No. 16A405

In the Supreme Court of the United States

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

Applicants,

v.

JON HUSTED, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE OF THE STATE OF OHIO, AND
THE STATE OF OHIO,

Respondents.

OPPOSITION TO EMERGENCY APPLICATION FOR A STAY OF THE SIXTH CIRCUIT'S JUDGMENT

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INTRODUCTION

Weeks after Ohioans began voting, Plaintiffs—the Northeast Ohio Coalition for the Homeless, Columbus Coalition for the Homeless, and the Ohio Democratic Party (referred to collectively as "NEOCH")—ask the Court to stay a Sixth Circuit decision issued six weeks ago (on September 13) after en banc review was denied three weeks ago (on October 6). And NEOCH bases this tardy request initially on a statutory claim that has persuaded zero judges and that would not establish a conclusive right to an injunction but merely a threshold right to sue. Defendants—Ohio and its Secretary of State (together, "Ohio")—respectfully ask the Court to decline NEOCH's ill-timed invitation. It fails every factor required for such "'extraordinary'" relief. *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (citation omitted).

This case involves two laws passed in 2014. S.B. 216 (the "Provisional-Ballot Law") made three changes relevant here. It: (1) added address and birthdate fields to the affirmation forms that *provisional* voters must complete; (2) reduced the post-election time that those voters have to show proper identification from ten to seven days; and (3) prohibited poll workers from filling out affirmation forms in most circumstances. R.698-5, PageID#34551. S.B. 205 (the "Absentee-Ballot Law") made three similar changes. It: (1) added address and birthdate fields to the identification envelopes that *absentee* voters must complete; (2) established in law a seven-day, post-election time that voters have to cure identification-envelope defects; and (3) prohibited election workers from filling out the envelopes in most circumstances. R.698-4, PageID#34529.

In the 2014 and 2015 elections, these laws affected only a "small" number of ballots relative to the over 3 million votes cast each time. Appx. A21. Voters cast 128,676 provisional ballots in those elections; only 620 of the 16,942 rejected provisionals were for deficiencies in the birthdate or address fields added by the Provisional-Ballot Law. Appx. A21; First Brief, 6th Cir. R.27, No. 16-3603, at 10 (citing record). Of the 1.29 million absentee ballots cast, only 1,712 were rejected for deficiencies in the birthdate or address fields added by the Absentee-Ballot Law. Appx. A21; First Brief, 6th Cir. R.27, No. 16-3603, at 13-14 (citing record).

Six weeks ago, the Sixth Circuit mostly reversed an injunction against the changes that these laws made. Appx. A2. The district court's injunction had ordered Ohio broadly to count defective ballots without much guidance on when Ohio could reject them. Appx. A183-A184. After an expedited appeal, the Sixth Circuit reversed the injunction with respect to provisional ballots, the cure periods, and the ban on poll-worker assistance. Appx. A29-A30. As to absentee ballots, it trimmed the injunction so that Ohio is enjoined only as to the birthdate and address fields, and only when that information is unnecessary to determine a voter's eligibility. *Id.* The Sixth Circuit denied en banc review. Appx. A185-A186.

NEOCH now asks this Court to partially stay the Sixth Circuit's judgment and recall its mandate. The Court should deny this request.

First, the request comes too late to change the rules for the 2016 election—with Ohio now on the 17th day of absentee voting. NEOCH has only itself to blame. It has used over a month of the last six weeks on delayed filings, despite Ohio's

repeated reminders that time was critical. After the Sixth Circuit ruled against NEOCH on September 13, NEOCH took the full *14 days* to request en banc review. After en banc denial on October 6, NEOCH took an additional *19 days* to file in this Court. NEOCH took this time despite this Court's well-known admonition that risks of election "confusion" increase "[a]s an election draws closer." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Ohio knows those risks all too well. *Husted v. Ohio State Conf. of NAACP*, 135 S. Ct. 42 (2014); *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008); *Spencer v. Pugh*, 543 U.S. 1301 (2004) (Stevens, J., in chambers); *cf. In re 2016 Primary Election*, __ F.3d __, 2016 WL 4611029, at *4 (6th Cir. Sept. 6, 2016) (reversing a district court's last-minute injunction to keep Ohio's polls open that had been issued in response to an anonymous phone call about traffic rather than to a plaintiff or a complaint).

NEOCH's delay causes real harm. Ohioans have been voting for weeks under the standards that the Sixth Circuit set. Yet NEOCH's requested stay affects election administration now—such as a board's duty to send deficiency notices to absentee voters based on the state law's definition of a deficiency (as slightly modified by the Sixth Circuit). It is not just a matter of post-election counting. And even at that stage, boards must confirm or reject *all* provisional ballots *before* they may start the official canvass eleven days after an election. Election Manual, R.698-2, PageID#34224-25. They need to know the rules for that examination in advance of its start. Thus, the Secretary has issued directives and held a training for workers, all of which would be upended if the Court switched directions now.

Finally, while the public costs would be great, the alleged "gain" to voters would be miniscule. Only a handful of potential voters are affected (especially after a recent Ohio Secretary of State directive clarifying that boards generally should not reject absentee or provisional ballots for "technical" mistakes in birthdates or addresses).

Second, on the merits, NEOCH primarily relies on its cross-appeal claims involving the "materiality" provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B), and the equal-protection rules from *Bush v. Gore*, 531 U.S. 98 (2000). *See* Appl. 23-25, 29-33. Yet *no* judge has agreed with these claims, so this Court would be the first to predicate an injunction on them. As for the "materiality" provision, NEOCH challenges the Sixth Circuit's 16-year-old holding that private parties cannot sue to enforce it. But this rarely cited law, which the Voting Rights Act has supplanted, is not invoked enough to justify review, and its requirements largely overlap with those raised by NEOCH's other claims. "Success" on this issue, moreover, would give NEOCH only a right to *sue*, not to an *injunction*. As for *Bush v. Gore*, NEOCH has identified no conflicts with the Sixth Circuit's understanding of that fact-specific decision. To the contrary, courts have long permitted differential treatment for differently situated voters. *E.g.*, *ACLU of N.M. v. Santillanes*, 546 F.3d 1313, 1320-21 (10th Cir. 2008).

Third, NEOCH is not entitled to a stay based on its claims under Section 2 of the Voting Rights Act or this Court's "*Anderson-Burdick*" balancing test for the Fourteenth Amendment. With respect to Section 2, the Sixth Circuit correctly held that, as NEOCH's expert found, the two *specific* laws at issue here did not have a

disparate impact. NEOCH asserts that this focus on *specific* impacts conflicts with a Fourth Circuit case examining the *cumulative* impacts from a State's voting regime. Appl. 26-27. But the Sixth Circuit's decision here follows an earlier Sixth Circuit decision that made clear that cumulative effects are necessary under Section 2. *See Ohio Democratic Party v. Husted*, __ F.3d __, 2016 WL 4437605, at *14-*15 (6th Cir. Aug. 23, 2016), *stay denied by* 2016 WL 4740615 (U.S. Sept. 13, 2016). Either way, NEOCH's claim fails. With respect to the Constitution, the Sixth Circuit merely applied this Court's well-settled "*Anderson-Burdick*" test—as clarified by Justice Stevens's opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)—to the unique facts at issue here.

