Nos. 16-3561

In the United States Court of Appeals for the Sixth Circuit

OHIO DEMOCRATIC PARTY; DEMOCRATIC PARTY OF CUYAHOGA COUNTY; MONTGOMERY COUNTY DEMOCRATIC PARTY; JORDAN ISERN; CAROL BIEHLE; BRUCE BUTCHER,

Plaintiffs-Appellees,

v.

JON HUSTED, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF OHIO; MIKE DEWINE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF OHIO,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Ohio, No. 2:15-cv-1802 (Hon. Michael H. Watson)

BRIEF *AMICUS CURIAE* OF THE CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 8

I. THE TEXT AND HISTORY OF THE FIFTEENTH AMENDMENT PROHIBIT LAWS THAT DENY OR ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE AND GIVE CONGRESS THE POWER TO PREVENT STATES FROM MAKING IT HARDER FOR RACIAL MINORITIES TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO VOTE. 8

II. SECTION 2 OF THE VOTING RIGHTS ACT PROHIBITS STATE LAWS THAT MAKE IT HARDER FOR RACIAL MINORITIES TO EXERCISE THEIR RIGHT TO VOTE AS A MEANS OF EFFECTUATING THE FIFTEENTH AMENDMENT'S EQUALITY MANDATE 15

III. THERE IS NO "EARLY VOTING" EXCEPTION TO THE FIFTEENTH AMENDMENT'S GUARANTEE OF EQUAL POLITICAL OPPORTUNITY. 20

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Dean,
555 F. Supp. 502 (D.R.I. 1982) 7

Chisom v. Roemer,
501 U.S. 380 (1991) 16

City of Rome v. United States,
446 U.S. 156 (1980) 15

Houston Lawyers' Ass'n v. Attorney Gen. of Tex.,
501 U.S. 419 (1991) 15

Johnson v. De Grandy,
512 U.S. 997 (1994) 19, 24

Lane v. Wilson,
307 U.S. 268 (1939) 7, 9, 21

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 5, 18, 19, 23

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 4, 16, 18, 24, 25, 27

League of Women Voters of Ohio v. Brunner,
548 F.3d 463 (6th Cir. 2008) 2

Mixon v. Ohio,
193 F.3d 389 (6th Cir. 1999) 17

Moore v. Detroit Sch. Reform Bd.,
293 F.3d 352 (6th Cir. 2002) 17

Obama for Am. v. Husted,
697 F.3d 423 (6th Cir. 2012) 1, 28

Ohio State Conference of the NAACP v. Husted,
768 F.3d 524 (6th Cir. 2014) 2, 4, 5, 16, 22, 24, 25, 28

Reno v. Bossier Parish Sch. Bd.,
528 U.S. 320 (2000) 9, 22

TABLE OF AUTHORITIES – cont'd.

Page(s)

Rice v. Cayetano,
528 U.S. 495 (2000) 8, 9, 17, 22

Schuette v. Coal. to Defend Affirmative Action,
134 S. Ct. 1623 (2014) 17, 18

Shaw v. Reno,
509 U.S. 630 (1993) 18

Shelby Cnty. v. Holder,
133 S. Ct. 2612 (2013) 8, 15, 17, 18

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 10

Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project,
135 S. Ct. 2507 (2015) 7, 15, 19, 26

Thornburg v. Gingles,
478 U.S. 30 (1986) 16, 18, 19

United States v. Blaine Cnty.,
363 F.3d 897 (9th Cir. 2004) 20

United States v. Marengo Cnty. Comm'n,
731 F.2d 1546 (11th Cir. 1984) 11, 20

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748 (1976) 27

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 10

STATUTES

52 U.S.C. § 10301 ..... 7, 8

U.S. Const. amend. XV, § 1 8

U.S. Const. amend. XV, § 2 10

OTHER AUTHORITIES

2 Cong. Rec. 4085 (1874) 13

TABLE OF AUTHORITIES – cont'd.

