP voting locations."). But we agree with the district court that on the whole, the record does not show that the General Assembly acted with racial animus.

VI. Due Process

The Due Process Clause is implicated in "exceptional" cases where a state's voting system is "fundamentally unfair." *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010) (quoting *League of Women Voters of Ohio*, 548 F.3d at 478). Fundamental unfairness may occur, for example, if a state uses non-uniform

procedures that result in significant disenfranchisement and vote dilution. *See League of Women Voters of Ohio*, 548 F.3d at 478. "[G]arden variety election irregularities," however, do not prove fundamental unfairness. *Griffin v. Burns*, 570 F.2d 1065, 1076, 1078-79 (1st Cir. 1978). The district court rejected the plaintiffs' fundamental-unfairness claim, and we affirm.

As discussed in response to the argument that Ohio's voting system lacks uniform standards, discrepancies at the margins in how local boards of elections apply statewide provisions is not unusual. Those predictable divergences impact a small number of voters and do not amount to a fundamentally unfair voting system. Nor do the technical-perfection requirements that SB 205 and SB 216 impose on absentee and provisional voters rise to an exceptional level of unfairness comparable to grossly non-uniform procedure or significant voter disenfranchisement.

We also find unconvincing the appellees' contention that the district court denied their procedural-due-process claim "without addressing its merits." Second Br. 75. The district court clearly held that the alleged harm was "caused by the portions of SB[] 205 and SB 216 that impose a completion requirement for the five fields, not the *lack* of process given when a ballot is rejected." *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *43 (S.D. Ohio June 7, 2016) (emphasis added). We therefore dismiss this claim.

VII. Conclusion

We AFFIRM the entry of judgment for the plaintiffs on their equal-protection undue-burden claim as it relates to the requirement that boards of elections reject mail-in and in-person absentee ballots for failure to complete the identification envelope's address and birthdate fields with technical precision. Therefore, we AFFIRM its permanent injunction of the portions of SB 205 that amend Sections 3509.06(D) and 3509.07 of the Ohio Revised Code. *See* S.B. 205, 130th Gen. Assemb. (Ohio 2014), at 9-12.

To be perfectly clear, this remaining injunction does not impede the legitimate interests of Ohio election law. The versions of Sections 3509.06(D) and 3509.07 that existed before the enactment of SB 205 (and that the injunction effectively reinstates) were altogether serviceable. Nothing in our opinion prevents election officials from rejecting absentee ballots whose identification envelopes contain "insufficient" information. Ohio Rev. Code. § 3509.07 (2013). The Secretary can and should continue to instruct the boards of elections on implementing those provisions in order to further the interest of uniformity and to provide guidance on the steps boards should take to identify absentee voters before deeming an identification envelope " insufficient." And, within the bounds of the Fourteenth Amendment, the General Assembly has authority to modify its elections laws in the future. But in doing so, it must act to further

important State interests if its proposed changes burden Ohioans' right to vote.

We deeply respect the dissent's recounting of important parts of the racial history of our country and the struggle for voting rights, and we agree that this history may always be appropriately borne in mind. However, that history does not without more determine the outcome of today's litigation over voting practices and methods. The legal standards we must follow are set out in the cases we discuss concerning the standards embodied in the Fourteenth Amendment and Section 2 of the Voting Rights Act. With respect to the dissent's discussion regarding factual findings, this opinion does not quarrel with the district court over its recitation of the record or of any credibility determinations made by the district court. Rather, our holding is that the district court's legal conclusions from that record are in certain parts erroneous, as set forth in this opinion, and in light of other parts of the record that the court did not consider.

For reasons stated, we REVERSE the judgment of the district court on the remaining undue-burden claims and the VRA Section 2 claims. We AFFIRM the entry of judgment for Ohio on all other claims.

DAMON J. KEITH, concurring in part, dissenting in part. Democracies die behind closed doors. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). By denying the most vulnerable the right to

vote, the Majority shuts minorities out of our political process. Rather than honor the men and women whose murdered lives opened the doors of our democracy and secured our right to vote, the Majority has abandoned this court's standard of review in order to conceal the votes of the most defenseless behind the dangerous veneers of factual findings lacking support and legal standards lacking precedent. I am deeply saddened and distraught by the court's deliberate decision to reverse the progress of history. I dissent.

In 2014, Ohio enacted Senate Bills 205 and 216, which (1) required county elections boards to reject the ballots of absentee and provisional voters whose identification envelopes or affirmation forms, respectively, contained an address or birthdate that did not exactly match voting records; (2) reduced the number of post-election days for absentee voters to cure identification-envelope errors, and the number of days for provisional voters to present valid identification, from ten days to seven days; and (3) restricted the ways in which poll workers can help in-person voters. After conducting a twelve-day trial and authoring a 112-page opinion brimming with sound factual findings and legal conclusions, the district court (Judge Algenon L. Marbley) justly held that all of the challenged provisions imposed an undue burden on the right to vote and violated plaintiffs' equal protection rights.

In complete abandonment of the clearly erroneous standard of review, the Majority displaces several of the district court's well-reasoned and supported

factual findings. The Majority's decision to gut the factual findings of the district court and to advance legal standards without precedent in order to shut the most vulnerable out of the political process must be subjected to the natural antiseptic of sunlight. The unfettered right to vote is the bedrock of a free and democratic society—without it, such a society cannot stand. This right is fundamental. It is the most valuable right a person possesses, because without it, all other rights are meaningless. As history has shown time and time again, laymen and jurists alike have actively worked to deny the right to vote to minorities, in both obvious and obscure ways. The Voting Rights Act ("VRA"),[1] sought to right this wrong by allowing all citizens—unrestrained—to exercise their right to vote regardless of race. While the VRA and Equal Protection Clause sought to bring this nation forward, closer to a society free of racial discrimination, today the Majority's opinion takes us several steps back. Because the Majority has completely ignored the applicable standard of review and has instead engaged in its own fact finding and reweighing of the evidence in complete disregard for the clearly erroneous standard of review, because the Majority has created a legal standard in contradiction to existing case law based on a concurring opinion and dictum, and because the Majority has dishonored the struggle for the right of the most vulnerable to vote, I dissent. I would instead affirm the district court in full.

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[1] 52 U.S.C.A. § 10301 *et seq*.

BACKGROUND

A. Historical Background

1. The Martyrdom and Struggle for Equal Protection

The Majority's actions must be viewed in full light of their historical context. The murders of countless men and women who struggled for the right to vote and equal protection cannot be overlooked. The utter brutality of white supremacy in its efforts to disenfranchise persons of color is the foundation for the tragedy that is the Majority's effort to roll back the progress of history. I will not forget. I cannot forget—indeed America cannot forget—the pain, suffering, and sorrow of those who died for equal protection and for this precious right to vote. I add the following publicly available historical statements to humanize the struggle for the right to be equal participants in the democratic process. While the Majority aptly notes that these historical statements do not dictate the outcome of this case, it is imperative that we assess the efforts to undermine the right to vote as an historical operative that did not begin with the Majority's opinion and unfortunately will not end with it.[2]

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[2] I give full context to the legal analysis of the issues presented in this case as well as full historical contextualization of the facts. The following pictures and synopses cannot capture the full horror of those who lost their lives in the quest for equal protection

	In 1955, **Reverend George Lee**, an African American Baptist minister who had the temerity to found a local NAACP chapter in Humphreys County, Mississippi, urged his congregation to vote. While the cause of his death is disputed, there is substantial evidence that he was murdered for his efforts.[3]

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and voting rights. The following is a mere fraction of the martyrs of the struggle for equality. The assaults, rapes, murders, lynching, and utter travesty of the struggle for equality can never

[3] *See* K.C. Meckfessel Taylor, Marielle Elisabet Dirkx, William Mcintosh, W. Tucker & Carrington, CSI Mississippi: *The Cautionary Tale of Mississippi's Medico-Legal History*, 82 Miss. L.J. 1271, 1272 (2013).

		In 1955, **Lamar Smith** was shot dead on the courthouse lawn by a white man in broad daylight while dozens of people watched.[4] The killer was never indicted. Smith had organized blacks to vote in a recent election.[5]

[4] Paula C. Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*, 17 Berkeley J. Afr.-Am. L. & Pol'y 377, 384 (2015).

[5] *Id.*

	In 1955, **Emmett Louis Till**, a 14-year-old boy on vacation, reportedly flirted with a white woman in a store.[6] Three nights later, two men took Till from his bed, beat him, shot him and dumped his body in the Tallahatchie River. One of Till's murderers reflected, "I just decided it was time a few people got put on notice. As long as I live and can do anything about it, niggers are gonna stay in their place. Niggers ain't gonna vote where I live."[7] An all-white jury declared the men innocent of murder.[8]

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[6] Ronald Turner, *Remembering Emmett Till*, 38 How. L.J. 411, 415 (1995).

[7] *Id.* at 417 (citing William Bradford Huie, *The Shocking Story of Approved Killing in Mississippi*, Look, Jan. 24, 1956, at 50).

[8] *Id.* at 419.

		In 1957, **Willie Edwards Jr.** was assaulted by several Klansmen who threatened to castrate him, took him to a bridge, and forced him to jump,[9] all for allegedly making advances toward a white woman.[10]

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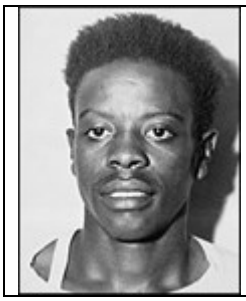
[9] Adam Nossiter, *Murder, Memory And the Klan; A Special Report: Widow Inherits a Confession To a 36-Year-Old Hate Crime*, N.Y. Times, Sept. 4, 1993, at 1, *available at* http://www.nytimes.com/1993/09/04/us/murder-memory-klan-special-report-widow-inherits-confession-36-year-old-hate.html?pagewanted=all (last visited September 6, 2016).

[10] Anthony V. Alfieri, *Retrying Race*, 101 Mich. L. Rev. 1141, 1163 (2003).

		In 1959, **Mack Charles Parker**, 23, was accused of raping a white woman.[11] Three days before his case was set for trial, a masked mob took him from his jail cell, beat him, shot him, and threw him in the Pearl River.[12]

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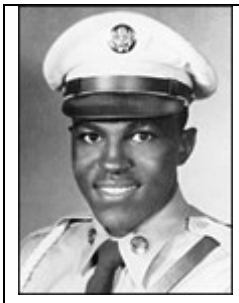
[11] Anders Walker, *The Violent Bear It Away: Emmett Till and the Modernization of Law Enforcement in Mississippi*, 46 San Diego L. Rev. 459, 492-93 (2009); *see also* Jack Greenberg, *Brown v. Board of Education: An Axe in the Frozen Sea of Racism*, 48 St. Louis U. L.J. 869, 877 (2004) (citing Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (1994)).

[12] *Walker*, 46 San Diego L. Rev. at 493.

	In 1961, **Herbert Lee**, who worked to register black voters, was killed by a state legislator who claimed self-defense and was never arrested.[13] Louis Allen, a black man who witnessed the murder, was later also killed.[14]
	In 1962, **Cpl. Roman Ducksworth Jr.**, a military police officer stationed in Maryland, was on leave to visit his sick wife when he was ordered off a bus by a police officer and shot dead.[15] The police officer may have mistaken Ducksworth for a "freedom rider" who was testing bus desegregation laws.[16]

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[13] Paula C. Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*, 17 Berkeley J. Afr.-Am. L. & Pol'y 377, 384 (2015).

[14] *Id.*

[15] *Id.* at 387.

[16] *Id.*

	In 1962, **Paul Guihard**, a reporter for a French news service, was killed by gunfire from a white mob during protests over the admission of James Meredith to the University of Mississippi.[17]

	In 1963, **William Lewis Moore**, a postman from Baltimore, was shot and killed during a one-man march against segregation.[18] Moore had planned to deliver a letter to the governor of Mississippi urging an end to intolerance.[19]

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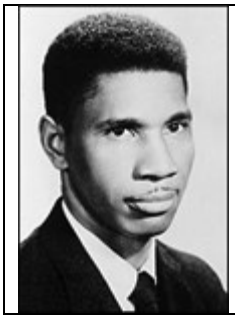
[17] Mitchell F. Crusto, *The Supreme Court's "New" Federalism: An Anti-Rights Agenda*?, 16 Ga. St. U. L. Rev. 517, 572 (2000) (citations omitted).

[18] Miles Johnson, A Postman's 1963 Walk For Justice, Cut Short On An Alabama Road, NPR, April 14, 2013, *available at* http://www.npr.org/2013/08/14/211711898/a-postmans-1963-walk-for-justice-cut-short-on-an-alabama-road (last visited September 6, 2016).

[19] *Id.*

	In 1963, **Medgar Evers**, who directed NAACP operations in Mississippi, was leading a campaign for integration in Jackson when he was shot and killed by a sniper at his home.[20]

	In 1963, **Addie Mae Collins, Denise McNair**, **Carole Robertson, and Cynthia Wesley** were getting ready for church services when a bomb exploded at the Sixteenth Street Baptist Church in Birmingham, Alabama, killing all four of the school-aged girls.[21] The church had been a center for civil rights meetings and marches.[22]

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[20] Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 Mich. L. Rev. 1225, 1236

[21] Donald Q. Cochran, *Ghosts of Alabama: The Prosecution of Bobby Frank Cherry for the Bombing of the Sixteenth Street Baptist Church*, 12 Mich. J. Race & L. 1 (2006).

[22] *Id.*

	In 1963, on the same day as the bombing killing four girls, **Virgil Lamar Ware**, 13, was riding on the handlebars of his brother's bicycle when white teenagers fatally shot him.[23] The white youths had come from a segregationist rally held in the aftermath of the Sixteenth Street Baptist Church bombing.[24]
	In 1964, Louis Allen, who witnessed the murder of civil rights worker Herbert Lee, endured years of threats, jailings, and harassment in Mississippi.25 He was making final arrangements to move north on the day he was killed.26

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[23] Tim Padgett and Frank Sikora, The Legacy of Virgil Ware, Time Magazine, Sept. 22, 2003, *available at* http://content.time.com/time/magazine/article/0,9171,485698,00.html (last visited September 6, 2016).

[24] *Id.*

[25] Anthony Hall, *A Stand for Justice-Examining Why Stand Your Ground Laws Negatively Impact African Americans*, 7 S. Region Black L. Students Ass'n L.J. 95, 112 (2013) (citation omitted).

[26] *Id.*

	In 1964, **Rev. Bruce Klunder** was among the civil rights activists who protested the building of a segregated school. Klunder was crushed to death when a bulldozer backed over him.27
	In 1964, Henry Hezekiah Dee and Charles Eddie Moore were killed by Klansmen who believed the two were part of a plot to arm blacks in the area.28 Their bodies were found during a massive search for the missing civil rights workers Chaney, Goodman, and Schwerner, listed immediately below.29

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[27] William D. Henderson, *Demography and Desegregation in the Cleveland Public Schools: Toward A Comprehensive Theory of Educational Failure and Success*, 26 N.Y.U. Rev. L. & Soc. Change 457, 557 (2001) (citing Paul Shepard, *A Martyr Remembered: 30 Years Ago, Rights Activist Bruce Klunder Died Beneath a Bulldozer Here*, Plain Dealer (Cleveland), Apr. 7, 1994, at A1).

[28] Janis L. McDonald, *Heroes or Spoilers? The Role of the Media in the Prosecutions of Unsolved Civil Rights Era Murders*, 34 Ohio N.U. L. Rev. 797, 817, 826 (2008) (citation omitted).

[29] *Id.*

	In 1964, **James Earl Chaney, Andrew Goodman, and Michael Henry Schwerner**, young civil rights workers, were arrested by a deputy sheriff and then released into the hands of Klansmen who had plotted their murders.[30] They were shot, and their bodies were buried in an earthen dam.[31]
	**In 1964, Lt. Col. Lemuel Penn, a Washington, D.C., educator, was driving to D.C. from Georgia when he was shot and killed by Klansmen in a passing car.32**

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[30] Paula C. Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*, 17 Berkeley J. Afr.-Am. L. & Pol'y 377, 384 (2015).

[31] *Id.*

[32] Michal R. Belknap, *The Vindication of Burke Marshall: The Southern Legal System and the Anti-Civil-Rights Violence of the 1960s*, 33 Emory L.J. 93, 102-03, 129, 132 (1984).

	In 1965, **Jimmie Lee Jackson** was beaten and shot by state troopers as he tried to protect his grandfather and mother from a trooper attack on civil rights marchers.[33] His death led to the voting rights march and the eventual passage of the Voting Rights Act.[34]
	In 1965, Rev. James Reeb, a Unitarian minister from Boston, was one of many white clergymen who joined the Selma marchers after state troopers attacked protestors at the the Edmund Pettus Bridge.35 Reeb was beaten to death by white men while he walked down a Selma street.36

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[33] Paula C. Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*, 17 Berkeley J. Afr.-Am. L. & Pol'y 377, 386 (2015).

[34] *See Id.* at 386-89.

[35] *Id.* at 384.

[36] *Id.*

	In 1965, **Viola Gregg Liuzzo**, a housewife and mother from Detroit, drove alone to Alabama to help with a voting rights march in Selma.[37] She was ferrying marchers between Selma and Montgomery when she was shot and killed by a Klansmen in a passing car.[38]
	In 1965, **Oneal Moore** was the first black deputy sheriff for the Washington Parish Sheriff's Office in Varnado, Louisiana.39 Moore was killed while on patrol. Mississippi police arrested Klansman Ray McElveen. Louisiana prosecutors extradited McElveen and indicted him for murder but released him within weeks for insufficient evidence and dropped all charges.40

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[37] *Id.* at 384.

[38] *Id.*

[39] Anthony V. Alfieri, *Retrying Race*, 101 Mich. L. Rev. 1141, 1164 (2003).

[40] *Id.*

	In 1966, **Samuel Leamon Younge Jr.**, a student civil rights activist, was fatally shot by a white gas station owner following an argument over segregated restrooms.[41]

[41] David J. Krajicek, *Black Man Killed For Trying To Use Whites-Only Bathroom In Alabama In 1966 Set Off Protests That Echo Today, Daily News*, May 21, 2016, available at http://www.nydailynews.com/news/national/black-man-killed-bathroom-alabama-1966-article-1.2645287 (last visited September 6, 2016).

	In 1966, **Vernon Ferdinand Dahmer**, a wealthy black businessman, offered to pay poll taxes for those who could not afford the fee required to vote.[42] The night after a radio station broadcasted Dahmer's offer, his home was firebombed.[43] Dahmer died later from severe burns after holding off the Klansmen with his shotgun long enough for his family to escape.[44]
	In 1966, Ben Chester White, a sixty-seven year old black man, was murdered by three members of the Klan who wanted to lure Reverend Martin Luther King, Jr. to the Natchez, Mississippi area.45 An all white male jury acquitted one of his killers.46

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[42] Joseph W. Gill, *Mississippi Justice at Last: The Trials and Convictions of Beckwith, Bowers and Killen*, Prosecutor, July/August 2007, at 26, 28.

[43] *Id.*

[44] *Id.*

[45] Janis L. McDonald, *Heroes or Spoilers? The Role of the Media in the Prosecutions of Unsolved Civil Rights Era Murders*, 34 Ohio N.U. L. Rev. 797, 809 (2008).

[46] *Id.*

	In 1967, **Wharlest Jackson**, the treasurer of his local NAACP chapter, was one of many blacks who received threatening Klan notices at his job.[47] After Jackson was promoted to a position previously reserved for whites, a bomb was planted in his car.[48] It exploded minutes after he left work one day, killing him instantly.[49]
	In 1967, Benjamin Brown, a former civil rights organizer, was at a protest when he was hit by stray gunshots from police who fired into the crowd.50

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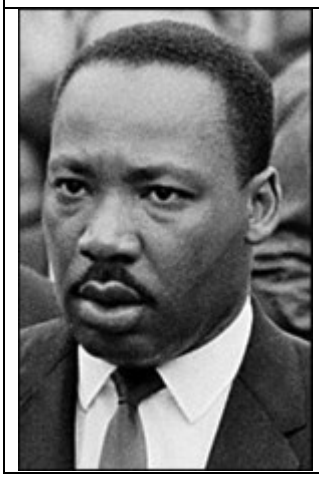
[47] Paula C. Johnson, *Voting Rights and Civil Rights Era Cold Cases: Section Five and the Five Cities Project*, 17 Berkeley J. Afr.-Am. L. & Pol'y 377, 384 (2015).

[48] *Id.*

[49] *Id.*

[50] Anders Walker, *The Violent Bear It Away: Emmett Till and the Modernization of Law Enforcement in Mississippi*, 46 San Diego L. Rev. 459, 499 (2009).

	In 1968, **Samuel Ephesians Hammond Jr.**, **Delano Herman Middleton, and Henry Ezekial Smith** were shot and killed by police who fired on student demonstrators at the South Carolina State College campus.[51]
	In 1968, Dr. Martin Luther King Jr., a Baptist minister, was a major architect of the Civil Rights Movement.52 He was assassinated as he prepared to lead a demonstration in Memphis.53

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[51] Bass, J. (n.d.). The Orangeburg Massacre, available at http://www.jackbass.com/_u_the_orangeburg_massacre_u_25512.htm (last visited September 6, 2016).

[52] Henry J. Richardson III, *From Birmingham's Jail to Beyond the Riverside Church: Martin Luther King's Global Authority*, 59 How. L.J. 169, 171 (2015).

[53] *Id.*

2. The Election of the United States' First Black President

Another important historical occurrence that cannot be separated from efforts to abridge minorities' right to vote is the election of the United States' First Black President. On February 10, 2007, then-Senator Barack Obama of Illinois, an African American, announced his candidacy for the United States Presidency.[54] On November 4, 2008, President Obama became the first African-American President of the United States. President Obama not only captured the presidency, but under his leadership, the Democratic party gained control of the House, the Senate and the White House for the first time since 1995.[55] On April 4, 2011, President Obama announced his reelection for the presidency.[56] On November 6, 2012, President Obama was re-elected President of the United States.[57]

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[54] Adam Nagourney & Jeff Zeleny, *Obama Formally Enters Presidential Race*, New York Times, Feb. 11, 2007.

[55] *Id.*

[56] Chris Cillizza & Emi Kolawole, *President Obama Announces Reelection Bid*, Washington Post, April 4, 2011.

[57] David A. Fahrenthold, *Obama Reelected As President*, Washington Post, November 7, 2012.

B. Factual Background

1. The Parties[58]

Plaintiff, "The Northeast Ohio Coalition for the Homeless" ("NEOCH"), advocates on behalf of the Cleveland homeless, airing and addressing issues related to their lack of housing, employment, and health care. About seventy percent of NEOCH's in-person homeless applicants are African American. Promoting voting among its members, and among the homeless county-wide, is central to NEOCH's mission, and NEOCH's executive director, staff, and volunteers expend substantial resources on voting activities in even-numbered years. Executor Director Brian Davis "spends as much as 80 hours per week around the voting registration deadline on such activities, and one part-time NEOCH staff person devotes 20 hours per week to early voting turnout

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[58] The following facts are taken from the district court opinion. *Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *1 (S.D. Ohio June 7, 2016). As stated *infra*, the Majority has failed to establish that any of the district court's factual findings are clearly erroneous. By way of reference, I incorporate all of the district court's factual findings in this dissent. I have highlighted many of those findings here; however, I direct attention in particular to the district court's finding regarding the Senate Factors, which I also incorporate herein. *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *24-32.

efforts." Because of the challenged laws, NEOCH would "no longer provide blank cards to its members to vote by mail, but will instead focus [on]...driving people to the polls to vote, which will divert drivers and vehicles from doing other work on behalf of the organization...." This will also require more financial resources.

In describing the impact of the loss of voting to the NEOCH constituency, the district court made the following findings of fact:

> Were NEOCH's members unable to vote, their bargaining power vis-à-vis elected officials would be diminished, which would in turn diminish NEOCH's effectiveness at advocating on their behalf, frustrating its mission and exposing an already vulnerable population to further governmental neglect. The homeless constituents of NEOCH and CCH face challenges that hinder them from asserting their own rights, including mental illness and/or addiction, difficulty maintaining a regular address or phone number, limited access to transportation, and illiteracy or lack of education. They also find it challenging to gain entrance to courtrooms and public buildings due to lack of ID, and many homeless people have a negative relationship with the judicial system or hesitate to get involved in litigation to assert their rights because they are more focused on meeting their immediate needs.

Husted, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *7 (citations omitted).

Of the NEOCH homeless members who have voted in primary elections, about eight vote in the Democratic primary for each one who votes in the Republican primary. *Id.* In describing the impact of SB 205 and SB 216, the district court made the following findings of fact:

> [E]ight to ten percent of those living in shelters across Cuyahoga County are absolutely illiterate, and the majority read at only a fourth-grade level. Davis feared that the complexity of the form, along with SB 205's provisions demanding that voters fill out the required fields completely and accurately...increased the risk of NEOCH's members being disenfranchised. In his twenty years working with the homeless, Davis has noticed that homeless persons have pervasive and profound problems filling out the forms. Not being able to read or fill out forms correctly is embarrassing and humiliating for many of NEOCH's members, and they hesitate to ask for help. NEOCH's practice with other government forms, such as those relating to Social Security disability and Medicaid benefits, is to read the forms aloud and fill them out on the homeless person's behalf as a matter of course.

Husted, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *7 (citations omitted).

Plaintiff, Columbus Coalition for the Homeless ("CCH"), advocates for homeless people in Columbus. Sixty percent of homeless people in shelters in Columbus are African American. Because of the

challenged laws, CCH will explain new voting requirements to homeless persons at meetings, publishing articles about the requirements, and train its members to educate other homeless persons.

Plaintiff, Ohio Democratic Party ("ODP"), is a political party consisting of 1.2 million members; it seeks to advance the interests of the Democratic Party.[59]

Defendant Secretary of the State of Ohio functions as Ohio's chief election officer. Ohio Rev. Code §§ 3501.04, 3501.05. The State of Ohio is an Intervenor.

2. Voting in Ohio

Absentee Voting. Since 2006, all registered voters have the option to vote absentee without any excuse. To receive an absentee ballot, a voter must provide to the Board of the county in which he or she will vote an application consisting of: (1) the voter's driver's license number; (2) the voter's last four digits of their social security number ("SSN-4"); and (3) an approved form of identification. If these requirements are met, the voter receives an absentee ballot; if these requirements are not met, the voter is notified of the deficiency.

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[59] The Service Employees International Union ("SEIU") is also a plaintiff in this matter. SEIU joined NEOCH in initiating the original action against the Secretary in 2006.

A voter may do "in-person absentee voting"—i.e., vote in-person at their county Board during certain days and hours—or, "mail-in absentee voting." When mailing the form to the Board, the voter must sign and include in the envelope an affirmation declaring the voter is eligible to vote, and if the voter did not provide a driver's license number or SSN-4, the voter must provide an acceptable form of identification or current state or federal documents that show the name and address of the voter. If there is an error in any of the five fields, the Board mails a Form 11-S, specifying the type of error and informing the voter that the ballot will not be counted unless certain steps are taken—namely, returning the Form 11-S by a certain time.

Provisional Voting. Voters who cannot confirm eligibility—and so cannot cast a regular ballot—can complete a provisional ballot. This allows the voter to cast provisionally, "subject to later verification." This type of voting is available to several categories of voters.

3. Challenged Laws

SB 205 — changes to absentee voting procedures

SB 205 mandates that an ID envelope is considered incomplete if the voter does not fill out the five fields of required information ("five-fields requirement"): (1) name; (2) residence address; (3) date of birth; (4) signature; and (5) some form of ID, which includes the types of acceptable ID required for the absentee

ballot application form. If these requirements are not met, the voter will receive a written notice informing them of the nature of the defect and that further information must be provided for the ballot to be counted. Before enactment of SB 205, the information contained in the five fields was merely requested, not required. Pursuant to SB 205, if the information is missing, the ballot "shall not be counted."

The information must be provided no later than the seventh day after the election. This opportunity to cure—i.e., "cure period"—was longer before the enactment of SB 205; voters had ten days rather than seven days to furnish the information.

SB 216 — changes to provisional voting procedures

Before enactment of SB 216, voters were required to provide only their names, IDs, and signatures in the provisional ballot affirmation form. Pursuant to SB 216, provisional voters must also provide the date of birth and current address. SB 216 also requires voters to print their names on the provisional ballot envelope. Section 3505.183(F) of the provision already imposed a "completeness requirement." Section 3505.181(F) provides that persons filling out provisional ballots may receive help, but only if they declare to an election official that they are unable to fill out the ballot due to blindness, disability, or illiteracy.

4. The Lead-Up to SB 205 and SB 216

Following the 2010 election, control of the Ohio House of Representatives switched from the Democratic to the Republican Party. "Rather quickly" after that change in leadership, House Republicans introduced two bills: (1) a bill to require all Ohioans to show a photo ID when voting and (2) House Bill 194 ("HB 194"), an expansive election-law bill that included "a number of restrictions on voting, including the restrictions that we see in [SBs 205 and 216]." Representative Kathleen Clyde, Ohio General Assemblyperson, testified that the debate over HB 194 was "very partisan and hostile" and "very quick." HB 194 was ready for the Governor's signature within two months of its introduction, which Representative Clyde testified marks a significantly shorter time period than usual for the passage of legislation of such complexity. *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *13.

In August 2012, in an unprecedented move, the Ohio legislature voted to repeal HB 194 after hundreds of thousands of Ohioans signed petitions to place it on the ballot for a statewide referendum in November 2012. Sixteen other bills proposing voting restrictions were introduced in the 2013-2014 General Assembly, eight of which passed. One bill was passed to shorten the window to gather signatures for referenda, which made it more difficult for citizens to put a referendum on the ballot. Another bill was passed making it easier to purge voters from the registration rolls. Senate Bill 238, which eliminated the first week of the early voting period, also was enacted. Other

bills were introduced, but not passed, which would have limited voting in the following ways: shortening the early voting period to 14 days; eliminating early voting hours; limiting the mailing of absentee ballot applications to voters and preventing the paying of return postage on absentee ballot envelopes; instituting a photo-ID requirement; and requiring state universities to provide in-state tuition rates to students if they provided those students with ID that they needed to vote.

None of the proponents of SB 205 cited voter fraud as a justification for the bill. *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *13. During the floor debate of SB 205, in contrast to most proposed legislation, there was no data or testimony offered about the need for the measures proposed in SB 205. *Id.* During committee debate, Representative Matt Huffman, speaking in favor of SB 205, asked "should we really be making it easier for those people who take the bus after church on Sunday to vote." *Id.* With respect to both SB 205 and SB 216, Democratic legislators spoke about their concerns that the provisional and absentee ballots of African-American voters would be thrown out disproportionately. 2016 U.S. Dist. LEXIS 74121, at *14.

As to the cure period, one Board official testified that before the challenged laws went into effect, voters did come in during the eighth, ninth, and tenth days of the cure period to cure their provisional and absentee ballots. Because the Board can receive absentee ballots up until ten days after Election Day, yet the cure period is only seven days, some voters to whom

the Board sends a Form 11-S notifying them of their need to cure their ballot will not receive it in time to do so. 2016 U.S. Dist. LEXIS 74121, at *17.

5. Information Requirements

The vast majority of NEOCH's individual homeless members plan to participate in the 2016 general election. Many of CCH's members also plan to vote. Many of the organization's members are illiterate, barely literate, and/or mentally ill. A CHH witness testified that without assistance, a homeless person could not complete the entire form and that due to the complexity and amount of print on the form, some homeless people would just tear it up and say, "you know, to hell with it." Forms that are, in the words of one Board official, "pretty complex," with "a lot of wording, a lot of stuff crammed into" them, can confuse even educated, literate voters.

6. Prohibition Against Poll-Worker Assistance

The district court found that the prohibition against poll-worker assistance burdens persons with low literacy, particularly if they are embarrassed to reveal their illiteracy due to the stigma it entails. Plaintiffs introduced ample evidence that many of their members fall into this category and that illiteracy or low literacy levels are prevalent among the homeless. Homeless voters suffer disproportionately from disabilities, including mental illness, which can also hamper their ability to fill out forms. About a third of the homeless individuals with whom NEOCH works have a mental disability, forty-

five to fifty percent read at a fourth-grade level, and eight to ten percent are completely illiterate. They may write poorly and have handwriting that is difficult to read or, due to mental illness, they struggle to focus on basic tasks without help. All of these issues combine to create difficulties for homeless voters in filling out forms without assistance like the absentee ID envelope and the provisional ballot affirmation. Moreover, NEOCH Executive Director Brian Davis testified that in his experience with voter mobilization of homeless people in 2014, Board staff members were more hesitant to engage with voters and offer help when it appeared to be necessary and that homeless voters have been more likely to make mistakes because of the lack of help. Secretary Husted failed to conduct any review or testing of the effect of the provisional ballot affirmation or the absentee identification envelope on voters with low literacy, despite a suggestion to do so from the League of Women Voters. In sum, the district court concluded that many homeless people face vexing and profound obstacles in exercising the basic right to vote, and the prohibition against poll-worker assistance is likely to exacerbate the problem.

ANALYSIS

A. The Majority Applies the Wrong Standard of Review for Factual Findings

By applying the wrong standard of review, the Majority abandons its role as a court of appellate review and plays the role of the trier of fact. I cannot join this flawed approach.

"On an appeal from a judgment entered after a bench trial, [this court] review[s] the district court's...conclusions of law de novo." *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005). "Mixed questions of law and fact are also subject to de novo review." T. *Marzetti Co. v. Roskam Baking Co.*, 680 F.3d 629, 633 (6th Cir. 2012) (citing *Thoroughbred Software Int'l, Inc. v. Dice Corp.*, 488 F.3d 352, 358 (6th Cir. 2007)). A district court's findings of fact are reviewed for clear error. *Lindstrom*, 424 F.3d at 492. "A finding of fact will only be clearly erroneous when, although there may be some evidence to support the finding, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Roskam Baking Co.*, 680 F.3d at 633 (quoting *United States v. Darwich*, 337 F.3d 645, 663 (6th Cir. 2003)). "If the district court's account of the evidence is plausible in light of the entire record, this court may not reverse that accounting, even if convinced that, had it been sitting as trier of fact, it would have weighed the evidence differently." *Id.* (quoting *Harlamert v. World Finer Foods, Inc.*, 489 F.3d 767, 771 (6th Cir. 2007)). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.* (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)).