In sum, the time has long since passed for Ohio to transition from election *litigation* to election *administration*. A last-minute stay reinstating a vague and ill-founded injunction would threaten the ability of Ohio's 88 boards of elections to process the many ballots that are now being cast by voters and reviewed by officials.

STATEMENT

Ohio voters must register 30 days before an election. Ohio Rev. Code § 3503.06(A). To do so, they must provide five pieces of information: (1) name, (2) address, (3) birthdate, (4) signature, and (5) identification. *Id.* § 3503.14(A). Acceptable identification includes, for example, a driver's license number, the last four digits of a social security number, or a recent utility bill. *Id.* Ohio has used these "five fields"—which are consistent with the National Voter Registration Act and Help America Vote Act—since 2006. 151 Ohio Laws (Part III) 5551, 5640-41

(2006). Once registered, voters have many voting options. This case concerns two non-traditional options: provisional voting and absentee voting.

A. The Provisional-Ballot Law Sought To Improve Elections By Increasing The Number Of Counted Ballots

Election Day voters must provide their name, current address, proof of identity, and signature. Ohio Rev. Code § 3505.18. Ohio does not require photo identification. These voters may use any of the identification forms that are available for registering, except the last four digits of their social security number. *Id.* Voters whose eligibility is in doubt may cast provisional ballots.

1. Before 2014, county boards of elections rejected many provisional ballots because voters were unregistered

Historically, when questions arose about a voter's eligibility (for example, if the voter's name did not appear in the rolls), the voter could not vote. Provisional voting arose only in recent decades. Nat'l Comm'n on Fed. Election Reform, To Assure Pride and Confidence in the Electoral Process 35 (2001), *available at* http://web1.millercenter.org/commissions/comm_2001.pdf (noting that provisional ballots were "pioneered" in the late twentieth century). Ohio traditionally allowed provisional ballots only for voters who had moved within the State without updating their address. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 571 (6th Cir. 2004). In 2006, in response to the Help America Vote Act, 52 U.S.C. § 21082, Ohio began offering those ballots for other reasons. Ohio Rev. Code § 3505.181(A)(1). Provisional voting now "is a failsafe" that gives voters whose eligibility is in question a second chance to vote. Election Manual, R.698-2, PageID#34216.

Provisional voters must complete a provisional-ballot "affirmation form" to assist boards in confirming their eligibility. Ohio Rev. Code § 3505.182. Voters without proper identification on Election Day may cast a provisional ballot by writing the last four digits of their social security number on this form. *Id.* Before 2014, if voters did not choose that option, they could appear at the board with proper identification within ten days after the election. Ohio Rev. Code § 3505.181(B)(8) (2013). Few showed up at the tail end of that ten-day period. Burke Tr., R.656, PageID#28690; Adams Tr., R.657, PageID#29094-95.

Boards must confirm or reject *all* provisional ballots before they may start the "official canvass" eleven days after an election. Election Manual, R.698-2, PageID#34224-25. To confirm a provisional voter's eligibility, they try to locate the voter within their county-level database. Sleeth Tr., R.660, PageID#29898-99. If that search fails, boards turn to the statewide database to confirm that the voter is registered and has not voted elsewhere in Ohio. *Id.*; Larrick/Osman Tr., R.663, PageID#30403-05, 30469. If a board cannot locate a voter there, it generally must reject the voter as unregistered, Ward Tr., R.661, PageID#30108-10, unless the voter falls within an exception that boards must implement after a recent Sixth Circuit ruling, *see A. Philip Randolph Inst. v. Husted*, 2016 WL 6093371, at *10-*12 (S.D. Ohio Oct. 19, 2016).

Provisional ballots represent a small percentage of the vote. In 2008, 206,859 voters (out of over 5.7 million) cast provisional ballots; in 2010, 105,195 voters (out of over 3.9 million) did so; and in 2012, 208,084 (out of over 5.6 million) did so.

Provisional Reps., R.698-13 to R.698-15, PageID#34720-26; Hood Rep., R.698-8, PageID#34651. Of these, boards rejected a fraction: 39,989 in 2008, 11,772 in 2010, and 34,299 in 2012. Provisional Reps., R.698-13 to R.698-15, PageID#34720-26. The *most* common reason for rejecting these ballots was that the voters were not registered (18,860 in 2008, 4,790 in 2010, and 20,120 in 2012). *Id.* The second most common reason was that the voters had voted at the wrong polling place and/or precinct (14,335 in 2008, 5,309 in 2010, and 9,520 in 2012). *Id.* In 2012, the Sixth Court affirmed an injunction requiring boards to count ballots cast at the wrong precinct but right polling place. *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 593-97 (6th Cir. 2012). But it overturned an injunction that would have required boards to accept the 9,000-plus provisional ballots cast at entirely wrong locations within Ohio. *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012); Provisional Rep., R.698-15, PageID#34726.

These statistics showed recurring issues.

Lack of Registration. In 2008, 2010, and 2012, boards rejected over 40,000 provisional ballots for lack of registration—accounting for over half of all rejections. Provisional Reps., R.698-13 to R.698-15, PageID#34720-26. Before 2014, Ohio did not adequately confront this problem: The affirmation form did not require birthdate and address, and so did not register these voters for future elections. Poland Tr., R.664, PageID#30728-30. While it included a separate registration application on the back, 2012 Affirmation Form, R.698-58, PageID#35184-85, many voters, "tired of filling out paperwork," would not complete this form, Ward Tr.,

R.661, PageID#30115. This happened "a lot." Terry Tr., R.665, PageID#30906. Thus, many voters would complete the form, be rejected, and remain unregistered for the next election (perhaps destined to cast failed ballots again). Poland Tr., R.664, PageID#30728-30; Terry/Damschroder Tr., R.665, PageID#30906, 30989.

Identifying Voters. Boards often could not locate some voters in databases using names and signatures alone. Ward Tr., R.661, PageID#30106-11; Poland Tr., R.664, PageID#30780-82; Terry Tr., R.665, PageID#30885-86. For example, boards had trouble locating voters who had changed names (such as newlyweds). Larrick Tr., R.663, PageID#30425; Terry Tr., R.665, PageID#30885-86. Many voters also shared similar names. Ward Tr., R.661, PageID#30106-11; Tr., R.664, PageID#30780-82. To list a few examples, Ohio's statewide database includes 368 Daniel Browns, 41 Sarah Pierces, 106 Betty Clarks, and about 650 John Smiths. Poland Tr., R.664, PageID#30719-21; Damschroder Tr., R.665, PageID#30995; Reed Tr., R.663, PageID#30288-95. Officials often could not identify these voters, adding to the unregistered rejections. Ward Tr., R.661, PageID#30106-11.

Voters Who Moved. Boards rejected many provisional ballots for voting in the wrong place, but many of these voters may have been eligible. Voters often cast provisional ballots because they moved without updating their registration with their new address. Poland Tr., R.664, PageID#30711; Terry Tr., R.665, PageID#30888. These voters, while eligible, must vote at the place for their *new* address. Ohio Rev. Code § 3505.183(B)(3)(f); Perlatti Tr., R.656, PageID#28831.

Yet the affirmation form did not require voters to provide that address. Perlatti Tr., R.656, PageID#28827-28; Poland Tr., R.664, PageID#30773.