Page(s)

Cong. Globe, 40th Cong., 3d Sess. (1869) 9, 11
Cong. Globe, 41st Cong., 2d Sess. (1870) 4, 12, 13, 14
Cong. Globe, 42d Cong., 2d Sess. (1872) 11

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and the questions it raises about the scope of the Fifteenth Amendment's protections and the power of Congress to enforce those protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 2004 general election, "Ohio voters faced long lines and wait-times that, at some polling places, stretched into the early morning of the following day." *Obama for Am. v. Husted*, 697 F.3d 423, 426 (6th Cir. 2012). These "[l]ong wait times caused some voters to leave their polling places without voting in order to attend school, work, or to

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

[attend to] family responsibilities or because a physical disability prevented them from standing in line," *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008). As a result "many voters," including racial minorities, whose political participation is hampered by vestiges of discrimination, "were effectively disenfranchised and unable to vote." *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 531 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); Appellees' Br. at 2-7.

In 2005, acting in response to this disenfranchisement of voters in the 2004 general election, the Ohio legislature established early voting. Under the 2005 early voting scheme, Ohio provided 35 days of early voting, including five days—known as Golden Week—in which citizens could both register and vote on the same day. Since then, "[early] voting has come to play a special role in Ohio in ensuring that African Americans have an equal opportunity to participate in the political process that is not necessarily true elsewhere." *Ohio State Conference of the NAACP*, 768 F.3d at 560. Indeed, in previous election cycles, early voting has been used successfully by tens of thousands of

citizens—disproportionately racial minorities—to register and exercise their constitutional right to vote.

In 2014, the Ohio legislature enacted S.B. 234 to eliminate Golden Week. Section 2 of the Voting Rights Act, which enforces the Fifteenth Amendment's prohibition on racial discrimination in voting, provides that government may not impose arbitrary and discriminatory barriers that make it harder for racial minorities to exercise their constitutionally guaranteed right to vote. Ohio's elimination of Golden Week and its opportunities for same-day registration imposes a discriminatory burden on racial minorities for reasons that are wholly tenuous; accordingly, S.B. 234 violates the basic rule of voter equality enshrined in the Constitution and the Voting Rights Act.

Both the Fifteenth Amendment and the Voting Rights Act not only outlaw state voting rules that "deny" the right to vote on account of race, they also expressly outlaw state voting regulations that "abridge" that right. As the text and history of the Fifteenth Amendment show, the Framers of the Fifteenth Amendment recognized that a broad prohibition on all forms of racial discrimination in voting, coupled with a broad legislative enforcement power, were critical to ensuring "the

colored man the full enjoyment of his right." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). The Framers were well aware that "[t]here may be a hundred prerequisites invented by the States," *id.* at 3658, "a hundred modes whereby [the colored man] can be deprived of his vote," *id.* at 3657, and wrote the Fifteenth Amendment to prevent all such efforts.

The Fifteenth Amendment's broad scope and its explicit grant of enforcement power to Congress ensure that the right to vote is actually enjoyed by all citizens regardless of race. Indeed, when Congress enacted the results test of the Voting Rights Act to forbid all forms of racial discrimination in voting, whether intentional or not, it was exercising the broad enforcement power it was granted in the Fifteenth Amendment. "Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting." *Ohio State Conference of the NAACP*, 768 F.3d at 552. Under the Fifteenth Amendment and the Voting Rights Act, "even one disenfranchised voter—let alone several thousand—is too many": "what matters . . . [is] simply that 'any' minority voter is being denied equal electoral opportunities." *League of*

Women Voters of N.C. v. North Carolina, 769 F.3d 224, 244 (4th Cir. 2014).

Enacted in response to the increased minority political participation made possible by Golden Week, S.B. 234 makes it harder for a substantial number of African American citizens to cast a ballot, eliminating state practices that were enacted to protect the right to vote and that had been disproportionately used by African Americans to enjoy equal political opportunities. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("In essence the State took away the [African-Americans'] opportunity because [they] were about to exercise it."). "The changes" adopted by the Ohio legislature, "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." *Id.* at 439. And the State completely failed to offer any good reason for S.B. 234's elimination of practices that had "play[ed] a special role in Ohio in ensuring that African Americans have an equal opportunity to participate in the political process." *Ohio State Conference of the NAACP*, 768 F.3d at 560. As the district court held, "the justifications offered in support of

the elimination of Golden Week were either not supported by evidence or did not withstand logical scrutiny." Op., R. 117, PageID# 6228.

