Case Nos. 16-3603/16-3691

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NORTHEAST OHIO COALITION FOR THE HOMELESS, *et al.*
Plaintiffs-Appellees/Cross-Appellants

v.

JON HUSTED, In His Official Capacity as Secretary of State, *et al.*
Defendant-Appellants/Cross-Appellees

An appeal from the Judgment in a Civil Case dated June 7, 2016,
in the United States District Court for the Southern District of Ohio,
Case No. 2:06-cv-896 (Doc. No. 691)

SECOND BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS NORTHEAST OHIO COALITION FOR THE HOMELESS, COLUMBUS COALITION FOR THE HOMELESS, AND OHIO DEMOCRATIC PARTY

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Disclosure of Corporate Affiliations and Financial Interest

Under 6 Cir. R. 26.1, Plaintiff-Appellee/Cross-Appellant Northeast Ohio Coalition for the Homeless makes the following disclosures:

1. Is the party a subsidiary or affiliate of a publicly owned corporation? NO
2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? NO

/s/ Subodh Chandra — July 14, 2016
Signature of Counsel — *Date*

Under 6 Cir. R. 26.1, Plaintiff-Appellee/Cross-Appellant Columbus Coalition for the Homeless makes the following disclosures:

1. Is the party a subsidiary or affiliate of a publicly owned corporation? NO
2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? NO

/s/ Subodh Chandra — July 14, 2016
Signature of Counsel — *Date*

Under 6 Cir. R. 26.1, Plaintiff-Appellee/Cross-Appellant Ohio Democratic Party makes the following disclosures:

1. Is the party a subsidiary or affiliate of a publicly owned corporation? NO
2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? NO

/s/ Donald J. McTigue — July 14, 2016
Signature of Counsel — *Date*

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Statement in Support of Oral Argument

Plaintiffs-Appellees respectfully request oral argument under Appellate Rule 34(a). This case concerns the fundamental right to vote and whether thousands of Ohio voters including minority voters in 2016 and beyond will have their voices heard in our democracy. The stakes for the parties and non-parties alike could not be higher.

Defendants' briefing contains a number of diversions from the central concerns in the case—namely that the contested statutes disenfranchise eligible Ohio voters, and are being applied inconsistently across the state. Among other issues, voters in smaller, white rural counties are not being subjected to the statutes' "gotcha" approach, while voters in larger, urban counties with large minority populations are.

The expedited briefing schedule in this case—which is particularly challenging to Plaintiffs given their burden of proof and the vast record—underscores oral argument's importance. Oral argument would assist the Court in dissecting the arguments through dialogue, identifying the distractions, and providing the parties with a fair chance to make their best case to the Court, after hearing the Court's concerns directly.

Jurisdictional Statement

Plaintiffs agree with Defendants' jurisdictional statement. Plaintiffs also timely filed a notice of cross appeal. R.697 (6/22/16).

Statement of the Issues

Appeal

1. **Anderson-Burdick/14th Amendment.** Courts must weigh burdens on voting rights against the alleged state interests, requiring that the interests be "significantly weighty" and "necessary." Here, the trial court did just that, making comprehensive fact findings about the "significant burdens" imposed, and Defendants' unpersuasive stated interests. Among the burdens are disenfranchisement of thousands of voters even where no question exists regarding eligibility. Did the court clearly err?

2. **Voting Rights Act Section 2**. VRA Section 2 claims are subject to a two-part test: is there disparate impact and does that impact interact with social and historical factors to deprive the plaintiffs of their voting rights? The district court made detailed factual findings regarding both parts of the test that both conditions apply to SB205/216. Did the court clearly err?

3. **Complaint supplementation.** Courts have broad discretion to permit supplemental pleadings—including after consent-decree entry—where the new claims bear "some relationship" to the existing claims. The court found Plaintiffs' new claims sufficiently related to the previous because they addressed burdens related to voter identification disproportionately affecting indigent voters protected by the Consent Decree. The State itself provided notice that SB216 modified the Decree. Did the court err?

4. **Preclusion.** *Res judicata*—waived when not raised below—does not apply where a party lacked a full and fair opportunity to litigate, or to a party whose interests were not represented in earlier litigation. Here, Defendants failed to assert *res judicata* regarding the *NEOCH-OOC/ODP* claims until appeal; and acquiesced by opposing ODP's efforts to dismiss those claims. ODP was forced to litigate them without sufficient factual development. And NEOCH and CCH did not consent to ODP's joining *OOC*. Will Plaintiffs be precluded from their obtaining relief?