This created a problem. These voters may have arrived at the correct location, told poll workers their new address, and supplied the required information. Poland Tr., R.664, PageID#30713. But unless the voters wrote the unrequired new address on the affirmation form, it appeared to boards that they had voted at the wrong place (because the database listed only the old address). Adams Tr., R.657, PageID#29081-82; Poland Tr., R.664, PageID#307112-14; Terry/Damschroder Tr., R.665, PageID#30887-89, 30996-97. Boards thus rejected these provisional ballots as "wrong place" votes because voters did not provide new addresses on the forms. Poland Tr., R.664, PageID#30712-14; Terry/Damschroder Tr., R.665, PageID#30887-89, 30996-98.

2. The Provisional-Ballot Law addresses these concerns

The Ohio Association of Election Officials ("OAEO")—a bipartisan group of local election officials—sought to resolve these issues. Ward Tr., R.661, PageID#30103-07; Terry Tr., R.665, PageID#30903-05. Its leadership stressed the importance of requiring voters to list their birthdates and addresses so that the affirmation form could "double" as a registration and account for voters who had moved. Terry Testimony, R.698-100, PageID#35381. They also recommended that the "cure" period for providing identification be seven days (rather than the three days referenced in a bill), so as to provide "headroom" for boards between the end of the cure period and the start of the official counting. Ockerman Testimony, R.698-95, PageID#35368-69. And they sought an exception for forgiving some mistakes.

Ward Tr., R.661, PageID#30105-06; Terry Testimony, R.698-100, PageID#35382-83. This balanced counting ballots with obtaining the benefits from birthdates. Terry Tr., R.665, PageID#30904-05.

The result was the Provisional-Ballot Law. It did three relevant things. First, it added two fields to the affirmation form: birthdate and address (in addition to name, signature, and identification form). Ohio Rev. Code § 3505.183(B)(1)(a). The law, however, directed boards to count ballots despite an inaccurate birthdate if: (1) the voter provided the correct month and day (but not year); (2) the database has a birthdate of January 1, 1800 (the default for missing birthdates from older registrations); or (3) three board members found that the voter satisfied the other fields. *Id.* § 3505.183(B)(3)(e). Second, the law gave voters who lack proper identification seven days after Election Day to show that identification (rather than the ten days provided in prior law). *Id.* § 3505.182(D). Third, partially in response to the 2012 litigation, the law repealed provisions requiring poll workers to complete portions of the affirmation form, minimizing risks of poll-worker error. S.B. 216, R.698-5, PageID#34570-71; Seitz Testimony, R.698-101, PageID#35387.

With this new law in 2014, voters cast 49,262 provisional ballots. EAC Election Rep., R.698-25, PageID#35023. Ohio counted 90.4%, giving it the nation's fifth highest acceptance rate. *Id.* PageID#35022-23. Of 4,734 rejected ballots, over half were for lack of registration. Provisional Rep., R.698-16, PageID#34728. Only 188 were rejected for address inconsistencies; only 59 for birthdate inconsistencies. *Id.* The 2015 statistics were similar (Ohio's 2015 ballot included a well-publicized

statewide marijuana initiative). Ohio counted 67,206 of the 79,414 provisional ballots. Provisional Rep., R.698-17, PageID#34371. Of the rejected ones, most (69%) were for non-registration. *Id.* Only 373 were rejected for birthdate or address problems. *Id.*

B. The Absentee-Ballot Law Confirmed Voter Eligibility, Increased Uniformity, Clarified Requirements, And Gave Voters A Statutory Right To Cure Deficiencies

Since 2006, Ohio has offered expansive absentee-voting options. To apply, voters must provide the five fields required for registration or casting a provisional ballot: (1) name, (2) address, (3) birthdate, (4) signature, and (5) identification. Ohio Rev. Code § 3509.03. An absentee ballot cannot be issued to a voter unless the election official has confirmed the voter's eligibility. Ohio Rev. Code § 3509.04(B). Boards begin mailing absentee ballots on the first day of the absentee-voting period. Election Manual, R.698-2, PageID#34183.

Absentee voters must return mailed-in ballots in identification envelopes. Ohio Rev. Code § 3509.05. They may provide a copy of any identification form that would be acceptable on Election Day, or, like provisional voters, may simply list the last four digits of their social security number as their identification. *Id.* Voters may vote absentee in person or by mail. *Id.* § 3509.05(A). They (or an authorized relative) must personally deliver ballots to boards by Election Day, or have them postmarked before the election and received by the tenth day thereafter. *Id.* § 3509.05(A)-(B)(1).

After the introduction of universal absentee voting in Ohio, several concerns prompted the OAEO to focus on absentee-voting issues. The 2005 law authorizing

universal absentee voting, for example, required identification envelopes to include spaces for address and birthdate. 151 Ohio Laws (Part III) 5267, 5282-84 (2005) (amending Ohio Rev. Code § 3509.04(B)); Identification Envelopes, R.698-49 to R.698-53, PageID#35169-77. Yet an absentee-ballot provision from before 2005 barred boards from counting "insufficient" envelopes and arguably required only the signature and identification fields. Ohio Rev. Code § 3509.07 (2013). The differences between these provisions created confusion as to which fields were required to count ballots. Damschroder Tr., R.665, PageID#31026-27.

The OAEO formed bipartisan task forces to tackle absentee-voting issues. Ward Tr., R.661, PageID#30096-98; Terry Tr., R.665, PageID#30874-77. To increase uniformity, it suggested that identification envelopes require five fields, including birthdate and address. OAEO Rep., R.698-62, PageID#35193; Ward Tr., R.661, PageID#30100. These fields would help "ensur[e] that they are the correct voter" without being "too exorbitant." Terry Tr., R.665, PageID#30879. While members disagreed on many things, the idea was "very noncontroversial." *Id.* PageID#30877-80. Kenneth Terry, a Democrat from Allen County, recalled no opposition. *Id.* PageID#30880. The OAEO also recommended that Ohio *codify* a cure period for envelope mistakes. Ward Tr., R.661, PageID#30100-02.

In response, Ohio passed the Absentee-Ballot Law. It required voters to list birthdates and addresses (in addition to names, signatures, and identification) on identification envelopes. Ohio Rev. Code §§ 3509.06(D)(3)(a), 3509.07(A). This unified the personal identifiers for registering, applying for an absentee ballot,

casting an absentee ballot, and casting a provisional ballot. *Id.* §§ 3503.14, 3509.03, 3509.06(D)(3), 3505.181-.183. The law also contained a similar exception to that in the Provisional-Ballot Law allowing boards to count ballots with inaccurate birthdates. *Id.* § 3509.06(D)(3)(a)(iii). And it permitted boards to preprint two of the fields (name and address) on identification envelopes mailed to voters. Ohio Rev. Code § 3509.04(B). The Secretary has since made that preprinting mandatory. Election Manual, R.698-2, PageID#34203. The law also codified a voter's right to receive notice of, and cure, mistakes. *Id.* § 3509.06(D)(3)(b). Voters must do so by seven days after the election (replacing a prior directive's ten-day period). *Id.*

Since the law's passage, Ohio's absentee-ballot acceptance rate remains around 98%. In 2014, Ohio counted 98.8% of the 864,562 absentee ballots cast. Absentee Rep., R.698-21, PageID#34757. In 2015, it counted 98.2% of those ballots. Absentee Rep., R.698-23, PageID#34769. Rejections due to birthdate and/or address deficiencies accounted for little of the total: 0.16% (about 1380) in 2014, and 0.08% (about 330) in 2015. *See* Absentee Supp. Reps., R.698-22 & R.698-24, PageID#34761-34768, 34773-34793; 2014-2015 Tables, R.686-1, PageID#33407, 33411. Most absentee-ballot rejections occur because voters did not timely return the ballots. EAC Election Rep., R.698-25, PageID#35015.