"In reviewing factual findings for clear error, 'the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.'" *Calloway v. Caraco Pharm. Labs., Ltd.*, 800 F.3d 244, 251 (6th Cir. 2015) (quoting Fed. R. Civ. P. 52(a)(6)). "[This court] cannot find that the district court committed clear error where there are two permissible views of the evidence, even if we would have weighed the evidence differently." *Id.* (quoting *King v. Zamiara*, 680 F.3d 686, 694 (6th Cir. 2012)).

Here, the district court took great lengths to make well reasoned and supported factual findings. Indeed, the district court's findings of facts were the product of *several years of litigation* and a *twelve-day bench trial*. The findings alone span over fifty pages in length. The findings are supported by statistical, empirical, and testimonial evidence after research was conducted regarding thousands of voters over several years of voting cycles. These findings of fact are critical to analyzing the claims brought pursuant to the Voting Rights Act and the Equal Protection Clause. Some of the most relevant findings of the district court are as follows:

- Across all even-numbered election years, minorities use provisional ballots more often than whites, and in presidential election years, the absentee ballots and provisional ballots of minority voters are more likely to be rejected than those of white voters.

- African-Americans were hindered from participating in the political process.
- Ohio has a history of racially discriminating voting laws.
- Racially polarized voting in Ohio is extensive.
- There are racialized appeals in politics.
- African-Americans are still not represented well in the most important and visible elected statewide posts.
- There is a lack of responsiveness to the particularized needs of African-American voters.

Yet, the Majority largely ignores these findings and instead applies a de novo standard of review. While the Majority asserts that it is not applying a de novo standard of review, careful review of the Majority opinion reveals that it indeed does. For instance, the Majority took note of the district court's conclusion that "African-American voters are more likely than white voters to have their absentee or provisional ballots rejected." "A district court's conclusion that a challenged electoral practice has discriminatory effect is a question of fact subject to review for clear error." *Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 308-09 (3rd Cir. 1994) (citing *Thornburg v. Gingles*, 478 U.S. 30, 79, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986)). Yet, the Majority disagreed with this factual finding merely because it sees the record differently. The Majority fails to demonstrate (or even assert) that the district court's factual findings are not "plausible in light of the entire record." *See Roskam Baking Co.*, 680 F.3d at 633 ("If the district court's account of the

evidence is *plausible in light of the entire record, this court may not reverse* that accounting, even if convinced that, had it been sitting as trier of fact, it would have weighed the evidence differently.") (emphasis added). The Majority did exactly what the Supreme Court has repeatedly said we cannot do, "reverse the finding of the trier of fact simply because it...would have decided the case differently." *See Anderson*, 470 U.S. at 573. The clear error standard of review "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Id.* We must be mindful that because we are a court of appellate review, we do not decide factual issues de novo. *See Id.* "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[60] *Id.* at 574.

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[60] Clear error review also applies "to the district court's finding that the [regulations impose]...a burden on African Americans' right to vote in Ohio." *Ohio Democratic Party v. Husted*, No. 16-3561, 834 F.3d 620, 2016 U.S. App. LEXIS 15433, 2016 WL 4437605, at *17 (6th Cir. Aug. 23, 2016) (Stranch, J., dissenting) (citing *OFA v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (concluding that the district court did not clearly err in finding that "early voters, who have disproportionately lower incomes and less education than election day voters," were burdened by challenged regulation)). Here, the district court concluded that "demanding perfect, or near-perfect,

Because the standard of review is the lens through which courts analyze a particular issue, the Majority's application of the incorrect standard infects its entire analysis. I cannot join the Majority in its blatant disregard for the standards that guide this court.

B. Because the Majority applied the wrong standard of review — engaging in a *de novo* review of the facts — and because the district court did not clearly err in finding that SB 205 and 216 disparately impacted African Americanvoters, the district court's findings of fact and legal conclusions on Plaintiffs' VRA claims should be affirmed.

The Supreme Court has instructed that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969)). In vote-denial cases, courts conduct a two-part analysis. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). First, a court

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adherence to the five-field requirement on ballots imposes a significant burden for homeless voters, who are some of society's most vulnerable members." This conclusion should not be disturbed absent clear error.

determines whether a practice or procedure has a disparate impact on a minority group. *See Thornburg v. Gingles*, 478 U.S. 30, 44, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986). Second, if it finds disparate impact, the court assesses whether the "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47. In applying the test, the court considers "the totality of circumstances." 52 U.S.C. § 10301(b).

1. Disparate Impact

Here, the district court did not commit clear error in finding "SB 205 and SB 216 have a disproportionate impact on African-American voters in Ohio, creating greater risk of disenfranchisement of African-Americans than whites." *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *47. The district court further concluded that "[t]he burdens imposed on voters by the five-field requirement, the prohibition on poll-worker assistance, and the reduced cure period fall more heavily on African-Americans than whites." *Id.*

The Majority contravenes a clearly erroneous standard of review by reweighing and reassessing the evidence to reach the conclusion that African American's are not disparately impacted by the new legislation. After years of litigation, a twelve-day trial, and painstakingly combing the record, the district court found that Dr. Timberlake's data on disparities in provisional and absentee ballot usage

and rejection rates reveal that higher minority population share is correlated to higher rates of absentee ballot rejection and provisional ballot usage and rejection. *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *47. In support of its conclusion, the district court cited the following findings of fact:

> [T]he Court credits Dr. Timberlake's findings that: (1) in the presidential election years of 2008 and 2012, where minority turnout was higher than during typical midterm elections, *minorities' absentee ballots were rejected at a higher rate than whites*'; (2) in 2008, 2010, 2012, and 2014, minorities cast provisional ballots at a higher rate than whites; [This finding is also corroborated by studies upon which Dr. Timberlake relied that showed that African-American voters use provisional ballots at a higher rate than white voters nationwide. (*See* Timberlake Rebuttal Rpt., P-1195 at PTF-243.)] and (3) in 2008, 2010, and 2012, *minorities had higher rates of rejection of provisional ballots than whites*.

Husted, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *48 (emphasis added).

The district court therefore concluded that "because of the passage of the challenged laws, African-American voters are more likely than white voters to have their absentee or provisional ballots rejected." *Id.* Despite the district court's well-reasoned findings, the Majority reinterprets and reweighs the evidence to conclude that Dr. Timberlake's findings do not

support the conclusion that minorities are disparately impacted by the challenged laws.

In so doing, the Majority makes much of the decrease in the use of absentee ballots in the 2012 and 2014 elections. However, again the Majority avers where the district court directly addressed the argument in a manner that was not clearly erroneous. Totally disregarding the district court's factual determinations and explanations, the Majority discounts the district court's explanation for the decrease in absentee ballots: "Plaintiffs presented evidence that the gubernatorial election was significantly less competitive in 2014 than in 2010, that overall turnout was lower in 2014 than 2010. *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *48. Given this plausible explanation, the district court did not clearly err.

Further, under either standard of review, the Majority's analysis still falls short. The Majority's reasons for rejecting the district court's factual findings are unavailing because the reasons suffer from at least three major analytical flaws. First, the Majority misinterprets the evidence. Second, the Majority fails to apply a totality of the circumstances standard. Third, the Majority errs in its conclusion regarding the undue burden.

First, the Majority misinterprets the evidence. For example, the Majority reasons as follows:

> [T]here is scant evidence in the record that minority voters are more likely to cast absentee

> ballots than white voters. It would therefore be illogical to infer that rejecting absentee ballots for failure to accurately complete address and birthdate fields disproportionately affects minority voters without some other evidence that minority voters are less likely to fulfill that requirement. And...the vast majority of absentee-ballot rejections are for reasons other than those challenged here.

By relying on the "scant evidence" that minority voters are more likely to cast absentee ballots than white voters, the Majority again misses the mark. While evidence that minorities avail of a voting practice more frequently than whites *can* support a Section 2 claim, it is not a *necessary component* for such a claim; minority voters may only show that they are more likely to have their ballots rejected than white voters because of the new requirements, which means they have "less opportunity than" white voters to exercise their right to vote. *See Chisom*, 501 U.S. at 395.

Second, the Majority applies the wrong legal test by considering the impact of each individual legislative change, rather than considering the disproportionate impact that the new Ohio voting requirements have on minorities as a whole. The Majority engages in a piecemeal freeze frame approach to the evidence finding that each new requirement alone in a vacuum does not meet the standard for disparate impact. Even faced with evidence that minority absentee ballots are rejected more frequently than white absentee ballots, the Majority asserts that this

distinction means nothing unless there is "some other evidence" that minority voters are less likely to correctly fill out the birthdate and address requirements. The Majority's requirement that the plaintiff must establish the disproportionate impact of *each* requirement imposes too great a burden. This approach does not comport with Section 2's mandate to consider the "totality of the circumstances." Indeed, at least one circuit has cautioned against the very approach the Majority takes here. *See League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014).

In *League of Women Voters*, the challenged house bill contained several new "electoral mechanisms." *Id.* at 242. That house bill, among other things, "imposed strict voter identification requirements, cut a week off of early voting, prohibited local election boards from keeping the polls open on the final Saturday afternoon before elections, and eliminated same-day voter registration." *Id.* at 228. The district court analyzed each challenged electoral mechanism separately. *Id.* at 242. But the Fourth Circuit criticized the district court for "inspecting the parts of [the] [bill] as if they existed in a vacuum." *Id.* at 242. Specifically, the district court "failed to consider the sum of those parts and their cumulative effect on minority access to the ballot box." *Id.* "Doing so is hard to square with Section 2's mandate to look at the '*totality of circumstances*.'" *Id.* (emphasis added) (quoting 52 U.S.C. § 10301(b)). We should be mindful that "a panoply of regulations, each apparently defensible when considered alone, nevertheless have

the combined effect of severely restricting participation...." *Id.* (quoting *Clingman v. Beaver*, 544 U.S. 581, 607-08, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005) (O'Connor, J., concurring in part and concurring in the judgment)). The Majority's approach creates the incentive for state legislatures to pass numerous electoral mechanisms so that courts are forced to put on blinders when it comes to understanding the combined effect of these mechanisms.

Third, the Majority errs in its conclusion regarding the undue burden. The Majority states that no undue burden exists because there was no evidence that voters received additional poll-worker assistance before the new requirements. However, disparate impact does not require such exact mathematical quantification. It is enough that there is a high likelihood of such assistance being needed given the interplay of structural inequalities with the challenged provisions as the district court correctly found under the governing standard. The Majority has not and cannot cite any legal precedent for such exacting standards, numbers, or data—nor should any be required. The Majority acknowledges that race is not recorded on ballots, but uses this absence of required information to make the self-invalidating argument that finding racial impact is impossible. This deft maneuver again contravenes the standard of review. Such reasoning and stealth of hand sets a very dangerous precedent.

I, therefore, dissent from the Majority's finding that the district court erred in finding that the Plaintiffs

satisfied the first prong of their vote denial claim—disparate impact—and would affirm.

2. Social and Historical Conditions

Furthermore, the district court's findings of fact with respect to the second prong—social and historical conditions—were a product of the district court's careful application of the so- called "Senate" factors or "*Gingles*" factors.[61] The factors from *Thornburg v. Gingles*, 478 U.S. 30, 79, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986) "might be probative" of a Section 2 violation. *See Michigan State A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 833 F.3d 656, 2016 U.S. App. LEXIS 15088, 2016 WL 4376429, at *7 (6th Cir. Aug. 17, 2016). The factors include:

> (1.) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the

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[61] "[T]he Supreme Court has also endorsed factors ("the *Gingles* factors") enunciated by Congress to determine whether [disparate] impact is a product of current or historical conditions of discrimination such that it violates Section 2." *Veasey v. Abbott*, No. 14-41127, 830 F.3d 216, 2016 U.S. App. LEXIS 13255, 2016 WL 3923868, at *17 (5th Cir. July 20, 2016); *see also Michigan State A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 833 F.3d 656, 2016 U.S. App. LEXIS 15088, 2016 WL 4376429, at *13, n.2 (6th Cir. Aug. 17, 2016).

minority group to register, to vote, or otherwise to participate in the democratic process;
(2.) the extent to which voting in the elections of the state or political subdivision is racially polarized;
(3.) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
(4.) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
(5.) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
(6.) whether political campaigns have been characterized by overt or subtle racial appeals;
(7.) the extent to which members of the minority group have been elected to public office in the jurisdiction;
(8.) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

> (9.) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See Gingles, 478 U.S. at 36-37. The district court made findings on all but the fourth factor. I summarize below.

Analyzing factors one and three together, the district court noted the strong history of "Ohio's racially discriminatory voting laws." Although the district court noted the history of Ohio's racially discriminatory voting practices from several decades ago, it also discussed recent discriminatory bills passed after the 2008 election.

As to the second factor, the district court noted that exit polls from Ohio voters in the 2012 presidential election suggest significant and substantial patterns of racially polarized voting. "Approximately, 41% of white voters and 96% of African-Americans reported voting for President Barack Obama—an enormous differential."

As to the fifth Senate factor, the district court noted the barriers faced by African Americans to participation in the political process. Indeed, the district court noted that persistent levels of discrimination faced by African Americans in "employment, housing, income, education and health."

As for factor six, the district court found that there are racialized appeals in politics in Ohio. Such appeals "serve to discourage or dissuade minority voters and prospective candidates by reinforcing the message that they simply do not belong in the political process and/or by mobilizing white voters in a particular direction by playing on insidious, sometimes explicit and sometimes implicit, stereotypes." The district court further cited as examples racialized statements made by public officials and referred to disparaging commercials.

Nor was the district court convinced that there was minority representation in Ohio (factor seven). As an example, no African American presently holds the position of Governor, Lieutenant Governor, Attorney General, Auditor, Secretary of State, and State Treasurer. African Americans have occupied each of these positions only five times in the history of the State. Until recently, and for the first time in sixty years, the Governor's twenty-six-person cabinet was entirely white.

As to factor eight, the district court found that not many of the "socioeconomic disparities have improved in recent years," demonstrating Ohio's lack of responsiveness to the particularized needs of African-American Ohioans. Disparities in unemployment have remained steady as well. Finally, as to factor nine, the district court found that Ohio's primary justification for the challenged laws at issue is that the they improve "election administration," but those justifications were tenuous.

Because Ohio does not challenge any of the district court's factual findings pursuant to *Gingles* on appeal, those factual findings are binding on this panel. *McElwee v. Wharton*, 7 F. App'x 437, 438 (6th Cir. 2001) ("The district court's unchallenged factual findings...are binding on this Court.") (per curiam); *see also Shields v. Reader's Digest Ass'n, Inc.*, 331 F.3d 536, 542 (6th Cir. 2003) ("[B]ecause [the] [p]laintiff has not directly challenged the district court's factual conclusions...all factual controversies are deemed abandoned on appeal and the district court's factual findings are hereby upheld.").

While the Majority never reaches the issue because it holds that Plaintiffs' Section 2 claim fails in its infancy, a careful review of the district court's factual findings pursuant to *Gingles* reveals that the challenged practice is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *See Michigan State A. Philip Randolph Inst. v. Johnson*, No. 16-2071, 833 F.3d 656, 2016 U.S. App. LEXIS 15088, 2016 WL 4376429, at *7 (6th Cir. Aug. 17, 2016) ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986))). Accordingly, I would affirm the district court's holding with respect to the Section 2 Voting Rights Act claim.

Furthermore, I would affirm the district court's findings with respect to both prongs of the vote denial claims as they apply to the restrictions on poll workers and the reduced time to cure. In support of its findings of vote denial on the poll worker restrictions and the reduced time to cure, the district court stated the following:

> Because low literacy levels are also correlated with substandard education (Timberlake Tr., Vol. 5 at 73), and the Court has credited Dr. Timberlake's findings that African-Americans suffer from lower educational attainment than whites in Ohio, the Court concludes that African-Americans would also suffer from higher costs associated with the five-field requirement and the prohibition on poll-worker assistance because they would face disproportionately more challenges filling out the forms. Because African-Americans move more frequently than whites, they may be more likely to be forced to vote provisionally. (*Id.* at 67-68; *see also* Hood Tr., Vol. 10 at 121, 124.) They are also more likely to be homeless. (Davis Tr., Vol. 4 at 186.) And because they are more likely to have inflexible schedules or lack access to a car, they are more likely to be burdened by a shorter cure period for absentee and provisional ballots. (Timberlake Tr., Vol. 5 at 61-62.) All of these effects of discrimination against African-Americans combine to create an

> inequality in their opportunities to participate in the political process.

Husted, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *52.

Given these structural inequalities and the impact of the poll worker restrictions and the shortened cure period, the district court did not clearly err.

C. The Majority Fundamentally Misunderstands the Concept of Disparate Impact

Additionally, the Majority fundamentally misunderstands the concept of disparate impact. A particular practice has a disparate impact on persons of a protected class when that practice has a "disproportionate" impact on the members of the protected class. *See, e.g., Alexander v. Local 496, Laborers' Intern. Union*, 177 F.3d 394, 419 (6th Cir. 1999) ("In a so-called 'disparate impact' case, the plaintiffs need not prove that the defendant intended to discriminate; instead, plaintiffs must prove that a particular [] practice, although neutral on its face, has caused a *disproportionate* adverse effect on a protected group.") (emphasis added); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1257 (6th Cir. 1981).

In some instances, after simply counting the number of persons affected by the new Ohio voter identification laws, without making any comparisons between minority and non-minority voters to assess

the disproportionality of those numbers, the Majority concludes that the voting practices in Ohio do not have a disparate impact because only a small number of voters are affected by the new laws. Disproportionality, by definition, requires assessing racial disparities. *See Alexander*, 177 F.3d at 419 (noting that "statistical evidence is not absolutely essential in proving a disparate impact case," but there "must be proof of disparity using the proper standards of comparison"). By relying on the sheer number of voters affected by the law in isolation, without making any relevant comparisons, the Majority fails to engage in any disparate impact analysis at all. The Majority merely engaged in a counting exercise that gets us nowhere in terms of analyzing the discriminatory impact of a rule or practice.

Next, the Majority concludes that "[a] law cannot disparately impact minority voters if its impact is insignificant to begin with." The text of the Voting Rights Act itself proves this statement to be false. Section 2 of the Voting Rights Act provides, in relevant part, that a violation is established if:

> ... based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have *less opportunity than other members* of the electorate to participate in the political process and to elect representatives of their choice.

Chisom v. Roemer, 501 U.S. 380, 395, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (quoting Sect. 2, Voting Rights Act). Tellingly, the Majority cites no legal authority for the proposition that in order for a practice to be discriminatory, its "impact" must also be "significant." Quite simply, a violation of Section 2 of the Voting Rights Act does not turn on whether people are being discriminated against in "significant" numbers, it turns on whether minorities have "less opportunity than" non-minorities to vote. *See Id.*[62] Moreover, although the ballots of minorities and the homeless may be insignificant to the Majority, they are not insignificant to the basic principles of the VRA, which does not require a certain number of affected persons, but looks instead at the impact on minorities as compared to non-minorities.

D. The Majority Applies the Wrong Legal Standard for the Equal Protection Claim

With respect to the Equal Protection Clause claim, I agree with the Majority's implicit rejection of Ohio's argument that rational-basis review applies. I

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[62] Further, the impact of SB 205 and 216 was certainly significant enough for the Ohio legislature to take action, for legislators to invest the time and energy in getting the laws passed, in defending a claim in a twelve-day trial, and absorbing the time of this court on appeal. The Majority's claim that the impact of the new legislation is insignificant is belied by reality.

further agree that the *Anderson/Burdick* balancing test applies instead. But the Majority's application of the test cannot be reconciled with Sixth Circuit precedent. The Majority takes issue with the district court's consideration of the burdens imposed by the challenged provisions on NEOCH's and CCH's homeless members. The Majority relies in part on Justice Scalia's concurrence in *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008), which states that "what petitioners view as the law's several light and heavy burdens are no more than the different *impacts* of the single burden that the law uniformly imposes on *all* voters." *See Crawford*, 553 U.S. at 205 (Scalia, J. concurring in judgment) (second emphasis added). The Majority then proceeds to "consider the burden that the provisions place on *all* Ohio voters." (Emphasis added).

The Majority's approach is incorrect. In *Crawford*, a plurality of the Supreme Court held that an Indiana statute that required citizens voting in person on election day or casting in person a ballot before election day was constitutional. *Crawford*, 553 U.S. at 185, 204. We have previously held that Justice Stevens' opinion is controlling for *Marks*[63] purposes,

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[63] *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred

see Obama for America v. Husted, 697 F.3d 423, 441 n.7 (6th Cir. 2012) ("*OFA*"), and Justice Stevens, quite simply, did not make the same assertion that Justice Scalia made. *See also Ohio State Conference of N.A.A.C.P. v. Husted*, 768 F.3d 524, 544 (6th Cir. 2014), *vacated sub nom. Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted*, 768 F.3d 524, 2014 WL 10384647 (6th Cir. 2014) ("A majority of the justices in *Crawford* either did not expressly reject or in fact endorsed the idea that a burden on only a subgroup of voters could trigger balancing review under *Anderson-Burdick*.").

In *Crawford*, a plurality of the Supreme Court acknowledged that, although for most voters it is not a substantial burden to comply with a photo ID requirement, a "somewhat heavier burden may be placed on a limited number of persons...includ[ing] elderly persons born out of State, who may have difficulty obtaining a birth certificate[,]...homeless persons[,]" and others. 553 U.S. at 198-99. Although the *Crawford* Court rejected the plaintiffs' argument that the law should be enjoined on the basis of the burden to that smaller group of voters, it did so because the record in that case did not contain evidence of the specific burdens imposed on those vulnerable groups. *Id.* at 201-02. Because the record was virtually devoid of evidence that would have allowed the Court to measure the "magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified,"

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in the judgments on the narrowest grounds.")

Id. at 200, the Court considered only the burden on all Indiana voters, which it determined was only "limited." *Id.* at 203.

That the Majority here has decided to pluck one line from Justice Scalia's concurrence to identify the appropriate legal test for analyzing Plaintiffs' equal-protection claim, is deeply misguided. The Majority, as a result, applies the wrong standard. Under the Majority's approach, no longer must we inquire as to how a voting regulation affects different groups of people—something I thought was the cornerstone of equal-protection jurisprudence. Instead, we must inquire whether a voting regulation burdens *everyone*, and only when it does, will that regulation be deemed *unequal*. This conclusion defies both logic and common sense.

Even if simple logic did not counsel against the Majority's approach, then our circuit precedent surely does. *See OFA*, 697 F.3d at 431. In *OFA*, the challenged regulation in effect reduced the number of days available for in-person voting by three days. *Id.* This court concluded that the district court did not clearly err in finding that "early voters, who have disproportionately lower incomes and less education than election day voters," were burdened by the challenged regulation. *Id.* Put another way, this court studied the impact of the challenged law on certain groups. *See Id.* Quite simply, despite the Majority's assertions that a law must impact everyone for it to violate the Equal Protection Clause, *Crawford* does not dictate or mandate such an analytical framework.

In sum, I would use the *Anderson/Burdick* balancing test to examine whether Ohio's interests outweigh the burdens imposed on Ohioan homeless individuals[64] on the basis of the three new requirements: (1) the birthdate and address forms requirement; (2) the reduction in the cure period; and (3) the restrictions on poll-worker assistance. As to the first requirement, the Majority and I are in agreement that the address and birthdate forms requirement violates the Equal Protection Clause, even though I disagree with the Majority's analytical approach in reaching that conclusion. Nevertheless, because the first requirement is not a point of contention, I focus on the remaining two.

Reduction in cure period. The district court ruled that the reduction of the cure period5, for absentee voters, would be "especially burdensome for voters with low literacy who may need to seek assistance in reading the Form 11-S[65] and filling it out before returning it to the Board." Thus, "[l]imiting the window in which

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[64] The district court found that approximately 60% of the homeless persons in shelters in Columbus, Ohio are African American and approximately 70% of NEOCH's in-person homeless applicants are African American.

[65] If there is an error in any of the five fields on an absentee ballot, the Board mails a "Form 11-S," specifying the type of error and informing the voter that the ballot will not be counted unless certain steps are taken—namely, returning the Form 11-S by a certain time.

they may cure a deficient ballot imposes a significant burden on homeless, impoverished, and illiterate voters."[66] *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *39. For provisional voters, "the opportunity to cure...ballots is limited to providing ID that they failed to provide when they voted...." 2016 U.S. Dist. LEXIS 74121, at 18.

Ohio characterizes the limitation as an "inconvenience" that does not constitute a burden. Ohio cites numerous testimonies indicating that few individuals avail of the cure-period in any case, and further, "Plaintiffs identified no person harmed by the three-day difference." In proffering an interest, Ohio states that the reduction serves to provide a "workable stopping point before election officials must begin the official canvas" eleven days after Election Day. The district court was not persuaded by the interest. "Of the *twenty-one* Board officials who testified at trial, *not one* indicated that he or she had experienced any inconvenience or increased cost during the pre-2014 ten-day cure period, or stated that the county Board needed extra time between the conclusion of the cure period and the start of the canvass to address any particular matters." No board official mentioned any "specific task[] that needed to be conducted between the end of the cure period and the beginning of the canvass."

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[66] Notably, it is unclear what channels the homeless individuals would use to receive the Form 11-S in the mail in time to cure the defect because these individuals are often transient with no fixed address.

Ohio contends that because the cure period was rarely used, reduction of that period was justified. But that argument cuts the other way—if that period was rarely used, then it would not matter if the cure period remained at ten days rather than at seven days. Given that no board official testified that a "specific task" needed to be conducted before the canvas, it appears that Ohio has not struggled to cope with a ten-day cure period. In these circumstances, Ohio has not shown that its interest outweighs the burdens imposed. *See OFA*, 697 F.3d at 434 ("With 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[.]'"). It should be noted that defendant bears the burden of justification. Because the defendant failed to meet even the minimum threshold of that burden, the district court did not clearly err.

The Majority says that there is no need for Ohio to wait for a problem to arise in the last three days of the cure period in order to act; however, that analysis misses the point. If there was no problem in the last three days, the action lacks any justification under any standard of review. Lacking any justification, the district court's findings were simply not erroneous.

Prohibition against poll-worker assistance. We must "weigh the character and magnitude of the asserted injury to the" protected rights against "the precise

interests put forward by the State as justifications for the burden imposed by its rule." *See Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992). The district court made careful factual findings that Plaintiffs' constituents were illiterate, barely literate, or suffering from disability or mental illness, which limited their ability to complete basic voting-related tasks. Although it is true that illiterate and disabled workers may receive assistance in filling out the form, an official testified that "Board staff members were more hesitant to engage with voters and offer help when it appeared to be necessary." Thus, in light of the district court's crediting this testimony, the district court's finding that the limitation of poll-worker assistance was burdensome is not clearly erroneous. The district court then found lacking the State's justifications for preventing poll workers from assisting voters who do not affirmatively ask for help because they are illiterate or disabled. *Husted*, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *39. The district court's findings were not clearly erroneous.

A close reading of the Majority's opinion reveals that the Majority's calibrations are misaligned. On the one hand, the Majority concludes that because there is no evidence of voter fraud, Ohio's asserted interest in protecting against voter fraud does not outweigh the burden placed on the voters by the address and birthdate requirements. Yet in the same breath, the Majority concludes that "Ohio's legitimate interest in minimizing election-official mistakes by ensuring that they are not overburdened and do not fill in

others' personal information justifies the limitation placed on poll-worker assistance" *even though there is no evidence that* the poll workers were overburdened or that there were problems with others filling in personal information.[67]

Moreover, the Majority reiterates that the impact on voters is small and insignificant. However, the Majority fails to cite any legal precedent that mandates a certain mathematical quantum because none is required. Furthermore, the complete lack of sensitivity and unbridled privilege with which the Majority exercises its view of the trivial is exactly what led to the constitutional and statutory protections at issue in this case. Still further, as I have stated throughout this dissent, the stakes of these proceedings are hardly small, insignificant, or trivial; instead, the impact is worthy of countless hours of the Ohio congressional time, energy, and efforts in not only passing these restrictive measures, but defending them. The rush to set forth and pass these measures belies any claim that what is at stake is slight, minor, unimportant, trifling, trivial, insignificant, inconsequential, negligible, nugatory,

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[67] While the state "need not justify its laws with 'elaborate, empirical verification,'" *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 924 (6th Cir. 1998), the state does need to assert a real and "precise" interest against which the citizens' right to vote must be weighed. *See Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

or infinitesimal. Similarly, the Majority continues to point out that the vast Majority of challenged ballots are struck for reasons that do not involve SB 205 and 216; however, our inquiry is the impact on those voters whose ballots SB 205 and 216 does disparately affect.

In sum, because I conclude that the burdens of the challenged laws outweigh the government's purported interests under the *Anderson/Burdick* balancing test, I would affirm the district court's judgment in favor of Plaintiffs with respect to the Equal Protection Clause claim.

CONCLUSION

The Majority applies the wrong legal tests, misapprehends the basic concept of disproportionality, and applies the wrong standard of review. Most disturbingly, the Majority substitutes its own view of the record for the carefully decided and supported factual findings of the district court. As the Supreme Court has cautioned, a "reviewing court oversteps the bounds of its duty...if it undertakes to duplicate the role of the lower court." *Anderson*, 470 U.S. at 573. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* at 574. "[P]arties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Id.* at 575. Today, the Majority disregards

the Supreme Court's well-established principles and substitutes its own view of the record for the carefully decided and supported factual findings of the district court.

The birth of this Nation was founded upon the radical principle that we, as a people, would govern ourselves. And voting is the ultimate expression of self-government. Instead of making it easier for all persons, unrestrained and unfettered, to exercise this fundamental right to vote, legislators are making it harder. States are audaciously nullifying a right for which our ancestors relentlessly fought and—in some instances—even tragically died. From that struggle came the Equal Protection Clause of the Fourteenth Amendment, and later, the Voting Rights Act. It is this court's responsibility to enforce both the Constitution and the statute, and thereby safeguard this precious right to vote. In my opinion, the Majority has failed to do just that. The Majority takes the position that unless a rule affects non-minorities, it does not run afoul of the Equal Protection Clause of the Fourteenth Amendment. This baffling position distorts the Equal Protection Clause so much so that the clause becomes unrecognizable, unenforceable, and fundamentally, unequal. For years, states have been (both stealthily and overtly) erecting hurdles to the right to vote. And the votes of those who are actually able to surmount those hurdles are often diluted through Gerrymandering. These states' actions of implementing rules and redrawing districts in an effort to restrict minorities' access to the ballots is

another reminder that history repeats itself. It is yet another reminder that many people hold the misguided belief that only the privileged majority should be granted access to political power and adequate representation.

With every gain in equality, there is often an equally robust and reactive retrenchment. We must never forget that constant dialectical tension. For every action, there is a reaction. The Majority's decision is a fateful reminder that we can never fool ourselves into believing that we have arrived as a nation. Our decision today, and more decisions like this one, will undoubtedly shape the future of this Nation because deciding who gets to vote inevitably affects who will become our leaders—a determination that is grounded in the principles long cherished and long pursued by our Founding Fathers. This is exactly why so many are actively seeking to etch away at the right to vote in assembly halls across this nation. These efforts are hardly insignificant or negligible. They are, for their proponents, necessary and highly deliberate. It is my hope that when future generations look back on these decisions, they conclude that we were on the right side of history. But today I fear that we were not.

For these reasons, I cannot concur with my colleagues in full. In the interest of clarity, I would affirm the district court and permanently enjoin the enforcement of portions of SB 205 and 216 that: require boards to reject the ballots of absentee and provisional voters who do not accurately complete the address and birthdate fields; reduce the cure period

to seven days; prohibit most forms of poll-worker assistance; and require provisional voters to print their names on the affirmation form.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Case No. 2:06-cv-896

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

v.

JON HUSTED, in his official capacity as Secretary of the State of Ohio,
Defendant.

FINAL JUDGMENT

I. INTRODUCTION

Because the right to exercise the franchise "is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Throughout this protracted

litigation, the Court has endeavored to fulfill its duty to scrutinize various restrictions of this basic right in Ohio. The current dispute centers on Plaintiffs' challenge to certain portions of Senate Bills 205 ("SB 205") and 216 ("SB 216"), which took effect on June 1, 2014 and made changes, respectively, to Ohio's absentee-and provisional-voting regimes. Plaintiffs, the Northeast Ohio Coalition for the Homeless ("NEOCH"), the Columbus Coalition for the Homeless ("CCH"), and Plaintiff-Intervenor the Ohio Democratic Party ("ODP"), ask the Court to declare that the challenged portions of the laws are unconstitutional and violate the Voting Rights Act, and to enjoin the Secretary of State of Ohio ("Defendant" or "Secretary") from enforcing them.

The Court presided over a bench trial on the matter and, after carefully considering all of the evidence, issues its findings of fact and conclusions of law under Federal Rule of Civil Procedure 52(a). For the reasons that follow, the Court enters **JUDGMENT in part** for Plaintiffs, and **JUDGMENT in part** for Defendant. The Court finds that the new information requirements, prohibition against poll-worker assistance to voters, and reduction in the cure period in SBs 205 and 216 are unconstitutional and violate the Voting Rights Act ("VRA"). The Court **ENJOINS** the Secretary from enforcing them.

II. PROCEDURAL HISTORY

The Court has recited the byzantine factual and procedural background of this case, and its related case, *Service Employees International Union, Local 1*

v. Husted, Case No. 2:12-cv-562 (the "*SEIU* case") numerous times. (*See* Docs. 108, 383, 452; *SEIU* case, Docs. 90, 103.) For purposes of this Final Judgment, the following overview of the litigation's history will suffice.

Plaintiffs NEOCH and the Service Employees International Union ("SEIU") initiated this action against the Secretary on October 24, 2006. (Compl., Doc. 2 at 50-52.) The Complaint alleged that portions of recently-enacted Ohio election laws ran afoul of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, constituted a poll-tax in violation of the Twenty-Fourth Amendment, and violated 42 U.S.C. § 1971(a)(2)(A) and (B), sections of the Civil Rights Act of 1964. (Doc. 2 at 38-49.)