The State contends that it is not required to justify its decision to eliminate Golden Week under Section 2 of the Voting Rights Act, emphasizing that "[s]tates have traditionally voted only on Election Day." Appellants' Br. at 5. But Ohio instituted a system of early voting and same-day registration during Golden Week after finding that voting only on Election Day disenfranchised a substantial number of voters, including racial minorities. Moreover, as the district court found, racial minorities have disproportionately relied on Golden Week to exercise their constitutional right to vote. Against that background, Ohio's inability to offer any good reason for changing course and eliminating a policy that had successfully ensured equal political opportunities for minority voters makes S.B. 234 the very definition of an election law that abridges the right to vote on account of race.

The State and its *amici* assail the district court's decision as a radical ruling out of step with basic Voting Rights Act principles, claiming that the district court's ruling interprets the Act in a manner that raises serious constitutional questions. But the district court's

ruling does not require states to employ early voting or impose any straightjacket on state election reform; it simply holds that a state may not eliminate electoral practices that ensure equal political opportunities for racial minorities—and are in fact overwhelmingly used by them—without any good reason. The Fifteenth Amendment plainly empowers Congress to set aside laws, like S.B. 234, that have an unjustified discriminatory result.

Eliminating a state practice that successfully fostered minority political participation and making it harder for racial minorities to exercise their rights for no good reason—like a decision to remove polling places from minority communities, *cf. Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982)—"arbitrarily creat[es] discriminatory effects," *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2507, 2522 (2015), leaving racial minorities with "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). The Voting Rights Act "nullifies sophisticated . . . modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939), that "result[] in a denial or abridgement of the right of any citizen of the United

States to vote on account of race or color." 52 U.S.C. § 10301(a). S.B. 234 is such a law.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FIFTEENTH AMENDMENT PROHIBIT LAWS THAT DENY OR ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE AND GIVE CONGRESS THE POWER TO PREVENT STATES FROM MAKING IT HARDER FOR RACIAL MINORITIES TO EXERCISE THEIR CONSTITUTIONAL RIGHT TO VOTE.

In language "as simple in command as it [is] comprehensive in reach," *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "Fundamental in purpose and effect . . . , the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race." *Rice*, 528 U.S. at 512; *see Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) (noting "the transformative effect the Fifteenth Amendment aimed to achieve").

Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," Cong. Globe, 40th Cong., 3d Sess. 725 (1869), the Framers chose sweeping language requiring "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 512. Thus, the Fifteenth Amendment equally forbids law that deny the right to vote outright on account of race as well as those that abridge it by making it harder for racial minorities to exercise their constitutional right to vote. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000) (explaining that the "core meaning" of "'abridge'" is "'shorten'" (quoting *Webster's New International Dictionary* 7 (2d ed. 1950))); *id.* at 359 (Souter, J., concurring in part and dissenting in part) ("[A]bridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden."); *Lane*, 307 U.S. at 275 (observing that the Fifteenth Amendment "hits onerous procedural requirements which effectively handicap exercise of the franchise by the

colored race although the abstract right to vote may remain unrestricted as to race").

To make the Fifteenth Amendment's guarantee a reality, the Framers explicitly invested Congress with a central role in protecting the right to vote—a constitutional right that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)—against all forms of racial discrimination. It did so by providing that "[t]he Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, § 2. By adding this language, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created" by the Amendment and that Congress would have "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966). As the Framers of the Fifteenth Amendment recognized, "the remedy for the violation" of the Fifteenth Amendment, like the remedies for violation of the other Reconstruction Amendments, "was expressly not left to the courts. The remedy was legislative, because . . . the amendment itself provided that it shall be

enforced by legislation on the part of Congress." Cong. Globe, 42d Cong., 2d Sess. 525 (1872).