C. Two Ohio District Courts Issued Conflicting Rulings On The Validity Of The Provisional-Ballot And Absentee-Ballot Laws

In *Ohio Organizing Collaborative v. Husted*, __ F. Supp. 3d __, 2016 WL 3248030 (S.D. Ohio May 24, 2016) ("*ODP*"), the Ohio Democratic Party challenged, among others, the Absentee-Ballot Law, the Provisional-Ballot Law, and the law

adjusting Ohio's month-long absentee-voting calendar. The court in *ODP* held a ten-day bench trial in November 2015. *Id.* at *1. On May 24, 2016, it enjoined *only* the law adjusting Ohio's calendar. *Id.* at *14-*23, *40-*44. On August 23, 2016, the Sixth Circuit reversed that part of its order and upheld Ohio's voting calendar. *Ohio Democratic Party*, 2016 WL 4437605, at *1. This Court denied a stay. *Ohio Democratic Party*, 2016 WL 4740615. Yet the *ODP* district court, in contrast with the district court in this case, *upheld* the laws challenged here. *Ohio Organizing Collaborative*, 2016 WL 3248030, at *31-*36. The court found that these laws impose minimal burdens and serve state interests. *Id.* The Ohio Democratic Party did not cross appeal that ruling.

In this case, which has a "byzantine" history, Appx. A74, the Ohio Democratic Party, the Northeast Ohio Coalition for the Homeless, and the Columbus Coalition for the Homeless (together, NEOCH) challenged the same Absentee-Ballot and Provisional-Ballot Laws. On June 7, 2016, two weeks after the other Ohio district court in *ODP* upheld these laws, the Ohio district court here invalidated them. Appx. A070-A184. It held that three components violated the Fourteenth Amendment: (1) the requirement that voters complete five fields on the affirmation forms and identification envelopes; (2) the prohibition against poll workers completing forms; and (3) the reduction in the cure period. Appx. A142-A152. To reach this result, the court relied on special burdens on "illiterate and homeless voters." Appx. A145, A149, A150. It found Ohio's interests insufficient given the "magnitude of the burden" on that group. Appx. A146, A149-A150, A152.

Alternatively, the court held that these provisions violated Section 2. It concluded that "African-American voters are more likely than white voters to have their absentee or provisional ballots rejected." Appx. A170. This alleged disparate impact in *overall* rejection rates—combined with an examination of the "*Gingles* factors"—allegedly established a Section 2 violation. Appx. A170-A179.

D. The Sixth Circuit Mostly Reversed The District Court's Injunction Well Over A Month Ago, And That Court Denied En Banc Review Three Weeks Ago

Ohio appealed the next day. Notice of Appeal, R.693, PageID#33910. Two days later, it filed a motion to expedite, requesting a schedule that would "give the Court time to resolve [the case]—including with any appropriate en banc proceedings—by the end of August or early September 2016." Mot., 6th Cir. R.17, No. 16-3603, at 1 (June 10, 2016). On June 15, 2016, the Sixth Circuit granted this motion and set a short schedule. Order, 6th Cir. R.19-2, No. 16-3503, at 1 (June 15, 2016). On June 23, 2016, NEOCH filed a cross appeal, Notice of Cross-Appeal, R.697, PageID#33925, requiring the Sixth Circuit to adjust the expedited schedule by adding a fourth brief to it, Order, 6th Cir. R.23, No. 16-3603 (June 23, 2016). The court heard oral argument on August 4.

On September 13, 2016, the Sixth Circuit issued a split decision mostly reversing the injunction. Appx. A1-A69. The court reversed the district court's judgment under Section 2, holding that NEOCH failed to show that the *specific* laws disparately affected minority voters. Appx. A12-A17. Applying an *Anderson-Burdick* analysis, the court next held that the Provisional-Ballot Law's five "field" requirements were constitutional, stressing that the two additional fields (birthdate

and address) served Ohio's important interests in registering and identifying voters. Appx. A19-A22. With regard to the Absentee-Ballot Law's five fields, the panel affirmed the district court's injunction only as to any requirement that voters complete address and birthdate fields "with technical precision." Appx. A22-A25, A29. It fully reversed relief as to both the limitations on poll-worker assistance and the reductions of the cure periods. Appx. A25-A26. Finally, it rejected alternative theories from NEOCH's cross appeal—including NEOCH's claims under 52 U.S.C. § 10101(a)(2)(B) and *Bush v. Gore*, 531 U.S. 98 (2000). Appx. A17-A19, A26-A29.

NEOCH then waited a full two weeks (until almost midnight on September 27) to petition for en banc review. Pet., 6th Cir. R.67, No. 16-3603 (Sept. 27, 2016). With absentee voting beginning on October 12, Ohio the next day moved to expedite because the judgment would affect the absentee-voting period. Mot., 6th Cir. R.69, No. 16-3603 (Sept. 28, 2016). The Sixth Circuit granted that request for expedition. Order, 6th Cir. R.70, No. 16-3603 (Sept. 29, 2016). Over several dissents published later, the court denied en banc review on October 6. Appx. A185-A197.

NEOCH waited another five days to ask the Sixth Circuit to stay its mandate. Mot., 6th Cir. R.77, No. 16-3603 (Oct. 11, 2016). Ohio filed an emergency response to this motion the next day. Response, 6th Cir. R.78, No. 16-3603 (Oct. 12, 2016). The Sixth Circuit denied a stay and issued its mandate on October 14. Appx. A198. NEOCH filed its present application another eleven days later, on October 25, 2016.

E. After The Sixth Circuit Issued Its Mandate, The Secretary Issued A Directive Clarifying State Law For The Election

Secretary Husted has taken steps to implement the Sixth Circuit's ruling and provide guidance to Ohio's 88 boards of elections. The Secretary first issued revised absentee-voting instructions to the boards reflecting the Sixth Circuit's ruling. *See* Directive 2016-36 ("Absentee Directive"), *available at* https://goo.gl/D0S1Tc. Among other changes, the revised instructions modified the list of "minimum" requirements on an absentee-ballot envelope to include only name, signature, and identification; specified that "if a board of elections must use address to confirm a voter's eligibility, it must not require technical precision in a voter's completion of the address field"; and instructed that "[a] board of elections may never reject an absentee ballot for the sole reason that the date of birth is missing, insufficient, or incomplete." *Id*. at 5-36, 5-38-39, 5-40.