Plaintiffs challenged the new laws on the basis that they subjected voters to possible criminal penalties that were confusing, vague, and impossible to apply; placed an unequal and undue burden on election-day voters by requiring them to produce identification ("ID") while exempting absentee voters from that requirement; imposed a poll tax by mandating that voters purchase a state-ID card or birth certificate; and treated provisional voters fundamentally unfairly by applying vague and internally inconsistent standards in a non-uniform manner. (*Id.* at ¶¶ 1-4.) Plaintiffs asked the Court to declare the challenged laws unconstitutional and to restrain the Secretary from enforcing those laws. (*Id.* at 50-51.)

The Court granted Plaintiffs' motion for a temporary restraining order on October 26, 2006. (Order Granting Mot. for TRO, Doc. 17.) The Court exempted certain voters from some of the ID requirements of the challenged laws, and the Court found that phrases in the challenged laws were unconstitutionally vague and unequally applied by county Boards of Elections ("Boards"). (*Id.* at 3.) On November 1, 2006, the parties entered into a consent order, which applied only to the November 2006 general election, addressing and clarifying election-day, absentee, and provisional voter-ID requirements for the 2006 election. (Consent Order, Doc. 51.) The Consent Order reiterated the requirements of certain provisions of the state voter-ID Law, amended the ID requirements for in-person absentee voters, and defined the terms of the Secretary's Directive 2006-78, which sought uniformity in administering the voter-ID law. (*Id.*)

On November 14, 2006, Plaintiffs filed a Motion to Enforce the Consent Order, alleging that some Boards were in violation of the 2006 Consent Order. (Mot. to Enforce Consent Order, Doc. 55.) The next day, all parties entered into an agreed enforcement order. (Doc. 57.) As with the Consent Order, the Enforcement Order set forth guidelines for the Secretary and Boards to follow in administering the election. (*Id.*)

Subsequently, on September 30, 2008, the Court found that Plaintiffs' showing of member injury was sufficient to confer standing for only three of their six challenges to the voter-ID laws. (Order Granting in

Part and Den. in Part Mot. to Dismiss for Lack of Jurisdiction, Doc. 108.)

On October 14, 2008, Plaintiffs moved the Court for a preliminary injunction that would enjoin the enforcement of Ohio voter-ID laws as unconstitutional, both facially and as applied to Plaintiffs' homeless members and other similarly situated homeless Ohio voters in the 2008 general election. (Mot. for Prelim. Inj., Doc. 111.) On October 27, 2008, the Court adopted then-Secretary of State Jennifer Brunner's directive resolving some of the issues in the Motion for Preliminary Injunction. (Order Granting Mot. for Prelim. Inj., Doc. 143.) The Court ordered the Secretary to instruct the Boards not to reject provisional ballots for reasons attributable to poll-worker error and not to reject provisional ballots when a voter with no fixed place of residence failed to list a building address on the form. (*Id.* at 2-3.)

NEOCH and SEIU filed an amended supplemental complaint on November 21, 2008, adding CCH and individual homeless Ohio voters as additional Plaintiffs. (Am. Compl., Doc. 159 at ¶¶ 2-20.) The Amended Complaint made allegations regarding events that happened after the Complaint in the matter was filed, and added new claims based on those new facts in light of the Supreme Court's decision in *Crawford v. Marion County*, 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008). According to the Amended Complaint, many homeless persons wishing to vote in the 2008 election did not have and could not easily obtain required ID. (*Id.* at ¶¶ 6-24.)

Plaintiffs alleged that the Secretary and Boards administered the 2006 and 2008 general elections in violation of the Fourteenth and Twenty-Fourth Amendments. (*Id.* at ¶¶ 116-131.) Plaintiffs requested, among other remedies, a declaration from the Court that the voter-ID laws were unconstitutional, both facially and as applied to NEOCH, CCH, and their members. (*Id.* at ¶ 39a-b.)

A. 2010 Consent Decree

On April 19, 2010, the parties entered into a consent decree. (Doc. 210.) The Consent Decree included various terms and orders, including an order for the Secretary to instruct Boards that voters who met certain criteria would be able to cast a valid provisional ballot using the last four digits of their Social Security number ("SSN-4") as ID, and an order for the Secretary to instruct Boards that they could not reject ballots filed erroneously due to poll-worker error. (*Id.* at ¶ 5a-c.) Specifically, the parties stated in Section I of the Decree that:

[i]n resolution of this action, the parties hereby AGREE to, and the Court expressly APPROVES, ENTERS, and ORDERS, the following . . .

1. The purposes of this Decree are to ensure that:

> a. The fundamental right to vote is fully protected for registered and qualified voters who lack the identification required by the Ohio Voter ID Laws, including indigent and homeless voters—such as the Individual Plaintiffs and certain members of the Coalitions—who do not have a

current address and cannot readily purchase a State of Ohio ID Card;

b. These voters are not required to purchase identification as a condition to exercising their fundamental right to vote and have their vote be counted;

c. The legal votes cast by these voters will be counted even if they are cast by provisional ballot on Election Day;

d. These voters will not be deprived of their fundamental right to vote because of differing interpretations and applications of the Provisional Ballot Laws by Ohio's 88 Boards of Elections;

e. These voters will not be deprived of their fundamental right to vote because of failures by poll workers to follow Ohio law. For purposes of this Decree[,] poll[-]worker error will not be presumed, but must be demonstrated through evidence; and

f. All legal votes that are cast by indigent and homeless voters on Election Day will be counted.

(*Id.* at ¶ 1.)

The Consent Decree enjoined the Boards to count provisional ballots cast by persons with no ID other than the last four digits of their Social Security numbers so long as:

i. The individual who cast the provisional ballot is registered to vote;

ii. The individual is eligible to cast a ballot in the precinct and for the election in which the individual cast the provisional ballot;

iii. The provisional ballot affirmation includes a statement that the individual is registered to vote in the precinct in which the provisional ballot was cast and a statement that the individual is eligible to vote in the election in which the provisional ballot was cast;

iv. The individual's name and signature appear in the correct place on the provisional ballot affirmation form, unless the voter declined to execute the affirmation and the poll workers complied with their statutory duties under R.C. 3505.182 and R.C. 3505.181(B)(6) when a voter declines to execute the affirmation;

v. The signature of the voter substantially conforms to the signature contained in the Board of Election's records for that voter;

vi. The provisional ballot affirmation includes the last four digits of that voter's social security number, which is not found to be invalid;

vii. The individual's right to vote was not successfully challenged;

viii. The individual did not already cast a ballot for the election in which the individual cast the provisional ballot; and

ix. Pursuant to R.C. 3505.183(B)(2), the Board of Elections determines that, in addition to the information included on the affirmation, there is no additional information for determining ballot validity provided by the provisional voter or to the Board of Elections during the ten days after the day of the election that casts doubt on the validity of the ballot or the individual's eligibility to vote.

(Doc. 210 at ¶ 5a.) The Consent Decree further enjoined the Boards from rejecting, for any of the following reasons, a provisional ballot cast by a voter who uses only her SSN-4:

> i. The voter provided the last four digits of a Social Security Number but did not provide a current driver's license, state issued identification, or other document which serves as identification under Ohio law;
>
> ii. The voter did not provide a date of birth;
>
> iii. The voter did not provide an address that is tied to a house, apartment or other dwelling provided that the voter indicated that he or she resides at a non-building location, including but not limited to a street comer, alley or highway overpass located in the precinct in which the voter seeks to cast a ballot and that the nonbuilding location qualifies as the individual's voting residence under R.C. 3503.02;
>
> iv. The voter indicated that he or she is homeless;
>
> v. The voter cast his or her provisional ballot in the wrong precinct, but in the correct polling place, for reasons attributable to poll[-]worker error;
>
> vi. The voter did not complete or properly complete and/or sign the provisional ballot application for reasons attributable to poll[-]worker error; or
>
> vii. The poll worker did not complete or properly complete and/or sign the provisional ballot application witness line and/or the provisional

> ballot affirmation form, except for reasons permitted by the governing statutes.

(*Id.* at ¶ 5b.)

The Consent Decree originally was set to expire on June 30, 2013. (*Id.* at ¶ 9.) On August 5, 2013, on Plaintiffs' motion, the Court extended the Consent Decree through December 31, 2016. (Order Granting in Part Mot. to Extend and Modify Consent Decree, Doc. 383 at 21.)

B. Second Supplemental Complaint

On September 24, 2014, the State provided notice to the Court that SB 216 would amend portions of the Notice required under Article IV, ¶ 8 of the Consent Decree. (Notice, Doc. 425.) Specifically, Defendant provided that the following changes in the new law were relevant to, and would supersede, these terms of the Consent Decree: (i) the elimination of a procedure allowing an individual who refused to execute a provisional ballot affirmation to still cast a provisional ballot; (ii) the requirement that the provisional ballot voter provide his or her date of birth on the provisional ballot affirmation in order for the provisional ballot to count, and that if the day and month of the date of birth does not match that of the voter in the Statewide Voter Registration Database (the "SVR"), the ballot cannot be counted unless the SVR states that the voter's date of birth is January 1, 1800, or the Board finds, by a vote of at least three members, that the voter has met all the other requirements; (iii) the requirement that the

provisional ballot voter provide his or her current address on the provisional ballot affirmation; (iv) the revision of the time period a provisional ballot voter may appear at the Board to provide acceptable ID from ten to seven days; and (v) the requirement that a provisional ballot voter is responsible for completing all parts of the provisional ballot affirmation. (*Id.* at 2-3.)

On October 30, 2014, Plaintiffs filed their Motion for Leave to File a Second Supplemental Complaint. (Mot. for Leave to File Second Suppl. Compl., Doc. 429). The Court granted the Motion on August 7, 2015 (Order Granting Mot., Doc. 452 at 26), later deeming the Second Supplemental Complaint to have been filed on October 30, 2014. (*See* Order, Doc. 642 at 6.) This is now the operative complaint in the case.

Plaintiffs contend that the contested portions of SB 205 and SB 216, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the First and Fifteenth Amendments, abridge, burden, and/or deny voting rights by:

- Requiring Boards to reject absentee and provisional ballots on the basis of technical errors or omissions, or mismatches with the SVR database—such as errors in the month and/or day of the voter's date of birth, signature or ID—even when the information sought is otherwise verifiable and the voter's identity is not in question;
- For absentee voters, creating a period to cure errors that is shorter than the period for timely

submitting ballots (and shorter than the period within which one might receive notice of any errors);

• For provisional ballot voters, shortening the period for correcting ID issues and providing no opportunity to correct any other errors; and

• Creating the risk of disparate treatment of "right location, wrong precinct" provisional ballot voters from county to county, based on whether a Board chooses to combine its poll books at multiple-precinct locations.

(Second Supplemental Compl., Doc. 453 at 31-41.) Plaintiffs further contend that the challenged laws violate Section 2 of the VRA because they will have a disproportionate impact on African-American and Latino voters, and that the Ohio legislature in fact intended as much. (*Id.* at 36-40.) Finally, Plaintiffs claim that SBs 205 and 216 violate additional provisions of the VRA that prohibit disenfranchisement of voters due to literacy tests and immaterial errors or omissions in an application to vote.

The Court presided over a twelve-day bench trial that concluded on March 31, 2016, and now issues the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

A. Parties

1. Plaintiffs

At trial, the Court had an opportunity to hear the testimony and observe the demeanors of NEOCH Executive Director Brian Davis, CCH Board Member Donald Strasser, and ODP General Counsel and Director of Operations Zachary West. The Court has no reservations as to the competency or credibility of any of those witnesses.

a. NEOCH

NEOCH is a Cleveland-based 501(c)(3) non-profit charitable organization comprising service providers, homeless persons, and volunteers. (Test. of Brian Davis, Tr., Vol. 4 at 161-62.) Founded in the 1980s, NEOCH advocates on behalf of the Cleveland homeless, airing and addressing issues related to their lack of housing, employment, and health care. (*Id.* at 162.) One of NEOCH's primary purposes is to protect the civil rights of homeless persons, including their right to vote. (*Id.* at 162-63.) Indeed, it was a picture of nuns registering homeless persons to vote that first piqued Brian Davis's interest in the organization. (*Id.* at 163.) According to Davis, ensuring that homeless persons exercise their right to vote is crucial to NEOCH's advocacy because elected officials are more attentive to the will of electors than of non-voters. (*Id.*) As he put it, "[E]lected officials don't often think that homeless

people participate in the voting process, and so if you can sit down with a mayor or city council member and say . . . we have X number of voters who are here with us, that says a lot more than just people who are coming with issues with government." (*Id.*)

To become a member of NEOCH, individuals sign a form and return it to the organization. (*Id.* at 184.) NEOCH annually sends a letter asking members to renew their memberships for the upcoming year. (*Id.*) Individuals maintain membership in the organization by filling out and returning those forms, which are also available at membership meetings and during other face-to-face meetings with individuals. (*Id.*) NEOCH's membership includes about 400 homeless persons, about 60 of whom are currently homeless. (*Id.* at 185.) The small number of currently homeless members compared to total membership is due to the ephemerality of homelessness—the average duration of any bout of homelessness in Cuyahoga County is 22 days for an individual, and 52 to 54 days for a family. (*Id.*) Approximately 70% of NEOCH's in-person homeless applicants are African-American. (*Id.* at 186.) This mirrors statistics for the homeless population in Cuyahoga County, which is double the percentage of African-Americans residents in Cuyahoga County. (*Id.* at 186, 232.)

NEOCH staff members meet daily with homeless individuals to address their problems and also conduct monthly membership meetings to discuss important issues for the homeless community. (Davis Tr., Vol. 7 at 58.) The Court finds that NEOCH has a close relationship with its members. (*See id.*)

NEOCH has succeeded in improving the conditions of homeless persons, including getting the Cleveland Police to agree not to harass persons for innocent behavior on public streets under the terms of a federal consent decree, one of only a few in the United States. (Davis Tr., Vol. 4 at 164.) Davis attributes such success to the votes cast by NEOCH's homeless constituents. (*Id.*) Were NEOCH's members unable to vote, their bargaining power vis-à-vis elected officials would be diminished, which would in turn diminish NEOCH's effectiveness at advocating on their behalf, frustrating its mission and exposing an already vulnerable population to further governmental neglect. (*Id.* at 165.) The homeless constituents of NEOCH and CCH face challenges that hinder them from asserting their own rights, including mental illness and/or addiction, difficulty maintaining a regular address or phone number, limited access to transportation, and illiteracy or lack of education. (Davis Tr., Vol. 7 at 59-60.) They also find it challenging to gain entrance to courtrooms and public buildings due to lack of ID, and many homeless people have a negative relationship with the judicial system or hesitate to get involved in litigation to assert their rights because they are more focused on meeting their immediate needs. (*Id.*)

Promoting voting among its members, and among the homeless county-wide, is central to NEOCH's mission, and NEOCH's executive director, staff, and volunteers expend substantial resources on voting activities in even-numbered years. Davis spends as much as 80 hours per week around the voting registration deadline on such activities, and one part-

time NEOCH staff person devotes 20 hours per week to early voting turnout efforts. (Davis Tr., Vol. 4 at 211, 221.) In presidential election years, between 100 and 125 persons volunteer their time to help NEOCH's homeless members vote. (*Id.* at 227.) In the month before Election Day, almost all of Davis' official activities are voting-related. (*Id.* at 217.) In the month prior to that, about 60-70 percent of Davis' time is spent devoted to getting as many homeless people as possible registered to vote and then ensuring they cast a ballot that is counted. (*Id.*) NEOCH's members are keen for the help—all but one of its homeless members that have filled out NEOCH membership forms have said they plan to vote in the 2016 general election. (*Id.* at 187-88, 192-93.) Of the NEOCH homeless members who have voted in primary elections, about eight vote in the Democratic primary for each one who votes in the Republican primary. (*Id.* at 198.)

If the challenged laws are not enjoined, NEOCH will have to divert significant resources to educate and assist voters to ensure that they cast a valid, counted ballot. This is because NEOCH will have to change its strategy for the 2016 election to focus on early in-person voting as opposed to vote-by-mail. (*Id.* at 203-04, 212-13, 220-21.) In the 2014 election, NEOCH encouraged both options, and handed out blank absentee ballot applications to members. (*Id.* at 203.) NEOCH later found that its members had difficulty filling out the Cuyahoga County absentee ballot identification envelope. (*Id.*) In Davis's experience, eight to ten percent of those living in shelters across Cuyahoga County are absolutely illiterate, and the

majority read at only a fourth-grade level. (*Id.* at 195.) Davis feared that the complexity of the form, along with SB 205's provisions demanding that voters fill out the required fields completely and accurately, discussed in Section III(C)(1), *infra*, increased the risk of NEOCH's members being disenfranchised. (*Id.* at 195, 202.) In his twenty years working with the homeless, Davis has noticed that homeless persons have pervasive and profound problems filling out the forms. (*Id.* at 195.) Not being able to read or fill out forms correctly is embarrassing and humiliating for many of NEOCH's members, and they hesitate to ask for help. (*Id.*) NEOCH's practice with other government forms, such as those relating to Social Security disability and Medicaid benefits, is to read the forms aloud and fill them out on the homeless person's behalf as a matter of course. (*Id.* at 194-95.)

In response to concerns about the complexity of the new voting forms, NEOCH will no longer provide blank cards to its members to vote by mail, but will instead focus its get-out-the-vote campaign on driving people to the polls to vote, which will divert drivers and vehicles from doing other work on behalf of the organization and its members, burdening NEOCH staff members and volunteers appreciably more than if it handed out blank forms. (*Id.* at 206-07, 224.) The push to drive voters to the polls also will require more financial resources than a vote-by-mail effort. (*Id.* at 224.)

b. CCH

CCH is a Columbus-based 501(c)(3) non-profit charitable organization dedicated to advocacy and education to improve the lives of homeless people in Columbus. (Test. of Donald Strasser, Tr., Vol. 7 at 14.) It is a coalition of service providers, current and former homeless persons, and concerned citizens. (*Id.* at 16-17.) Its mission is:

> to work together to educate the central Ohio community about the devastating effects of homelessness upon individuals and families; to advocate on behalf of homeless persons and organizations that serve them; and to empower homeless persons to achieve greater self-sufficiency.

(CCH website, P-1566.)

CCH's organizing efforts include holding monthly meetings in which CCH encourages people both to register and vote, and directs them to resources that can help with obtaining the ID required to vote. (Pl.'s Resp. to Interrog., P-1559 at 5.) CCH also assists members one-on-one by accompanying them to appointments to access social services. (Strasser Tr., Vol. 7 at 16.) Sixty percent of homeless people in shelters in Columbus, the population for which CCH advocates, are African-American. (*Id.* at 12.) Both homeless individuals and homeless shelters are members of CCH, and the shelter members also have daily interaction with homeless people and provide direct services to them. (*Id.* at 18.) CCH has a close relationship with its members. (*Id.* at 16-18.) Its members often have difficulty dealing with large-

scale bureaucracies or courts, and they face other challenges in asserting their rights such as mental health and chemical dependency problems, low literacy rates, inadequate work history, and residential instability. (*Id.* at 19.)

CCH plans to increase its voter-education efforts by explaining new voting requirements to homeless persons at meetings, publishing articles about the requirements, and training its constituent homeless members to educate other homeless persons about the voting requirements. (P-1559 at 5.) CCH plans to spend its resources educating voters in 2016 about the new requirements in the challenged laws. (Strasser Tr., Vol. 7 at 32-33.) CCH is a small concern—with one full-time staff person and one part-time staff person, and a 2012 account balance of $77,624.30—and any time or money spent on educating the homeless about new voting requirements will pose an immediate and stark burden on the organization. (P-1559 at 4-5; 2012 Annual Report, P-1565.)

c. ODP

ODP is a political party comprising 1.2 million members dedicated to, among other goals, advancing the interests of the Democratic Party. (Test. of Zachary West, Tr., Vol. 2 at 228); *Ohio Democratic Party: Constitution and Bylaws, 2014*,

https://ohiodems.org/wpcontent/uploads/2015/08/2014odpconstitution.pdf (last visited June 2, 2016).[1] Like NEOCH and CCH, ODP spends significant resources on voting-related activity, including voter registration, education, and protection efforts, and will continue to do so through the 2016 general election and beyond. (West Tr., Vol. 2 at 222-25.) This includes sending out a Voter Bill of Rights in presidential election years, which contains information such as polling locations and hours and the types of ID voters need to cast a valid ballot. (*Id.* at 223-24.) ODP conducts more voter outreach and education during presidential election years because those are the elections that have the highest turnout and the most new registrants. (*Id.* at 224.) ODP conducts activities aimed at promoting vote-by-mail and early in-person voting as part of its Get Out the Vote ("GOTV") strategy. (*Id.* at 228, 234.) Changes to election laws between 2012 and 2016 will require ODP to devote more resources to educate voters about the new procedural requirements. (*Id.* at 234-35.) In some cases, ODP will have to re-educate voters to whom it already has conducted outreach to inform them that they must comply with the five-field requirement. (*Id.* at 235.) This will be especially burdensome to ODP because, as a result of a 2010 action by the Federal Elections Commission ("FEC"),

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[1] The Court takes judicial notice of this non-controversial, publicly available foundational fact. *See United States v. Harris*, 331 F.2d 600, 601 (6th Cir. 1964) (per curiam).

GOTV activity must be paid for with "hard" money, which is subject to stricter contribution limits and thus more challenging for the party to raise than "soft" money. (*Id.* at 234.)

2. Defendant

The Secretary functions as Ohio's chief election officer. Ohio Rev. Code § 3501.04. His responsibilities include, among others, appointing members of the Boards, issuing directives and advisories to Board members regarding election administration and enforcing them, and prescribing the form of registration cards, ballots, cards of instructions, and poll books. *Id.* § 3501.05.

B. Voting in Ohio

To cast a legitimate vote in Ohio, an elector must be at least eighteen years old and a citizen of the United States. Ohio Const., Art. V, § 1. Electors also must have resided in Ohio and the requisite county, township, or ward, and have been registered for at least 30 days prior to the election. *Id.* Ohio voters can cast a legitimate ballot in the following three ways: (1) in-person on Election Day; (2) no-excuse, mail-in early absentee voting; and (3) no-excuse, inperson early absentee voting. (Test. of Dr. M.V. "Trey" Hood, III, Tr., Vol. 10 at 18-19); Ohio Rev. Code §§ 3505.181-82, 3509.01, 3509.06(D)(3)(b). Voters may cast a provisional ballot either on Election Day or before. (Test. of Matthew Damschroder, Tr., Vol. 11 at 120.)

1. Election-Day Voting

In-person, Election Day voting is the most common form of voting in Ohio, accounting for approximately two-thirds of all votes cast in any given election. (*Id.*)

Election-Day voters go to their assigned polling place on Election Day, check in with a poll worker, and announce their name and address. *See* Ohio Rev. Code § 3505.18(A)(1). A voter must provide proof of identity in the form of a current and valid photo ID, a military ID, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of voter registration mailed by a Board. *Id.* If the elector cannot provide proof of identity, she may cast a provisional ballot. *Id.* § 3505.18(A)(2).

2. Absentee Voting

Beginning in 2006, all registered voters have had the option to vote absentee instead of on Election Day, without excuse, either in person or by mail. (Damschroder Tr., Vol. 11 at 127-28.) To receive an absentee ballot, a voter must furnish to the Board of the county in which the voter will vote a written application including the voter's name, signature, address, date of birth, and one of these three items: (1) the voter's driver's license number; (2) the voter's SSN-4; or (3) a copy of the voter's current and valid photo ID, military ID, utility bill, bank statement, government check, paycheck, or other government document besides a notice of voter registration mailed by a Board that shows the name and address

of the elector. *See* Ohio Rev. Code § 3509.03(A)-(E). If a Board director receives an absentee ballot application that does not contain the required information, the director "promptly shall notify the applicant of the additional information required to be provided by the applicant to complete that application." *Id.* § 3509.04(A). If the application meets the requirements, the Board "shall deliver to the applicant in person or mail directly to the applicant" the absentee ballot. *Id.* § 3509.04(B). Voters may then submit their absentee vote either in-person or by mail. (Test. of Anthony Perlatti, Tr., Vol. 2 at 147; Test. of Sherry Poland, Tr., Vol. 10 at 207-08.)

a. In-Person Absentee Voting

Beginning four weeks before an election, any Ohio voter may vote early and in-person at their county Board during designated days and hours. *See* Ohio Rev. Code §§ 3509.01(B)(3), 3501.10(C). For the 2016 general election, Ohio will offer 23 days of early in-person voting starting on October 12.[2] (2016 General

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[2] Since the conclusion of the trial, another court in this district has reinstated an additional week of early voting, known as "Golden Week," on the grounds that the elimination of that week of voting violates the VRA and the Fourteenth Amendment. *See Ohio Org. Collaborative v. Husted*, No. 2:15-cv-1802, 2016 U.S. Dist. LEXIS 85699, at *100 (S.D. Ohio May 24, 2016) (Watson, J.). Therefore, more than 23 days will now be offered.

Election Early Voting Calendar, D-32.) The requirement to fill out the absentee ballot application is the same for in-person absentee voting as mail-in absentee voting. *See* Ohio Rev. Code § 3509.03.

b. Mail-in Absentee Voting

Ohio also offers all voters a no-excuse mail-in absentee option. *See id.* § 3509.05. Since 2012, the Secretary has mailed absentee ballot applications statewide for even-year general elections both to every registered, active voter and to every registered voter who cast a ballot in one of the past two federal general elections, regardless of voter status. (Dir. 2014-15, D-35; Damschroder Tr., Vol. 11 at 129.)

Before mailing the form back to the Board, the voter must sign and include in the envelope an affirmation declaring that the voter is eligible to vote and, if the voter did not provide a driver's license number or SSN-4 on the affirmation, the voter must include in the application a copy of the voter's: (1) current and valid photo ID; (2) military ID; or (3) current utility bill, bank statement, government check, paycheck, or other government document, besides a notice of voter registration mailed by a Board, that shows the name and address of the elector. *See* Ohio Rev. Code § 3509.05(A).

If the Board finds an error in one of the five fields on a voter's absentee ballot identification envelope, the Board mails a Form 11-S to the voter specifying which of the five fields contained an error and informing the voter that her ballot will not be

counted unless: (1) she returns the Form 11-S to the Board by the seventh day after the election; or (2) mails it by the seventh day after the election and it is received by the Board by the tenth day after the election. (Form 11-S, D-48; Damschroder Tr., Vol. 11 at 160.)

3. Provisional Voting

Sometimes, if the Board cannot confirm eligibility, a voter is not able to cast a regular ballot either early in-person or on Election Day. *See* Ohio Revised Code § 3505.181(A)(1). Those voters must instead complete a provisional ballot. As the name suggests, provisional ballots allow voters to cast ballots provisionally, subject to later verification. (Damschroder Tr., Vol. 11 at 124-25.) The vast majority of provisional ballots are cast at the polling place on Election Day. (Poland Tr., Vol. 10 at 187; Damschroder Tr., Vol. 11 at 126.)

Provisional ballots are available to those voters: (1) who declare that they are eligible to vote and registered in the precinct in which they wish to vote but whose names do not appear on the list of eligible voters; (2) who are unable to provide the requisite forms of ID pursuant to Ohio Revised Code § 3505.18(A)(1); (3) whose names are marked as having requested an absentee, uniformed services, or overseas ballot for that same election but appear in person to vote; (4) whose notification of registration has been returned undelivered to the Board and whose address the Board was unable to verify as correct; (5) whose eligibility has been successfully

challenged by a poll worker at the polling place pursuant to Ohio Revised Code §§ 3505.20 or 3513.20, or whose application or challenge hearing will be held after Election Day pursuant to Ohio Revised Code § 3503.24(D)(1); (6) whose name has changed and remains within the precinct without providing proof of the name change, or who has moved from one precinct to another within a county, or moved from one county to another within Ohio; and (7) whose signature is not the same as the signature of the person who signed the registration forms. Ohio Rev. Code § 3505.181(A)(1)-(7). Voters who cast provisional ballots because they do not have a valid ID may provide either a driver's license number or SSN-4 or appear at the Board of Elections within seven days of Election Day to provide an ID or their driver's license number or SSN-4. *Id.* § 3505.18(A)(2)(a)-(b).

C. The Challenged Laws

1. SB 205

SB 205 changed Ohio law regarding absentee voting procedures. At issue here are the amendments as reflected in §§ 3509.03-04 and 3509.06-07 of the Revised Code. Plaintiffs challenge the portions of §§ 3509.03 and 3509.04 that explicitly prohibit any election official from filling out any portion of the required forms unless the voter declares to an election official that she cannot fill the form out due to blindness, disability, or illiteracy. *See* Ohio Rev. Code § 3505.24.

Section 3509.06 now imposes a completeness requirement for absentee ballot ID envelopes, mandating that an ID envelope is considered incomplete if the voter fails to fill out the five fields of required information—name, residence address, date of birth, signature, and some form of ID, which includes all types of ID required for the absentee ballot application form—or the information does not conform to the information contained in the SVR. *See id.* § 3509.06(D)(3)(a)-(b). In such event:

> the election officials shall mail a written notice to the voter, informing the voter of the nature of the defect. The notice shall inform the voter that in order for the voter's ballot to be counted, the voter must provide the necessary information to the board of elections in writing and on a form prescribed by the secretary of state not later than the seventh day after the day of the election. The voter may deliver the form to the office of the board in person or by mail. If the voter provides the necessary information to the board of elections not later than the seventh day after the day of the election and the ballot is not successfully challenged on another basis, the voter's ballot shall be counted in accordance with this section.

Id. § 3509.06(D)(3)(b). Before SB 205 was enacted, the absentee voter ID envelope *requested* the information contained in the five fields (name, address, date of birth, identification and signature), but did not *require* it, meaning that Boards had the

discretion to count the ballot even if some of the information requested in the five fields was missing or incorrect.[3] (Test. of Timothy Burke, Tr., Vol. 2 at 192.)

Section 3509.07 provides that absentee voters must complete the five fields in the manner described in § 3509.06(D)(3)(a), or the election officials "shall not" accept or count the ballot unless the would-be voter provides the missing required information no later than the seventh day after the election. *See* Ohio Rev. Code § 3509.07(A). Before SB 205, voters had ten days after the election to cure any deficiencies, pursuant to a directive issued by Secretary Brunner. (Damschroder Tr., Vol. 11 at 158; D-34, Directive 2010-68 at 6.)

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[3] Ohio law makes an exception for a voter who fills in an incorrect birth date provided that the voter has filled in the field and: (1) the voter has filled in the correct month and day; (2) the SVR lists the voter's birthday as January 1, 1800; or (3) by a vote of at least three members the Board finds that the voter has met the requirements of the other four fields. *See* Ohio Rev. Code § 3509.06(D)(3)(a)(iii)(III).

2. SB 216

The challenged portions of SB 216 concern provisional voting procedures, and are reflected in §§ 3501.22, and 3505.181-83 of the Revised Code.

Section 3501.22(A)(2)(b) gives Boards, by a vote of three of four members, the option to combine the poll books in multi-precinct voting locations, creating a single poll book for each location.[4]

Under § 3505.181(B)(2), a provisional voter must complete and execute the provisional ballot affirmation, which requires the following fields: printed name, date of birth, current address, signature, and proof of identity, which may include SSN-4, Ohio driver's license number, a form of unexpired government ID containing the voter's name and current address (or former address if an Ohio driver's license or ID), a military ID card, current utility bill, bank statement, government check, paycheck, or other government document that

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[4] Since the Second Supplemental Complaint was filed, the Secretary has issued a directive requiring all county boards to combine poll books in multi-precinct voting locations into a single poll book for each location. (D-2, Directive 2015-24 at 2-80-81; Damschroder Tr., Vol. 11 at 150.) The Court finds, therefore, that Plaintiffs' challenge to the portion of SB 216 that gives Boards the option, but does not require, the combining of poll books is moot.

contains the voter's name and address, other than a notice of voter registration mailed by a Board. *See* Ohio Rev. Code § 3505.181(A)-(D). SB 216 added two new fields—date of birth[5] and current address—that voters must fill in on a provisional ballot affirmation form. *Id.* § 3505.183(B)(1)(a); Damschroder Tr., Vol. 11 at 133. Before SB 216 amended the Code, under § 3505.183, voters were required to provide only their names, IDs, and signatures. (Senate Bill 216, P-1189 at 22.) SB 216 also required voters to *print*, rather than simply include, their names on the provisional ballot envelope. (*Compare id. with* Ohio Rev. Code § 3505.183.) Finally, unlike SB 205, SB 216 did not create a new completeness requirement for the five fields, because § 3505.181(F) already contained such a requirement. (*See* P-1189 at 18.)

Section 3505.181(F) dictates that, like with the challenged portions of the Code as amended by SB 205, persons filling out provisional ballots may receive help from poll workers, but only if the voter "[d]eclares to the . . . election official" that the voter "is unable to mark the . . . ballot by reason of blindness, disability, or illiteracy." Ohio Rev. Code § 3505.24(b).

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[5] Like for absentee ballots, Ohio law makes an exception for an incorrect birth year, a birth year in the SVR of January 1, 1800, or if by a vote of at least three members the Board finds that the voter has provided all other required information. Ohio Rev. Code § 3505.183(B)(3)(e).

SB 216 reduced the period to cure incomplete or incorrect provisional ballots from ten to seven days after the election. *Id.* § 3505.181(B)(7). (Damschroder Tr., Vol. 11 at 133-34; P-1189 at 14.) Provisional voters who did not provide a driver's license number, SSN-4, or valid ID on Election Day may go to the Board during this period to cure their ballots, but voters with other errors on the affirmation forms may not. Ohio Rev. Code § 3505.181(B)(7). The Board is not required to notify a provisional voter before the end of the cure period if the information on the provisional ballot envelope is incomplete or defective. *See id.* § 3505.181.