5. **Standing.** A party has organizational standing if it must divert resources because of the challenged laws; associational standing if its members would have standing to sue on their own; and third-party standing if it bears a close relationship to those facing obstacles in pursuing legal claims themselves. Because SB205/216 mandate disenfranchisement for minor errors, NEOCH and its organizational members will divert resources to drive people to the polls rather than distribute absentee forms; NEOCH and CCH daily meet with homeless people, who have difficulty asserting their own rights. Did the court err in finding standing?

Cross-Appeal

1. **14th Amendment *Bush v. Gore* equal protection for standardless vote counting.** Under *Bush v. Gore*, the 14th Amendment's equal-protection guarantee prohibits using non-uniform standards in elections and treating voters in an arbitrary and disparate manner. In the 2014-15 general elections, Ohio's elections boards applied materially different standards, followed materially different processes, and arrived at materially different results in rejecting or counting absentee and provisional ballots where the accompanying form had a five-field error or omission. Voters in urban counties with larger minority populations would be disenfranchised, when the votes of identically situated voters in smaller, rural counties with higher white percentages would be counted. Do these differing standards violate equal protection?

2. **VRA literacy tests.** The VRA's literacy-test prohibition precludes denying the right to vote because of a failure to comply with any "test or device," including "perfect-form requirements" that are "patently arbitrary and could not be fairly applied in any sense." SB205/216 require provisional- and absentee-ballot forms to be fully and accurately completed for a ballot to be counted, even when information demanded is unnecessary to determining voter eligibility. Some boards strictly enforce these laws and decline to provide assistance in filling out the forms unless specifically requested, while other boards count ballots despite errors or omissions and help voters with the forms. Does rejecting a ballot for minor technical errors violate the VRA's literacy-test provision?

3. **14th Amendment's substantive-due-process.** The 14th Amendment's substantive-due-process guarantee prohibits voting systems that are

fundamentally unfair. Boards are unequally and unfairly applying the challenged laws, including strict enforcement by urban counties with high minority-voter percentages and no-to-little enforcement by rural counties that are almost entirely white. Does the unequal enforcement of the laws, and the resulting disproportionate impact on urban and minority voters, create a fundamentally unfair voting system that violates substantive due process?

4. **VRA materiality.** The VRA's materiality provision prohibits denying the right to vote because of immaterial errors or omissions. The provision is plainly intended to protect voters. The Sixth Circuit held that this provision affords no private right of action—but the Eleventh Circuit then held a private right of action exists. Does a private right of action under the VRA's materiality provision exist, enabling voters to act to protect themselves? And if so, have Plaintiffs proved this claim's elements?

5. **14th and 15th Amendment intentional race discrimination.** The 14th and 15th Amendments forbid intentional race discrimination. Intentional discrimination is found in the legislative context if the intent to discriminate is one of the motivating factors in creating that legislation. Here, the court took a restricted view of the evidence ignoring a broader record of discriminatory intent in SB205/216's adoption and implementation. Did the court err?

6. **14th Amendment procedural due process.** The 14th Amendment's procedural-due-process guarantee requires that voters have notice and an opportunity to be heard before being deprived of the liberty interest inherent in the right to vote. The challenged laws deprive absentee and provisional voters of their right to vote without adequate pre-deprivation notice and/or an opportunity to be heard and prevent disenfranchisement, and without any post-deprivation notice. And the statutory schemes provide absentee voters only limited opportunity to cure regarding all of the five fields, but afford similarly situated provisional voters no such opportunity to cure, except for only one field. Does this lack of procedural due process violate the 14th Amendment's Due Process Clause?

Statement of the Case[1]

Defendants take the position that voters who write their names in perfectly legible cursive on ballot forms that say "print name" should have their votes discarded—even when the name fields' plain function of gathering names has been fulfilled and those voters' identity or eligibility is not in question. *See* Tr., R.665, PageID#30161-31063, 31072, 31073-31074. This is but one example of the many in the record of Defendants using trivial, immaterial errors to disenfranchise voters.

Such is the state of affairs that has silenced eligible voters' voices in our democracy.