In addition, the Secretary drafted a new directive to clarify any confusion among the boards regarding the mistakes that can serve as a basis to reject a ballot. Directive 2016-38 ("Counting Directive"), *available at* https://goo.gl/EzGVgF. That Directive highlighted the Sixth Circuit's ruling regarding the address and birthdate requirements for absentee-ballot identification envelopes, but also clarified the procedure relating to mistakes on *provisional-ballot* affirmation forms. It confirmed that "as long as a board can still identify the voter," technical mistakes in birthdates or addresses are "not valid reasons to reject a ballot." *Id.* at 1-2. It also reminded boards to follow the requirements set forth in an earlier directive (Directive 2008-80) "[i]n all other matters relative to voter identification." Directive

2008-80 clarified the standards to verify a voter's identity. Among other guidelines, Directive 2008-80 instructed that a voter's name should be deemed to "conform" to the registration record for identification purposes when it contains "the same last name and the same first name or derivative of the first name as the first and last names appearing in the poll list or signature poll book," and clarifies that "[m]inor misspellings shall not preclude the use of a proffered ID for purposes of voting." *See* Directive 2008-80, at 3, *available at* https://goo.gl/tqGgmx.

Boards of elections have been operating under these directives for two weeks. Early voting began on October 12. Since that time, boards have not only received training on the directives, but have used them to process the absentee ballots that they have received. Under Ohio law, boards are required promptly to review all absentee-ballot identification envelopes to determine whether they contain sufficient identifying information. Absentee Directive, at 5-33. If a ballot envelope is deficient, the board must send a letter notifying the voter of the problem and the process and time for "curing" the defect. *Id.* The standards and procedures set forth in the Secretary's directives govern the boards' decisions regarding whether identification envelopes are sufficient and which voters receive notice and an opportunity to cure. Likewise, these directives inform the communications and guidance that the boards have relayed to their own staff and volunteers regarding how ballots should be processed and, ultimately, counted.

REASONS FOR DENYING THE STAY

The "[d]enial of . . . in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases.'" *Conkright*, 556 U.S. at 1402 (Ginsburg, J., in

chambers) (citation omitted). That is particularly true where, as here, applicants attack state or federal laws. "[S]tatutes are presumptively constitutional and, absent compelling equities on the other side, . . . should remain in effect pending a final decision on the merits by this Court." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1352 (1977) (Rehnquist, J., in chambers). The Court has identified three requirements for a stay of a judgment. The "applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Additionally, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.*

NEOCH cannot meet these standards. The Court should deny the application based on the equities. *See* Part I. In addition, the Court should deny a stay because NEOCH has not shown a likelihood that the Court would grant certiorari and reverse on either of the cross-appeal issues that NEOCH repeatedly lost in the lower courts. *See* Part II. And the Court should deny a stay because NEOCH has not shown a likelihood that the Court would grant certiorari and reverse the Sixth Circuit's Section 2 and *Anderson-Burdick* rulings. *See* Part III.

I. NEOCH HAS FILED TOO LATE FOR THIS YEAR'S ELECTION, AND A STAY WOULD IRREPARABLY HARM OHIO

The Court should deny a stay on the equities alone. Ohio has been voting for weeks, while NEOCH has repeatedly dragged its feet in its filings. Ohio needs to

focus on administering the election rather than litigating the rules. And, contrary to NEOCH's claims, the limited issues here affect relatively few voters.

A. NEOCH Delayed For Weeks After The Sixth Circuit's Decision, And A Stay At This Late Date Could Risk Confusion As Boards Scramble To Learn Revised Rules

NEOCH's delay has caused a time crunch. It asserts that it has been "diligent" in pursuing its case, Appl. 36, but ignores the last six weeks. That omission is unsurprising, as the calendar shows that NEOCH repeatedly wasted time, forcing Ohio and the courts to compensate for its delays.

1. "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon *general equitable principles*." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (emphasis added). Those general principles include a party's timeliness in requesting relief. Even in matters of life and death, for example, the Court has recognized that it may resolve any "doubts and uncertainties" against petitioners who "delay their filings." *See Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992); *Gomez v. U.S. Dist. Ct. for N. Dist. Of Cal.*, 503 U.S. 653, 654 (1992). This is equally true in the election context. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5.

When this Court established this "*Purcell* principle" against last-minute election changes, it said on October 20, 2006, that changes aimed at Election Day, November 7—then 18 days away—were too late. *Id.* at 3. Here, NEOCH has filed

for a stay 14 days before the election, so any Court decision would be even tighter than in *Purcell*. From the beginning of the appeal, moreover, Ohio has sought to speed things up. After the district court ruled on June 7, Ohio appealed the next day and asked the Sixth Circuit to "expedite this appeal to give the Court time to resolve it—including with any appropriate en banc proceedings—by the end of August or early September 2016." Mot., 6th Cir. R.17, No. 16-3603, at 2 (June 10, 2016). "Resolution by that time would, in fairness to both sides, give either side time to seek review in the Supreme Court." *Id.*

Since the Sixth Circuit ruled on September 13, however, NEOCH has delayed. The Sixth Circuit's decision left 29 days until Ohio's absentee voting opened on October 12. Yet NEOCH took the full *14 days* to file an en banc petition on September 27—past 11:00 p.m. Ohio reacted the next day, September 28, by moving to expedite the petition because the issues affected absentee voting, not just post-election counting. Mot., 6th Cir. R.69, No. 16-3603, at 2 (Sept. 28, 2016). The court granted Ohio's motion and later ordered Ohio to respond in a day to the en banc petition. Finally, on October 6, it denied en banc review, leaving opinions to follow so that the decision could issue more quickly. NEOCH then took *5 more days* to move the Sixth Circuit to stay the mandate—with voting starting the next morning. Ohio responded the next day, again explaining the urgency. The court denied the stay and issued the mandate Friday, October 14. Now, NEOCH has taken *11 additional days* from the October 14 stay denial to file in this Court.

These repeated delays threaten proper election administration and must count against NEOCH now.

2. Ohio would face irreparable harm if the Court granted a stay. "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citation omitted). An injunction invalidating a state law "frustrates the intent of the elected representatives of the people," *Crawford*, 553 U.S. at 203 (Stevens, J., op.) (internal quotation marks omitted), and "short circuit[s] the democratic process," *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Thus, the presumption of constitutionality that attaches to laws "'is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered . . . in balancing hardships.'" *Bowen v. Kendrick*, 483 U.S. 1304, 1304 (1987) (Rehnquist, C.J., in chambers) (citation omitted).

Aside from this sovereign harm, changing the rules during the ongoing election could substantially disrupt its appropriate administration. Contrary to NEOCH's claim, Appl. 35, its purported carveout from its requested stay for Ohio's cure-period and poll-worker-assistance laws does not resolve all absentee-voting concerns over a stay. Throughout the past weeks and in the remaining days, boards have sent, and will continue to send, deficiency notices to absentee voters who do not adequately complete their identification envelopes. *See* Absentee Directive, at 5-33. Changing the rules for those envelopes could affect who should get those

notices. Nor is it an answer, as NEOCH claims, to say that Ohio could merely forgive more errors in post-election counting. *See* Appl. 34. If a stay moves the goalposts, boards could stop sending letters to some voters who are situated similarly to those who already received such letters—telling them to cure or risk not being counted—weeks ago. Moreover, the Secretary has issued the Absentee and Counting Directives over the last weeks, so countermanding those instructions now would be confusing for counties. The Secretary has also held training sessions, such as webinars, over the last weeks. Any changed training now would also consume the time of elections officials—who are busy conducting Ohio's month-long voting.