D. The Lead-up to SB 205 and SB 216

The only members of the General Assembly from whom the Court heard testimony at trial were Representative Kathleen Clyde and former Senator Nina Turner, both Democrats who voted against the bills. The Court found both witnesses credible as to their recollection of the events surrounding passage of the challenged laws. Representative Clyde, who has represented the 75th district in the Ohio House of Representatives since 2011, has an extensive background as a lawyer and advocate on voting rights and election law issues. (Test. of Kathleen Clyde, Tr., Vol. 1 at 26.) Her work experience includes internships at the Brennan Center for Justice and Election Law at Moritz, an election law institute at the Ohio State University Moritz College of Law, and Secretary Brunner's office, as well as employment as the Democratic Director of the Early Vote Center in Franklin County for Barack Obama's

2008 presidential election campaign and as Deputy Legal Counsel to the Ohio House Democrats. (*Id.* at 28-29, 31.) She has also worked with homeless populations at the Community Shelter Board in Columbus, Ohio and is thus familiar with issues homeless people face in voting. (*Id.* at 26-27.)

Former Senator Turner, who represented the 25th district in the Ohio Senate from 2008-2015, was born and raised in Cleveland, Ohio, where she currently is a tenured professor of African-American and United States history at Cuyahoga Community College. (Test. of Nina Turner, Tr., Vol. 6 at 88-89, 110, 118.) Senator Turner's district was primarily African-American, and throughout her career, including her time in the Senate and her employment with different elected officials, she has worked on issues affecting African-Americans, particularly with regard to socioeconomic disparities and the educational achievement gap between African-American and white students. (*Id.* at 99-101.)

Following the 2010 election, control of the Ohio House of Representatives switched from the Democratic to the Republican Party. (Clyde Tr., Vol. 1 at 33.) "Rather quickly" after that change in leadership, House Republicans introduced two bills: (1) a bill to require all Ohioans to show a photo ID when voting; and (2) House Bill 194 ("HB 194"), an expansive election-law bill that included "a number of restrictions on voting, including the restrictions that we see in [SBs 205 and 216]." (*Id.* at 33.) Representative Clyde testified that the debate over HB 194 was "very partisan and hostile" and "very

quick." (*Id.* at 39.) HB 194 was ready for the Governor's signature within two months of its introduction, which Representative Clyde testified marks a significantly shorter time period than usual for the passage of legislation of such complexity. (*Id.* at 50.)

In August 2012, in an unprecedented move, the Ohio legislature voted to repeal HB 194 after hundreds of thousands of Ohioans signed petitions to place it on the ballot for a statewide referendum in November 2012. (*Id.* at 55, 57.)

Sixteen other bills proposing voting restrictions were introduced in the 2013-2014 General Assembly, eight of which passed. (*Id.* at 59.) One bill was passed to shorten the window to gather signatures for referenda, which made it more difficult for citizens to put a referendum on the ballot. (*Id.* at 60.) Another bill was passed making it easier to purge voters from the registration rolls. (*Id.* at 60-61.) Senate Bill 238, which eliminated the first week of the early voting period, also was enacted.[6] (*Id.* at 62.) Other bills were introduced, but not passed, which would have limited voting in the following ways: shortening the early

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[6] As noted above in Section III(B)(2)(a), another court in this district subsequently found SB 238's elimination of the first week of the early voting period to be unconstitutional and in violation of Section 2 of the Voting Rights Act. *See OOC*, slip op. at 102. Accordingly, that court enjoined SB 238's enforcement.

voting period to 14 days; eliminating early voting hours; limiting the mailing of absentee ballot applications to voters and preventing the paying of return postage on absentee ballot envelopes; instituting a photo-ID requirement; and requiring state universities to provide in-state tuition rates to students if they provided those students with ID that they needed to vote. (*Id.* at 64.)

SB 205 was considered by the Policy and Legislative Oversight Committee for approximately one or two months, and it passed the House in a total of four or five months. (*Id.* at 70, 80.) Representative Clyde and Senator Turner both testified that proponents of the challenged laws defended them on the ground that they would create a more uniform voting process and that voters needed to take responsibility to fill out information without the assistance of poll workers. (*Id.* at 69, 71; Turner Tr. Vol. 6 at 162.) None of the proponents cited fraud as a justification. (*Id.*) Representative Clyde also stated that during the floor debate over SB 205, Representative Mike Dovilla, the floor manager of the bill and Chairman of the Committee, argued that "Government doesn't need to spoon-feed voting materials to voters." (Clyde Tr., Vol. 1 at 69.) She further testified that, in contrast to most proposed legislation, there was no data or testimony offered about the need for the measures proposed in SB 205. (*Id.* at 72.) Clyde and other opponents of the bill raised concerns about the impact of the proposed changes on voters with disabilities or low literacy levels. (*Id.* at 73-74.) Clyde also testified that it was highly unusual that no proponents of the bill testified in its favor in front of

the legislature, although on cross-examination she conceded that at least one proponent did testify. (*Id.* at 81, 114-15.) Several interest groups spoke against the proposed changes in front of the committee. (*Id.* at 81-82.) Clyde and Turner both recalled some of their Democratic colleagues arguing that the bill would have a "negative impact . . . on the African-American community." (Turner Tr., Vol. 6 at 164; Clyde Tr., Vol. 1 at 101.) During committee debate, Representative Matt Huffman, speaking in favor of SB 205, asked "should we really be making it easier for those people who take the bus after church on Sunday to vote," which Clyde testified she understood to be referring to the Souls to the Polls initiative for African-American voters to vote early in person. (*Id.* at 82-83.)

During the debate over SB 216, its supporters in the legislature testified that the intent behind the bill was to comply with the court order in the *SEIU* case. (*Id.* at 96.) Turner also stated that Senator Seitz, the bill's sponsor, characterized the bill as "streamlining the process for elections officials." (Turner Tr., Vol. 6 at 166.) Two Democratic amendments were tabled on party-line votes and not included in the final bill. (Clyde Tr., Vol. 1 at 105.) The first amendment would have counted provisional ballots cast at the wrong polling place when there was evidence of poll-worker error. (*Id.* at 103.) The second would have counted provisional ballots as long as there was enough information to identify the voter. (*Id.* at 103-04.)

With respect to both SB 205 and SB 216, Democratic legislators spoke about their concerns that the

provisional and absentee ballots of African-American voters would be thrown out disproportionately. (*Id.* at 102.) Clyde and other House Democrats also spoke out about their concerns that voters who made minor errors or had low literacy would be adversely affected by the bill. (*Id.* at 99-101.) Both chambers passed an amendment, which eventually made it into the final version of SB 216, that allowed ballots to be counted in some circumstances if the voter put the wrong year for his or her birthdate. (*Id.* at 106; Test. of Kenneth Terry, Tr., Vol. 11 at 51; Ohio Rev. Code § 3509.06(D)(3)(a)(iii)(III).)

The Court also heard testimony from two members of the Ohio Association of Election Officials ("OAEO"), Kenneth Terry and Timothy Ward. Terry, a Democrat, is Director of the Allen County Board of Elections and was a Legislative Committee Member and Democratic Co-Chair of the OAEO's Legislative Committee. (Terry Tr., Vol. 11 at 18-19.) Ward, a Republican, is currently Director of the Madison County Board of Elections and the first Vice President of the OAEO. (Test. of Timothy Ward, Vol. 7 at 189-90.) He was the Republican cochair of the OAEO's Legislative Committee, which reviews draft legislation and makes recommendations to the General Assembly. (*Id.* at 190-91.) The Court found both witnesses credible regarding the operations and actions of the OAEO.

The OAEO is an organization comprising directors, deputy directors, board members, and staff from Boards of each of Ohio's 88 counties. (Terry Tr., Vol. 11, Doc. 665 at 19.) The OAEO is bipartisan, with

equal representation from the Democratic and Republican Parties. (*Id.* at 20; Ward Tr., Vol. 7 at 191.) It seeks to uphold and promote professionalism among elections administrators in Ohio. (*Id.*) Both Terry and Ward testified that they served on a 2013 OAEO task force to address how to improve Ohio's absentee balloting system. (*Id.* at 193; Terry Tr., Vol. 11 at 23-24.)

Ultimately, many of the OAEO's suggestions were rejected by the legislature. The OAEO, for example, recommended that early in-person voters be treated identically to Election Day voters, obviating the requirement to fill out an identification envelope. (*Id.* at 95; D-62 at 4.) Moreover, although the OAEO supported the five-field requirements in the challenged laws (Ward Tr., Vol. 7 at 196), Terry testified that they did not discuss whether the ballots would be thrown out if the five fields were not complete. (Terry Tr., Vol. 11 at 96.) As such, the Court finds that the OAEO's position on the legislation sheds little light on the intent of the General Assembly since the General Assembly only adopted the OAEO's recommendations in part.

E. The Implementation of SB 205 and SB 216

1. Individual Voter Testimony

Plaintiffs introduced testimony from individual voters who were disenfranchised for failing to follow the challenged laws' new information requirements. Kenneth Boggs, for example, voted by absentee ballot in the 2014 election in Franklin County. (Doc. 672-2.)

His ballot was rejected because, it being October when he filled out the form, he mistakenly wrote "10" instead of "6" in the field for his birth month. (*Id.*) He later received notice that his vote was thrown out, but when he was notified it was too late to correct the error, leaving him "furious" that his vote was thrown out because he made "a very minor and obvious mistake." (*Id.*)

Elizabeth Coffman and her husband voted by provisional ballot in Franklin County in the 2015 general election. (Doc 672-3.) She mistakenly wrote her current address in the "former address" field. (*Id.*) She and her husband received notice from the Board of Elections asking them to verify their new address, which they filled out and returned. Ms. Coffman's ballot was nonetheless rejected, which she did not know until contacted as a result of this litigation. (*Id.*) She is "angry" that she was disenfranchised. (*Id.*)

Cheryl and Hugh Davis voted by absentee ballot in Franklin County in the 2014 general election. (Docs. 672-4, 672-5.) Mr. Davis filled out their ID envelopes, accidentally swapping their information. (*Id.*) Mr. Davis crossed out the information and corrected the mistakes as to all fields except their dates of birth. (*Id.*) Both of their ballots were rejected without notice, for what Mr. Davis characterized as a "mistake . . . clear to anyone who looked at [their] ballot forms and ID envelopes." (Doc. 672-5.)

Keith Dehmann is a Fairfield County resident and active serviceman for the United States Air National

Guard Reserves. (Doc. 672-6.) He voted by absentee ballot in the 2014 general election. (*Id.*) After mailing his ballot, he received notice of an error on its ID envelope for failing to fill in the date of birth field. (*Id.*) He received a supplemental form from the Fairfield Board of Elections to correct the mistake, which he filled out and returned soon after receiving it. (*Id.*) His ballot was ultimately rejected, which he did not know until contacted as a result of this litigation, leaving him "frustrated and disappointed" that his ballot was not counted. It made him question "whether [he] should continue doing absentee voting in the future." (*Id.*)

Katherine Galko is a Summit County resident who resides in an assisted-living facility. (Doc. 672-7.) She is 92 years old, and has been voting since she was 18. (*Id.*) She voted in her assisted-living facility for the 2014 general election with assistance from someone who read the ballot to her. (*Id.*) The person who helped her fill out the form mistakenly wrote the date of the election instead of her Social Security number. (*Id.*) Her ballot was rejected. (*Id.*)

Roland Gilbert is a Franklin County resident. (Doc. 672-8.) A lawyer by training, he is 86 years old and legally blind. (*Id.*) He voted by absentee ballot in the 2014 general election. (*Id.*) Although he used a closed-circuit lighted machine that magnifies print to help him see, he mistakenly wrote the current date in the date-of-birth field. (*Id.*) His ballot was rejected, which he did not know until contacted as a result of

this litigation. He does not believe his vote should have been rejected due to an "obvious clerical error."

(*Id.*)

Kadar Hiir became a United States citizen in 2012. (Doc. 672-9.) He voted for the first time in the 2014 general election, by provisional ballot. (*Id.*) He mistakenly transposed the month and day of his birth on the provisional ballot affirmation form, which is customary both in Somalia, where he grew up, and in most parts of the world besides the United States. (*Id.*) His ballot was rejected, and he received no notice either of his mistake or of his ballot's rejection. (*Id.*)

Elisabeth Hire is a Franklin county resident who voted in person in the 2014 general election. (Doc. 672-10.) She was told she had to vote provisionally, but she mistakenly wrote one digit of her Social Security number incorrectly. (*Id.*) She never received any notice about the error. (*Id.*)

Gunther and Linda Lahm voted by absentee ballot in Franklin County in the 2014 general election. (Docs. 672-13, 14.) Mrs. Lahm filled out their ID envelopes but mistakenly mixed them up. She later fixed all of the mistakes except for the date-of-birth fields. (*Id.*) Their ballots were rejected, leaving them both "very angry." (*Id.*) They feel strongly that voting is very important—so strongly that both offered to fly back to Columbus from Florida to testify on the matter. (*Id.*)

Courtney White, a college student in Toledo, voted by absentee ballot in Delaware County in the 2014 general election. (Doc. 672-18.) She provided her then-current college mailing address in the voting-residence field on the ID envelope. (*Id.*) She did not interpret "voting residence" to mean the residence where she was registered. Her ballot was rejected without notice, and she was unaware of the rejection until contacted as a result of this litigation. (*Id.*)

2. Aggregate Data and Testimony from Board Officials

Plaintiffs have produced many other examples of voters who failed to meet the information requirements of the forms, which indicates that the voters either disregarded or misunderstood what was being asked. (*See* Pls.' Proposed Findings of Fact and Conclusions of Law, Doc. 687-2, Table A.) In the 2014 general election, 4,734 of the 49,262 provisional ballots cast statewide were rejected. (Provisional Ballot Report, 2014 General Election, P-19.) Of those, 16 were for failure to print a full name on the provisional envelope, 188 were for failure to provide a current address, 59 were for missing or incorrect birth date, 163 were for failure to sign the provisional ballot envelope, and 173 were for failure to provide ID. (*Id.*) In the 2015 general election, 12,208 of the 79,414 provisional ballots cast were rejected. (Provisional Ballot Report, 2015 General Election, P-20.) Of those, 22 were for failure to print a full name on the provisional envelope, 310 were for failure to provide a current address, 63 were for missing or incorrect birth date, 263 were for failure to sign the

provisional envelope, and 278 were for failure to provide ID. (*Id.*)

As for absentee ballots, in the 2014 general election, 1,018 were rejected for missing or incorrect date of birth, 354 for different address on the identification envelope than on file with the Board, 633 for "voter ID envelope contains insufficient information," and 199 for lack of proper ID. (P-17.) In 2015, there were 236 rejections for missing or incorrect date of birth, 94 for different address on the identification envelope than on file with the Board, 436 for "voter ID envelope contains insufficient information," and 77 for lack of proper ID. (P-18.)

Plaintiffs also submitted thousands of provisional and absentee voter forms from the 2014 and 2015 general elections that they obtained in discovery from twenty-four of the eighty-eight Boards in Ohio. Many of the more than 3,100 rejected ballots that Plaintiffs obtained showed that ballots were rejected for reasons such as wrongly entering a mailing address instead of a registration address, leaving the date-of-birth field blank, leaving the field blank for identification or checking a box next to a form of identification but failing to fill it in, or writing a name in cursive instead of print (for provisional voters). (*See* Doc. 687-2, Table A)

The Court also heard testimony from Board officials that missing one of the fields is fairly common, and that the required identification envelope has "a lot of wording, a lot of stuff crammed into that space." (Test. of Zach Manifold, Tr., Vol. 3 at 57.)

As to the cure period, one Board official testified that before the challenged laws went into effect, voters did come in during the eighth, ninth and tenth days of the cure period after the election to cure their provisional and absentee ballots. (Burke, Tr., Vol. 2 at 184.) Moreover, there is evidence that because the Board can receive absentee ballots up until ten days after Election Day, yet the cure period is only seven days, some voters to whom the Board sends a Form 11-S notifying them of their need to cure their ballot will not receive it in time to do so. (*See* Test. of Eric Morgan, Tr., Vol. 4 at 97; Test. of Jocelyn Bucaro, Vol. 6 at 57-58.)

3. Varied Board Practices

Testimony and other evidence from twenty-four Boards of Elections statewide likewise demonstrate that voters have been disenfranchised for failing to conform to the new requirements. Concerning the address field, if, for example, on a provisional or absentee ballot form, the voter's street number is incorrect,[7] Adams, Allen, Carroll, Fayette, Harrison, Meigs, Noble, Paulding, and Wyandot Counties accept the ballot, while Butler, Cuyahoga, Franklin, Hamilton, Lawrence, Lorain, Lucas, Miami, Richland, Stark, and Summit Counties reject it. (Pls.' Proposed Findings of Fact and Conclusions of Law,

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[7] Per the Secretary's Directive, Ohio counties are now required to pre-print the voter's name and address on their absentee ballot identification envelopes. (Damschroder Tr., Vol. 11 at 162.)

Table C-3, Doc. 687-4.) If the street name is missing or incorrect, voters will have their ballots accepted in Allen, Carroll, Fayette, Harrison, Meigs, Noble, Paulding, and Wyandot Counties, while they will have their ballots rejected in Cuyahoga, Delaware, Franklin, Hamilton, Lorain, Lucas, Stark and Summit Counties. (*Id.*, Table C-4, Doc. 687-4 at 7-8.) In Butler County, the ballot may be accepted. (*Id.* at 7.) If voters write an address that is not subsequently confirmed by the Board, voters in Carroll and Wyandot Counties will have their votes counted, while those in Butler, Delaware, Fairfield, Franklin, Hamilton, Lorain, Lucas, Meigs, and Miami Counties will have their votes rejected. (*Id.*, Table C-1, Doc. 687-4.) If the voter writes a commercial rather than a residential address, Boards in Cuyahoga, Delaware, Lawrence, and Montgomery Counties will reject the ballot, while those of Fairfield and Lucas might or might not accept it. (*Id.*, Table C-2, Doc. 687-4.)

As to the date-of-birth-field requirement, if, for example, the voter fills in the wrong month or day but the correct year, her vote is accepted in Adams, Allen, Carroll, Fayette, Meigs, Noble, and Wyandot Counties, while it is rejected in Butler, Delaware, Fairfield, Franklin, Lawrence, Lorain, Miami, and Summit Counties. (*Id.*, Table D-1, Doc 687-5.) The votes might or might not be accepted in Cuyahoga or Harrison Counties. (*Id.* at 2.) If the voter accidentally provides the current date instead of her date of birth, Harrison, Meigs, Noble, and Wyandot Counties will accept the vote, while Butler, Cuyahoga, Delaware, Lawrence, Lorain, Lucas, Miami, Summit, and Warren Counties will not. (*Id.*, Table D-3.)

F. Burden on Plaintiffs

Plaintiffs seek relief from three portions of the challenged laws: (1) the requirement that voters accurately complete all five fields on the provisional ballot affirmation and absentee identification envelope before their ballots can be counted; (2) prohibitions against poll-worker assistance to voters; and (3) the reduction in the period to cure deficient ballots from ten to seven days after the election.

1. Information Requirements

As noted in this Court's findings of fact in Section (III)(A)(1)(a), *supra*, the vast majority of NEOCH's individual homeless members plan to participate in the 2016 general election. (Davis Tr., Vol. 4 at 187-88, 192-93; *see also* NEOCH's Second Suppl. Resp. to Interrogs., P-1562 at 10.) Many of CCH's members also plan to vote. (*See* CCH's Second Suppl. Resps. to Interrogs., P-1563 at 1.) And as the Court found, many of the organization's members are illiterate, barely literate, and/or mentally ill. The Court credits CCH's Strasser's testimony that "without assistance, a homeless person could [not] complete the entire form" and that due to the complexity and amount of print on the form, "some homeless people would just tear it up and say, you know, to hell with it." (Strasser Tr., Vol. 7 at 24, 26-27.)

Demanding perfect, or near-perfect, adherence to the five-field requirement on ballots imposes a significant burden for homeless voters, who are some of society's most vulnerable members. *See, e.g., OOC*, slip op. at

81 ("The new requirements will especially burden voters with . . . low literacy."). As demonstrated in Section III(E)(2), *supra*, forms that are, in the words of one Board official, "pretty complex," with "a lot of wording, a lot of stuff crammed into" them (Manifold Tr., Vol. 3 at 57; *see also* Strasser Tr., Vol. 7 at 23), can trip up even educated, literate voters.

2. Prohibition Against Poll-Worker Assistance

The prohibition against poll-worker assistance burdens persons with low literacy, particularly if they are embarrassed to reveal their illiteracy due to the stigma it entails. (Strasser Tr., Vol. 7 at 25; *see* Damschroder Tr., Vol. 12 at 26.) Plaintiffs have introduced ample evidence that many of their members fall into this category, and that illiteracy or low literacy levels are prevalent among the homeless. (Davis Tr., Vol. 4 at 196; Strasser Tr., Vol. 7 at 19.) Homeless voters suffer disproportionately from disabilities, including mental illness, which can also hamper their ability to fill out forms. (Davis Tr., Vol. 4 at 197.) About a third of the homeless individuals with whom NEOCH works have a mental disability, forty-five to fifty percent read at a fourth-grade level, and eight to ten percent are completely illiterate. (*Id.*) They may write poorly and have handwriting that is difficult to read or, due to mental illness, they struggle to focus on basic tasks without help. (Strasser Tr., Vol. 7 at 25-26.) All of these issues combine to create difficulties for homeless voters in filling out forms without assistance like the absentee ID envelope and the provisional ballot affirmation. (*Id.* at 29; Davis Tr., Vol. 4 at 195.) Moreover, Davis

testified that in his experience with voter mobilization of homeless people in 2014, Board staff members were more hesitant to engage with voters and offer help when it appeared to be necessary, and that homeless voters have been more likely to make mistakes because of the lack of help. (*Id.* at 202.) Secretary Husted failed to conduct any review or testing of the effect of the provisional ballot affirmation or the absentee identification envelope on voters with low literacy, despite a suggestion to do so from the League of Women Voters. (Damschroder Tr., Vol. 11 at 211-12.)

In sum, many homeless people face vexing and profound obstacles in exercising the basic right to vote, and the prohibition against poll-worker assistance is likely to exacerbate the problem.

3. Reduction of the Cure Period

Reducing the cure period from ten days to seven inconveniences voters who would face logistical difficulties curing their ballots in a shorter time period. For provisional voters, the opportunity to cure their ballots is limited to providing ID that they failed to provide when they voted, but absentee voters have the ability to cure any problems with their identification envelope. (*See* Bloom Tr., Vol. 1 at 227; Terry Tr. Vol. 11 at 42.) Moreover, some absentee voters may not receive their Form 11-S notifying them of a deficiency with their ballot until close to or after the conclusion of the cure period. (Morgan Tr., Vol. 4 at 102.)

NEOCH and CCH represent voters whose means are much more limited than the average voter and who are less likely to be able to access transportation and more likely to suffer from residential instability. They are also less likely to be able to fill out their address correctly. (Davis Tr., Vol. 4 at 97.) Even to read the Form 11-S, which Boards mail when absentee identification envelopes are deficient, may require assistance for some illiterate or semi-literate homeless voters, and logically, a reduced cure period would give them less time to receive a Form 11-S, seek assistance in reading it, and bring it to the Board to cure the ballot.

G. The State's Justifications for Enacting the Challenged Laws

1. Information Requirements

Defendant argues that standardization is one of the reasons for adding the new five-field requirement in SBs 205 and 216, contending that the new laws created rules that streamline and clarify absentee and provisional voting procedures. As to SB 205, Senator William Coley, the bill's sponsor, testified, "Whether you reside in Lima or Lowell, Batavia or Bedford Heights, Hamilton or Hilliard, you should play by the same rules." (Sponsor Test., D-98 at 1.)

Defendant also offers administrative convenience as a rationale for the five-field requirement because the two additional fields give Boards more information with which they can identify voters, increasing the likelihood that Boards can identify voters and thus

count more votes. (*See* Ward Tr., Vol. 11 at 52.) This is one of the reasons the bipartisan OAEO was "generally supportive" of these new information requirements. (Interested Party Test. of Aaron Ockerman, Executive Director of OAEO, D-95 at 1).

Defendant's next rationale, as to SB 216 only, is that the law aims to "reduce the number of provisional ballots cast in the State of Ohio," that is, to update address and name changes and register more voters who will then be able to cast regular ballots in future elections. (Sponsor Test. of Bill Seitz, D-101 at 1.) In Ohio, most provisional ballots rejections are due to the voter not being registered anywhere in the State, or being registered in the State but not in the precinct where the voter has shown up to vote on Election Day. (*See* D-13-17; Perlatti Tr., Vol. 2 at 143.) Before the bill's enactment, the front of the provisional ballot affirmation form, which required only a name, signature, and form of ID, did not include enough information with which Boards could register voters. (Poland Tr., Vol. 10 at 204-05.) The Secretary tried to address this issue by requiring Boards to include a separate registration form on the back of the affirmation form for the voter to fill out, although the testimony of Board officials differed as to whether a significant numbers of voters typically completed the form. (Damschroder Tr., Vol. 11 at 144; Poland Tr., Vol. 10 at 204; Terry Tr., Vol. 11 at 52-53; Test. of Lavera Scott, Tr., Vol. 6 at 242-43; Ward Tr., Vol. 7 at 211; Test. of Paula Sauter, Tr., Vol. 7 at 177.) Voters who had moved without updating their registration could cast a valid provisional ballot but, under the prior system, where providing the new

address was not mandatory, the ballot of a provisional voter who did not provide a current address would be rejected, because it would appear to Boards that the ballot was cast in the wrong precinct. (Dir. 2012-54, D-106; Damschroder Tr., Vol. 11 at 143-45.).

Under the new law, Boards may use the provisional ballot forms with the newly required information fields to register voters who have filled out the fields correctly, in an attempt to decrease the number of provisional voters in future elections. (*See, e.g.*, Poland, Vol. 10 at 206-07 (stating that in the 2014 election, 256 voters in Hamilton County had their provisional ballots rejected because they were not registered to vote, but the Board used the affirmations of 233 of them to register them); Ward Tr., Vol. 7 at 212-13 (testifying that in 2015, 156 of 158 previously unregistered voters are now registered thanks to the information provided on their provisional ballot affirmations).)

2. Prohibition Against Poll-Worker Assistance

The State's proffered interests in preventing poll workers from completing voters' absentee and provisional ballot forms are twofold. First, mistakes seem less likely because in most cases, only the voter knows her personal information. (Damschroder Tr., Vol. 12 at 29-30.) Second, the prohibition should minimize the burden on poll workers, who are temporary workers without significant expertise. (Terry Tr., Vol. 11 at 39-40; Poland Tr., Vol. 10 at 185-86; Test. of Eben McNair, Tr., Vol. 2 at 40.)

3. Reduction in Cure Period

The State's justification for reducing the cure period is to standardize the post-election processes and to provide a "workable stopping point before election officials must begin the official canvass" eleven days after Election Day. (Def.'s Proposed Findings of Fact and Conclusions of Law at 36-37 (citing Hood Tr., Vol. 10 at 23).) As for SB 205, the State offered the further justification that the law actually codified a seven-day cure period whereas the previous ten-day cure period was authorized merely by directive. (*Id.* at 49-50; Damschroder Tr., Vol. 11 at 158.)

H. Disparate Impact

At trial, the Court heard testimony from one opinion witness for Plaintiffs and two for Defendant about the impact of SBs 205 and 216 on African-American as compared to white voters.

1. Dr. Jeffrey Timberlake

a. Background and Methodology

Dr. Jeffrey Timberlake is a tenured Associate Professor of Sociology at the University of Cincinnati. (Test. of Jeffrey Timberlake, Tr., Vol. 5 at 4.) He has published several scholarly works involving original quantitative data analysis using secondary data sources, and the statistical tool on which he has most relied is regression analysis. (*Id.* at 7-8.) Regression analysis, a broad category of statistical methods, is a

common tool to determine a statistical numerical relationship between two sets of variables. (*Id.* at 20, 22.)

Prior to trial, Dr. Timberlake prepared and submitted an expert report for a lawsuit brought by state and local political parties against the Secretary that included similar claims to those in the case *sub judice*, including allegations that recently enacted Ohio election laws have a disparate impact on African-American voters. (Compl., *OOC*, Case No. 2:15-cv-01802 (the "*OOC* case"), Doc. 1 at 56.) Dr. Timberlake grouped all Ohio counties into three categories based on their percentages of minority residents and poverty rates: high minority, low minority/high poverty, and low minority/low poverty. (Timberlake Tr., Vol. 5 at 17; Timberlake Rpt., P-1194 at PTF-00163.) In that case, as here, the Secretary put on a rebuttal case to critique Dr. Timberlake's methodology. (Timberlake Tr., Vol. 5 at 17.) The rebuttal expert faulted Dr. Timberlake for not using a regression analysis, which is more sophisticated than the method he used in the *OOC* case, and the court in that case ultimately agreed with the rebuttal expert that Dr. Timberlake's opinion was entitled to little weight for that reason. (*OOC*, slip op. at 8.) Acknowledging the limitations of the other method, Dr. Timberlake conducted a regression analysis for the report he presented in *this* trial. (Timberlake Tr., Vol. 5 at 17.)

A regression analysis is useful because Ohio does not record voters' race, making it impossible to examine differential rates of voting among racial groups

directly. (*Id.* at 20-21.) Dr. Timberlake compared the minority population share of each of Ohio's counties—the independent variable—to the usage and rejection rates of absentee and provisional balloting in each county—the dependent/explanatory variable—to discern whether SB 205 and SB 216 have had a differential impact on African-American and white voters. (*Id.* at 20.) The simplest regression analysis here would have been an assessment of county minority population share and the rate of absentee and provisional ballot use and rejection. (*Id.*) But such an analysis runs into a problem known as ecological inference; in other words, it does not account for other factors that might be driving the disparity. (*Id.* at 22-23.) By controlling for such factors, the data tell a clearer story regarding county-percent minority and the rates of absentee and provisional ballot use and rejection. (*Id.* at 23.) Accordingly, Dr. Timberlake controlled for the following variables: (1) whether the county is urban or rural; and (2) three characteristics of the county white population: (i) its median age; (ii) its median income; and (iii) its percentage with a college degree. (*Id.*) Dr. Timberlake controlled for these characteristics of the white population because differences *among* whites across different counties, rather than *between* whites and minorities within one county, could have explained the different results. (*Id.* at 28.) He explained that he controlled for these four factors because research in the field reveals that age, income, and education are "strongly predictive of all different kinds of voting." (*Id.*)

b. Conclusions Regarding Disparate Impact

In the *OOC* case, Dr. Timberlake concluded that minority voters used provisional and absentee balloting at higher rates and had their ballots rejected at higher rates than whites over each of the several years for which he had data. (*Id.* at 33.) After controlling for the additional demographic factors in *this* case, Dr. Timberlake's regression analysis led him to soften somewhat, but not contradict, his finding of disparate impact compared with his findings in the *OOC* case. (*Id.* at 34.) Most notably, he no longer concluded that minorities used absentee balloting at higher rates than whites. (*Id.*) Dr. Timberlake's overall findings here were as follows:

> [T]here is very little evidence that minority voters used absentee balloting at higher rates than whites do. There is very strong evidence that minorities use provisional balloting at higher rates than whites do. And there is pretty strong evidence that minority provisional ballots are rejected at higher rates [than those of whites]. And there is good, but not great, evidence that minority absentee ballots are rejected at higher rates.

(*Id.*)

As to absentee ballot usage, it appears from Dr. Timberlake's analysis that minority voters actually use absentee balloting[8] at lower rates than white

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[8] Dr. Timberlake's findings did not break out early in-

voters. (*Id.* at 44.) When Dr. Timberlake conducted a regression analysis and controlled for the four variables discussed above, his findings showed that minority voters probably cast proportionately fewer absentee ballots than white voters in the 2012 and 2014 elections, although they cast slightly more than whites in 2008 and 2010. (*Id.* at 44.)

As to absentee ballot rejection, evidence suggests that in 2008 and 2012 (presidential election years), there was a positive relationship between minority population share and absentee ballot rejection. (*Id.* at 45.) This, according to Dr. Timberlake, shows that minorities' absentee ballots are rejected more often than whites', at least in presidential election years. (*Id.* at 47.) Dr. Timberlake did not have data on absentee ballot rejections for 2010, and he testified that in 2014 there was not a strong relationship between county-percent minority and the rejection of absentee ballots, leading him to conclude that the disparate impact was likely confined to presidential election years. (*Id.*) More specifically, Dr. Timberlake's data showed that for every 100,000 residents of voting age, an additional one percent

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person voting and mail-in absentee voting but rather included total absentee ballots cast. (*Id.* at 44-45.) Two other courts in this district have found that African-American voters use early in-person voting more than white voters. *See OOC*, slip op. at 36-39 (S.D. Ohio May 24, 2016); *NAACP v. Husted*, 43 F. Supp. 3d 808, 851 (S.D. Ohio 2014), *vacated by* 2014 U.S. App. LEXIS 24472, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

minority population in a county led to an additional 15.9 absentee ballots rejected in 2008 and 4.6 rejected in 2012. (Timberlake Rpt., P-1194 at 7-8)

As to provisional ballot usage, Dr. Timberlake found a positive correlation between a county's minority population share and the number of provisional ballots cast for all years analyzed—i.e., 2008, 2010, 2012, and 2014. (Timberlake Tr., Vol. 5 at 48.) In 2008, for every 100,000 residents of voting age, an additional 58.6 provisional ballots were cast for each percent minority population in a county. (Timberlake Rpt., P-1194 at 9.) For 2010, 2012, and 2014, the corresponding numbers were 32.2, 50.7, and 7.2, respectively. (*Id.* at 9-10.)

As for provisional ballot rejections, "there [was] a higher rate of rejection of provisional ballots as the percent minority increases in all years except 2014." (Timberlake Tr., Vol. 5 at 48.) So in 2008, 2010, and 2012, "provisional ballots are rejected at higher rates as the percent minority gets higher in the county" although this trend did not hold true in 2014. (*Id.*) The effect was more pronounced in presidential election years. Specifically, for every 100,000 residents of voting age, an additional 17.7 provisional ballots were rejected in 2008, 4.4 in 2010, 9.3 in 2012, and 0.3 in 2014. (Timberlake Rpt., P-1194 at 9-10.)