Voices like Roland Gilbert's, 86, of Franklin County. He uses a magnifying machine to see. And he accidentally wrote the current date instead of his birthdate when filling out his absentee-ballot-envelope in 2014, just as many of us might do. Thanks to SB205, with no notice, even though his eligibility was unquestioned (and despite the State's supposed "permissive" birthdate policy), his vote was discarded.[2] Gilbert Decl., R.672-13, PageID#31503.

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[1] For a more thorough treatment of the relevant facts, the Court is respectfully encouraged to review the Proposed Findings, R.687, PageID#33421-33473.

[2] Defendants make much about the ostensibly liberal, discretionary forgiveness policy for date-of-birth errors. As the individual-voter experiences and board testimony show (*see, e.g.*, R.672-13), not every county does that, belying Defendants' professed reverence for uniformity. For example, Summit County rejected the majority of ballots with DOB errors, even those where voter-identity was not in question. *See, e.g.*, 2014 Summit Minutes (P-1003), R.729-2, PageID#37915-39637, 39696-39698, 2015 Summit Minutes (P-1004), R.729-3,

And voices like Katherine Galko's, 92, of Summit County. A "slow reader," she lives in an assisted-living facility and had someone help her fill out her absentee-ballot envelope. She does not know why there was a date on her form in the place for the social-security number. Even though no doubt exists regarding her identity or eligibility as she had already qualified for her absentee ballot, her vote was discarded. *See* Galko Decl., R.672-7, PageID#31502.

And voices like Sally Miller's, 87, of Franklin County. She has macular degeneration. Her 2014 absentee-ballot form reflects a one-digit variation of her social-security number. She received no notice from the board and her ballot was discarded, despite having already qualified for her ballot and no doubts as to her eligibility existing. Miller Decl., R.672-15, PageID#31510. *See also* Ord., R.691, PageID#33824-33827 (crediting Declarations, R.672, PageID#31493-31513).

To vindicate the rights of voters like these, Plaintiffs-Appellees[3] challenged Ohio Senate Bills 205 and 216 (SB205/216), which changed absentee and

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PageID#39772-39773, 39793-39794, 39812-39821. And Husted has failed to require uniform forgiveness across Ohio on birthdates or fields when they are unnecessary to matching voters to databases. So the fortuity of where a voter lives and the whim of boards determine whether a vote is counted.

[3] Plaintiffs are (1) the Northeast Ohio Coalition for the Homeless (NEOCH), a non-profit "coalition of service providers, housing activists, members, and homeless people" dedicated to ensuring homeless people are able to vote by protecting access to the ballot box; (2) Columbus Coalition for the Homeless (CCH), a similar organization that advocates on behalf of homeless persons, and empowers homeless persons to reach greater self-sufficiency; and (3) the Ohio Democratic

provisional-voting laws effective in June 2014. In their Second Supplemental Complaint against Defendants-Appellants Ohio Secretary of State Husted and Ohio Attorney General Michael DeWine ("Defendants"), Plaintiffs asserted that, as applied, these laws violate the 14th Amendment's due-process and equal-protection clauses, unlawfully discriminate based on race in violation of the 14th and 15th Amendments, violate Section 2 of the Voting Rights Act ("VRA"), and violate VRA provisions that prohibit voter disenfranchisement via literacy tests and/or immaterial errors or omissions in an application to vote. (Second Suppl. Compl., R.453, PageID#15789-15830.)

The Second Supplemental Complaint and related Motion for Leave were filed on October 30, 2014. (Second Suppl. Compl., R.453, PageID#15789-15830; Motion for Leave, R.429, PageID#15269-15279.) The action was filed as a supplemental pleading under Civil Rule 15(d) because SB205/216 undermine the parties' April 19, 2010 Consent Decree assuring that the fundamental right to vote is "fully protected" for voters who lack ID, including homeless and indigent voters. (Decree, R.210, PageID#4970-4975.) The trial court granted Plaintiffs' Motion for Leave, later deeming it to have been filed on October 30, 2014. (Ord., R.642, PageID#27143-27148.)

Party (ODP), a state political party dedicated to electing Democratic candidates to Ohio public offices. (Ord., R.691, PageID#33806-33812.)

After an expedited discovery, trial was held in March 2016, followed by post-trial briefing. The trial court entered judgment on June 7, 2016. This appeal was timely filed, as was a cross appeal.