During the debates over the Fifteenth Amendment, the Framers explained that the Amendment's Enforcement Clause gives Congress a broad "affirmative power" to secure the right to vote. Cong. Globe, 40th Cong., 3d Sess. 727 (1869); *id.* at 1625 ("Congress . . . under the second clause of this amendment" has the power to "impart by direct congressional legislation to the colored man his right to vote. No one can dispute this."). Without a broad enforcement power, the Framers feared that the constitutional guarantee would not be fully realized. "Who is to stand as the champion of the individual and enforce the guarantees of the Constitution in his behalf as against the so-called sovereignty of the States? Clearly no power but that of the central Government is or can be competent for their adjustment . . . ." *Id.* at 984; *see United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1561 (11th Cir. 1984) ("The Civil War Amendments granted national citizenship to all blacks and guaranteed their right of access to the voting process. By their very nature they plainly empowered the

federal government to intervene in state and local affairs to protect the rights of minorities newly granted national citizenship.").

In 1870, the same year the Fifteenth Amendment was ratified, Congress invoked the Amendment's Enforcement Clause in support of voting rights legislation, reflecting the Framers' judgment that the Fifteenth Amendment is "ample and full, and clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). The Amendment's Enforcement Clause, Senator Oliver Morton explained, "intended to give to Congress the power of conferring upon the colored man the full enjoyment of his right. We so understood it when we passed it. . . . [T]he second section was put there . . . for the purpose of enabling Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." *Id.* at 3670; *id.* at 3655 (explaining that the "intention and purpose" of the Fifteenth Amendment's Enforcement Clause was to "secure to the colored man by proper legislation the right to go to the polls and quietly and peacefully deposit his ballot there"); *id.* at 3663 ("Congress has a right by appropriate legislation to prevent any state from discriminating against

a voter on account of his race . . . ."); *see also* 2 Cong. Rec. 4085 (1874) (observing that the Enforcement Clause of the Fifteenth Amendment was added to allow Congress "to act affirmatively" and ensure that "the right to vote, should be enjoyed").

As the debates reflect, the Framers of the Fifteenth Amendment specifically recognized that a broad legislative power to protect the right to vote against all forms of racial discrimination—both denials and abridgements of the right to vote—was critical to ensuring "the colored man the full enjoyment of his right," Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). In the months following ratification of the Fifteenth Amendment, Congress recognized the grim reality that many states would pursue novel methods of disenfranchising African Americans on account of their race. Highlighting the importance of providing "proper machinery . . . for enforcing the fifteenth amendment," Senator William Stewart explained that "it is impossible to enumerate over-specifically all the requirements that might be made as prerequisites for voting, ... The States can invent just as many requirements [for voting] as you have fingers and toes. They could make one every day." Cong. Globe, 41st Cong., 2d Sess. 3658 (1870). He further noted: "There

may be a hundred prerequisites invented by the States," *id.*, "a hundred modes whereby [the colored man] can be deprived of his vote," *id.* at 3657; *see id.* at 3568 (noting "it is our imperative duty . . . to pass suitable laws to enforce the fifteenth amendment" because, without them, "the fifteenth amendment will be practically disregarded in every community where there is a strong prejudice against negro voting"). The only means to ensure minority voting rights, the Framers of the Fifteenth Amendment recognized, "are to be found in national legislation. This security cannot be obtained through State legislation," where "the laws are made by an oppressing race . . . ." *Id.* at app. 392. The Framers thus granted Congress a significant new power when they enacted the Fifteenth Amendment. As the next Section shows, Section 2 of the Voting Rights Act fulfills the promise of the Fifteenth Amendment by prohibiting any racial discrimination in voting, whether intentional or not.

II. SECTION 2 OF THE VOTING RIGHTS ACT PROHIBITS STATE LAWS THAT MAKE IT HARDER FOR RACIAL MINORITIES TO EXERCISE THEIR RIGHT TO VOTE AS A MEANS OF EFFECTUATING THE FIFTEENTH AMENDMENT'S EQUALITY MANDATE.

The results test of the Voting Rights Act directly fulfills the Fifteenth Amendment's guarantee of equality by prohibiting the enforcement of state laws and policies that "function unfairly to exclude minorities" from the political process—either by denying or abridging their right to vote—"without any sufficient justification." *See Inclusive Cmtys.*, 135 S. Ct. at 2522; *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 427 (1991). It is well established that, "under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect." *City of Rome v. United States*, 446 U.S. 156, 175 (1980).