2. Dr. Nolan McCarty

Dr. Nolan McCarty, an opinion witness for Defendant, served as a rebuttal witness to Dr. Timberlake. Dr. McCarty is Professor of Politics and

Public Affairs and Chair of the Politics Department at Princeton University. (Test. of Nolan McCarty, Tr., Vol. 8 at 4.) He uses quantitative and statistical methods, including regression analysis, to analyze electronic and legislative voting data. (*Id.* at 4-5.) Dr. McCarty focused on evaluating what he characterized as Dr. Timberlake's "claim[] that the new laws will enhance and increase racial disparities." (*Id.* at 60.) Dr. McCarty's testimony was two-fold: he criticized Dr. Timberlake's methods and conclusions, and then offered his own approach.

Dr. McCarty opined that Dr. Timberlake's analysis suffered from two related problems: aggregation bias and omitted variable bias. (McCarty Rpt., D-11 at 6-7.) Aggregation bias "is the idea that we cannot infer things about individual-level behavior from aggregate data very precisely." (McCarty Tr., Vol. 8 at 29.) Because Dr. Timberlake relied on county-level data to support his assertion that SBs 205 and 216 are likely to have a disparate impact on minority voters, Dr. McCarty concluded that it is difficult to draw from any correlation between minority population share and ballot rejection rates an *individual* relationship between race and rejection. (*Id.* at 29.) Such a relationship can only be certain when comparing data from two homogeneous populations, which is not possible at the county level in Ohio because its county with the highest minority population share is only about 30% minority and overall ballot rejection rates constitute only one or two percent of the votes. (*Id.* at 29-30.)

Aggregation bias is a subset of omitted variable bias. (*Id.* at 41.) Omitted variable bias arises when a regression analysis does not account for other variables that could be responsible for the statistical relationships observed. (*Id.* at 33.) Although he acknowledged that Dr. Timberlake did account for some omitted variables, Dr. McCarty testified that many other factors completely unrelated to race could have explained the results in part, including the number and competitiveness of local political races, voters' average distance from a polling location, and other factors. (*Id.* at 33-34.)

Dr. McCarty also performed his own analysis of Dr. Timberlake's data, namely a "first-difference" analysis, or an analysis of changes in ballot rejection rates within a county over time. (*Id.* at 39.) Specifically, Dr. McCarty compared provisional and absentee ballot usage and rejection rates across counties from 2010 (before the implementation of the challenged laws) to 2014 (after implementation). (*Id.* at 40-41.) According to Dr. McCarty, the first-difference analysis eliminates many concerns about omitted variable bias because one can assume that many other factors are consistent across two midterm election years in any given county. (*Id.* at 40.) From this analysis, Dr. McCarty concluded that the changes in the ballot-casting rejections rates from 2010 to 2014 "had no real relationship to the minority population share." (*Id.* at 44.)

Although the Court recognizes and appreciates Dr. McCarty's expertise and perspective, in the Court's view, his criticism of Dr. Timberlake's analysis is

largely irrelevant, and the submission of his own methods only slightly probative. Dr. McCarty's criticism of Dr. Timberlake's analysis is irrelevant because the criticism adds nothing to the Court's understanding of what Dr. Timberlake has already acknowledged, which is that the quantitative election data cannot definitively show an individual relationship between race and ballot usage and rejection because Ohio does not maintain data on the race of its voters. (Timberlake Tr., Vol. 5 at 20-21.) As to aggregation bias, the Court notes that Dr. Timberlake could not have used precinct-level data rather than county-level data for his analysis of ballot rejection because Ohio does not maintain rejection rates of provisional and absentee ballots at the precinct level. Although Dr. Timberlake could have used precinct-level data to calculate absentee and provisional ballot usage, he had no choice but to use the county-level data to analyze rejection rate. As to omitted variable bias, although the Court recognizes that, of course, there are always more variables that could be included in a multivariable regression analysis, the factors that Dr. Timberlake used tend to be highly predictive of voting behavior and, therefore, Dr. Timberlake's analysis, if not perfect, is nevertheless probative of disparate impact. (*Id.* at 28.)

Dr. McCarty's first-differences analysis is only slightly probative because, as he admits, African-American voter turnout is lower—not only in absolute numbers, but relative to white voters—in midterm elections than presidential elections. (McCarty Tr., Vol. 8 at 62.) Because the Court finds

Dr. Timberlake's conclusions regarding disparate impact to be especially compelling in the presidential years of 2008 and 2012, Dr. McCarty's analysis of changes from 2010 to 2014 is mostly irrelevant to Dr. Timberlake's most persuasive findings of disparate impact. Second, the Court finds that even in this first-differences analysis, which purports to control for the important variables that contribute to the disparities between high-minority and low-minority counties, there was an appreciable difference in the competitiveness of the 2010 and 2014 gubernatorial elections (*see* Timberlake Rebuttal Rpt., P-1195 at 3; McCarty Tr., Vol. 8 at 68-69[9]), and thus in voter turnout, and the Court finds that this factor, for which Dr. McCarty has not accounted, could be somewhat probative of the difference in provisional ballot rejections between the 2010 and the 2014 elections.

3. Dr. M.V. "Trey" Hood, III

Defendant also called Dr. M.V. "Trey" Hood, III, as an opinion witness.[10] Dr. Hood is a tenured professor

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[9] Republican John Kasich won the hotly contested 2010 gubernatorial election with 49% of the vote to Democrat Ted Strickland's 47%, yet Kasich defeated Democrat Ed Fitzgerald 64-33% in 2014. (Timberlake Rebuttal Rpt., P-1195 at 3.)

[10] Much of Dr. Hood's expert report and opinion testimony concerned Dr. Timberlake's discussion of the Senate factors, which will be discussed in Section

of political science at the University of Georgia, and he teaches classes and has published articles on politics, including southern politics, racial politics, and election administration. (Test. of Trey Hood, Tr., Vol. 10 at 5-8.)

Dr. Hood criticized the methodology and conclusions of Dr. Timberlake's regression analysis. He reiterated Dr. McCarty's concern about aggregate bias, a concern on which the Court has already explained it puts little weight. (Hood Rebuttal Rpt., D-10 at 9-10). The Court disagrees with Dr. Hood's opinion that no conclusion can be drawn from the provisional ballot usage and data and, as discussed above, finds that Dr. Timberlake's data and analysis paint a fairly compelling picture that minorities use provisional ballots more often than whites and that, in presidential years in particular, those ballots are rejected more often than the ballots of white voters. The Court infers from Dr. Timberlake's analysis that in future presidential elections in which SB 205 and SB 216 are in place, minorities would be more likely to use provisional ballots and to have those ballots rejected. Neither Dr. McCarty nor Dr. Hood has offered convincing reasons for the Court to infer otherwise. (*See* McCarty Tr., Vol. 8 at 61.)

Dr. Hood also suggests that the rate of provisional ballot rejections has decreased over time, and relies on the post-implementation data from 2014 and 2015 in so concluding, but as Dr. Timberlake pointed out in his rebuttal report, the provisional ballot rejection

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III(*I*)(1), *infra*.

rate actually increased from 2014 to 2015, from 9.6% to 15.4%. (Timberlake Rebuttal Rpt., P-1195 at 4; *see also* McCarty Tr., Vol. 8 at 67.) The Court also finds more useful Dr. Timberlake's calculations for provisional ballot rejections, which are calculated as a percentage of the provisional ballots cast rather than Dr. Hood's calculations using the total number of ballots cast in that election. (Timberlake Rebuttal Rpt., P-1195 at 3-4.) Using his own method, Dr. Timberlake found, contrary to Dr. Hood's conclusion, that the provisional ballot rate has, in fact, fluctuated over time and shows no clear pattern other than that it was higher during the last two presidential election years (19.3% in 2008 and 16.5% in 2012) than the last two midterm election years (11.2% in 2010 and 9.6% in 2014). (Timberlake Rebuttal Rpt., P-1195 at 4.) Given that the rejection rate most recently increased again in 2015, the Court concludes that the data shows that it would be premature to assume that the provisional ballot rejection rate is declining, much less to suggest that SB 216 has actually *caused* fewer rejections, as Defendant suggests.

Besides criticizing Dr. Timberlake's data, methodology, and opinions, Dr. Hood also testified as to what he considered to be valid reasons for enacting the new laws, notably improved election administration, including enabling Boards to identify voters more easily in a database and making it easier for voters to register if they cast a provisional ballot but were not properly registered in the appropriate county and precinct. (Hood Tr., Vol. 10 at 21-22.) He formed these opinions based on conversations with Assistant Secretary Damschroder and review of

sworn statements by Board officials submitted in the *OOC* case. (*Id.* at 26.) Dr. Hood's testimony does not particularly add to the Court's understanding or interpretation of any of the testimony or submissions from representatives of the various Boards and Assistant Secretary Damschroder. The Court gives little weight to Dr. Hood's opinion that the rejection of provisional ballots for trivial errors is unlikely to occur under the new law because the Boards review provisional and absentee ballots and "screen out" trivial errors from substantive errors, which he defines as errors that "preclude[] the Board from being able to identify who the voter is." (Hood Rpt., D-8 at 4, 8; Hood Tr., Vol. 10 at 127.) This proffered opinion carries no weight because it assumes that Boards will not disenfranchise voters whom it can identify, even though the evidence before the Court suggests that Boards have disenfranchised such voters.

In sum, Dr. Hood's testimony and report were in large part irrelevant to the issues before the Court and also reflected methodological errors that undermine his conclusions. Other courts have found

likewise.[11] As such, the Court finds his contribution of limited value.

4. Conclusions from Expert Reports

The Court finds that Dr. Timberlake's methodology, given the limited data available on the race of voters, accounted for sufficient factors to address the

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[11] *See Veasey v. Perry*, 71 F. Supp. 3d 627, 663 (S.D. Tex. 2014) ("On cross-examination, Plaintiffs pointed out a multitude of errors, omissions, and inconsistencies in Dr. Hood's methodology, report, and rebuttal testimony, which Dr. Hood failed to adequately respond to or explain. The Court thus finds Dr. Hood's testimony and analysis unconvincing and gives it little weight.") (footnotes omitted); *Frank v. Walker*, 17 F. Supp. 3d 837, 881-84 (E.D. Wis. 2014) (discounting Dr. Hood's findings), *rev'd on other grounds*, 768 F.3d 744 (7th Cir. 2014); *Florida v. United States*, 885 F. Supp. 2d 299, 324 (D.D.C. 2012) ("In finding that African-American voters in the covered counties will be disproportionately affected by the reduction in early voting days under the new law, we reject the contrary opinions of Florida's expert witness, Professor Hood. We do so because the analysis underlying his conclusions suffers from a number of methodological flaws.") (footnotes omitted); *Common Cause/Georgia v. Billups*, 504 F. Supp. 2d 1333, 2007 WL 7600409, at *14 (N.D. Ga. 2007) (excluding Dr. Hood as an expert witness as to absentee voting analysis because his testimony was either unreliable or not relevant).

concerns arising from aggregation bias and omitted variable bias. For the reasons outlined above, the Court gives great weight to Dr. Timberlake's conclusions that across all even-numbered election years, minorities use provisional ballots more often than whites, and that in presidential election years, the absentee ballots and provisional ballots of minority voters are more likely to be rejected than those of white voters.

The Court gives little weight to Dr. McCarty's opinions, finding that they are irrelevant to Dr. Timberlake's findings or do not refute his most compelling conclusions. The Court gives little to no weight to Dr. Hood's opinions.

I. Racial Discrimination

1. The Senate Factors

In addition to their testimony on potential disparate impact by race, Drs. Timberlake and Hood offered testimony and expert reports regarding the applicability of the Senate factors in this case.[12] Senator Turner and Representative Clyde also offered lay testimony that is relevant to a consideration of the Senate factors. Courts use these factors, which come from Senate Judiciary Committee recommendations issued in connection

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[12] Dr. Timberlake's expert report on the Senate factors was prepared for the *OOC* case and also admitted at trial here.

with the 1982 amendments to the VRA and were incorporated and expanded by the Supreme Court in *Thornburg v. Gingles*, to determine whether "the totality of circumstances" shows that minorities "have less opportunity than other members of the electorate to participate in the political process." 478 U.S. 30, 36, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986) (citing 52 U.S.C. § 10301(b)). The factors include:

> 1. the extent of any history of official [voting-related] discrimination in the state or political subdivision . . .
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;

> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[;][and]
> [9.] whether the policy underlying the state of political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 36-37 (quoting S.Rep. No. 97-417, 97th Cong., 2d Sess., pages 28-29 (1982)). The Court finds the following facts relevant to an assessment of the "social and historical conditions" faced by African-American voters in Ohio. *Id.* at 47. As the Court will explain in detail, it finds Dr. Timberlake's testimony regarding the Senate factors to be highly probative and gives little to no weight to Dr. Hood's analysis of the Senate factors.

a. Fifth Factor: Extent of Discrimination Hindering Participation in Political Process

It is neither surprising nor accidental that African-Americans comprise a disproportionate share of NEOCH's and CCH's constituent homeless members. (*See* Davis Tr., Vol. 4 at 132, 186.) Ohio's history of race-based discrimination has led to current racial disparities that are pervasive, profound, and deplorable. After examining socioeconomic indicators across the categories of employment, housing,

income, education, and health, Dr. Timberlake came to the "simple" conclusion that there is "pronounced racial inequality on *all* of these indicators in the state of Ohio." (Timberlake Tr., Vol. 5 at 64) (emphasis added). Indeed, "[r]ace-specific data from the Ohio subsample of the nationally representative American Community Survey ("ACS") reveals *substantial* and *entrenched* inequalities." (Timberlake Rpt., P-1194 at PTF-167) (emphasis added). For example, 34% of the African-American population in Ohio lives in poverty compared to 12% of the white population—a difference of nearly three to one. (Timberlake Tr., Vol. 5 at 69.) The disparities between Ohio's African-American and white populations in family income and poverty are "stark." (Timberlake Rpt., P-1194 at PTF-178.) Household income of African-Americans in Ohio is about 60% of that of whites across all counties, and in counties with a higher percentage of minority residents, the inequality is even worse. In those high-minority counties—where three-quarters of Ohio minorities live—white household income is 84% greater than African-American household income. (*Id.*)

Unemployment is significantly higher among working-age African-American Ohioans than white. (*Id.* at 167.) Job-level racial segregation has led to "the relegation of minority employees to lower-return and more precarious jobs, and ongoing minority vulnerability to discrimination in hiring, firing, promotion, demotion, and harassment." (*Id.* at 166-67). Thirty-five percent of white Ohioans hold professional positions compared to 25% of African-Americans, while 53% of African-Americans hold

service jobs compared to 41% of whites. (*Id.* at 168.) Because they are more likely to have professional positions, whites are more likely than African-Americans to have the greater job security, flexibility, earnings, and benefits that accompany those jobs. (*Id.*) Importantly, substantial research reveals that, even controlling for such factors as experience and education, significant disparities remain, indicating that discrimination plays a significant role in creating these employment disparities and job-level segregation, "especially when the disparities are as large as they are in Ohio." (*Id.* at 169-70.)

Ohio also has pronounced race-based housing disparities. According to one recent nationwide analysis, Cleveland, Cincinnati, and Columbus are the 8th, 12th, and 22nd most segregated cities in the United States. (*Id.* at 171.) Whites in Ohio are almost twice as likely to be homeowners as African-Americans and, relatedly, African-Americans are more likely to move in any given time period than whites. (*Id.* at 173.) Indeed, over each year, 21.6% of African-American Ohioans move their residence compared to 13.1% of white Ohioans. (*Id.*) African-Americans live in substantially poorer neighborhoods than whites, the consequences of which include reliance on public transportation and lack of access to neighbors with resources such as cars, which could result in greater difficulties procuring transportation to places like polling locations and Boards. (*Id.* at 174-75.) Research indicates that African-Americans prefer living in integrated, as opposed to segregated, communities, so self-selection cannot explain these disparities. (*Id.* at 176).

What can? A large part of the current problem of race-based housing disparities is structural and generational—"the result of a long history of discrimination at the federal, state, [and] local . . . levels." (*Id.* at 176.) For example, in the Great Depression, the United States government created the Home Owners Loan Corporation ("HOLC") and the Federal Housing Administration ("FHA") "to help families reclaim their homes from foreclosure and to foster homeownership among new generations of Americans." (*Id.* at 176-77.) Using federal dollars, these agencies engaged in "redlining" practices, refusing to issue loans to residents in African-American neighborhoods. (*Id.* at 177.) This practice was devastating for African-Americans in Ohio because they were "virtually shut out of the opportunity to buy or build homes" and languished in "older, decaying, segregated neighborhoods in central cities," while the federal government subsidized white families' exodus to the suburbs. (*Id.*) At the local level, Ohio municipalities have been found liable for discrimination against African-Americans under the Fair Housing Act. (*Id.*) As recently as last year, the Medina Metropolitan Housing Authority settled a housing discrimination suit brought by the United States Department of Housing and Urban Development ("HUD"). (*Id.*)

Along with the structural and generational roots of current racial disparities, there is also the problem of individual prejudice. African-Americans continue to experience longstanding discrimination at the hands

of private landlords. For example, a HUD-funded study found that within the Cleveland suburban housing market, "African-American testers were more likely than white testers to receive poor treatment at the hands of real estate agents." (*Id.*)

Ohio also suffers racial disparities in educational opportunities and attainment. (*Id.* at 178.) Both Cleveland and Columbus were ordered by federal courts to take steps to desegregate their schools in the late 1970s—more than 20 years after *Brown v. Board of Education. See Reed v. Rhodes*, 422 F. Supp. 708 (N.D. Ohio 1976); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979). Even now, Ohio has three of the top 100 most segregated school districts in the nation: Cleveland, Youngstown, and Cincinnati. (Timberlake Rpt., P.-1194 at PTF-180.) African-American children are also disproportionately clustered in schools with high poverty rates. (*Id.* at 181.) For example, the average African-American child in Toledo goes to a school where four-fifths of her classmates live in poverty, compared to two-fifths for the average white child. (*Id.*) This degree of school poverty is significant because it reinforces racial disparities. Indeed, research suggests the following:

> the higher the concentration of poverty in a school, the more negative overall implications for peer associations and aspirations, school and classroom climate, extracurricular programming, school physical quality, safety and resources, curriculum availability, spending per pupil, and teacher quality and experience, all of which hold

> consequences for race-specific gaps in educational attainment and achievement. Thus, African American children in the State of Ohio are significantly hampered by persistent, contemporary school segregation and the resource and social inequalities that emanate from that.

(*Id.*)

Race-based disparities in education in Ohio are evinced by educational attainment at both the low and high ends of the spectrum. (Timberlake Rpt., P-1194 at PTF-183.) At the most basic levels, African-American Ohioans are disproportionately illiterate compared to white Ohioans,[13] (Timberlake, Tr., Vol. 6 at 21, 73), and African-American dropout rates are 7% higher than they are for whites. (Timberlake Rpt., P-1194 at PTF-183.) At the upper end, over a quarter of white adults in Ohio have attained a bachelor's degree or higher, compared to less than 15% of African-Americans. (*Id.*) In high-minority counties, these racial disparities are even greater. (*Id.*)

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[13] The court in the *OOC* case was unwilling to find that African-Americans have a lower literacy rate than whites despite evidence of disproportionate lower standardized test scores and higher high school dropout rates among African-Americans compared to whites. Reasonable minds might disagree as to the prudence of that particular finding in those circumstances, but the record there, unlike here, included no evidence that literacy and race were related per se. (*OOC*, slip op. at 82.)

Negative health indicators are more common in adult African-Americans than whites in Ohio, including high blood pressure (37.5% to 26.2%); diabetes (12.3% to 9.2%); stroke (3.4% to 2.1%); and disability generally (19.3% to 15.6%). (*Id.* at 186.) Worse yet, 27.6% of African-American Ohioans are uninsured compared to 17.0% of whites. (*Id.*) African-American babies are twice as likely to be born with low birth weight, and the African-American infant mortality rate is 2.5 times that of the rate for whites. (*Id.*) Childhood asthma rates (19.5% for African-Americans versus 12.2% for whites), preventative dental care (87.9% to 95.7%) and treatment for those with mental illness (60% to 30%) demonstrate a current and widespread problem of racially disproportionate health disparities between African-American and white Ohioans. (*Id.*)

b. First and Third Factors: Voting-Related Discriminatory Processes

The history of Ohio's racially discriminatory voting laws goes back to its founding. In 1802, the new state constitution explicitly limited voting rights to white men. (*Id.* at 190.) The exclusion of African-Americans from the franchise "was seen as initially important owing to concerns that freed slaves would migrate en masse to the State." (*Id.*) Racial exclusion continued with the Ohio legislature's passage of "Black Codes" and "Black Laws" from 1804-1807. Those codes instituted the following racist practices:

> • Requiring that "black or mulatto persons" have a court certificate validating that they were in fact free.
> • Requiring that all "black or mulatto" adults and their children be registered with the county clerk's office at the cost of 12.5 cents per name.
> • Imposing penalties for employers who employed "black or mulatto" persons without such certification.
> • Imposing penalties for any individual harboring a "black or mulatto person."
> • Requiring African-Americans to prove they were not slaves and to find at least two people who would guarantee a surety of five hundred dollars for an African-American's good behavior.
> • Restricting interracial marriage and gun ownership among African-Americans.

(*Id.* at 190-91.) Although the Ohio legislature eventually repealed the laws in 1849, the exclusion of African-Americans from the franchise continued long after. (*Id.* at 191.) In 1868, the Ohio General Assembly amended the Act to Preserve the Purity in Elections, granting election officials the right to question prospective voters whether they were of African descent. (*Id.*) The Supreme Court of Ohio ruled the amendment unconstitutional, concluding that male citizens "having a visible admixture of African blood, but in whom the white blood preponderates, are white male citizens within the meaning the constitution of Ohio, and have the same right to vote as citizens of pure white blood." *Monroe v. Collins*, 17 Ohio St. 665, 666 (1867). A 1912 state

referendum to remove the race-based voting restriction in its entirety was defeated. (Timberlake Rpt., P-1194 at PTF-191.)

It was not until passage of the 19th Amendment guaranteeing women's suffrage that "white" was removed from the Ohio Constitution, leaving it facially discriminatory long after the ratification of the Fifteenth Amendment. (*Id.*) Throughout most of Ohio's history, African-Americans had virtually no representation in elected office. (*Id.*) In 1962, in response to the United States Supreme Court's mandate in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962), Ohio and other states were required to craft congressional districts that accurately reflected the presence and concentration of certain voters, including African-Americans. The Ohio Constitution was later amended in 1967 to ensure more clearly proportional representation statewide. (*Id.*)

And more recently, voting practices and changes in Ohio continue to discriminate against minority voters. Poll watching, for example, although ostensibly aimed at combatting voter fraud, has a pernicious history of intimidation of minority voters. (*Id.* at 192.) Groups such as True the Vote, an independent citizen group, were allowed to operate in some Ohio counties during the 2012 general election. (*Id.*) Franklin County banned the group's activity due to, among other concerns, disturbing "complaints and reports that the group trained volunteers 'to use cameras to intimidate voters when they entered the polling place, record their names on tablet computers

and attempt to stop unquestionably qualified voters before they could get to a voting machine.'" (*Id.* at 192) (citing Ed O'Keefe, *Tea Party-Linked Poll Watchers Rejected in Ohio County*, Wash. Post, Nov. 6, 2012). True the Vote also furnished software to local citizen groups to monitor prospective voters, disparately targeting African-Americans and college students. (*Id.*)

In 2006, Ohio passed a voter ID law requiring all voters to announce their full name and current address and provide proof of their identity. (*Id.* at 194.) Studies have shown that voter ID laws are most common in states with a high percentage of minority residents. (*Id.*)

In response to the long lines and misallocation of voting machines that afflicted heavily minority precincts in the 2004 presidential election, Ohio expanded opportunities for early voting, including early-in person voting, which improved minority participation in the 2008 election. (*Id.* at 193.) Estimates from the Current Population Survey (CPS) Voting and Registration Supplement indicated that in 2008, 19.9% of African-Americans used early inperson voting compared to 6.2% of whites. (*Id.*)

But after the gains in minority participation in the 2008 election, Ohio introduced legislation to restrict ballot access, including HB 194, which was subsequently repealed by the General Assembly after citizens gathered signatures to place it on the ballot, and SB 238, which cut early in-person voting hours and eliminated Golden Week but was later enjoined

due to its discriminatory effect. (*Id.* at 194; *OOC*, slip op. at 120.)

Dr. Hood finds fault with Dr. Timberlake's analysis of historical discrimination because a number of the examples on which he relies are more than 200 years old. (Hood Rebuttal Rpt., D-10 at 5.) True enough, but this critique fails to account for the most recent actions to restrict voting rights, which Dr. Timberlake discusses in detail. (*See* Timberlake Rpt., P-1194 at PTF-192-94.) And Dr. Hood's contention that Ohio does not have a history of official discrimination simply because it was never covered under the preclearance provisions of Section 5 of the VRA is misplaced. (See Hood Rebuttal Rpt., D-10 at 5.) *All* states are required to comply with *Section 2* of the VRA. As recently as last month, a court not only found that Ohio has a history of official discrimination, but also found that Ohio's elimination of Golden Week violated Section 2. (*OOC*, slip op. at 102, 107-08.) Finally, Dr. Hood's contention that Plaintiffs lack evidence of the first and third Senate factors because African-American turnout rates were roughly equivalent to white turnout rates in the two most recent presidential elections is, again, not probative of evidence about how discriminatory practices "tend to enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 45.

c. Second Factor: Racially Polarized Voting in Ohio

Racially polarized voting in Ohio is extensive. Exit polls from Ohio voters in the 2012 presidential

election "suggest *significant and substantial* patterns of racially polarized voting." (Timberlake Rpt., P-1194 at PTF-195.) Approximately 41% of white voters and 96% of African-American voters reported voting for President Barack Obama—an enormous differential. (*Id.*) Other statewide races, including presidential, gubernatorial, and senatorial races have yielded differentials of 40 to 60% or more. (*Id.* at 196-97.) And racially polarized voting is also evident in primary contests, such as the 2008 Democratic primary contest, in which 38% of white Ohio Democrats voted for Senator Obama, compared to 89% of African-Americans. (*Id.* at 196.) Dr. Hood does not respond to Dr. Timberlake's analysis of this factor other than to comment that the candidate who was favored by African-American voters often won the election (Hood Rebuttal Rpt., D-10 at 6), which is irrelevant to the question of whether there was racial polarization.

d. Sixth Factor: Racialized Appeals in Politics

Recent political campaigns in Ohio have suffered from both overt and subtle racialized appeals, or "race codings." (Timberlake Rpt., P-1194 at PTF-197.) These appeals serve to "discourage[e] or dissuad[e] minority voters and prospective candidates by reinforcing the message that they simply do not belong in the political process and/or by mobilizing white voters in a particular direction by playing on insidious, sometimes explicit and sometimes implicit, stereotypes." (*Id.*) Political science research indicates that many political campaigns are designed to invoke fears surrounding crime, welfare, and immigration to

"play on white racial stereotypes and to fuel animosity and mobilization," which "allow[s] for racial appeal without the explicit appearance of race baiting." (*Id.* at 197-98.)

Plaintiffs have introduced many examples of racialized appeals. For instance, former Senator Turner testified about racially charged political attack ads against her when she ran for Ohio Secretary of State, including an Ohio Republican Party mail piece and television commercial, both of which referred to her as a "slum landlord" and distorted her picture to make her skin appear darker, which she interpreted as playing on pernicious stereotypes about African-Americans. (Turner Tr., Vol. 6 at 148-49, 151.)

Shortly before the 2012 presidential election, anonymous funders placed sixty "Voter Fraud" billboards in Cleveland and Columbus. Although voter fraud is a crime, there was little to no evidence that such fraud was taking place in Ohio. Tellingly, these billboards seemed to be strategically placed disproportionately in African-American and Latino neighborhoods in both cities, often within eyesight of large public housing communities. (Timberlake Rpt., P-1194 at PTF-198.)

During the same election season, the Tea Party Victory Fund aired a commercial featuring a shouting African-American woman claiming that President Obama gave her a cell phone and would take care of welfare recipients. (*Id.* at 199.) The commercial was an appeal to anti-welfare sentiment and, although it

did not mention race explicitly, Dr. Timberlake wrote in his report that it nonetheless appeared to reinforce the stereotype that African-Americans are poor, lazy, and dependent on the government for handouts. (*Id.*)

In August 2012, Doug Preisse, Chairman of the Franklin County Republican Party, stated, "I guess I really actually feel we shouldn't contort the voting process to accommodate the urban—read African-American—voter turnout machine." This was not a slip of the tongue but, rather, a written response to a reporter's question. (*Id.* at 200.)

Dr. Hood takes issue with Dr. Timberlake's characterization of racialized appeals in Ohio politics because some of Dr. Timberlake's cited examples were not tied to a particular candidate—like Preisse's comment about the African-American voter turnout machine—or funded by a particular campaign, like the billboards, for which a private family foundation paid. (Hood Rebuttal Rpt., D-10 at 6.) But the Court sees no reason why this distinction is relevant to an analysis of the presence of racialized appeals in politics more generally, given that the pertinent

question is the *effect* of such appeals on minority voters, not the source.

e. Seventh Factor: Minority Representation

Although Ohio has made "significant progress" in minority representation at the state and federal levels, African-Americans remain underrepresented in the most important and visible elected statewide posts. (Timberlake Rpt., P-1194 at 203.) For instance, despite comprising 12.4% of Ohio's population, African-Americans have filled the positions of Governor, Lieutenant Governor, Attorney General, Auditor, Secretary of State, and State Treasurer only five times in Ohio history—one lieutenant governor, one secretary of state, and three state treasurers. (*Id.* at 202.) No African-American holds any of these positions currently. (*Id.*) Similarly, of the 156 justices on the Supreme Court of Ohio, only three have been African-American, and only one of the nineteen current members of the State Board of Education is African-American. (*Id.*) Until last year, and for the first time in sixty years, the Governor's twenty-six-person cabinet was entirely white. (*Id.* at 203.) In local offices and state legislative bodies, however, African-Americans hold elected office in numbers roughly proportional to their percentage in the population (e.g., the Ohio General Assembly) or even greater (e.g., the Columbus City Council). (Hood Rebuttal Rpt., D-10 at 7-8.)

f. Eighth Factor: Lack of Responsiveness

The primary evidence for Ohio's lack of responsiveness to the particularized needs of African-American Ohioans is the extensive data and testimony concerning racial disparities in employment, housing, income, education, and health. (*See* Timberlake Rpt., P-1194 at 203.) Nor have many of those socioeconomic disparities improved in recent years. In 1989, for example, the African-American poverty rate in Ohio was 32.3%, while in 2013, it was 33.6%. (*Id.*) Disparities in employment rates have remained steady over the last few decades too. (*Id.* at 168; 203.) Moreover, Ohio has a history of requiring federal intervention to protect minority rights in the desegregation of its schools and housing. (*Id.* at 203-04.) Additionally, the legislature's response to the increased minority access to the polls following the post-2004 election reforms has been to take repeated steps to limit such access, which suggests a lack of responsiveness to African-Americans. (*Id.* at 204.) Senator Turner also testified that Secretary Husted, to the best of her knowledge, never reached out to her or any other members of the Ohio Legislative Black Caucus to ask for their input regarding how any of the voting procedures or directives he has implemented might affect African-American voters. (Turner Tr., Vol. 10 at 157-58.)

g. Ninth Factor: Tenuousness

Defendant does not argue here, as he has in defending other election laws,[14] that SBs 205 and 216 are justified by cost savings or preventing voter fraud. Defendant's primary justification for the challenged laws is that they improve election administration, representing "the result of more than a decade of efforts by legislators, boards of elections, and state elections officials to continuously evaluate and improve Ohio's voting systems." (Def.'s Proposed Findings of Fact and Conclusions of Law, Doc. 686 at P 18.) But, given that the State's justifications are not supported by evidence, *see infra*, Section IV(B)(1), and SB 216's sponsor, Senator Seitz, admitted in a news article to trying to "ratchet back" the post-2004 voting laws that expanded opportunities for voters, the justifications for SBs 205 and 216 appear tenuous. (Timberlake Rpt., P-1194 at PTF-204.)

2. The Calculus of Voting

In addition to his testimony on the Senate factors, Dr. Timberlake testified about how the Calculus of Voting could explain what causes the disparate impact he identified in absentee ballot rejection rates and provisional ballot usage and rejection rates. Developed from rational choice theory, the Calculus of Voting is a framework to assess the individual thought processes and social mechanisms that influence whether potential voters choose to vote.

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[14] *See NAACP*, 43 F. Supp. 3d at 818-19.

(Timberlake Tr., Vol. 5 at 56-57.) For example, in the *OOC* case, Dr. Timberlake considered voters' employment. (*Id.* at 57.) Voters with blue-collar jobs are more likely to have inflexible work schedules and to lack financial resources or access to a car and, therefore, might not vote because voting would pose too costly a burden to be justified by the result of those voters' ballots. (*Id.*) In that case, the Calculus of Voting provided a basis to explain why, for example, African-Americans would use early in-person voting more frequently, namely because African-Americans are more likely to be wage workers than whites and early in-person voting is a more flexible way to vote. (*Id.*)

Here, the Calculus of Voting helps explain why increasing the information required to be filled out correctly by voters might depress those illiterate voters' willingness to participate in elections. (*Id.* at 58.) And because the challenged laws reduce the post-election cure period from ten days to seven, thus decreasing the flexibility afforded to voters to cure problems with their ballots, voters with less flexible schedules might be less able or likely to cure defects, particularly since provisional voters must go to the Board in person to cure the ballots. (*Id.* at 59-60.) Therefore, given the evidence of profound socioeconomic disparities between whites and African-Americans, the Calculus of Voting explains why African-Americans may be more likely to have their ballots thrown out for errors in the five fields

due to their lower educational attainment levels (which are correlated with literacy rates) or may have more difficulty curing their provisional ballots because they are less likely to have the flexible work schedule and access to transportation to go to the Board. (*Id.* at 61-62, 73.)