I. Voting in Ohio

An Ohio voter must be at least age 18 and a U.S. citizen. Ohio Const., Art. V, § 1. Electors must have resided in Ohio and have been registered to vote for at least 30 days before the election. *Id.* Electors must also reside in the precinct in which they vote. *Id*. Ohio voters can cast a ballot in three ways: (1) in person at the correct polling place on Election Day; (2) by mailing an absentee ballot; and (3) by casting an absentee ballot in person at a county elections-board office or other designated location before Election Day. ORC §§ 3505.181-82, 3509.01, 3509.06(D)(3)(b). Voters required to cast a provisional ballot may do so on or before Election Day. (Tr., R.665, PageID#30973.)

To vote on Election Day, voters go to their assigned polling place, check in with a poll worker, announce their name and address, and provide an acceptable form of identity, *e.g.*, a photo ID or utility bill. ORC § 3505.18(A). If a voter is unable to provide proof of identity, she must cast a provisional ballot. *Id.*

To vote by absentee ballot, a voter must first provide her elections board with a completed written application that includes her name, signature, address, date of birth, and proof of identification in the form of: (1) a driver's license

number; (2) the last four digits of the voter's Social Security Number ("SSN-4"); or (3) a copy of the voter's current and valid photo ID, military ID, utility bill, bank statement, government check, paycheck, or other government document. ORC § 3505.09(A)-(E). If a board receives an absentee-ballot application that does not contain the required information, it "promptly shall notify the applicant of the additional information required to be provided by the applicant to complete that application," and if the application meets the requirements, an absentee ballot shall be provided to the voter either in person or by mail. ORC § 3509.04.

Having proved their eligibility, most absentee voters must then completely and correctly fill out an absent-voter identification envelope ("ID envelope") and return their ballot inside that envelope. ORC § 3509.05(A). The ID envelope requires absentee voters to completely and correctly provide the exact same information (name, address, date of birth, identification, and signature) previously provided on their absentee-ballot applications. *Id.* Some in-person absentee voters vote on direct-recording electronic (DRE) machines instead of filling out paper ballots and are not required to fill out an ID envelope (which means they cannot make an error or omission on that form). (Pls.' Prop. Findings, Table F-1, R.687, PageID#33686-33687.)

As noted, voters must reside in the precinct where they seek to vote. Absentee voters declare their residency precincts when they sign and submit a

completed absentee-ballot application. Provisional voters declare their residency precincts when they state their address to a pollworker. (Tr., R.654, PageID#28572-28573; Tr., R.657, PageID#29080-29082; Tr., R.660, PageID#29652, 29802; Tr., R.661, PageID#30024-30025.) The election official who processes a provisional voter's application determines the correct precinct for that voter based on the address the voter provided. After determining the voter's correct precinct, the election official issues the voter a precinct-specific ballot. (Tr., R.654, PageID#28572-28573, PageID#28634, 28645-28647; Tr., R.660, PageID#29652, 29802, PageID#29883; Tr., R.661, PageID#30024-30025.)

II. SB205/216 imposed new perfect-form requirements.

SB205/216 imposed new perfect-form requirements that require discarding otherwise legitimately cast absentee and provisional ballots. SB205 requires boards to reject absentee ballots if there is any error or omission in the five fields of required information on the ID envelope (*i.e.*, name, residence address, date of birth, signature, and acceptable identification), or if the information does not match the voter's database record in the statewide voter registration database ("SVR"). ORC § 3509.06(D)(3)(a)-(b). (Tr., R.665, PageID#31007.) This is true even if the voter is otherwise determined to be eligible to vote. Before SB205/216, this information was requested but an error or omission did not require the boards to reject a ballot. (Tr., R.656, PageID#28874.) Boards must reject the ballot even if

the error, omission, or mismatch is purely technical or they can otherwise verify the voter's identity and eligibility to vote.

SB216 likewise imposed a new "perfect-form" requirement for provisional-ballot-affirmation forms. Before SB216's adoption, provisional ballots were only required to be "substantially" completed. ORC §§ 3505.182-3505.183. Like absentee ballots, if each field is not filled in completely and perfectly, boards must reject an otherwise eligible voter's ballot. *Id.*

SB216 also added two new fields to the provisional-ballot affirmation form that must be completely and correctly filled out for the ballot to be counted: date of birth and current address. ORC §§ 3505.182-3505.183. (Tr., R.665, PageID#30986.) Before SB216, provisional voters were only required to provide their names, identification, and signatures. *Id.* SB216 also added language requiring voters to *print* their names on the provisional-ballot envelope, rather than merely provide their names. ORC § 3505.183.