Section 2 of the Voting Rights Act—the statute's "permanent, nationwide ban on racial discrimination in voting," *Shelby Cnty.*, 133 S. Ct. at 2631—enforces the Fifteenth Amendment's command of racial equality by prohibiting a state from enforcing a state law that disproportionately denies or abridges the right of racial minorities to vote, perpetuates past discrimination, and rests only on tenuous

justifications. *See Thornburg v. Gingles,* 478 U.S. 30, 47 (1986) ("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."); *Ohio State Conference of the NAACP,* 768 F.3d at 552 ("Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting."); *id.* at 554 ("[A]s the text of Section 2(b) indicates, the challenged 'standard, practice, or procedure,' must impose a discriminatory burden on members of a protected class" that is "linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class" (quoting *Gingles*, 478 U.S. at 47)); *League of Women Voters of N.C.*, 769 F.3d at 240 (same); *see also Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If . . . 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, . . . § 2 would therefore be violated . . . .").

Laws—such as S.B. 234—that impose on racial minorities discriminatory burdens on access to the political process, and that cannot be adequately justified, run the "serious risk . . . of causing specific injuries on account of race." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1633 (2014) (Kennedy, J., plurality opinion). Using its authority to enforce the Fifteenth Amendment, Congress determined that, whether intentional or not, "any racial discrimination in voting is too much." *Shelby Cnty.*, 133 S. Ct. at 2631. "Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Instead, a plaintiff need only show that the challenged action or requirement has a discriminatory effect on members of a protected group." *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002); *see Mixon v. Ohio*, 193 F.3d 389, 407 (6th Cir. 1999) ("Section 2 of the Voting Rights Act requires only a showing of discriminatory effect.").

Congress enacted the results test of Section 2 against the backdrop of a long history and continuing use by state and local governments of "[m]anipulative devices and practices," including race-neutral measures, "to deny the vote to blacks," *Rice*, 528 U.S. at 513, or

to "reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'" *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969)). The Act's broad focus on discriminatory results helps to ensure that, regardless of the motives of lawmakers, no "hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action." *Coal. to Defend Affirmative Action*, 134 S. Ct. at 1637; *see League of United Latin Am. Citizens,* 548 U.S. at 439 (finding that, despite political motivation, "[t]he changes" made by the state had "undermined the progress of a racial group that ha[d] been subject to significant voting-related discrimination"); *Gingles*, 478 U.S. at 44 n.9 (explaining that "'voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination'" (quoting S. Rep. No. 97-417, at 40 (1982))); *League of Women Voters of N.C.*, 769 F.3d at 246 (stressing "Congress's directive to view current changes to North Carolina's voting laws against the mire of its past").

Aiming to redress "current conditions" that offend the Fifteenth Amendment's guarantee of equality, *see Shelby Cnty.*, 133 S. Ct. at

2629, Section 2 requires courts to carefully review state laws to ensure that they do not unfairly constrict equal access to the political process, demanding an "'intensely local appraisal of the design and impact,'" *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)), of challenged state laws and practices, paying close attention to whether the "effect of the[] [State's] choices" is to "deny[] equal opportunity" to minority voters. *League of United Latin Am. Citizens,* 548 U.S. at 441-42; *see Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (explaining that "[t]he need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power"). In this respect, the results test, like other kinds of disparate impact liability analysis, "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment" by showing that challenged laws "function unfairly" to deny equal political opportunities "without any sufficient justification." *Inclusive Cmtys.*, 135 S. Ct. at 2522.