Dr. McCarty testified that he had no opinion on the usefulness of the Calculus of Voting framework or its applicability to this case. (McCarty Tr., Vol. 8 at 81.) Dr. Hood was not directly questioned about the Calculus of Voting but did acknowledge that factors like higher residential mobility could affect voter turnout and the provisional ballot casting rate. (Hood Tr., Vol. 10 at 121, 124.) The Court finds this method to be persuasive in offering an explanation for some of the causal factors that may influence the disparities in provisional ballot usage and absentee and provisional ballot rejection rates.

IV. CONCLUSIONS OF LAW

A. Standing

The Court has an "independent obligation to ensure [its] jurisdiction over a case." *In re Cannon*, 277 F.3d 838, 852 (6th Cir. 2002). Based on its factual findings and the relevant law, the Court concludes that Plaintiffs NEOCH, CCH, and ODP have constitutional and prudential standing to bring all of their claims.[15]

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[15] The Court will address separately, in Section IV(C),

To establish constitutional standing, a plaintiff must show: (1) an "injury in fact" that is concrete and particularized and actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood, rather than mere speculation, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

NEOCH, CCH, and ODP have both organizational and associational (or representational) standing to bring this suit. An organization may assert constitutional standing in one of two ways: "(1) on its own behalf because it has suffered a palpable injury as a result of [a defendant's] actions; or (2) as the representative of its members." *MX Grp., Inc. v. City of Covington*, 293 F.3d 326, 332-33 (6th Cir. 2002). Additionally, NEOCH and CCH have third-party standing to assert their members' interests.

1. Organizational Standing

As to organizational standing, Plaintiffs have shown that the challenged laws have created and will create "a drain on [the] organization[s'] resources," which "constitutes a concrete and demonstrable injury for standing purposes." *Miami Valley Fair Housing Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982)). Here,

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the parties' arguments regarding Plaintiffs' statutory standing under the Voting Rights Act.

the Court finds that NEOCH has diverted resources from its vote-by-mail program to early in-person voter turnout due to its assessment that the challenged laws will increase the likelihood that its members' ballots will be thrown out, and that in the 2016 election it will have to continue that diversion of resources. Driving voters to the polls requires more resources than NEOCH's vote-by-mail campaigns and will result in a greater drain on NEOCH's resources, a drain that will be especially pronounced in 2016 because it is a presidential year that requires turning out more voters. CCH, in turn, must increase its voter-education efforts by explaining new voting requirements to its homeless members and training its members to educate other members about those requirements. Finally, ODP must divert resources from registering and educating new voters to educating other voters about the new procedural requirements in the challenged laws. This diversion of resources will prove even more burdensome due to the FEC's requirement that GOTV activity be paid for from "hard" dollars, which have more strict contribution limits and are thus harder to raise than "soft" dollars. SB 205 and SB 216 have altered the course of Plaintiffs' "daily operations" and caused them injury. *See Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 546-47 (6th Cir. 2004) (finding organizational standing where the organizations' "daily operations are stymied to the extent that they can no longer honor their own monitoring and reporting obligations to their members").

The factual record supports the Court's conclusion that Plaintiffs, with their limited organizational resources, have diverted and will continue to divert funds as a result of the challenged laws. *See Miami Valley*, 725 F.3d at 576; *cf. Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014) (holding that the plaintiff lacked organizational standing because it maintained only an "abstract social interest in maximizing voter turnout" as opposed to a concrete financial interest in encouraging ballot access). Although the Sixth Circuit held in *Fair Elections Ohio* that an organization is not injured when it must "instruct election volunteers about absentee voting procedures when the volunteers are being trained in voting procedures already," the organizational plaintiff in that case asserted only that it would have to change its training program and materials. *Id.* at 459-60. Here, on the other hand, Plaintiffs would be compelled to revamp their entire get-out-the-vote strategy to focus on early in-person absentee voting instead of vote-by-mail absentee voting due to the increased risk of error in the mail-in absentee balloting process. Because this new get-out-the-vote effort will be more costly and time-consuming, NEOCH and CCH have shown a significantly greater injury than the *Fair Elections Ohio* plaintiff.

As to ODP, a showing that a political party would be "compell[ed] . . . to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote" is sufficient to confer standing. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007),

aff'd, 553 U.S. 181, 189 n.7, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) ("We also agree with the unanimous view of [the Seventh Circuit panel] that the Democrats have standing to challenge the validity of [the voter ID law] and that there is no need to decide whether the other petitioners also have standing."). And "[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-84, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). Moreover, in *Fair Elections Ohio*, the panel majority explicitly observed that if "a political party can marshal its forces more effectively by winning its lawsuit, that ought to be enough for Article III" standing. 770 F.3d at 460 (contrasting political party's standing with "armchair observer[s] [who] decide[] that the government is violating the law"). *See also OOC*, slip op. at 24-28 (finding that ODP had standing to challenge election laws, some of which also are challenged here).

Here, the Court concludes that all three Plaintiffs' diversion of organizational resources constitutes an injury-in-fact. Further, Plaintiffs have shown that the enactment of the challenged laws has caused the diversion of resources and that, absent the enforcement of these laws, they would not be required to divert these resources.

2. Associational or Representational Standing

Plaintiffs also have shown that they have associational standing, or standing to bring suit on behalf of their members. An association has standing to bring suit on its members' behalf "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)). In *Sandusky County Democratic Party v. Blackwell*, the Sixth Circuit found that a state and local political party and three labor unions had associational standing to challenge the rejection of provisional ballots cast in the wrong precinct even though the plaintiffs had not "identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers." 387 F.3d 565, 574 (6th Cir. 2004) (per curiam). The court reasoned that "by their nature, mistakes cannot be specifically identified in advance. . . . It is inevitable, however, that there will be such mistakes." *Id.* Therefore, the court concluded that the injury was not speculative, but real and imminent, and that the organizations had standing to assert "the rights of their members who will vote in the November 2004 election" even though they could not pinpoint which members would be harmed by having their names dropped from the voter rolls or listed in an incorrect precinct. *Id.* Similarly, Plaintiffs here have shown

that their members are at risk of being disenfranchised in the 2016 general election due to a failure to fill out the five-field information correctly or cure their ballots within the allotted cure period.

Each organizational plaintiff has shown that the interests at stake are germane to the organization's purpose. *See Laidlaw*, 528 U.S. at 181. NEOCH and CCH both seek to encourage homeless people to advocate for their interests, an important component of which is to register to vote and to vote. ODP registers its members, educates them about voting procedures and requirements, and encourages them to vote for Democratic candidates.

Nor is there any doubt that individual members of NEOCH, CCH, and ODP would have standing to sue in their own right. The individuals these organizations serve would have standing to challenge SB 205 and SB 216 in their own right because, as members of a highly transient population with low literacy rates, they stand at risk of being disenfranchised.

Finally, the participation of individual members in the lawsuit is unnecessary because Plaintiffs seek injunctive relief, which would affect all Ohio voters. *See Hunt*, 432 U.S. at 344 (noting that a request for declaratory and injunctive relief does not require individualized proof and is thus "properly resolved in a group context"); *see also United Food and Commercial Workers Union 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996) (same). Therefore, the Court concludes that

Plaintiffs have associational standing to bring their claims.

3. Third-Party Standing

Additionally, NEOCH and CCH have third-party standing to bring their claims. Generally, a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). A limited exception to this rule applies, however, where: (1) the party asserting the right has a "close" relationship with the person who possesses the right; and (2) the possessor of the right is hindered in her ability to protect her own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 129-30, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004) (quoting *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). Whether a close relationship and hindrance exist are questions of fact. *Singleton v. Wulff*, 428 U.S. 106, 114-15, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976).

NEOCH and CCH have close relationships with homeless populations in Cuyahoga and Franklin Counties such that they are "fully, or very nearly, as effective a proponent of the right as" homeless individuals themselves. *Id.* at 115. NEOCH and CCH regularly work with homeless individuals, advocate for their needs, connect them to necessary social services, and encourage their participation in civic life. The Supreme Court has recognized relationships between lawyers and clients or doctors and patients as sufficiently close to confer third-party standing

and stressed that third-party standing may lie when the litigant has a relationship as an "advocate" for the third-party. *See Eisenstadt v. Baird*, 405 U.S. 438, 445-46, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *see also Carey v. Population Servs., Int'l*, 431 U.S. 678, 683-84, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (holding that retail seller of contraceptives had third-party standing on behalf of customers to challenge statute restricting the sale of contraceptives). Again, *Fair Elections Ohio* does not control because the plaintiff there, a federation of churches conducting voter outreach, had no particular connection to the individuals at risk of disenfranchisement—registered voters who were jailed after 6:00 p.m. on the Friday before Election Day and not released in time to cast their votes in person—and, therefore, these "unidentified, future late jailed voters" lacked a close relationship with the federation. 770 F.3d at 461.

As to hindrance, Plaintiffs have shown that NEOCH's and CCH's members, as some of the most vulnerable individuals in the state, suffer disproportionately from mental health problems, substance abuse, limited financial resources, and low levels of literacy and education. Due to these challenges, they often have difficulty navigating the court system, obtaining counsel, maintaining a consistent address and phone number, and obtaining ID that would allow them access to courtrooms. A right holder's hindrance need not be "insurmountable" but only "genuine." *Singleton*, 428 U.S. at 116-17. The homeless individuals served by NEOCH and CCH face exactly the kind of "practical

obstacles" the Supreme Court has recognized as sufficient to confer third-party standing. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). NEOCH and CCH have shown that they bear a close relationship to the homeless populations they serve, and that such individuals are hindered by numerous obstacles in their ability to protect their own interests. Therefore, NEOCH and CCH have third-party standing to assert the claims of their members.

B. Constitutional Claims

1. Equal Protection: Undue Burden

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. This includes protecting a qualified citizen's right to vote, which is a right "of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S. Ct. 983, 59 L. Ed. 2d 230 (1979)). Undermining this right renders even the most basic of other rights "illusory." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). Restrictions on the franchise in presidential elections "implicate a uniquely important national interest" because only the President and Vice President represent all voters across the country and, accordingly, a state's

restrictions "ha[ve] an impact beyond its own borders." *Anderson v. Celebrezze*, 460 U.S. 780, 794-95, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). The right includes both "the initial allocation of the franchise" and also "the manner of its exercise," *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477 (6th Cir. 2008) (quoting *Bush v. Gore*, 531 U.S. 98, 104, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000)), and one aspect of "the manner of its exercise" is when a State "places restrictions on the right to vote," as Ohio has done here, *Obama for Am. v. Husted*, 697 F.3d 423, 428 (6th Cir. 2012).

Balanced against a citizen's fundamental right to vote is the responsibility of the States to choose the "Times, Places and Manner of holding Elections," U.S. Const., Art. I § 4, cl. 1, which gives them "the power to regulate their own elections," *Burdick*, 504 U.S. at 433. The regulation of elections is, of course, necessary to ensure that they are fair, orderly, and honest. *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

In conducting an equal-protection analysis, "[t]he precise character of the state's action and the nature of the burden on voters will determine the appropriate equal protection standard." *Obama for Am.*, 697 F.3d at 428-29. This begins with an analysis of the regulations at issue. *See id.* (citing *Biener v. Calio*, 361 F.3d 206, 214 (3d Cir. 2004)).

In evaluating the constitutionality of laws that impose no burden on the fundamental right to vote, courts apply rational basis review. *Ne. Ohio Coal. For*

the Homeless v. Husted, 696 F.3d 580, 592 (6th Cir. 2012) ("*NEOCH*"). On the other hand, a law that "'severely' burdens the fundamental right to vote," such as a poll tax, triggers strict scrutiny, *Obama for Am.*, 697 F.3d at 429 (quoting *Burdick*, 504 U.S. at 434), and must be "narrowly drawn to advance a state interest of compelling importance," *Norman v. Reed*, 502 U.S. 279, 289, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992). And "[fo]r the majority of cases falling between these extremes, [courts] apply "the 'flexible' *Anderson-Burdick* balancing test." *NEOCH*, 696 F.3d at 592 (quoting *Burdick*, 504 U.S. at 434). The *Anderson-Burdick* test provides as follows:

> 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).

This balancing of interests is necessarily fact-intensive. *See Obama for Am.*, 697 F.3d at 429. There is no "'litmus test' that would neatly separate valid from invalid restrictions," so the trial court must weigh the burden on voters against the state's asserted justifications and "make the 'hard judgment' that our adversary system demands." *Crawford*, 553

U.S. at 190 (Stevens, J., plurality opinion). When the Court identifies any burden a state law places on the right to vote, "[h]owever slight that burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Id.* at 191 (quoting *Norman*, 502 U.S. at 288-89).

Plaintiffs challenge three specific provisions in both SB 205 and SB 216: (1) the requirements that voters must accurately complete five fields on the provisional ballot affirmation and absentee identification envelope before their ballots can be counted; (2) the prohibitions against poll-worker assistance to voters; and (3) the reduction in the period to cure deficient ballots from ten to seven days after the election. Mindful that the Court's task is to balance 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,'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789) (emphasis added), the Court will analyze the burden with particular attention to the record evidence regarding relevant characteristics of the homeless constituencies of Plaintiffs NEOCH and CCH.

This is in keeping with *Crawford*, where a plurality of the Supreme Court acknowledged that, although for most voters it is not a substantial burden to comply with a photo ID requirement, a "somewhat

heavier burden may be placed on a limited number of persons . . . includ[ing] elderly persons born out of State, who may have difficulty obtaining a birth certificate[,] . . . homeless persons[,]" and others. 553 U.S. at 198-99. Although the *Crawford* Court rejected the plaintiffs' argument that the law should be enjoined on the basis of the burden to that smaller group of voters, it did so because the record in that case did not contain evidence of the specific burdens imposed on those vulnerable groups. *Id.* at 201-02. Because the record was virtually devoid of evidence that would have allowed the Court to measure the "magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified," *id.* at 200, the Court considered only the burden on all Indiana voters, which it determined was only "limited," *id.* at 203.[16]

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[16] Defendant cites Justice Scalia's concurrence in *Crawford* that stated "our precedents refute the view that individual impacts are relevant to determining the severity of the burden [the law] imposes." 553 U.S. at 205 (Scalia, J., concurring). Justice Scalia, writing for three Justices, argued that rather than upholding the law on the basis that the record did not show a substantial burden on particular groups of vulnerable voters, the Court should not have taken into account the law's effects on any group but the electorate as a whole, characterizing the lead opinion as endorsing a "case-by-case approach [that] naturally encourages constant litigation." *Id.* at 208. The Sixth Circuit has declined to follow the

Here, as this Court explains below, Plaintiffs have introduced sufficient evidence to show a significant burden on NEOCH's and CCH's members as to the three aspects of the challenged laws.

a. Information Requirements

Plaintiffs NEOCH and CCH argue that the challenged laws will impose a burden on the right to vote of their illiterate and homeless members. The Court agrees. The weight of the evidence presented at trial compels the Court to find that the information requirements impose a significant burden on NEOCH and CCH because many illiterate and homeless voters have difficulties filling out forms correctly, as discussed in the Court's findings of fact in Section III(F)(1). The Court now turns to whether the State's "precise interests" for maintaining the laws are "sufficiently weighty" and "necessary" to justify the burden. *See Obama for Am.*, 697 F.3d at 433.

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concurring opinion's approach. *Obama for Am.*, 697 F.3d at 441 n.7. This approach failed to garner support from a majority of the justices, as it was disfavored by the lead opinion and implicitly by the two dissents, both of which discussed the specific burdens the law would impose on poor, elderly, or disabled voters who would have difficulty procuring transportation to the Bureau of Motor Vehicles or obtaining the documents required to get the free voter ID. *Crawford*, 553 U.S. at 220-22 (Souter, J., dissenting); *id.* at 238-39 (Breyer, J., dissenting).

The Court finds that the State has not offered explanations for the portions of the law disenfranchising voters who fail to conform to the new informational requirements that are sufficiently weighty to justify the significant burden on homeless voters who struggle to fill out the forms completely and accurately. Unlike in several other cases in which courts have scrutinized voting restrictions in Ohio,[17] Defendant has not offered combatting voter fraud as a justification for requiring the additional information, so the integrity of the process is not at issue. Boards are thus rejecting ballots from qualified voters for mere technical mistakes. Significantly, the OAEO did not support this portion of the law. Although otherwise generally supportive of many of the reforms, OAEO did not weigh in on whether the new requirements should cause ballots to be rejected for nonconformance. (Terry Tr., Vol. 11 at 96.) And Defendant's own election administration opinion witness, Dr. Hood, conceded that many of the errors causing ballots to be rejected are "trivial." (Hood Tr., Vol. 10 at 127.) In fact, Dr. Hood stated that the purpose of the five-field requirement was "to positively identify voters, not to disqualify ballots based on inconsequential errors on the part of voters," suggesting that he may not have even understood that ballots would be thrown out for non-

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[17] *See, e.g., NEOCH*, 696 F.3d at 596; *Sandusky Cnty. Democratic Party*, 387 F.3d at 569; *NAACP*, 43 F. Supp. 3d at 844.

conformity with the requirements, much less could he offer a significant state interest in doing so. (Hood Rpt., D-8 at 8 n.15.)

Defendant's justification that the new requirements give Boards more information for identifying and registering voters may be persuasive as a reason to *include* the five fields on the form, but it is unpersuasive as a rationale for *rejecting* ballots with missing or incomplete information. While giving Boards more information can certainly prove helpful for both identification and future registration, (*see, e.g.*, Ward Tr., Vol. 7 at 205, 234), Defendant has failed to prove in any way how disenfranchising voters who fail to conform to the requirements furthers that goal. Board officials have testified that they did not need all five fields to identify voters, and in most cases easily could identify voters before the new date-of-birth and address requirements. (Perlatti Tr., Vol. 2 at 73; Bucaro Tr., Vol. 6 at 41-42; Sauter Tr., Vol. 7 at 127-28) For absentee ballots, it is even easier for the Board to confirm a voter's identity because the identification envelopes in which voters return their absentee ballots have unique bar codes on them which, when returned to the Board, can be used to identify the voter. (Burke Tr., Vol. 2 at 185; Manifold Tr., Vol. 3 at 97-99; Scott Tr., Vol. 6 at 223-24; Damschroder Tr., Vol. 11 at 211.) Moreover, because absentee voters have already provided the information in the five fields when completing their absentee-ballot application, the Board already has this information and it is unnecessary to have all five

fields for identification; one piece of information would suffice. *See* Ohio Rev. Code § 3509.03(A)-(E).

Because they can usually identify the voter with the bar code (for absentee ballots) and one or two fields (for provisional ballots), requiring Boards to spend additional time checking that each of the five fields is filled out completely and accurately before crediting it actually takes additional time for election officials, thus further undermining the State's purported administrative-convenience justification. (Damschroder Tr., Vol. 11 at 203; Burke Tr., Vol. 2 at 191-92.) In the case of absentee ballots, Boards are required to expend even more time and resources because when they receive incomplete or incorrect identification envelopes, rather than simply counting the ballots if they can identify the voters, they must send the Form 11-S notifying voters of the deficiency and giving them an opportunity to cure the errors or omissions. (*Id.* at 192.)

Additionally, there is nothing in the record to show why uniformity, standing alone, is a sufficiently weighty interest to justify the burden on Plaintiffs. And again, even if there is a uniformity interest—which Defendant characterizes as somewhat related to administrative convenience—in standardizing all the required types of absentee and provisional balloting forms, the Secretary offers no justification for why uniformity requires *rejecting* nonconforming ballots.

Finally, the Court finds it significant and telling that Assistant Secretary Damschroder expressed regret for not conducting literacy testing on the forms prior to their issuance for the sole reason that doing so would have avoided litigation. (Damshroder Tr., Vol. 12 at 31.) He prefaced this admission with "I don't intend this answer to sound flip," but irrespective of whether he meant it to be "flip," the answer raises a question about the motivation for this burden on voters' rights. This is the same witness who, just a day earlier, agreed that Defendant should do everything within reason to ensure that qualified voters are able to cast ballots that are counted. (Damschroder Tr., Vol. 11 at 179.) The State's interest in avoiding litigation certainly does not outweigh the burden on NEOCH's and CCH's members, some of our most vulnerable citizens.

Defendant characterizes one of the Sixth Circuit decisions in the related *SEIU* case as closely analogous to the issue of the five-field requirement here. *See NEOCH*, 696 F.3d at 599-600.[18] There, the Sixth Circuit affirmed in part and reversed in part a preliminary injunction granted by this Court, finding that the plaintiffs were unlikely to succeed on the merits of their challenge to the disqualification of deficient provisional ballot affirmation forms because the instructions on the provisional ballot form, which

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[18] The *NEOCH* and *SEIU* cases were consolidated on appeal for purposes of that opinion.

at the time included only fields for name, identification, and signature (with the signature field being optional), were "rather simple." *Id.* The Sixth Circuit faulted this Court's *Anderson-Burdick* analysis as both overstating the burden to voters in compliance with this form and minimizing the "legitimate state interests" in "election oversight and fraud prevention." *Id.* Based on the ample factual record at trial that detailed the obstacles faced by homeless and illiterate or semi-literate voters and the number of rejections for errors in the date-of-birth and address fields on the forms in question, the Court finds that the burden here is far from "minimal" and "unspecified." *See id.* at 600. Moreover, Defendant has not asserted fraud as a justification here and, most importantly, the other state interests, as the Court has explained exhaustively, provide *no* rationale for making the five fields mandatory, much less a "sufficiently weighty" one to "justify the limitation" on Plaintiffs' rights. *Crawford*, 553 U.S. at 191 (quoting *Norman*, 502 U.S. at 288-89). Accordingly, the Court finds that the five-field requirement violates Plaintiffs' equal-protection rights.

b. Prohibition Against Poll-Worker Assistance

The Court finds that prohibiting poll workers from assisting voters unless the voter declares her illiteracy or disability imposes a significant burden on NEOCH and CCH, because as discussed in the Court's findings of fact in Section III(F)(2), many of their members are illiterate, barely literate, or suffering from disability or mental illness, which

limits their ability to complete basic voting-related tasks. The Court then finds lacking the State's justifications for preventing poll workers from assisting voters who do not affirmatively ask for help because they are illiterate or disabled.

Although there is always a risk of poll-worker error, just as there is of voter error, poll workers are trained and certainly more skilled in filling out forms than homeless voters. (*See* Terry Tr., Vol. 11 at 39-40.) Particularly when missing or incomplete information is a problem—for instance, if a voter leaves a field completely blank or writes in a street number without an address—poll workers are much more likely to be able to help a voter than to create an error. And Assistant Secretary Damschroder conceded that he was not aware of any other government workers who are explicitly barred from helping people fill out forms unless they specifically request assistance, which suggests that a restriction like this is not necessary to burden homeless voters' rights, given that many other government agencies also likely have an interest in avoiding creating errors on forms. (Damschroder Tr., Vol. 12 at 30; Clyde Tr., Vol. 1 at 50.) Because Plaintiffs' members require so much assistance—NEOCH fills out forms of all types for its members as a matter of course—the Court concludes that the State's interest in minimizing poll-worker error, although not completely unfounded like some of the other interests it has put forth, does not outweigh the magnitude of the burden in this case. *See Burdick*, 504 U.S. at 434.

c. Reduction of the Cure Period

As discussed in Section III(F)(3), *supra*, NEOCH and CCH represent voters whose means are much more limited than the average voter. They are, for example, less likely to have access to reliable transportation and more likely to suffer from residential instability. As to absentee voters specifically, limiting the cure period would be especially burdensome for voters with low literacy who may need to seek assistance in reading the Form 11-S and filling it out before returning it to the Board. Limiting the window in which they may cure a deficient ballot imposes a significant burden on homeless, impoverished, and illiterate voters. The Court now turns to whether the State's interests are "sufficiently weighty to justify the limitation" on Plaintiffs' rights. *Norman*, 502 U.S. at 288-89.

The reduction of the post-election cure period to seven days does not survive any sort of heightened scrutiny. Of the twenty-one Board officials who testified at trial, not one indicated that he or she had experienced any inconvenience or increased cost during the pre-2014 ten-day cure period, or stated that the county Board needed extra time between the conclusion of the cure period and the start of the canvass to address any particular matters. (*See, e.g.*, Burke Tr., Vol. 2 at 184-85; Terry Tr., Vol. 11 at 88-89.) Senator Seitz, one of the bills' sponsors, told Allen County Board of Elections Director Terry that the reduction was intended to prevent an influx of

voters from coming into the Boards while election officials were preparing to conduct their canvass. (Terry Tr., Vol. 11 at 88.) Terry responded, "[t]hat doesn't happen." (*Id.*) Although the Court heard testimony from several Board officials that the few weeks immediately following the election were quite "busy" (Poland Tr., Vol. 10 at 231), there was no testimony that eliminating the cure period *actually* saves Boards any time or staff resources. And Assistant Secretary Damschroder's testimony that the three additional days gives the Boards time to "get everything ready for the Board to actually vote," or begin the canvass (Damschroder Tr., Vol. 12 at 41), is not substantiated by testimony from any of the actual Board officials who testified at trial, none of whom mentioned any specific tasks that needed to be conducted between the end of the cure period and the beginning of the canvass.

In *Obama for America*, the Sixth Circuit concluded that the State's proffered interest in reducing costs and administrative burdens did not justify the increased burden on voters of eliminating early voting the weekend before the election because there was "no evidence that local boards of elections have struggled to cope with early voting in the past [and] no evidence that they may struggle to do so during the November 2012 election." 697 F.3d at 434. Similarly here, although "the list of responsibilities of the boards of elections is long, . . . the State has shown no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio

since" the ten-day cure period was in place. *Id.* at 432-33. Therefore, the Court finds no evidence that the cure period would benefit the Boards by alleviating their administrative burden in any way.

In sum, the Court finds that the five-field requirement, the prohibition against poll-worker assistance to voters, and the seven-day cure period in both SB 205 and SB 216 violate Plaintiffs' equal-protection rights. The Court **ENTERS JUDGMENT FOR PLAINTIFFS** on this claim.

2. Equal Protection: Disparate Treatment of Election-Day, Provisional, and Absentee Voters

State law and election procedure "must not result in 'arbitrary and disparate treatment' of votes." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 234 (6th Cir. 2011). The Court considers Plaintiffs' equal-protection claim of arbitrary-and-disparate treatment under the Anderson-Burdick framework. *See Obama for Am.*, 697 F.3d at 430; *Jolivette v. Husted*, 694 F.3d 760, 771 (6th Cir. 2012) ("We examine [the plaintiff's] equal-protection challenges to the Ohio statutory framework using the same balancing framework as his First Amendment challenge.").

To prevail on an equal-protection claim, Plaintiffs must show that the government has "treat[ed] differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992); *see also Jolivette*, 694 F.3d at 771 ("[The plaintiff's] equal-protection claims do not get off the ground because independent

candidates and partisan candidates are not similarly situated for purposes of election regulations."). It is possible for voters to be similarly situated in certain relevant respects—and thus an equal-protection claim would lie—even if they are not similarly situated in all respects. For instance, in *Obama for America*, the Sixth Circuit took note of this possibility:

> In many respects, absent military and overseas voters are not similarly situated to Ohio voters. Typically, their absence from the country is the factor that makes them distinct, and this is reflected in the exceptions and special accommodations afforded to these voters under federal and state law. With respect to in-person early voting, however, there is no relevant distinction between the two groups.

697 F.3d at 435.

Here, Plaintiffs asks the Court to find that the State has treated the following types of voters impermissibly: (1) provisional and absentee voters differently than Election Day voters, because Election Day voters are not required to fill out all five fields; (2) certain early-in person absentee voters and all vote-by-mail absentee voters differently than other early in-person absentee voters, by requiring the former two groups to fill out the absentee ballot identification form; and (3) treating wrong-location/wrong-precinct voters differently than right-location/ wrong-precinct voters by rejecting the former group's ballots and counting the latter's. Plaintiffs fail to show any of these groups are

similarly situated and, therefore, this claim fails as a threshold matter. (Doc. 687 at ¶¶ 265-67.)

First, Election Day voters are not similarly situated to either provisional or absentee voters in "all relevant respects." *Nordlinger*, 505 U.S. at 10. Election Day voters show the poll worker their ID and sign the poll book in the presence of the poll worker. (Damschroder Vol. 11 at 120-21.) Vote-by-mail absentee voters, on the other hand, never interact with poll workers. Nor are provisional voters similarly situated, as the reason they are classified as provisional in the first place is that they are unable to cast a regular ballot and additional information may be needed to verify their eligibility. *See* Ohio Rev. Code § 3505.181(A)(1). Moreover, Election Day voters casting a regular ballot do not have the option of providing only their SSN-4 as an ID, as absentee and provisional voters do, a classification that actually cuts against Plaintiffs' argument that provisional and absentee voters are treated disparately. (Davis Tr., Vol. 7 at 68-69.)

Nor are early-in-person voters who vote on DRE machines similarly situated to other absentee voters. Evidence at trial suggests it would be virtually impossible for someone other than the voter who filled out the absentee ballot application to vote on a DRE machine. (Test. of Susan Bloom, Tr., Vol. 1 at 269; Bucaro Tr., Vol. 6 at 67-68.) The same cannot be said for an absentee voter who does not appear in person at the Board. Although Plaintiffs may have a stronger argument that an early in-person voter who votes on a paper ballot is similarly situated to an

early in-person DRE machine voter, Plaintiffs did not adduce evidence at trial to compare the circumstances of these groups of voters and thus the Court does not find that they are similarly situated.

As to wrong-location/wrong-precinct voters, when the related *SEIU* case was previously before the Sixth Circuit on a motion to stay the Court's preliminary injunction, which directed the Secretary to count provisional ballots that were cast at the wrong multi-precinct polling place due to poll-worker error, the Sixth Circuit granted the Secretary's motion for a stay. *Service Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (per curiam). The court found it highly likely that the Secretary would succeed on appeal and relied heavily on the fact that "[w]hile poll-worker error may contribute to the occurrence of wrong-place/wrong-precinct ballots, the burden on these *voters* certainly differs from the burden on right-place/wrong-precinct voters—and likely decreases—because the wrong-place/wrong-precinct voter took affirmative steps to arrive at the wrong polling location." *Id.* at 344. From this ruling the Court concludes that wrong-location/wrong-precinct voters are not similarly situated to right-location/ wrong-precinct voters. The Court **ENTERS JUDGMENT FOR DEFENDANT** on Plaintiffs' arbitrary-and-disparate treatment claim.

3. Equal Protection: Lack of Uniform Standards

Plaintiffs' bring their next equal-protection claim, characterized as a challenge to Ohio's lack of uniform standards, under *Bush v. Gore*, 531 U.S. 98, 121 S.

Ct. 525, 148 L. Ed. 2d 388 (2000). Plaintiffs allege that Boards used different standards and procedures, and arrived at different results, when determining whether to reject or count absentee and provisional ballots with a five-field error or omission in the 2014 and 2015 elections. (Doc. 687 at ¶ 256.)

In *Bush*, the Supreme Court, although explicitly limiting its consideration "to the present circumstances," found that the Florida recount process lacked "adequate statewide standards for determining what is a legal vote, and practical procedures to implement them." 531 U.S. at 109-10. The standard for counting ballots in that recount, as ordered by the Florida Supreme Court, was to consider "the intent of the voter," but the Supreme Court found fault with the "absence of specific standards to ensure [the] equal application" of this principle. *Id.* at 105-06.

The *Bush* Court clarified that its holding did not implicate "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 109. Instead, it suggested that "where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards," that court's remedy must contain "at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* Finding a number of procedural irregularities, such as one county changing its evaluative standards for a valid ballot in the middle of the counting process, *id.* at 106-07, the Florida Supreme Court's failure to specify

who would recount the ballots in each county, *id.* at 109, and the inclusion of partial as well as full recounts in some counties, *id.* at 108, the United States Supreme Court found that the court-ordered recount violated Governor Bush's equal protection rights, *id.* at 110.

Although *Bush* was limited to its facts, the Sixth Circuit has recognized that *Bush* may apply to other situations where the state has failed to establish uniform standards and counties' treatment of voters varies in unreasonable ways. *See League of Women Voters of Ohio*, 548 F.3d at 477-78 (holding that the plaintiffs stated a *Bush v. Gore* claim when they alleged that voting machines were not allocated proportionately, long wait times caused voters to leave their polling places without casting a ballot, poll workers misdirected voters to the wrong polling place, touch-screen voting machines malfunctioned, and disabled voters were turned away from voting). The Sixth Circuit also has recognized that "[c]onstitutional concerns regarding the review of provisional ballots by local boards of elections are especially great" because "the review of provisional ballots occurs after the initial count of regular ballots is known." *Hunter*, 635 F.3d at 235.

Here, the Court finds that the Boards are "exercis[ing] . . . their expertise" in "develop[ing] different systems for implementing elections." *Bush*, 531 U.S. at 109. The standard that allows the Board to decide by a vote of three members whether to count a missing date-of-birth field does not rise to the

level of the standard-less recount in Bush. The Boards are implementing the state's specific standards "for determining what is a legal vote," and the Ohio system does not approach the ambiguous "intent of the voter" Florida standard. *Id.* at 110.

The Court **ENTERS JUDGMENT FOR DEFENDANT** on this claim.

4. Procedural Due Process

Plaintiffs next allege that Defendant has deprived absentee and provisional voters of notice and an opportunity to be heard when their ballots were rejected. Plaintiffs challenge several aspects of SBs 205 and 216 that are relevant to notice and an opportunity to be heard. First, as to absentee voters, Plaintiffs take issue with the fact that the Form 11-S requires voters to be literate and may arrive after the end of the cure period. (Doc. 687 at ¶ 248.) Second, as to provisional voters, Plaintiffs charge that due process is not satisfied because provisional voters receive no pre-deprivation process or opportunity to cure unless their error is lack of identification, and an inadequate pre-deprivation notice and opportunity to cure a missing form of identification. (*Id.* at ¶ 246.)