Even setting aside absentee-voting concerns, it is too late to change the rules for Election Day. NEOCH cavalierly suggests that nothing matters until 11 days *after* Election Day, Appl. 35, but boards of election must confirm or reject *all* provisional ballots before they start the "official canvass" at that time. Election Manual, R.698-2, PageID#34224-25. The *process* of assessing provisional votes for *validity* begins the morning after the election, in preparation for the counting later. Elections officials immediately sort the ballots into categories based on complete or incomplete information, and begin searching databases to identify voters. Both the sorting and the curing require fixed rules about what constitutes a deficiency in which fields. Changing those rules mid-sorting, post-election, would be chaotic.

B. No Irreparable Injury Will Befall NEOCH If The Court Declines Its Requested Stay

NEOCH's irreparable-injury claims are mistaken. To begin with, few voters were affected by the disputed Ohio laws even before the Secretary's latest directive

to the boards. Ohio counts almost all absentee and provisional ballots: The absentee acceptance rate has hovered around 98% for years, and, in 2014, over 90% of 49,262 provisional ballots were counted (the nation's fifth-highest acceptance rate). Statistics Tables, R.698-18 to R.698-23, PageID#34734-34772; 2008-2015 Table, R.686-3, PageID#33416 (absentee ballots); EAC Election Rep., R.698-25, PageID#35022-23 (provisional ballots). Indeed, rejections attributable to the challenged laws are miniscule in percentage terms. In 2014, 59 provisional ballots were rejected for birthdate errors and 188 for address errors. Provisional Rep., R.698-16, PageID#34728. In 2015, both types of errors combined were just 373. Provisional Rep., R.698-17, PageID#34731. For absentees, the combined rejections were about 1380 (or 0.16% of absentees) in 2014, and about 330 (0.08% of all) in 2015. *See* Absentee Supp. Reps., R.698-22 & R.698-24, PageID#34761-34768, 34773-34793; 2014-2015 Tables, R.686-1, PageID#33407, 33411.

Even looking to all five fields, and not just the new address/birthdate fields, the numbers remain proportionately small. In 2014, 470 provisional ballots were rejected for informational failures in the five informational fields; in 2015, 723 were. (Another 173 in 2014, and 278 in 2015, were rejected for failure to provide ID, and some unknown subset of those could arguably be informational flaws.) Provisional Reps., R.698-16 & R.698-17, PageID#34728, 34371. For absentees, the five-field informational rejections were 2640 in 2014 and 1030 in 2015. (Another 199 in 2014 and 77 in 2015 were for voter ID issues, some of which could be informational). Absentee Supp. Reps., R.698-22 & R.698-24, PageID#34761-34768, 34773-34793.

In addition, the Secretary's Counting Directive will further clarify that technical errors—including items such as transposed numbers of birth month and birth date, or name misspellings or shortenings—generally should not be a basis for rejecting a ballot. *See* Directive 2016-38, at 1-2. That Directive applies to *both* absentee and provisional ballots, so it conforms to the Sixth Circuit's modified injunction as to absentees and reflects what Ohio law has otherwise provided as to both absentees and provisionals. Thus, NEOCH's complaints about "trivial errors," Appl. 34, such as rejections for month and day transposition, Appl. 3, are misguided.

NEOCH admits that the Counting Directive accurately interprets Ohio law. Appl. 7. But it counters that "a state court could disagree." *Id.* Nobody has filed such a state-court case, and NEOCH is unclear on what the grounds would be. NEOCH also complains that the Counting Directive is insufficient because it might be only "temporary," and because a future administration could change it. Appl. 32. That argument provides no basis to grant their requested "temporary" stay for this election only. No urgency exists for future elections that would justify such a stay.

Lastly, NEOCH argues that a stay is proper because of another Sixth Circuit decision invalidating a maintenance program for voter lists that had been in operation since 1994. Appl. 7, 33-34 (citing *A. Philip Randolph Inst. v. Husted*, __ F.3d __, 2016 WL 5328160 (6th Cir. Sept. 23, 2016)). The Sixth Circuit "held that a process overseen for over 22 years by multiple Ohio Secretaries of State—from both major political parties—was unlawful" under the National Voter Registration Act.

A. Philip Randolph Inst. v. Husted, 2016 WL 6093371, at *2 (S.D. Ohio Oct. 19, 2016). Far from justifying a stay here, this decision strongly cuts against one. As the district court recognized on remand from that case, the court was in "a difficult position" because the Sixth Circuit's decision placed complex "logistical hurdles" on "Secretary Husted and Ohio's 88 county boards of elections." *Id.* This last-minute, complex election change should not compel this Court to issue further complications and even more last-minute changes. It should compel the Court to avoid any further disruptions.

II. THIS COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE THE SIXTH CIRCUIT'S RULINGS REJECTING NEOCH'S TWO CROSS-APPEAL CLAIMS

NEOCH seeks an injunction based on two legal claims that no judge in the lower courts has accepted—a statutory claim under 52 U.S.C. § 10101(a)(2)(B), and a constitutional claim under *Bush v. Gore*, 531 U.S. 98 (2000). The Court should not be the *first* to issue an injunction tied to these meritless claims.

A. NEOCH's Argument That 52 U.S.C. § 10101(a)(2)(B), A Rarely Invoked Provision, Can Be Enforced Through A Private Suit Does Not Justify This Court's Intervention At This Time

52 U.S.C. § 10101(a)(2)(B) (formerly 42 U.S.C. § 1971(a)(2)(B)) provides that "[n]o 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[.]

Id. It is unlikely that this Court would grant certiorari to review the Sixth Circuit's 16-year-old holding that no private right of action exists to enforce this "materiality"

provision. *See McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), *cert. denied* 532 U.S. 906 (2001). It is even more unlikely that the Court would reverse the Sixth Circuit's longstanding interpretation.

1. The Court will not likely grant review of this question. *First*, § 10101(a)(2)(B) has not arisen frequently enough to warrant this Court's review. That provision was part of Title I of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241—a law better known for its other Titles, such as Title II (public accommodations) and Title VII (employment). *Id.* § 101, 78 Stat. at 241. In terms of voting provisions, the Voting Rights Act has largely taken precedence over § 10101 and other provisions from earlier laws. "In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of 'the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds.'" *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2633 (2013) (Ginsburg, J., dissenting) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)). But this "series of enforcement statutes in the 1950s and 1960s"—including § 10101(a)(2)(B)—"depended on individual lawsuits filed by the Department of Justice." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). When that litigation proved "slow and expensive," *id.*, Congress responded with the Voting Rights Act of 1965. That Act has largely supplanted § 10101.

The absence of circuit cases addressing § 10101(a)(2)(B) confirms this point. Even though the provision has been on the books for over 50 years, only two circuit decisions have ever considered whether private parties may sue to enforce it.

Compare McKay, 226 F.3d at 756, *with Schwier v. Cox*, 340 F.3d 1284, 1294-97 (11th Cir. 2003). Similarly, circuit courts have rarely had the opportunity to interpret the meaning of the provision's "materiality" requirement. *E.g.*, *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1172-75 (11th Cir. 2008) (upholding law requiring voters to identify driver's license number or four digits of social security number when registering). This 1-1 circuit split is too shallow to merit review now. The Court instead should wait for further percolation to see if other circuits consider this question.