Further, SB216 curtailed the period after the election in which provisional voters may return to the board and provide acceptable identification (no other error or omission is expressly permitted to be cured). Before SB216, voters had ten days post-election to provide this information and allow their provisional ballots to be counted. SB216 shortened the cure period by 30% to seven days. ORC § 3505.181. (Tr., R.665, PageID#30986-30987.)

SB205/SB216 also amended ORC §§ 3509.03, 3509.04, 3509.06, 3509.07, 3505.24, and 3505.181 to bar election officials from assisting voters in filling out absentee and provisional-ballot forms, unless a voter declares he or she is unable to mark a ballot "by reason of blindness, disability, or illiteracy." *E.g.*, ORC § 3505.24. (Tr., R.665, PageID#31036.)

Finally, SB216 amended the law to codify this Court's previous decision that if a voter casts provisional ballot in the correct polling location but wrong precinct, then the voter's ballot should be counted for the issues for which the individual was eligible to cast a ballot as it is considered pollworker error. ORC § 3505.183. But SB216 went further than the court ruling and affirmatively *prohibited* boards from counting ballots cast by voters in the wrong polling location—even if the error was also caused by pollworker error. *Id.*

III. The lead-up to SB205/SB216 included various schemes to abridge voting rights.

Republicans took control of Ohio's General Assembly following the 2010 election and began to introduce bills to change Ohio's voting laws. (Tr., R.654, PageID#28425.) They introduced two bills during the 129th General Assembly—one requiring photo identification to vote and HB194, an omnibus bill containing a "number of restrictions on voting," including restrictions that later became a part of SB205/216. (*Id.*) Significant partisan rancor surrounded HB194, and the bill moved through the legislature extremely quickly. (*Id.* at PageID#28435-28443.)

After HB194 was signed into law, opponents collected enough signatures to put a repeal referendum on the November 2014 ballot. (*Id.* at PageID#28446-28447.) Ohioans never got their chance to invalidate HB194 because in August 2012, the legislature repealed it by passing HB224. (*Id.* at PageID#28448.)

During the 2013-14 session, 16 bills proposing voting restrictions were introduced of which eight passed. (*Id.* at PageID#28451.) SB205/216 passed and became effective in June 2014. "The only members of the General Assembly who testified at trial were Representative Clyde and former Senator Nina Turner, both Democrats who voted against the bills." (Ord., R.691, PageID#33819.) Both stated at trial that during SB205/216's consideration, Democratic legislators voiced concerns that African-American voters' provisional and absentee ballots would be thrown out disproportionately. (Tr., R.654, PageID#28494; Tr., R.660, PageID#29768-29771, 29775-29776.) Clyde and other Democrats also voiced concerns that the bills would harm voters who made minor errors or had low literacy. (Tr., R.654, PageID#28491-28492.)

At trial, Defendants failed to offer testimony from SB205/216's legislative sponsors. Husted's top deputy Matthew Damschroder claims the office was uninvolved in, and neither asked for nor commented on, SB205/216. (Tr., R. 665, PageID#30987, 31040.) The statutes were not legislative priorities for Ohio's chief elections officer. Tr., R.665, PageID#31043. Damschroder admitted that he does

not know what the General Assembly's intent was in enacting the contested statutes. (*Id.* PageID#31041.)

But Damschoder also admitted that alleged voter "fraud" was not and could not be a rationale for and does not justify SB205/216's five-fields requirements. Tr., R.665, PageID#30988, 31052. Defendants' own studies have found even merely *potential* voter fraud in Ohio to be infinitesimal. (And SB205/216's respective sponsors did not cite fraud as a rationale for the statutes either. R.698, D-98, D-99, D-101, D-102.)

And Damschroder admitted that the supposed *benefits* of the five-fields requirement do not justify *disenfranchisement*. To benefit from provisional-ballot-affirmation forms doubling as a voter-registration form, *registered* voters generally need not be disenfranchised just to benefit those who are *not* registered. Tr., R.665, PageID#31049-31050. Yet registered voters are subject to perfect-form requirements. The voter-registration benefit from SB216's provision that provisional-ballot-affirmation forms double as voter-registration forms neither excuses nor explains disenfranchising *absentee* voters for minor errors or omissions on their forms. *Id*. PageID#31049-31051.