III. THERE IS NO "EARLY VOTING" EXCEPTION TO THE FIFTEENTH AMENDMENT'S GUARANTEE OF EQUAL POLITICAL OPPORTUNITY.

The State and its *amici* claim that the district court's interpretation of the results test is so radical and out of step with basic Voting Rights Act principles that it raises serious constitutional questions and fails to respect Ohio's equal dignity. Appellants' Br. at 43, 49-51, 60-61; Br. of *Amici* Buckeye Inst. & Judicial Educ. Project in Supp. of Defendants-Appellants at 18-22. According to the State, if Section 2 prohibits S.B. 234, Section 2 would likely exceed Congress's power to enforce the Fifteenth Amendment. Ohio is wrong. As just discussed, Section 2's results test, as applied in this context, plainly falls within the scope of Congress's broad enforcement power, meaning that Congress possesses the authority to prohibit—as it did when it enacted the results test—arbitrary, discriminatory voting laws that make it harder for racial minorities to exercise their constitutional right to vote. *See Marengo Cnty. Comm'n*, 731 F.2d at 1561 ("Congress could reasonably conclude that practices with discriminatory results had to be prohibited to reduce the risk of constitutional violations and the perpetuation of past violations."); *United States v. Blaine Cnty.*, 363

F.3d 897, 909 (9th Cir. 2004) (upholding Congress's judgment that the results test was "'necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination'" (quoting *Marengo Cnty. Comm'n*, 731 F.2d at 1557)); Appellees' Br. at 32-33. The district court properly applied Section 2 to strike down S.B. 234, conducting the careful review Congress insisted on to enforce the Fifteenth Amendment's guarantee of equal political opportunity.

The Voting Rights Act not only outlaws state voting rules that "deny" the right to vote on account of race, it also expressly outlaws state voting regulations that "abridge" that right. Fulfilling the promise of the Fifteenth Amendment, the Voting Rights Act ensures that the right to vote is actually enjoyed by all regardless of race by eliminating any "contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color," *Lane*, 307 U.S. at 275, whether they deny the right to vote outright or simply abridge the right.

The State's argument depends on a crabbed notion of the protection afforded by the Fifteenth Amendment against discriminatory abridgements of the right to vote. In the State's view, since Election

Day voting is the norm, Appellants' Br. at 48, Ohio has not abridged the right to vote on account of race by eliminating state practices that "play a special role in Ohio in ensuring that African Americans have an equal opportunity to participate in the political process that is not necessarily true elsewhere." *Ohio State Conference of the NAACP*, 768 F.3d at 560. As an initial matter, the State's view cannot be squared with the plain meaning of abridge, which is to "'shorten,'" *see Bossier Parish*, 528 U.S. at 333-34 (quoting *Webster's New International Dictionary* 7 (2d ed. 1950))—which is literally what Ohio did in eliminating Golden Week. Moreover, the State's view cannot be squared with either Supreme Court precedent or the purpose of the Fifteenth Amendment, which is to ensure a multiracial democracy equally open to all. Reading "abridge" in the manner suggested by Ohio would undercut the Fifteenth Amendment's "comprehensive . . . reach" and its ability to fulfill what the Supreme Court has previously recognized is its ultimate purpose, that is, to ensure "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise." *Rice*, 528 U.S. at 512. The State's invitation to create an early voting exception to the Fifteenth Amendment's guarantee of equality should be declined.

The fact that this suit challenges the state's elimination of previously existing voting opportunities that helped ensure that racial minorities enjoyed equal political opportunities does not change the basic Voting Rights Act analysis. In *League of Latin Am. Citizens*, for example, the Supreme Court held that the Texas legislature had violated Section 2 by unjustifiably eliminating equal political opportunities previously afforded, stressing that "[u]nder § 2, the State must be held accountable for the effect of [its] choices in denying equal opportunity . . . ." 548 U.S. at 441. As the Court explained, "[t]he changes" made by the state legislature "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." *Id.* at 439. The Court found that "the redrawing of the district lines was damaging to the Latinos," observing that "the State took away the Latinos' opportunity because Latinos were about to exercise it." *Id.* at 440. As this Court and others have recognized, "[t]he fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is . . . relevant to an assessment of whether, under the current system,

African Americans have an equal opportunity to participate in the political process as compared to other voters." *Ohio State Conference of the NAACP*, 768 F.3d at 558; *League of Women Voters of N.C.*, 769 F.3d at 241, 242 (rejecting notion that "courts are categorically barred from considering past practices" and holding that "[i]n refusing to consider the elimination of voting mechanisms successful in fostering minority participation, the district court misapprehended and misapplied Section 2"); Appellees' Br. at 31-32. Any other result would be inconsistent with Congress's directive to consider the totality of circumstances—which plainly include an "eye toward past practices," *League of Women Voters of N.C.*, 769 F.3d at 241—in order to redress "the demonstrated ingenuity of state and local governments in hobbling minority voting power." *Johnson*, 512 U.S. at 1018.