In response, NEOCH nowhere disputes the lack of precedent interpreting or applying § 10101(a)(2)(B). It instead rhetorically suggests that other voting cases may not have arisen under § 10101(a)(2)(B) because other States do not "disenfranchis[e] voters on the basis of immaterial errors." Appl. 25. But Ohio law does no such thing. Regardless, over the last few decades, plaintiffs have not been chary of bringing challenges to other state voting practices. *Cf. Shelby Cnty. v. Holder*, 679 F.3d 848, 868 (D.C. Cir. 2012), *rev'd by* 133 S. Ct. 2612 (2013) ("The record shows that between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some *653 section 2 suits* filed in *covered jurisdictions*, providing relief from discriminatory voting practices in at least 825 counties." (emphases added)). The lack of cases under § 10101(a)(2)(B) thus cannot be explained, as NEOCH would have it, by the alleged lack of opportunities to sue.

Second, this question does not warrant review because it will not change the outcome *in this case*. That is because NEOCH raised constitutional claims under

Anderson-Burdick in addition to its claim under § 10101(a)(2)(B). This Court's constitutional interpretation of the Fourteenth Amendment overlaps with (and in some respects duplicates) Congress's legislative mandate in § 10101(a)(2)(B). The statute dates to 1964—two years *before* this Court initiated its modern cost-benefit balancing under the *Anderson-Burdick* test. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 (2008) (Stevens, J., op.) (discussing *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966)). That constitutional balancing now governs *all* voting laws, including those addressing "'the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted). It is hard to imagine a state voting requirement that would be deemed "immaterial" to voting under § 10101(a)(2)(B) yet somehow survive the cost-benefit balancing that courts now regularly apply under *Anderson-Burdick*.

Applying the *Anderson-Burdick* test here, moreover, the Sixth Circuit found that most provisions at issue are justified by Ohio's interests. Appx. A19-A26. Even if private parties could enforce § 10101(a)(2)(B) through a private right of action, courts would be unlikely to invalidate Ohio's laws under that provision for all of the same reasons that the laws satisfy *Anderson-Burdick* balancing. The Counting Directive, moreover, reinforces that Ohio laws governing birthdates and addresses need not be read in a manner to invalidate otherwise valid votes for "technical mistakes." *See* Directive 2016-38, at 1-2.

NEOCH responds that § 10101(a)(2)(B) could be applied differently than the *Anderson-Burdick* framework because its "plain language" requires invalidation of Ohio's laws without any balancing of voting burdens with state interests. Appl. 25. That is not so. Whether a provision is "material" will depend heavily on the state interests that it serves. *Cf. Browning*, 522 F.3d at 1174 (noting different definitions of "material," including merely "minimal relevance" to voter qualifications).

Third, NEOCH's claim about the materiality provision provides no basis for an *injunction*. The district court's decision to grant an injunction in no way relied on this statute. And NEOCH raises only a threshold *procedural* question, not one going to the *merits*. So even if this Court were to agree with NEOCH, it would lead only to a remand for more litigation on the merits, not to injunctive relief.

2. The Sixth Circuit was correct 16 years ago in *McKay*. This Court has been reluctant to permit implied rights of action or rights of action under § 1983—even in the voting context. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5, 6 (2008); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The logic of those cases extends to this one.

For one thing, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). In the Civil Rights Act of 1964, Congress *expressly* created the well-known private rights of action in Title II for public accommodations and Title VII for employment.

If it had intended for a private right of action under § 10101(a)(2)(B) as well, Congress would have said so expressly as with these other provisions.

For another, the "'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (citation omitted). When Congress passed the materiality provision, the law already had an enforcement method—suits by the Department of Justice. *See* 52 U.S.C. § 10101(c). Indeed, it is precisely because "individual lawsuits filed by the Department of Justice" proved ineffective that Congress later passed the Voting Rights Act. *Nw. Austin*, 557 U.S. at 197.

For a third, "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (citation omitted). Here, the text of § 10101(a)(2) ("[n]o person acting under color of law shall") focuses on the regulated actors rather than the benefited parties.

B. NEOCH's *Bush v. Gore* Claims Do Not Warrant A Stay

NEOCH also argues that the Sixth Circuit violated the lessons of *Bush v. Gore* in two ways. Appl. 29-33. Yet, like NEOCH's materiality argument, this claim seeks relief based on a legal theory that *no judge* has accepted. This Court is unlikely to grant certiorari and reverse on these *Bush v. Gore* theories.

1. NEOCH asserts that the Sixth Circuit's decision allows differential treatment of voters in different counties regarding "technical errors." Appl. 29. But the Counting Directive tells county boards statewide that "technical mistakes" in birthdates and addresses are "not valid reasons to reject a ballot." Directive 2016-

38, at 1-2. And Ohio law sets neutral standards for determining the validity of ballots; those standards are nothing like the "want" of "specific rules" that condemned a court-imposed counting method in *Bush v. Gore*. 531 U.S. at 106. Indeed, *Bush* recognized that some county-to-county variability would be inevitable. 531 U.S. at 109 ("local entities, in the exercise of their expertise, may develop different systems for implementing elections"). As the Sixth Circuit noted, "[a]rguable 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." Appx. A27. And to the extent that a party believes that a particular board's decision to reject a particular ballot would *violate* state law, the party could attempt to seek state-law mandamus relief in state courts.

2. NEOCH next mistakenly asserts that the Sixth Circuit's decision *itself* violates *Bush v. Gore*. Appl. 30-33. Yet it identifies no case that holds that a court violates the Equal Protection Clause by interpreting it.

NEOCH asserts that the Sixth Circuit's decision creates unequal treatment *among* different absentee voters because "minor errors" about the identification or name fields will invalidate a ballot while minor errors about an address or birthdate will not. Appl. 30-31. Again, NEOCH overlooks directions to county boards. A longstanding directive tells boards that "[m]inor misspellings" of a voter's name do not invalidate ballots. *See* Directive 2008-80, at 3. Although that guidance was

written for matching the name on a voter's identification to the board's voting records, the Secretary also instructs boards to ignore minor differences between the name and voting records for the name field. Moreover, even if errors in *different* fields were treated differently, it would not pose an obvious conflict with *Bush*, which criticized a lack of "minimum procedures" for counting the *same* field (a vote for presidential electors) across Florida. *See* 531 U.S. at 109.

Alternatively, NEOCH argues that the Sixth Circuit's decision created an equal-protection problem by directing boards to use different standards when counting absentee and provisional ballots. Appl. 31-32. Once again, NEOCH ignores the Counting Directive, which applies to "fields on absentee . . . envelopes *and* provisional ballot affirmations." Directive 2016-38, at 1 (emphasis added). Regardless, distinctions between absentee and provisional voters raise no *Bush v. Gore* concerns. That case addressed a standardless vote-counting process made up by a state court that provided no criteria for local officials. 531 U.S. at 103, 105. Here, the Sixth Circuit did not create rules, let alone rules that lack "standards for determining what is a legal vote." *Id.* at 110. Finally, nothing is unusual with treating different voters differently when state interests differ. *Cf. Crawford*, 553 U.S. at 185-86 (Stevens, J., op.) (noting that Indiana's identification requirement did not apply to absentee ballots); *Santillanes*, 546 F.3d at 1320-21 (upholding different procedures for absentee and in-person voters).