In *Hunter v. Hamilton County*, another Ohio provisional voting case, a court considered a claim from NEOCH, the ODP, and a judicial candidate that the Hamilton County Board of Elections violated their procedural due process rights when it rejected provisional ballots cast in the wrong precinct without providing voters with notice and an opportunity to be

heard. 850 F. Supp. 2d 795, 846 (S.D. Ohio 2012). After a permanent injunction hearing, Judge Dlott entered judgment for the plaintiffs on their equal-protection claim because the Board, in determining whether provisional ballots were cast in the wrong precinct due to poll-worker error, considered evidence of the location where the ballots were cast for some, but not all, provisional ballots, thereby treating voters disparately. *Id.* at 847. The court ruled for the Board on the plaintiffs' procedural due-process claim, however, explaining as follows:

> This claim fails because, in the Court's view, the harm that Plaintiffs allege is the direct result of the Ohio statutes in question, not the lack of process. Even if the Board had given provisional voters notice and an opportunity to explain the cause of their miscast ballots, Ohio law would have prevented the Board from counting those miscast ballots regardless of the explanation. Ohio law makes clear, as the Ohio Supreme Court held in *Painter*, that provisional ballots cast in the wrong precinct shall not be counted, even where the ballot is miscast due to poll-worker error. . . . Thus, Plaintiffs' proposed post-deprivation remedy is inextricably intertwined with the validity of Ohio's election laws. It would be superfluous for the Court to order the Board to provide provisional voters with notice and an opportunity to be heard if Ohio law prevents the Board from counting miscast ballots regardless of the voter's particular circumstance

Id. at 846-47 (citations and footnote omitted); *see also Davis v. Robert*, No. 15-cv-12076, 2016 U.S. Dist. LEXIS 35910, 2016 WL 1084683, at *4 (E.D. Mich. Mar. 21, 2016) ("It is the statute . . .that has deprived him of access to the document he seeks. . . . [T]he lack of adequate process has caused him no harm.") (citing *Hunter*, 850 F. Supp. 2d at 846-47). Similarly, here, the Court finds that Plaintiffs' harm is caused by the portions of SBs 205 and SB 216 that impose a completion requirement for the five fields, not the lack of process given when a ballot is rejected. Accordingly, the Court **ENTERS JUDGMENT FOR DEFENDANT** on Plaintiffs' procedural due-process claim.

5. Substantive Due Process

Plaintiffs' substantive due-process claim also fails. The Sixth Circuit has held that substantive due process is implicated "in the exceptional case where a state's voting system is fundamentally unfair." *Warf v. Bd. of Elections of Green, Cnty., Ky.*, 619 F.3d 553, 559 (6th Cir. 2010) (finding no due-process violation when a state court voided all 542 absentee ballots cast in an election as tainted). A voting system may be "fundamentally unfair" when "poll-worker error cause[d] thousands of qualified voters to cast wrong-precinct ballots from the correct polling locations," *NEOCH*, 696 F.3d at 597, and the state nevertheless "enforce[d]its strict disqualification rules without exception, despite the systemic poll-worker error identified in this litigation and others," *id.* (affirming this Court's grant of preliminary injunction on the plaintiff's substantive due-process claim). The

evidence before the Court does not reveal that thousands of ballots have been or will be rejected due to poll-worker error or that SB 205 and SB 216 have resulted in "significant disenfranchisement and vote dilution." *Warf*, 619 F.3d at 559 (citing *League of Women Voters of Ohio*, 548 F.3d at 478). The Court, therefore, cannot conclude that Plaintiffs have shown a "fundamentally unfair" voting system. *Id.*

The Court **ENTERS JUDGMENT FOR DEFENDANT** on Plaintiffs' substantive due-process claim.

6. Race Discrimination Under the Fourteenth *and* Fifteenth Amendments

Plaintiffs assert that SB 205 and SB 216 violate the Fourteenth and Fifteenth Amendments because they were enacted with a discriminatory purpose. To prevail on a discriminatory intent claim, a plaintiff need not show that the discriminatory purpose was the sole purpose or even the "dominant" or "primary" one. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). But the plaintiff must show that racial discrimination was "a motivating factor in the decision." *Id.* at 265-66. The discriminatory purpose need not be "express or appear on the face of the statute." *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976). Courts should inquire into both circumstantial and direct evidence of intent to discern whether an invidious discriminatory purpose was a motivating factor. *Arlington Heights*, 429 U.S. at 266.

In *Arlington Heights*, the Supreme Court laid out several evidentiary sources relevant to this inquiry: the historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes"; the "specific sequence of events leading up [to] the challenged decision"; "[d]epartures from the normal procedural sequence" of legislative enactments; and the legislative or administrative history, "especially when there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 266-68. The Supreme Court also stated that in rare cases the law's impact, or whether it "bears more heavily on one race than another," may be probative, but only when "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Id.* at 266 (internal quotation marks omitted). Recognizing that "discriminatory intent is so difficult to prove by direct evidence, it is incumbent on a sensitive decisionmaker to analyze all of the surrounding facts and circumstances to see if discriminatory intent can be reasonably inferred." *Grano v. Dep't of Dev. of Columbus*, 637 F.2d 1073, 1081 n.7 (6th Cir. 1980) (citing *Arlington Heights*, 429 U.S. at 252).

Having examined all of the surrounding facts and circumstances to the passage of the challenged laws, the Court cannot reasonably infer discriminatory intent. Plaintiffs ask the Court to infer such intent

from the lead-up to the passage of SBs 205 and 216—namely, the multitude of proposed legislation in the previous legislative session which aimed to restrict voting rights—and the legislative history and debate surrounding the passage of SBs 205 and 216. No House or Senate representatives who voted in favor of the bill testified at trial, so the Plaintiffs ask the Court to find this discriminatory intent based mostly on the testimony of Representative Kathleen Clyde and former-Senator Nina Turner, Democrats and opponents of the challenged laws.

This is not the "rare" case described in *Arlington Heights*, where "a clear pattern, unexplainable on grounds other than race," requires a conclusion of discriminatory intent absent any other evidence of such intent. 429 U.S. at 266; *see Gomillion v. Lightfoot*, 364 U.S. 339, 341-42, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960) (finding that plaintiff had stated a race-discrimination claim when the city of Tuskegee redrew its boundaries to remove from the city all but four or five of 400 African-American voters while not removing a single white voter). The Court turns, therefore, to the remaining *Arlington Heights* factors. Although the Court agrees, based on its discussion above regarding the Senate factors, that there is a history of discrimination surrounding voting in Ohio, particularly with regard to the 2004 election, the evidence Plaintiffs presented at trial does not show that the legislature departed from its normal procedural practices in passing the challenged laws or that the legislative drafting history weighs in favor of a finding of discriminatory purpose.

First, the procedural lead-up to the passage of this bill was not highly unusual. Although it may have been rare for only a few supporters to testify in favor of the bills in committee, or for no data or studies to demonstrate the need for the bills, this does not counsel a finding of discriminatory intent. Likewise, the fact that Democratic amendments to the bills were defeated, although revelatory of a highly polarized and partisan legislative session, is not evidence of racial discrimination. *See Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 369-70 (6th Cir. 2002) (noting that allegations of speedy passage of legislation, failure to analyze relevant information before voting on the legislation, reliance on tenuous justifications, and rejection of certain amendments "indicate a general dissatisfaction with the legislative process that preceded the enactment of the [challenged law]" but were not evidence of discriminatory intent). The timelines for debate and passage through the House of Representatives, approximately four or five months, was also not unusual.

Second, although Representative Clyde and Senator Turner testified that they and other Democrats in the legislature raised concerns that the bills would have a disproportionate impact on African-American voters, the only testimony in the record regarding comments about race by a member of the legislature is Representative Clyde's description of Representative Huffman's statement during committee debate, in which he asked: "[S]hould we really be making it easier for those people who take the bus after church on Sunday to vote," which was a

reference to African-American voters. (Clyde Tr., Vol. 1 at 82-83.) Given that *Arlington Heights* endorses the use of circumstantial as well as direct evidence, there is no bright-line rule that the record must demonstrate the racial animus of a certain number of legislators in order to justify a finding of discriminatory intent. *See* 429 U.S. at 266. But on this record, with its scarce evidence in support of the other *Arlington Heights* factors, the Court concludes that Representative Huffman's discriminatory intent—while patent on its face—cannot be imputed to the majority of the legislative body, which voted for passage of the bills.

Nor does evidence of Doug Preisse's statement and the billboard erected by a non-legislator, both of which the Court finds reprehensible, particularly given the history of racial discrimination in Ohio, allow the Court to strike down SBs 205 and 216 based on discriminatory motives of the legislature. (*See* Clyde Tr., Vol. 1 at 40; Turner Tr., Vol. 6 at 142, 257.)

Make no mistake: the Court is deeply troubled by the flurry of voting-related legislation introduced during the time period in question, all of which sought to limit the precious right to the franchise in some manner, and most of which was a peripatetic solution in search of a problem. The Court agrees, moreover, that the Republican-controlled General Assembly's frenetic pace of introducing such legislation reflects questionable motives, given the wealth of other problems facing the state which actually needed solutions. If the dog whistles in the General

Assembly continue to get louder, courts considering future challenges to voting restrictions in Ohio may very well find that intentional discrimination is afoot. But when applying all of the *Arlington Heights* factors to the record before it today, the Court cannot infer that the General Assembly acted with racially discriminatory intent in the passage of SBs 205 and 216.

The Court **ENTERS JUDGMENT FOR DEFENDANT** on the intentional-discrimination claim.

7. Viewpoint Discrimination

Plaintiffs cast their final constitutional claim as one of voter viewpoint discrimination under the First Amendment and the Equal Protection Clause. They contend that the challenged laws intentionally discriminate against voters who support the Democratic Party, as evidenced by the intent of the legislature in enacting the laws as well as various actions and omissions of Defendant Husted including: failing to investigate discrimination against Democratic voters, ignoring objections and pleas for intervention from Democratic representatives, firing Democratic members of the Boards of Elections, and issuing directives intended to disenfranchise Democratic voters. (Doc. 687 at ¶ 277-81.)

Defendant cites to Supreme Court precedent that "if a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may

have provided one motivation for the votes of individual legislators." *Crawford*, 553 U.S. at 204. But here Plaintiffs contend that the laws, although facially nondiscriminatory, were, in fact, enacted for a viewpoint-discriminatory purpose and are enforced as such, and they urge the Court to enjoin the laws in question because they burden voters based on the political party they support, which constitutes impermissible viewpoint discrimination under the First Amendment.

The Supreme Court has recognized that it is constitutionally impermissible to "'[f]enc[e] out' from the franchise a sector of the population because of the way they may vote." *Carrington v. Rash*, 380 U.S. 89, 94, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965). In *Vieth v. Jubelirer*, with Justice Scalia writing for a four-judge plurality, the Supreme Court held that "neither Article I, § 2, nor the Equal Protection Clause, nor (what appellants only fleetingly invoke) Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S. 267, 305, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004). Concurring in the judgment, Justice Kennedy wrote that in his view the arguments for finding cases of partisan gerrymandering nonjusticiable "are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander." *Id.* at 309 (Kennedy, J., concurring). Justice Kennedy noted that a statute which declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation,

though still in accord with one-person, one-vote principles" would undoubtedly be held unconstitutional. *Id.* at 312. Justice Kennedy further mused that:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.

Id. at 314 (citing *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)). If a court found that a state "did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the state shows some compelling interest." *Id.* at 315. Justice Kennedy cautioned, however, that courts should be wary in "adopting a standard that turns on whether the partisan interests in the redistricting process were excessive. Excessiveness is not easily determined." *Id.* at 316.

Here, Plaintiffs essentially propose that the Court apply such a First Amendment standard, although they cite to no other court that has done so. *See OOC*, slip op. at 118 (noting that no courts have recognized a cause of action based on the concurrence in *Vieth*). They argue that there is sufficient evidence to justify the searching review required by strict scrutiny because a discriminatory purpose behind the laws

belies their facial neutrality. Even if the Court adopts Plaintiffs' standard, however, Plaintiffs have not put forth sufficient evidence of the General Assembly's impermissible motive. As the Court acknowledged when entering judgment for Defendant on Plaintiffs' claim of intentional race discrimination, the racist comments of one state legislator, coupled with the introduction of other bills limiting voting rights and a refusal to consider Democratic amendments, come just short of a finding of intentional discrimination. Therefore, even if the Court could identify a workable standard in this type of case to determine whether the legislature has engaged in viewpoint discrimination, the Court's factual findings compel a contrary conclusion on the first-order question. Put simply, although "partisan interests may have provided one motivation for the votes of individual legislators," *Crawford*, 553 U.S. at 204, there is insufficient evidence before the Court to show that the Ohio General Assembly passed these laws with any more of an impermissible objective than the Indiana legislature that passed the voter-ID statute in *Crawford*. The Court **ENTERS JUDGMENT FOR DEFENDANT** on Plaintiffs' viewpoint-discrimination claim.

C. Voting Rights Act Claims

1. Section 2

Section 2 of the Voting Rights Act provides, in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

52 U.S.C. § 10301.

The Supreme Court has instructed that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403, 111 S. Ct. 2354, 115 L. Ed. 2d 348 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969)). After the 1982 amendments to the VRA, proof of intentional discrimination is not required for a plaintiff to prevail on a Section 2 claim. *Id.* at 394 n.21; *Moore*, 293 F.3d at 363. In vote-denial cases like this one, courts conduct a two-part analysis under the "results test"

of § 10301(b). *OOC*, slip op. at 95; *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014). First, a court determines whether a practice or procedure has a disparate impact on a minority group. *See Gingles*, 478 U.S. at 44 ("The 'right' question . . . is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice . . . . In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'") (internal citations omitted). Second, if it finds disparate impact, the court assesses whether the "electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47. In applying the results test, the Court considers "the totality of circumstances." 52 U.S.C. § 10301(b).

Defendant argues that Plaintiffs have failed to prove that the challenged laws harm African-Americans' right to vote, that the laws cause the right to vote to be denied, and that African-Americans lack meaningful access to the polls on account of race. (Doc. 686 at ¶ 232.) Essentially, Defendant's first argument relates to the Court's inquiry regarding disparate impact, and the second and third go to the Court's assessment of whether the challenged laws interact with social and historical conditions in Ohio to create an inequality in the ability of African-

American voters to participate in the democratic process as compared to whites.

a. SB 205 and SB 216 Have a Disparate Impact on African-Americans

The evidence shows that SB 205 and SB 216 have a disproportionate impact on African-American voters in Ohio, creating greater risk of disenfranchisement of African-Americans than whites. The burdens imposed on voters by the five-field requirement, the prohibition on pollworker assistance, and the reduced cure period fall more heavily on African-Americans than whites.

Dr. Timberlake's data on disparities in provisional and absentee ballot usage and rejection rates reveal that higher minority population share is correlated to higher rates of absentee ballot rejection and provisional ballot usage and rejection. Although Dr. Hood, and implicitly Dr. McCarty, criticized Dr. Timberlake's analysis for relying on county-level rather than precinct-level data, and Dr. McCarty criticized the analysis for not controlling for enough other factors that could explain the disparities, the Court concludes that since Dr. Timberlake's multivariable regression analysis accounted for a variety of key factors besides race that were likely to explain disparities in rejection rates (including the median age, income, and educational attainment of the white voters in those counties as well as the urbanicity of the counties), Dr. Timberlake's data yield convincing evidence that restrictions on absentee and provisional balloting leads to higher

rejection rates of minority voters' provisional and absentee ballots.

In particular, as noted above in its findings of fact, the Court credits Dr. Timberlake's findings that: (1) in the presidential election years of 2008 and 2012, where minority turnout was higher than during typical midterm elections, minorities' absentee ballots were rejected at a higher rate than whites'; (2) in 2008, 2010, 2012, and 2014, minorities cast provisional ballots at a higher rate than whites;[19] and (3) in 2008, 2010, and 2012, minorities had higher rates of rejection of provisional ballots than whites. The State makes much of the fact that the 2014 election did not reveal the same relationship between rates of provisional-ballot rejections and minority population share, asking the Court to draw the conclusion that the challenged laws were actually having the effect of *decreasing* provisional ballot rejections. But Plaintiffs presented evidence that the gubernatorial election was significantly less competitive in 2014 than in 2010, that overall turnout was lower in 2014 than 2010, and that overall provisional ballot rejections increased in 2015. It is premature, therefore, to conclude that overall provisional ballot rejection rates are decreasing or that African-American voters' provisional ballot

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[19] This finding is also corroborated by studies upon which Dr. Timberlake relied that showed that African-American voters use provisional ballots at a higher rate than white voters nationwide. (*See* Timberlake Rebuttal Rpt., P-1195 at PTF-243.)

rejection rates are decreasing. And in presidential election years in particular, the evidence strongly suggests that provisional ballot and absentee ballot rejections fall disproportionately on African-American voters.

Defendant's argument that Plaintiffs have failed to show harm because they cannot identify an objective benchmark against which to assess the burdens of the challenged laws on African-American voters is unpersuasive. Essentially, Defendant charges that Plaintiffs sought to use Ohio's pre-2014 election procedures as a benchmark, which improperly grafts a retrogression analysis—the inquiry for a Section 5 claim—onto a Section 2 claim.

The "purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 47 L. Ed. 2d 629 (1976). In contrast, Section 2 has a "broader mandate" of barring all states and their political subdivisions from "maintaining any voting 'standard, practice or procedure' that 'results in a denial or abridgment of the right . . . to vote on account of race or color.'" *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997) ("*Bossier I*") (quoting 52 U.S.C. § 10301(a)). The Supreme Court has held that a benchmark is nevertheless required for Section 2 claims, noting that in the context of vote-dilution cases:

> It makes no sense to suggest that a voting practice "abridges" the right to vote without some baseline with which to compare the practice. In § 5 preclearance proceedings—which uniquely deal only and specifically with changes in voting procedures—the baseline is the status quo that is proposed to be changed . . . . In § 2 . . . proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative.

Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334, 120 S. Ct. 866, 145 L. Ed. 2d 845 (2000) ("*Bossier II*").

In contrast to the Section 2 *vote dilution* cases such as those where the Supreme Court has addressed the benchmark requirement, however, the "hypothetical" benchmark here is more straightforward. *See, e.g., Bossier II*, 528 U.S. at 334; *Holder v. Hall*, 512 U.S. 874, 884, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994) (plurality opinion) ("[W]ith some voting practices, there in fact may be no appropriate benchmark to determine if an existing voting practice is dilutive under § 2."). This Court's relevant inquiry is whether African-American voters "have less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b); *see also OOC*, slip op. at 97 ("[T]he relevant benchmark is inherently built into § 2 claims and is whether members of the minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice."). The benchmark, accordingly, is simply the

ability of other groups of voters to participate in the political process compared to African-Americans' ability to do so.[20] The Court concludes for the reasons stated above that Dr. Timberlake's multivariable regression analysis provides convincing evidence that because of the passage of the challenged laws, African-American voters are more likely than white voters to have their absentee or provisional ballots rejected.[21]

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[20] Defendant repeatedly attempts to compare Ohio's voting practices with respect to provisional and absentee balloting to those of other states but, as the Supreme Court made clear in *Gingles*, a court's Section 2 analysis is "an intensely local appraisal of the design and impact of" election administration "in the light of past and present reality, political and otherwise." 478 U.S. at 78 (quoting *White v. Regester*, 412 U.S. 755, 769-70, 93 S. Ct. 2332, 37 L. Ed. 2d 314 (1973)); *see also League of Women Voters of N.C.*, 769 F.3d at 243 ("Section 2 . . . is local in nature."); *OOC*, slip op. at 97 (considering challenged statutes "as they are now, wholly within the State of Ohio (rather than comparing Ohio across other states)").

[21] To the extent Defendant argues that past voting practices have no relevance to the Section 2 analysis, he is mistaken. On its face, Section 2 requires a broad "totality of circumstances" review. 52 U.S.C. § 10301(b). There is no doubt that to analyze the totality of the circumstances requires attention to past practices, and neither the Supreme Court nor the Sixth Circuit has held that such an inquiry is

Having found that Plaintiffs have shown that SB 205 and SB 216 have a disproportionate impact on African-Americans, the Court turns to the second part of the Section 2 results standard.

b. SB 205 and SB 216 Combine with the Effects of Past Discrimination to Interfere with the Voting Power of African-Americans

The second part of the results test[22] requires "a

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improper. *See League of Women Voters of N.C.*, 769 F.3d at 241 ("Clearly, an eye toward past practices is part and parcel of the totality of the circumstances."); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1325 (10th Cir. 1996) (quoting from the legislative history of the 1982 amendments to Section 2 that "[i]f [a challenged] procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact") (quoting 1982 U.S.C.C.A.N. at 207, n.117). Further, as the Fourth Circuit noted in *League of Women Voters*, the Supreme Court has acknowledged that some parts of the Section 2 and Section 5 inquiries "may overlap," 769 F.3d at 241 (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 478, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003)). Moreover, "[b]oth Section 2 and Section 5 invite comparison by using the term 'abridge[ ].'" *Id. Compare* 52 U.S.C. § 10304(a) *and* 52 U.S.C. § 10301(a)).

[22] Courts have interpreted this second part of the test as a requirement for a "causal connection between the challenged electoral practice and the alleged

searching practical evaluation of the past and present reality" and a "'functional' view of the political process" to determine whether the challenged laws diminish voting opportunities for African-American Ohioans. *Gingles*, 478 U.S. at 45. The Senate Judiciary Report accompanying the 1982 bill that amended Section 2 describes the "typical factors" that

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discrimination that results in a denial or abridgement of the right to vote." *Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310 (3d Cir. 1994); *see also Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to *cause* an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.") (emphasis added); *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986) ("[A] showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act. Rather, such a showing merely directs the court's inquiry into the interaction of the challenged legislation with those historical, social and political factors generally probative of dilution.") (internal quotation marks and citation omitted); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (finding no causal link between a system of appointing school board members and African-American underrepresentation because there was evidence that African-American residents were not seeking school board seats in numbers commensurate with their share of the population).

may be probative of a Section 2 violation, which the Supreme Court adopted in *Gingles*, 478 U.S. at 36.

The *Gingles*/Senate factors include: (1) a history of official discrimination that affected the right of members of a minority group to register, vote, or otherwise participate in the democratic process; (2) the extent to which voting is racially polarized; (3) the extent to which the state has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination; (4) denial of access to a candidate slating process; (5) the extent to which members of the minority group bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office; (8) whether there is significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (9) whether the policy underlying the state's use of the voting qualification, prerequisite to voting, or practice or procedure is tenuous. *Id.* at 36-37. The plaintiff need not prove "any particular number of factors . . . [nor] that a majority of them point one way or the other." *Id.* at 45 (citation and internal quotation marks omitted).

Although the Senate Report indicated that "the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims," and the claim at issue in *Gingles* itself was a vote-dilution claim, neither the Report nor the *Gingles* Court suggested that the factors should be considered *only* in vote-dilution cases.[23] *See Gingles*, 478 U.S. at 45. Several circuits have expressly adopted the Senate factors to analyze vote-denial claims. *See, e.g., League of Women Voters of N.C.*, 769 F.3d at 239-40; *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005) (en banc); *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 (9th Cir. 1997). Moreover, "the principles that make vote dilution objectionable under the Voting Rights Act logically extend to vote denial" and "[v]ote denial is simply a more extreme form of the same pernicious violation" of vote dilution. *League of Women Voters of N.C.*, 769 F.3d at 239.

The Court finds that all the Senate factors except the fourth weigh in favor of a finding that SBs 205 and 216 interact with social and historical conditions to decrease African-Americans' access to the electoral process.

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[23] In their proposed findings of fact and conclusions of law, Defendant obliquely suggests that the Senate factors are not useful in the vote-denial, as opposed to the vote-dilution, context and thus the Court has chosen to address this argument. (Doc. 686 at ¶ 237.)

Factor One: History of Official Discrimination. The evidence at trial showed that Ohio has a long history of official discrimination against African-American voters, as another court in this district recently concluded. *See OOC*, slip op. at 102 ("Plaintiffs have provided evidence that Ohio had facially discriminatory voting laws between 1802 and 1923."). Also relevant here, however, is recent discrimination against African-American voters, including the unequal allocation of voting machines in the 2004 election that led to hours-long waits for voters in predominantly African-American urban neighborhoods, as well as repeated attempts by the General Assembly—some of which passed, others that did not or were blocked by the courts—to roll back election administration changes made after 2004 that expanded voting opportunities. *See, e.g., Obama for Am.*, 697 F.3d at 425; *NAACP v. Husted*, 43 F. Supp. 3d 808 (S.D. Ohio 2014), *vacated by* 2014 U.S. App. LEXIS 24472, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). (Clyde Tr. Vol. 1 at 55, 57, 60-61.) This recent onslaught of attempts to limit voter registration and turnout, coupled with the numerous earlier laws on the books that Ohio used to disenfranchise African-Americans, suggests that the disparate impact is linked to social and historical conditions of discrimination against African-American voters.

Factor Two: Racially Polarized Voting. African-Americans tend to vote overwhelmingly for Democratic candidates and the majority of whites in most parts of the state vote for Republicans. This

pattern holds true across different races and election cycles and indicates stark polarization. *See also NAACP*, 43 F. Supp. 3d at 849 (noting the "polarized nature of recent elections in Ohio"); *United States v. City of Euclid*, 580 F. Supp. 2d 584, 607 (N.D. Ohio 2008) (finding that the City of Euclid had a pattern of racially polarized voting where "racial bloc voting occurred in seven of the eight elections since 1995 involving African-American candidates").

Factor Three: *Voting Practices that Enhance the Opportunity for Discrimination*. Like the first factor, this factor weighs in favor of a finding of discriminatory result. As noted above, of particular concern to the Court is that after the expansion of early voting opportunities following the disastrous 2004 election—which was plagued by long lines in predominantly African-American precincts—the Ohio General Assembly has moved so doggedly to roll back the expansion of the franchise. Indeed, two others courts in this district have explicitly found that "minority voters are disproportionately affected by the elimination of those early voting days." *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 906-07 (S.D. Ohio 2012) (noting that the state had submitted no studies or evidence to counter plaintiffs' argument in this regard); *see also OOC*, slip op. at 98.

Factor Five: Effects of Discrimination in Education, Employment, and Health on Political Participation. As discussed at length above, African-Americans have suffered discrimination in housing, education, and health and suffer from higher poverty rates, acute residential segregation, and lower educational

attainment. These socioeconomic disparities have undoubtedly hindered their ability to participate in the political process. Inflexible hourly-wage jobs, health problems, and limited access to transportation also make it logistically more difficult to show up to vote. *See OOC*, slip op. at 104 ("[African Americans] are more likely to be transient than whites and are more likely than whites to rely on public transportation. The Court finds this discrimination hinders African Americans' ability to participate effectively in the political process."). Lower educational attainment also poses challenges in navigating the registration and voting process. *See City of Euclid*, 580 F. Supp. 2d at 609 ("[T]he social science literature on voter participation makes clear that educational achievement is strongly and directly correlated with voter registration and turnout."). This factor weighs strongly in favor of a finding of discriminatory results.

Factor Six: Overt or Subtle Racial Appeals in Campaigns. From an email from a top Republican Party official denigrating the "urban—read African-American—voter turnout machine" to racist appeals like the "Obama phone lady" ad, Ohio has seen both overt and subtle racial appeals in campaigns over the last several years. Moreover, the targeting of minority communities for anti-voter fraud efforts, including with billboards, is an indication that voter suppression tactics have not disappeared but are now merely cloaked in ostensibly race-neutral language. Old dogs, it seems, *can* learn new tricks.

Factor Seven: Proportional Representation. Although African-American candidates have won elected office in recent years at the local level (and in Ohio's delegation to the United States House of Representatives) in numbers roughly proportional to their percentage of the state's population, they have not enjoyed similar success at the state level or in districts where the electorate is predominantly white. Due to the lack of representation on the statewide level, this factor weighs somewhat in favor of finding a discriminatory result.

Factor Eight: Lack of Legislative Responsiveness to Minority Needs. State elected officials have often overlooked the needs of minority constituents. The Court finds that this factor weighs in favor of finding a discriminatory result because the state government has repeatedly and vigorously taken action to roll back the much-needed post-2004 voting reforms that led to an increase in African-American turnout rates, and because the state has also shown a lack of interest in intervention to address many of the longstanding, entrenched problems that plague Ohio's minority communities, including educational inequality and segregation, as well as poverty, infant mortality, and other negative health and economic outcomes. Federal or court intervention has often been required to address these problems.

Factor Nine: Tenuousness. Although the State's purported rationale for the challenged laws is to improve election administration, the Court finds that this rationale is weak. As discussed above, improving election administration and making it easier for

Boards to identify voters does not justify throwing out the ballots of voters whom the Boards *can* and *have* identified. And given Senator Seitz's statement that he hoped SB 216 would help "ratchet back" the post-2004 reforms that expanded electoral opportunities for Ohio voters, especially African-American voters (*see* Timberlake Rpt., P-1194 at PTF-204), the Court finds that the State's justifications are tenuous.

Defendant offers little response to Plaintiffs' evidence regarding the Senate factors. He does contend, however, that Plaintiffs cannot show that African-American voters lack meaningful access to the polls because voter registration and turnout numbers, as introduced through the testimony of Dr. Hood, show that African-American and white voters are currently on equal footing with regard to these important metrics. According to Defendant, then, no matter what historical and social conditions exist, it is impossible to conclude that the challenged laws deny African-Americans the opportunity to participate in the electoral process any less than whites. But this is both an overbroad and under-broad interpretation of the factors. Registration and turnout numbers in presidential election years do not tell the entire story of a group's access to the polls. Additionally, the purpose of the Senate factors is to examine the context of "social and historical conditions" to determine whether they interact with the disparate impact the Court has identified, not to consider turnout rates in isolation. It may be useful to consider turnout and registration rates as one component of the "functional view of the political

process." *Gingles*, 478 U.S. at 45 (internal quotation marks omitted). But other factors enter the Court's consideration when looking at these turnout and registration numbers in context, such as the opportunity to elect (and re-elect) the nation's first African-American President, which may have had a positive effect on registration and turnout numbers among African-American voters in 2008 and 2012.[24]

Moreover, as Dr. McCarty acknowledged at trial, although turnout of voters from all demographic groups is lower in midterm elections than presidential elections, African-American turnout drops more than white turnout in midterm elections. (McCarty Tr., Vol. 8 at 62.)

Because other factors likely had an effect on turnout and registration numbers in the 2008 and 2012 elections, and because other evidence regarding the Senate factors weighs strongly in favor of a finding of discriminatory result, the Court concludes that the challenged laws interact with the effects of discrimination against minority voters to create inequality in the electoral opportunities enjoyed by African-American voters as compared to white voters.

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[24] *See Veasey v. Perry*, 71 F. Supp. 3d 627, 655 (S.D. Tex. 2014), *vacated in part on other grounds by Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016) (noting that Dr. Hood testified in that case that "he linked the 2008 increased voter turnout to the unprecedented Obama campaign").

Gingles, 478 U.S. at 47. When considering the relevant "social and historical conditions" in Ohio, *id.*, the Court finds that this case is a classic example of a Section 2 vote denial claim, akin to the hypothetical that Justice Scalia laid out in *Chisom*:

> If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity "*to participate* in the political process" than whites, and [Section] 2 would therefore be violated . . . .

501 U.S. at 408 (emphasis in original); *see also League of Women Voters of N.C.*, 769 F.3d at 246. The Court finds that the Calculus of Voting, as described by Dr. Timberlake, explains the interaction between the challenged laws and the effects of discrimination against African-Americans. As Dr. Timberlake stated, voters must

> understand the rules that they must follow to register and vote successfully, they must have the time available to register and vote, either in person or by absentee ballot, and in many cases they must have the financial wherewithal to go to the polls. Because of these resource requirements, poor, uneducated, and minority voters are most at risk of not having the capacity to cast ballots.

(Timberlake Rpt., P-1194 at PTF-206.)

Evidence of the fifth Senate factor shows that African-Americans are less likely to own a car or have access to child care, more likely to be employed

in hourly-wage, inflexible jobs, and more likely to suffer health problems. (*Id.* at 168, 179, 185, 188.) African-Americans also move more frequently than whites, and such a move requires a change in voter-registration address under Ohio law. (*Id.* at 173.) Finally, African-Americans have lower levels of educational attainment than whites, and low literacy is correlated to substandard educational opportunities and attainment. (*Id.* at 183-85; Timberlake Tr., Vol. 5 at 73.)

The Court agrees with Dr. Timberlake that these inequalities, rooted in historical discrimination against African-Americans, have "significant and far-reaching" effects with "specific and direct consequences for voting." (Timberlake Rpt., P-1195 at PTF-187.) Because low literacy levels are also correlated with substandard education (Timberlake Tr., Vol. 5 at 73), and the Court has credited Dr. Timberlake's findings that African-Americans suffer from lower educational attainment than whites in Ohio, the Court concludes that African-Americans would also suffer from higher costs associated with the five-field requirement and the prohibition on poll-worker assistance because they would face disproportionately more challenges filling out the forms. Because African-Americans move more frequently than whites, they may be more likely to be forced to vote provisionally. (*Id.* at 67-68; *see also* Hood Tr., Vol. 10 at 121, 124.) They are also more likely to be homeless. (Davis Tr., Vol. 4 at 186.) And because they are more likely to have inflexible schedules or lack access to a car, they are more likely

to be burdened by a shorter cure period for absentee and provisional ballots. (Timberlake Tr., Vol. 5 at 61-62.) All of these effects of discrimination against African-Americans combine to create an inequality in their opportunities to participate in the political process. *Gingles*, 478 U.S. at 47.

The Ohio General Assembly took action after the disastrous 2004 election to expand voters' access to absentee and provisional balloting, and the rollback of these improvements will disproportionately harm African-American voters. Due to the General Assembly's retrenchment and the social and historical conditions affecting African-American Ohioans, SBs 205 and 216 have a discriminatory impact on African-Americans.