S.B. 234 runs afoul of Section 2's guarantee of equal political opportunity not simply because it changed course, but because it did so in a manner that resulted in racial discrimination, and it did so for no good reason. Without offering any legitimate justification for its change in law, Ohio made it harder for racial minorities—who because of past and existing racial discrimination are more likely to be poor, less likely

to own a vehicle, and less likely to take time off of work—to exercise their right to vote. *See Ohio State Conference of the NAACP*, 768 F.3d at 555 (finding that elimination of Golden Week "will disproportionately burden African American voters and that this burden means that they will have a harder time voting than other members of the electorate"); *League of Women Voters of N.C.*, 769 F.3d at 246 (preliminarily enjoining law that eliminated state policies that "were enacted to increase voter participation, that African American voters disproportionately used" and whose elimination "disproportionately impacts African American voters"); Appellees' Br. at 19-22.

This might be a different case if Ohio had been able to come forward with some legitimate justification for eliminating the voting opportunities provided by Golden Week, opportunities that African Americans have disproportionately used to ensure equal political opportunity. But, as the district court found, the State completely failed to do so. The State's briefing in this Court—which repeats the tenuous justifications rejected by the district court—underscores that S.B. 234's elimination of voting opportunities "arbitrarily creat[es]

discriminatory effects" without "any sufficient justification." *Inclusive Cmtys.*, 135 S. Ct. at 2522.

Ohio claims that it eliminated Golden Week because "overlapping registration and voting raises some fraud risk." Appellants Br. at 28. But how does making it easier for Ohioans to register and cast a ballot during the extra days of early voting provided by Golden Week lead to fraud? Ohio never really explains, ignoring the safeguards in place to prevent abuse of the voting opportunities provided by Golden Week. *See* Appellees' Br. at 44-45 (explaining that "ballots cast by same-day registrants were segregated from other ballots so they could be pulled if a registrant failed mail-verification"). Further, as the district court noted, under Ohio law—entirely separate from Golden Week—"a voter can register on the last day of the registration period and cast an in-person ballot the very next day before the mail-verification process." Op., R. 117, PageID# 6172-73. The issue of overlapping registration and voting does not explain why the Ohio legislature targeted Golden Week for elimination.

Next, Ohio claims that it eliminated Golden Week to "balance giving voters early-voting options against ensuring they have relevant

information." Appellants' Br. at 29. This is a highly paternalistic justification that seeks to take voting opportunities away from minority voters based on the assumption that the state knows better than the voters themselves when they should cast their ballots, and that voting early is the wrong choice. This is not a legitimate justification for curtailing voting opportunities. Under our constitutional system, the choice is left to the voters of Ohio, who can decide whether to vote at the beginning of the period permitted by state law or whether to wait until Election Day. *Cf. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); Appellees' Br. at 49.

Finally, Ohio claims that the elimination of Golden Week helps avoid administrative burdens and extra cost. Appellants' Br. at 27-28, 30. "Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote," but here the state "rationalized election administration changes that disproportionately affected minority voters on the pretext of procedural inertia and under-resourcing." *League of Women Voters of N.C.*, 769 F.3d at 244. These justifications, too, fail. "[T]he State has not shown that any problems arose as a result of the added

responsibilities of administering early voting," *Obama for America*, 697 F.3d at 433, and "it is not enough merely to assert that a restriction on voting saves costs. Arguably *some* cost-saving rationale could be identified in most voting restrictions. Rather, where more than minimal burdens on voters are established, the State must demonstrate that such costs would actually be burdensome." *Ohio State Conference of the NAACP*, 768 F.3d at 548. Ohio did not even try to make this showing. *See* Appellees' Br. at 48-49.

The record in this case admits of only one conclusion. Ohio eliminated voting opportunities that helped African Americans enjoy equal political opportunities for no good reason. The Voting Rights Act forbids this discriminatory result.

CONCLUSION

For all the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,483 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5)and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

Executed this 18th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on July 18, 2016.

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