In short, the Court is unlikely to grant certiorari and reverse based on a claim that no judge has accepted, and based on a case that confined its analysis to its own unprecedented "circumstances." *Bush*, 531 U.S. at 109.

III. THIS COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE THE SIXTH CIRCUIT'S RULINGS ON THE SECTION 2 OR *ANDERSON-BURDICK* ISSUES

The Sixth Circuit's resolution of NEOCH's Section 2 and *Anderson-Burdick* claims are also not cert-worthy, and this Court would not reverse its rulings.

A. The Sixth Circuit's Section 2 Analysis Does Not Conflict With The Fourth Circuit's Views of Section 2

As Ohio explained in its opposition in the *Ohio Democratic Party* case, *see* Ohio Opp., No. 16A223, at 26-27 (Sept. 8, 2016), challengers asserting a Section 2 claim must make both "micro" and "macro" level showings. At the "macro" level, challengers must show that a State's political processes—i.e., its entire registration and voting processes—are "not equally open" to certain racial groups. At a "micro" level, challengers must connect those general inequalities to the specifically challenged practice by showing that its specific disparate impact helps cause that general inequality. Here, the Sixth Circuit rightly rejected NEOCH's Section 2 claim because, as NEOCH's expert found, the *specific* laws that NEOCH challenges here (in contrast to the general absentee-voting or provisional-voting processes) did not have a racially disparate impact at the *micro* level. Appx. A14-A17.

In response, NEOCH does not dispute this factual point. It instead makes a legal one—arguing that the Sixth Circuit created a conflict with the Fourth Circuit by examining only the *specific impact* of the challenged laws rather than the *cumulative impact* of Ohio's voting processes. Appl. 26 (citing *League of Women*

Voters of N.C. v. North Carolina, 769 F.3d 224, 242 (4th Cir. 2014)). Yet if the specifically challenged laws do not themselves disparately harm African Americans, there is no need to look to state laws in the aggregate because, whatever the *cause* of any aggregate harm, it does not arise from those laws. If anything, here the laws *help* African-American voters. As the Sixth Circuit recognized, in all recent 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"—rejections having nothing to do with this case. Appx. A16. And the *pro-registration* effect of the new laws (by having the provisional ballot double as a registration form) helps reduce the future number of rejections for lack of registration. Appx. A16-A17.

Regardless, the Sixth Circuit's earlier decision in *Ohio Democratic Party* confirms that no split exists with the Fourth Circuit. That case shows that the Sixth Circuit does *not* ignore cumulative-level data as an element necessary for a Section 2 claim. *See* 2016 WL 4437605, at *14-15. There, the court rejected a Section 2 challenge to Ohio's absentee-voting calendar because the Ohio Democratic Party had failed to show that the State's calendar had led to general voting inequalities for African Americans. "In 2008, 2010, 2012, and 2014, African Americans registered at higher percentages than whites, and both groups' registration numbers are statistically indistinguishable in every federal election since 2006." *Id.* at *14. And the exact same "macro" level data on Ohio voting and registration rates that the court found dispositive in that case exists in this one. *Id.* The laws at issue here were in effect in 2014, yet "the statistical evidence shows

that African Americans' participation was at least equal to that of white voters in 2014." *Id.*

Indeed, in *Ohio Democratic Party*, the Ohio Democratic Party (a plaintiff here) argued that the Sixth Circuit's decision conflicted with another Fourth Circuit decision because it looked to *aggregate* data. Appl., No. 16A223, at 30-31 (Sept. 1, 2016) (discussing *N.C. St. Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016)). To get a stay in this case, by contrast, NEOCH now claims that the Sixth Circuit erred by looking at *specific* data. Both claims are mistaken. If a challenged law has no specific disparate impact, it cannot be the cause of any macro-level inequalities. And if no macro-level inequalities exist, a Section 2 claim must also fail. NEOCH's claim thus fails for both reasons. Just as this Court denied a stay in *Ohio Democratic Party*, it should deny a stay here as well.

B. The Sixth Circuit's Constitutional Ruling Applied This Court's Established *Anderson-Burdick* Framework To The Specific Facts Of This Case

The Sixth Circuit's constitutional holdings under the *Anderson-Burdick* test offer no basis for certiorari or reversal. *First*, the Sixth Circuit merely applied this Court's settled legal framework under its *Anderson-Burdick* cases to the specific laws at issue. NEOCH identifies *no* other circuit cases that have allegedly interpreted this Court's *Crawford* decision in a manner conflicting with the Sixth Circuit's approach. *Cf. Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (recognizing that, under *Crawford*, "the burden some voters faced could not prevent the state from applying the law generally").

Second, NEOCH mistakenly argues that the Sixth Circuit wrongly chose Justice Scalia's view (which measured burdens on all voters), over Justice Stevens's view (which, NEOCH says, measured burdens on a subset of voters). Appl. 28-29. Not so. The Sixth Circuit discussed both opinions, and recognized Justice Stevens's as the controlling one. Appx. A21. It then noted that, "[e]ven 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 become disenfranchised as a result of" the challenged laws. *Id.* The Sixth Circuit thus undertook the same analysis as Justice Stevens's opinion in *Crawford*, which held that the record did not allow the Court to "quantify" the burden on any voting subset. 553 U.S. at 200. That fact-specific ruling about *this* record does not warrant further review.

Third, NEOCH misreads Justice Stevens's *Crawford* opinion. According to NEOCH, that opinion did not require measuring the burden on all voters when assessing *facial* relief. Appl. 28. But that is exactly what it said. For facial challenges, it looked to the statute's "broad application" to "*all*" voters in concluding that the law imposed "only a limited burden on voters' rights." *Crawford*, 553 U.S. at 200, 202-03 (Stevens, J., op.) (emphasis added). Justice Stevens reserved the "subset" option that his opinion discussed for as-applied relief. The emergency application here, though, seeks to restore a *facial* injunction. The district court's order enjoined two Ohio statutes as for *all* voters, not merely a *subset* of voters.

Fourth, NEOCH ignores the Counting Directive. It reminds boards that—even for the provisional ballots untouched by the Sixth Circuit's ruling—"technical mistakes" about birthdates or addresses are generally "not valid reasons to reject a ballot." Directive 2016-38, at 1-2. And the challenged laws affected only a tiny percentage of the overall vote in prior elections. In 2014, for example, only 59 provisional ballots were rejected for birthdate problems and only 188 for address problems; in 2015, both types of problems combined were just 373. *See* First Brief, 6th Cir. R.27, No. 16-3603, at 10 (citing record). These statistics cannot justify the broad facial relief that NEOCH seeks at the last minute from this Court.

CONCLUSION

The Court should deny the application for a stay.

Respectfully submitted,

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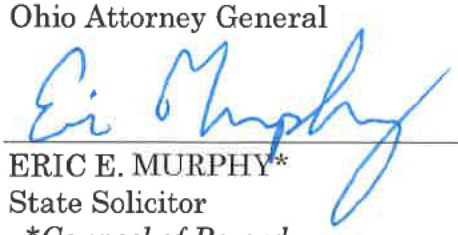

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