SB 205 and SB 216 violate Section 2 of the Voting Rights Act. The Court **ENTERS JUDGMENT FOR PLAINTIFFS** on their Section 2 claim.

2. Materiality Provision

Section 1971 of the Voting Rights Act provides that no person acting under color of law shall "deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). In *McKay v. Thompson*, the Sixth Circuit held that Section 1971 is enforceable only by the Attorney General, not by private citizens.

226 F.3d 752, 756 (6th Cir. 2000). In so stating, the Sixth Circuit cited to the section of the statute that provides that when any person is deprived of a right or privilege to include § 10101(a)(2)(B), "the Attorney General may institute for the United States, or in the name of the United States, a civil action . . . ." 52 U.S.C. § 10101(c). The only other authority the court cited was a case from the Eastern District of Michigan holding that there was no private right of action under the materiality provision. *See Willing v. Lake Orion Cmty. Sch. Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996). The Sixth Circuit offered no explanation for why § 10101(c), which *allows* for an action by the Attorney General, necessarily *bars* a private right of action.

The Eleventh Circuit has subsequently examined this issue in depth and found that a private right of action does exist, reasoning that the Supreme Court has found that other sections of the Voting Rights Act, 42 U.S.C. §§ 1973c and 1973h, could be enforced by a private right of action, even though those sections also explicitly provide for enforcement by the Attorney General but not by individuals. *Schwier v. Cox*, 340 F.3d 1284, 1294-95 (11th Cir. 2003). The Eleventh Circuit also relied on legislative history during the debate over whether to add the provision giving the Attorney General the power to bring a civil suit, before which time individual plaintiffs could and did enforce the provisions of Section 1971 under Section 1983, namely that the House Judiciary Committee stated that the bill's purpose was "to

provide means of *further* securing and protecting the civil rights of persons." *Id.* at 1295.

Plaintiffs have indicated that they seek to challenge the holding of *McKay* on appeal, but regardless of the thorough reasoning in *Schwier*, this Court remains bound by McKay and finds that Plaintiffs lack standing to bring a claim under the materiality provision of the VRA. The Court **ENTERS JUDGMENT FOR DEFENDANT** on this claim.

3. Literacy Test

Section 1973aa of the Voting Rights Act provides that no citizen shall be denied the right to vote "because of his failure to comply with any test or device." 52 U.S.C. § 10501(a). The statute defines "test or device" as:

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Id. § 10501(b).

As a threshold matter, Defendant contends that because the Sixth Circuit has found that Congress did not create a private right of action under Section

1971 of the VRA, *see McKay*, 226 F.3d at 756, an issue on which there is a circuit split, *see Schwier*, 340 F.3d at 1296, there is likewise no private right of action under Section 1973aa. Defendant points to 52 U.S.C. § 10504, which provides that "[w]henever the Attorney General has reason to believe that a State or political subdivision . . . has enacted or is seeking to administer any test or device as a prerequisitive to voting . . . he may institute for the United States, or in the name of the United States, an action in a district court of the United States . . . ." This section, the Secretary asserts, closely mirrors the language of the statute that the Sixth Circuit held to prohibit a private right of action to enforce the materiality provision of the VRA.

But the Court has found no case, in the Sixth Circuit or elsewhere, squarely holding that there is no private right of action under Section 1973aa, and numerous courts have found standing under this section of the VRA either explicitly or implicitly. *See, e.g., Greater Birmingham Ministries v. State*, No. 2:15-cv-2193, 161 F. Supp. 3d 1104, 2016 U.S. Dist. LEXIS 18891, 2016 WL 627709, at *7 (N.D. Ala. Feb. 17, 2016); *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1215 (S.D. Fla. 2006). *But see Jennerjahn v. City of Los Angeles*, No. 15-cv-263, 2015 U.S. Dist. LEXIS 117283, 2015 WL 5138671, at *5 (C.D. Cal. July 27, 2015) (dismissing complaint for failure to state a claim but also stating that "[Plaintiff] should consider whether the ordinance falls within the statutory definition of a 'test or device' and whether he has authority to sue for any such violation").

Further, the Supreme Court has read an implied private right of action into other sections of the VRA, including the prohibition against poll taxes under 52 U.S.C. § 10306, *see Morse v. Republican Party of Va.*, 517 U.S. 186, 233-34, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996) (plurality opinion), and *id.* at 240 (Breyer, J., concurring) (agreeing with plurality opinion that a private right of action lies under § 10306), and the provision allowing for declaratory judgments that a new state enactment is subject to the preclearance requirements of Section 5 of the Act under 52 U.S.C. § 10304, *see Allen v. State Bd. of Elections*, 393 U.S. 544, 560, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). In light of these sections of the VRA, which contain similar language empowering the Attorney General to bring suit, the Court concludes that a private right of action also lies under Section 1973aa, and Plaintiffs thus have standing to bring their literacy-test claim.

That said, the Court concludes that the challenged laws do not violate Section 1973aa of the VRA. Requiring voters to fill out absentee and provisional ballot forms with their birth date and address does not constitute a requirement to "comply with [a] test or device." 52 U.S.C. § 10501(a). Although Plaintiffs object that filling out the form requires illiterate or semi-literate voters to demonstrate "the ability to read, write, understand, or interpret any matter," *id.* § 10501(b), other plaintiffs have used the statute to vindicate their rights when required to read very complex forms or forms written only in a language they do not speak. *See, e.g., Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir.

1973) (upholding a preliminary injunction requiring election commissioners to provide voting assistance in Spanish to Spanish-speaking voters).

Moreover, although the Court has discussed the difficulties homeless and illiterate voters face in filling out forms in the context of the *Anderson-Burdick* burden analysis, the Court is not persuaded that a plaintiff can prevail on a VRA literacy-test claim when a state statute explicitly provides for assistance to illiterate voters, as the Ohio Revised Code does. *See* Ohio Rev. Code § 3505.24; Ohio Rev. Code § 3505.181(F). *See also Diaz*, 435 F. Supp. 2d at 1215 (holding that a requirement that voters check a box reading "I affirm that I have not been adjudicated mentally incapacitated with respect to voting or, if I have, my competency has been restored," did not violate Section 1973aa because "applicants are free to request and receive (and others free to offer and provide) assistance in completing the application"). *Cf. United States v. Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966) (invalidating a state law prohibiting illiterate voters from receiving assistance at the polls); *United States v. Mississippi*, 256 F. Supp. 344, 348 (S.D. Miss. 1966) (requiring state to provide assistance to illiterate voters).

Although Plaintiffs point to testimony from the House Report on the VRA, they offer no response to Defendant's argument that literacy is not a requirement of the challenged laws because Ohio law allows for assistance to illiterate or blind voters.

Because Ohio law so allows, Plaintiffs' claim must fail. The Court **ENTERS JUDGMENT FOR DEFENDANT** on the Section 1973aa claim.

V. CONCLUSION

The Court enters **JUDGMENT** for Plaintiffs on their Fourteenth Amendment undue burden claim and Section 2 VRA claim. The Court enters **JUDGMENT** for Defendant on all other claims.

Accordingly, the Court **PERMANENTLY ENJOINS** the enforcement of the amendments from SB 205 and SB 216 to the Ohio Revised Code as follows:

Ohio Revised Code §§ 3509.06 and 3509.07 are enjoined to the extent they require full and accurate completion of absentee-ballot identification envelopes before an otherwise qualified elector's ballot may be counted;

Ohio Revised Code §§ 3509.06 and 3509.07 are enjoined to the extent they provide for only seven days for voters to correct absentee-ballot identification envelopes, and the ten-day period provided by Secretary of State directive is restored;

Ohio Revised Code §§ 3505.181, 3505.182, and 3505.183 are enjoined to the extent they require full and accurate completion of provisional-ballot affirmation forms, and require a printed name, before an otherwise qualified elector's ballot may be counted;

Ohio Revised Code §§ 3505.181, 3505.182, and 3505.183 are enjoined to the extent they provide for only seven days for voters to correct provisional-ballot affirmation forms rather than ten days;

Ohio Revised Code §§ 3509.03, 3509.04. and 3505.181(F) are enjoined to the extent they prohibit poll workers from completing voters' absentee or provisional ballot forms unless voters provide a specific reason for seeking assistance.

IT IS SO ORDERED.

/s/ Algenon L. Marbley

ALGENON L. MARBLEY

UNITED STATES DISTRICT JUDGE

DATED: June 7, 2016

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 16-3603/3691

NORTHEAST OHIO COALITION FOR THE HOMELESS; COLUMBUS COALITION FOR THE HOMELESS; OHIO DEMOCRATIC PARTY,
Plaintiffs-Appellees/Cross-Appellants,

v.

JON HUSTED, in his official capacity as Secretary of the State of Ohio,
Defendant-Appellant/Cross-Appellee,

and

STATE OF OHIO,
Intervenor-Appellant/Cross-Appellee.

BUCKEYE INSTITUTE; JUDICIAL EDUCATION PROJECT,
Amici Supporting Defendants-Appellants/Cross-Appellees.

Appeal from the United States District Court for the Southern District of Ohio, at Columbus. Algenon L. Marbley, District Judge. (2:06-cv-00896)

Before KEITH, BOGGS, and ROGERS, Circuit Judges, delivered a dissent to the denial of rehearing en banc in which MOORE, CLAY, WHITE, STRANCH, and DONALD, J.J., joined. DONALD, J., delivered a dissent to the denial of rehearing en banc in which COLE, C.J., MOORE, Clay, and STRANCH, J.J., joined.

ORDER*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision on the cases. The petition then was circulated to the full court.** Less than a majority of the judges voted in favor of rehearing en banc.

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* This order was originally issued as an unpublished order on October 6, 2016. On October 13, 2016 the court designated the order—with the separate writings contemporaneously attached—as one recommended for full-text publication. October 6, 2016, Filed

** Judge Batchelder denies the motion for her recusal.

Therefore, the petition is denied. Judge Keith would grant rehearing for the reasons stated in his dissent. Separate writings will follow, and the mandate will issue no later than October 13, 2016.

Dissent by: COLE, Donald; Chief Judge, dissenting from denial of rehearing en banc.

Overview

I dissent from the denial of rehearing en banc for four reasons. First, the majority ignores many of the district court's well-supported factual findings. Not only does such review disregard the clear-error standard, it undermines the court's distinct role in weighing evidence and making credibility determinations. Second, the majority's analysis under the Voting Rights Act conflicts with the text of Section 2, and hence contradicts prior decisions by our circuit and other circuits that have considered comparable voting restrictions. Third, the majority misapprehends fundamental tenets of the Voting Rights Act in a manner that would deprive the most vulnerable citizens of the right to vote. As such, the majority overlooks the Act's objective. Fourth, the majority's review under the Equal Protection Clause creates an unsupportable model for discerning whether the state has impinged on a fundamental right.

I. Disregard of Clear-Error Standard and Undermining of the District Court's Role

As Judge Keith articulates in his compelling and persuasive dissent, our precedent required that the district court's factual findings be reviewed for clear error. "Under the clear-error standard, we abide by the court's findings of fact unless the record leaves us with the definite and firm conviction that a mistake has been committed." *United States v. Yancy*, 725 F.3d 596, 598 (6th Cir. 2013) (internal quotation marks omitted). In other words, "[i]f the district court's account of the evidence is plausible in light of the entire record, this court may not reverse . . . even if convinced that, had it been sitting as trier of fact, it would have weighed the evidence differently." *T. Marzetti Co. v. Roskam Baking Co.*, 680 F.3d 629, 633 (6th Cir. 2012) (internal quotation marks omitted).

This case involves a particularly exhaustive record following a twelve-day bench trial. The district court heard the testimony and observed the demeanor of numerous lay and expert witnesses, including the Assistant Secretary of State, over twenty board of election officials, a tenured sociology professor, and the Executive Director of plaintiff Northeast Ohio Coalition for the Homeless ("NEOCH"). After carefully considering voluminous evidence, Judge Algenon Marbley set forth his factual findings and legal conclusions in a detailed fifty-five-page opinion, taking care to explain the competency and credibility of the witnesses on which he relied. *See e.g., Northeast Ohio Coalition for the Homeless v. Husted*, No. 2:06-CV-896, 2016 U.S. Dist. LEXIS 74121, 2016

WL 3166251, at *22 (S.D. Ohio June 7, 2016) ("Dist. Op.").

Despite the high threshold for discounting the district court's judgment, the district court's clear reference to the evidence supporting its factual findings, and the majority's acknowledgment that clear error is the controlling standard, the majority repeatedly turns a blind eye to well-supported factual findings in this case. *Northeast Ohio Coalition for the Homeless v. Husted*, Nos. 16-3603/3691, 2016 U.S. App. LEXIS 16769, 2016 WL 4761326, at *7 (6th Cir. Sept. 13, 2016) ("Maj. Op."). For example, the majority determines that SB 205's perfection requirement does not violate the Voting Rights Act based on the lack of evidence that minority voters are: 1) more likely than white voters to cast absentee ballots and 2) less likely to correctly complete their ID envelopes. 2016 U.S. App. LEXIS 16769, at *8. Yet the district court found that African-American voters have been more likely to have their absentee ballots rejected, 2016 U.S. Dist. LEXIS 74121, at *48, and that NEOCH members, the majority of whom are African-American, have had difficulty completing their envelopes. *See* 2016 U.S. App. LEXIS 16769, at *7, *17-18. Moreover, the court's undergirding for the factual findings is itself unrefuted and supported by the evidence. *Id.* (noting that eight to ten percent of those living in shelters across Cuyahoga County are illiterate and the majority read at a fourth-grade level, about a third are mentally ill, and many are too embarrassed to ask for help with their forms).

Similarly, the majority denies that SB 216's perfection requirement violates the Equal Protection Clause. 2016 U.S. App. LEXIS 16769, at *12. It concludes that the state's interests in registering and identifying provisional voters outweigh the burdens of completing the additional fields. *Id.* In doing so, it relies on the notion that entering just the name and last four digits of the Social Security number of a provisional voter can result in multiple hits. *Id.* The district court's factual finding that board officials could easily identify voters before SB 216 took effect, based on the testimony of no less than three of these officials, flatly contradicts this. 2016 U.S. Dist. LEXIS 74121, at *37.

Finally, the majority determines that the limits on poll-worker assistance do not violate the Equal Protection Clause. 2016 U.S. App. LEXIS 16769, at *14-15. The court considers an interest in minimizing mistakes by those workers, as well as the state's assurance that blind, disabled, and illiterate individuals may ask for help. *Id.* Neither consideration survives the district court's factual findings, however, which are as firmly rooted in the record as they are in common-sense: 1) a trained poll worker is more likely to help an untrained voter provide or complete information than introduce an error, 2016 U.S. Dist. LEXIS 74121, at *39 (citing testimony by a member of the Ohio Association of Election Officials); 2) since the laws took effect, homeless voters suffering from a host of physical and mental health problems have been more likely to incorrectly fill out forms due to the lack of help, 2016

U.S. App. LEXIS 16769, at *18; and 3) many NEOCH members are too embarrassed to ask for help given their severe problems. 2016 U.S. App. LEXIS 16769, at *7, *18.

The majority's treatment of the factual findings in this case is concerning, not only for its abdication of clear-error review, but for the diminished role it leaves the district court. "The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson v. City of Bessemer*, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* at 575. As shown above, when a court of appeals gives short shrift to the well-supported factual findings of the district court in favor of de novo review, it risks distorting the legal analyses that depend on it. This is especially true in factually rich contexts, including cases invoking the Voting Rights Act or Equal Protection Clause.

II. Conflict with Text of Section 2 and Contradiction of Prior Decisions

The majority concludes that neither of the perfection requirements violates the Voting Rights Act because the "vast majority" of absentee and provisional ballots are rejected for unrelated reasons. 2016 U.S. App. LEXIS 16769, at *8. As Judge Keith aptly notes in his dissent, however, this approach misinterprets the very concept of disparate impact. The question

under Section 2 of the Voting Rights Act is whether African-American voters "have *less* opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added). The inquiry is inherently comparative. Yet the majority concentrates on the overall impact of the laws, taking evidence of a slight total effect on whether ballots are rejected as proof that the laws would not cause African-American voters' ballots to be rejected at higher rates than white voters' ballots. *See Ohio Democratic Party v. Husted*, No. 16-3561, 2016 U.S. App. LEXIS 15433, 2016 WL 4437605, at *14 (6th Cir. Aug. 23, 2016) (focusing on the "disparate impact on African Americans' opportunity to participate in the political process"). But even a minor overall impact can disproportionately affect one, in this case protected, group. *See e.g.*, 2016 U.S. Dist. LEXIS 74121, at *48.

Further, Section 2 of the Voting Rights Act requires courts to assess whether political processes are equally open to minorities based on the "totality of circumstances." 52 U.S.C. § 10301(b). The totality of circumstances necessarily includes the cumulative burden of the disputed laws and the various, localized factors augmenting or undercutting that burden. Thus the majority errs in considering the effect of each law in isolation, both from the other challenged laws and other legal and non-legal voting restrictions. As Judge Keith highlights in his dissent, the Fourth Circuit has already faulted a lower court for "inspecting the different parts" of a voting

restriction "as if they existed in a vacuum." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014). The lower court should, rather, have "consider[ed] the sum of those parts . . . on minority access to the ballot box." *Id.* Notably, the Fourth Circuit found the lower court's piecemeal method difficult to "square with Section 2's mandate to look at the totality of the circumstances." *Id.* (internal quotation marks omitted).

III. Threat to Most Vulnerable Citizens Despite Objective of Voting Rights Act

The majority determines that the reduced cure period survives scrutiny under the Voting Rights Act due to a lack of evidence as to how many absentee or provisional voters used the eliminated days in past elections. 2016 U.S. App. LEXIS 16769, at *9. Likewise, it concludes that the limits on poll-worker assistance are permissible under the Act based on the little proof that minority voters are more likely than white voters to cast absentee ballots, and no evidence at all that they disproportionately benefitted from the assistance in past elections. *Id.*

But Section 2 does not require plaintiffs to demonstrate hardship with mathematical precision. Indeed, the majority cites no authority supporting its conclusion and other circuits have taken an entirely different approach. In *Veasey v. Abbott*, for instance, the Fifth Circuit rejected the state's argument that the district court erred in finding that an ID requirement violated the Voting Rights Act. 830 F.3d 216 (5th Cir. 2016). The state cited the absence of

"any concrete proof that voters were denied the right to vote" as a result of the requirement. *Id.* at 253. The circuit credited the district court's acceptance of expert testimony underscoring the disparate impact of the requirement on the poor, who in turn were shown to be minorities at disproportionate rates. *Id.* at 250, 254. The circuit took special heed of record evidence explaining the connection between poverty and the inability to meet the requirement. *See e.g., id*. at 251 ("unreliable and irregular wage work and other income . . . affect the cost of taking the time to locate and bring the requisite papers and identity cards, travel to a processing site, wait through the assessment, and get photo identifications") (internal quotation marks omitted).

Here, the district court made comparable findings about the challenged laws' disparate impact on African-Americans. These include the inference that homeless voters, again disproportionately minorities, have been more likely to make mistakes on voting forms since the limits on poll-worker assistance took effect. 2016 U.S. Dist. LEXIS 74121, at *18. They also encompass findings on the reasons for this phenomenon: everything from illiteracy to the humiliation it engenders, which prevents those who are exempt from the limits from seeking help. *Id.* By the same token, the district court's findings that African-Americans rely on public transportation at higher rates than whites, and tend to lack neighbors with cars, support the conclusion that decreasing the days available to cure mistakes would have a

disparate impact on them under the Voting Rights Act. 2016 U.S. Dist. LEXIS 74121, at *18, *26, *31.

To require plaintiffs to provide precise proof in cases brought under the Voting Rights Act is to ignore the reality that such proof is virtually impossible to come by. This is true because of the peculiar nature of many voting restrictions, and the characteristics common to those who allege violations of the Act in the first place. *See* 2016 U.S. Dist. LEXIS 74121, at *13 (cataloguing other, proposed voting restrictions, including a bill "requiring state universities to provide in-state tuition rates to students if they provided those students with ID that they needed to vote"). Indisputably, plaintiffs in Voting Rights Act cases tend to represent the most vulnerable members of society.

The present case is illustrative. NEOCH and Columbus Coalition for the Homeless plaintiffs embody the interests of poorly educated voters, many of whom are mentally ill, and who would rather conceal their dependence on others than document it. 2016 U.S. Dist. LEXIS 74121, at *7, *18. They are also a transient population and thus difficult to keep track of and follow. 2016 U.S. Dist. LEXIS 74121, at *6-7. The Voting Rights Act's focus on historically disadvantaged groups anticipates this and requires that courts avoid erecting too high of a barrier to the claims advanced under it. 52 U.S.C. § 10301(a) (referring to "race" and "color"). Otherwise, we risk betraying the Act's purpose—to ensure that the most marginalized are able to participate in the electoral process despite continuing inequities.

IV. Danger to Other Fundamental Rights

The majority concludes that limits on poll-worker assistance do not unduly burden the right to vote under the Equal Protection Clause because the state's "legitimate interest in minimizing" mistakes by poll-workers justifies those limits.[1] 2016 U.S. App. LEXIS 16769, at *15. But this takes the strength of the state's rationale for the limits at face value. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195-96, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008) (taking time to assess the "legitimacy" of even the most accepted interest in voting restrictions by noting "flagrant examples of [voter] fraud in other parts of the country" and the state's own experience with fraud in a recent election). The majority's error means accepting "minimizing mistakes by poll-workers" as a legitimate basis for the limits on their

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[1] I do not address in detail the majority's conclusions about the challenged laws' burdens because I subscribe to Judge Donald's analysis of *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008). I too "disagree with the majority's approach of consider[ing] the burden that the provisions place on all Ohio voters" (internal quotation marks omitted). What the Equal Protection Clause requires, rather, is to identify the population that the laws actually affect, and then gauge the nature and severity of the laws' impact on that group. *Crawford*, 553 U.S. at 200 (examining whether it is possible to assess the magnitude of the burden on a narrow class of voters).

assistance where the historic *function* of such workers has been to ensure that the electoral process works. *See e.g.*, 2016 U.S. Dist. LEXIS 74121, at *39 ("[P]oll workers are trained and certainly more skilled in filling out forms than homeless voters."). Indeed, the district court's factual findings confirm that poll-worker assistance leads to more complete and accurate information from voters. *Id.* To this extent, the limits seem to be a solution in search of a problem.

Assuming arguendo that the state has a legitimate interest in minimizing mistakes by poll-workers, the majority neglects to inquire into the extent to which the limits on assistance actually advance that interest. *See Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) ("even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained"). This is especially confounding where the limits subvert the state's asserted rationale, with diminished involvement by poll-workers leading to greater, not fewer errors. 2016 U.S. Dist. LEXIS 74121, at *39.

The majority also disagrees that the reduced cure period violates the Equal Protection Clause. 2016 U.S. App. LEXIS 16769, at *15. In the face of evidence that the ten-day period had inconvenienced no board officials, the court states that a government need not wait until an issue arises to enact a law addressing it. *Id.* It is true that states may act to ward off a problem. But they may not impinge on a

constitutional right without offering evidence, both of the likelihood and expected consequences of the problem, and probability that the law will in fact alleviate it. Given the relative nature of the undue burden standard, the sufficiency of the state's proof will depend on the severity of the burden established by plaintiffs.

The majority's choice not to require anything of the state beyond a conclusory statement of a law's benefits where the right to vote is at stake belies the Supreme Court's treatment of threats to this and other fundamental liberties. *See e.g., Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) ("It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.") (internal quotation marks omitted); *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966) ("distinctions in laws denying fundamental rights" "call[] for the closest scrutiny"). This approach creates a perilous model for assessing potential violations of constitutional rights other than the right to vote.

Conclusion

Because the full court's review is needed to maintain uniformity of this circuit's decisions, and the majority's opinion raises several issues of exceptional importance, I respectfully dissent from the denial of rehearing en banc.

DONALD, Circuit Judge, dissenting from the denial of *en banc* rehearing.

The majority must not pretend to write on a clean slate while ignoring the bloody and shameful history of denial. On December 6, 2015, this country commemorated the 150th anniversary of the ratification of the Thirteenth Amendment on December 6, 1865, which abolished years of enslavement of people of African descent. Although monumental, that constitutional amendment still did not afford citizens of African descent the right to vote. On July 9, 1868, the Fourteenth Amendment was adopted and purported to provide equal protection and citizenship rights for African Americans. Finally, on March 30, 1870, the Fifteenth Amendment was ratified granting African American men the right to vote. Yet, 100 years thereafter, United States citizens of African descent languished as second-class citizens. They were denied the right to vote by tactics and methodologies that all would decry such practices in a developing country. It was only by blood, sweat, advocacy, and even death, that African Americans were finally afforded what the Constitution provided more than 100 years earlier. It was not until 1965 with the passage of the Voting Rights Act that this most important badge of citizenship could be practiced by African Americans. In speaking before Congress on the issue of voting rights following the violence met by protestors during their peaceful march in Selma, Alabama, former President Lyndon B. Johnson rightly declared that "it

is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome." The Voting Rights Act "was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565, 89 S. Ct. 817, 22 L. Ed. 2d 1 (1969). Yet, the majority's decision in this case ignores history and takes us in the wrong direction.

Though well over a century has passed since the enactment of the Fifteenth Amendment, which purported to prohibit the government from denying a citizen the right to vote on the basis of race, to this day, many citizens are still effectively being denied the right to vote. *See generally Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2632-52, 186 L. Ed. 2d 651 (2013) (Ginsburg, J., dissenting) (detailing the variety and persistence of "second generation barriers" created in recent years to deny minorities the right to fully participate in the electoral process). While in the past, efforts to prevent these groups from voting were more overt, in the present day, we see calculated and systematic attempts to prevent disadvantaged and marginalized groups, like ethnic minorities, the elderly, and the poor, from voting. Gone are the days of literacy tests, poll taxes, and the attacking and jailing of minorities who dared to challenge the pervasive discrimination they faced in attempting to exercise their right to vote. But the vestiges of the old methods used to deny minorities the right to vote remain. These antiquated measures have merely been replaced with more subtle, creative ways to

deny these citizens the right to vote, including enacting voting identification laws; establishing large voting districts to dilute minorities' voting power; enacting laws to reduce early voting days; and, as we have just seen in the case of Ohio, creating needless requirements, the imperfection of which results in one's vote being rejected. This case adds to the persistent practice of surreptitiously denying certain citizens their right to vote.

I disagree with the majority's conclusion, and the decision to deny *en banc* rehearing, for two reasons. First, the Equal Protection claim. I disagree with the majority's approach of "consider[ing] the burden that the provisions place on all Ohio voters." Like Judge Keith observes in his dissent, the conclusion that "we must inquire whether a voting regulation burdens *everyone*, and only when it does, will that regulation be deemed *unequal*," defies both logic and common sense. Rather than following Justice Scalia's approach in *Crawford v. Marion County Election Board*, 553 U.S. 181, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008), the majority should have followed Justice Stevens' method in that opinion. Although no majority was reached in *Crawford*, Justice Stevens' reasoning decided the case on a narrower ground than Justice Scalia's because while both opinions upheld the challenged law, Justice Scalia's opinion broadly held that the restriction must burden all voters, so went a step further than Justice Stevens' opinion. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977); *see also Obama for Am. v. Husted*, 697 F.3d 423, 441 n.7 (6th

Cir. 2012) (White, J., concurring/dissenting). Though, in Justice Stevens' opinion in *Crawford*, the small number of voters who may experience a special burden from the new voting laws could not establish that the laws imposed "excessively burdensome requirements" on a class of voters, 553 U.S. at 202, it did not hold that a limited class of voters could not establish an undue burden unless the burden was placed on *all* voters. Rather, the plaintiffs in *Crawford* could not make the requisite showing because "on the basis of the evidence in the record it [was] not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified." *Id.* at 200.

Contrary to *Crawford*, here, the record did make it possible to quantify the burden placed on this narrow class of voters. Specifically, the district court found that the new laws imposed a significant burden on Appellees because many of their members are homeless and illiterate, so have difficulties correctly filling out forms. *Northeast Ohio Coalition for the Homeless v. Husted*, No. 2:06-CV-896, 2016 U.S. Dist. LEXIS 74121, 2016 WL 3166251, at *17-18, *37 (S.D. Ohio June 7, 2016). The majority concludes that the state's interest in confirming eligible voters justifies the addition of the address and birthdate requirements, but this conclusion ignores the district court's findings that election officials could typically identify voters with provisional ballots using only one or two fields. *See* 2016 U.S. Dist. LEXIS 74121, at *38. So adding two fields—birthdate and address—to

the already existing three fields does not seem to further the identified interest. Moreover, combatting voter fraud was not a justification for either SB 205 or SB 216. 2016 U.S. Dist. LEXIS 74121, at *37.

Therefore, I cannot agree with the majority's conclusion that the state's interest outweighs the increased burden placed on these voters when Ohio rejects ballots based on two additional unnecessary requirements.

The majority also erred with respect to the Voting Rights Act claim. The district court found that SB 205 and SB 216 had a disparate impact on African American voters because minority voters had higher rates of provisional and absentee ballot *rejection*, even "account[ing] for a variety of key factors besides race that were likely to explain disparities in rejection rates (including the median age, income, and educational attainment of the white voters in those counties as well as the urbanicity of the counties)." 2016 U.S. Dist. LEXIS 74121, at *47-*49. The majority, however, rejected these findings, reasoning that there was "scant evidence" that minority voters used absentee ballots more than white voters.

Appellate courts must view the district court's factual findings under the clearly erroneous standard, meaning that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence

differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). Though the majority was entitled to reject the district court's account of the facts if it was "so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it," *see id.* at 575, the majority did not make that showing here. That minority voters do not *use* absentee ballots any more than white voters does not undermine the conclusion that minority voters' absentee and provisional ballots are *rejected* at a higher rate than those of white voters. The proper focus should have been on the disparate impact of the new provisions, not the rate at which minorities use absentee ballots. *See Ohio Democratic Party v. Husted*, No. 16-3561, 2016 U.S. App. LEXIS 15433, 2016 WL 4437605, at *13 (6th Cir. Aug. 23, 2016) (published) (noting that, to succeed on a Voting Rights Act vote-denial claim, plaintiffs must establish that the challenged law caused a disparate impact amounting to denial of a protected class members' right to vote).

More than "[a] century after the Fourteenth and Fifteenth Amendments guaranteed citizens the right to vote free of discrimination on the basis of race, the blight of racial discrimination in voting continue[s] to infect the electoral process in parts of our country." *Shelby Cty.*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting) (citation omitted) (internal quotation marks omitted). By inexplicably considering only whether these new voting laws placed a burden on *all* Ohio voters, and utterly disregarding the district court's factual findings that minority voters' ballots

were rejected more often than those of white voters, the majority opinion carries on this practice of denying disadvantaged groups the right to vote and halts the progress made for decades to preserve this core right. I dissent from the denial of *en banc* rehearing in this case because, like Judge Keith, "I will not forget. I cannot forget—indeed America cannot forget—the pain, suffering, and sorrow of those who died for equal protection and for this precious right to vote."

APPENDIX D

52 USC § 10101. Voting rights

(a) Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers; literacy tests; agreements between Attorney General and State or local authorities; definitions.

(1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(2) No person acting under color of law shall--

(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure

different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

(B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election; or

(C) employ any literacy test as a qualification for voting in any election unless (i) such test is administered to each individual and is conducted wholly in writing, and (ii) a certified copy of the test and of the answers given by the individual is furnished to him within twenty-five days of the submission of his request made within the period of time during which records and papers are required to be retained and preserved pursuant to title III of the Civil Rights Act of 1960 (42 U. S. C. 1974-74e; 74 Stat. 88): *Provided, however,* That the Attorney General may enter into agreements with appropriate State or local authorities that preparation, conduct, and

maintenance of such tests in accordance with the provisions of applicable State or local law, including such special provisions as are necessary in the preparation, conduct, and maintenance of such tests for persons who are blind or otherwise physically handicapped, meet the purposes of this subparagraph and constitute compliance therewith.

(3) For purposes of this subsection--

(A) the term "vote" shall have the same meaning as in subsection (e) of this section;

(B) the phrase "literacy test" includes any test of the ability to read, write, understand, or interpret any matter.

(b) Intimidation, threats, or coercion. No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) Preventive relief; injunction; rebuttable literacy presumption; liability of United States for costs; State as party defendant. Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. If in any such proceeding literacy is a relevant fact there shall be a rebuttable presumption that any person who has not been adjudged an incompetent and who has completed the sixth grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico where instruction is carried on predominantly in the English language, possesses sufficient literacy, comprehension, and intelligence to vote in any election. In any proceeding hereunder the United States shall be liable for costs the same as a private person. Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a), the act or practice shall also be deemed that of the State and the State may be

joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

(d) Jurisdiction; exhaustion of other remedies. The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(e) Order qualifying person to vote; application; hearing; voting referees; transmittal of report and order; certificate of qualification; definitions. In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him

qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote, to vote at an appropriate election shall constitute contempt of court.

An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by Revised Statutes, section 1757; (5 U.S.C. 16) to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an

order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: *Provided, however,* That such applicant shall be qualified to vote under State law. In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provisions for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

When used in the subsection, the word "vote" includes all action necessary to make a vote

effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a); and the words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

(f) Contempt; assignment of counsel; witnesses. Any person cited for an alleged contempt under this Act shall be allowed to make his full defense by counsel learned in the law; and the court before which he is cited or tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, who shall have free access to him at all reasonable hours. He shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like

process of the court to compel his witnesses to appear at his trial or hearing, as is usually granted to compel witnesses to appear on behalf of the prosecution. If such person shall be found by the court to be financially unable to provide for such counsel, it shall be the duty of the court to provide such counsel.

(g) Three-judge district court: hearing, determination, expedition of action, review by Supreme Court; single-judge district court: hearing, determination, expedition of action. In any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e) of this section the Attorney General, at the time he files the complaint, or any defendant in the proceeding, within twenty days after service upon him of the complaint, may file with the clerk of such court a request that a court of three judges be convened to hear and determine the entire case. A copy of the request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit

judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceedings authorized by this subsection, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or, in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.