Defendants introduced testimony from representatives of "interested party" Ohio Association of Election Officials (OAEO) in SB205/216, ostensibly to show support for the bills, but both representatives, Ward and Terry, admitted that

OAEO's proposals were not accepted as a whole, and they did not intend that voters be disenfranchised for five-fields errors. (Tr., R.661, PageID#30131-30132, 30141; Tr., R.665, PageID#30948-30949.)

D. SB 205/216's implementation resulted in the disenfranchisement of thousands of voters—with counties engaged in materially different and standardless implementation of the statutes.

At trial, Plaintiffs showed that SB205/216 are not just problematic in theory but in practice. In the unusually low-turnout 2014 and 2015 general elections alone, SB205/216's mandatory five-field requirements disenfranchised thousands of provisional and absentee voters.

The rejected provisional ballots included 3,703 wrong-precinct-and-polling location, 38 failure-to-print-full-name, 498 failure-to-provide-current-address, 451 failure-to-provide-identification, and 122 missing-or-incorrect-date-of-birth-that-do-not-meet-exceptions ballots. (Provisional Summary, R.704-2, PageID#35865-35869; *see also* Ord., R.691, PageID #38827.) The rejected absentee ballots included 34 missing-or-non-matching name, 1,254 missing-or-incorrect-date-of-birth-that-do-not-meet-exceptions, 448 different-address-on-ID-envelope-than-in-voter's-record, 979 voter-ID-envelope-contains-insufficient-information, 10 failure-to-provide-residence-address, and 271 non-first-time-voter-without proper-identification ballots. (Absentee Summary, R.704-2, PageID#35832-35864; *see also* Ord., R.691, PageID #38827.)

It is reasonable to expect these numbers to be much higher in high-turnout, presidential-election years such as 2016.

Specific reasons for rejecting absentee and provisional ballots based on the forms included writing names in cursive rather than printing them (regardless of legibility), writing the current date rather than the date of birth, failing to fill in a complete address, writing addresses in the former address field instead of the current address field, using a P.O. Box as their current address, transposing identification numbers, and other reasons too numerous to list here. (*See* Pls.' Prop. Findings, Table A, R.687, PageID#33497-33645.) One board official testified that it is fairly common for voters to simply miss one of the fields and explained that it happens because "[i]t's a pretty complex envelope.... [T]here's a lot of wording, a lot of stuff crammed into that space." Tr., R.657, PageID#29002. *See also* Declarations, R.672, PageID#31493-31513 (numerous disenfranchised voters' testimony).

V. The district court heard abundant board testimony that disenfranchising voters is unnecessary to reap the statutes' supposed benefits.

In most instances, boards can identify voters and confirm their qualifications to vote, even if one or more of the five fields is missing, incomplete, incorrect, or does not "match" the information in the State database. (Tr., R.656,

PageID#28755-28756; Tr., R.660, PageID#29649; Tr., R.661, PageID#30031-30032; Betty Edwards Dep., R.644, PageID#27162.)

Boards confirm voters' eligibility when approving ballot applications. (Tr., R.657, PageID#29019 & 29044.) Boards can also confirm the identity of absentee voters based on a bar code or unique identifier placed on the ID envelope, along with one other piece of information such as the voter's signature. (Tr., R.656, PageID#28867; Tr., R.657, PageID#29019-29020 & 29042-29044; Tr., R.660, PageID#29831-29833; Tr., R.661, PageID#30062.) And provisional voters who requested but did not return an absentee ballot had their eligibility confirmed when their application was approved. (Tr., R.656, PageID#28756-28757.)

Several board officials testified that it is unfair to disenfranchise voters simply because they make a mistake in one of the five fields (either an error or an omission) where their identity and qualifications to vote under State law can otherwise be verified. (Tr., R.657, PageID#29017-29109; Tr., R.657, PageID#29109-29110, 29657-29658, & 29671-29672; Tr., R.661, PageID#30037-30039.)

VI. Counties are engaged in materially different and standardless implementation of SB205/216 so that where a voter lives determines whether a vote is counted—with large urban counties with large minority percentages more likely to enforce the statutes than smaller, rural, white counties.

Besides boards discarding ballots based on trivial errors or omissions, Ohio's boards treat differently ballots with the same errors (*i.e.*, some are rejected while others are counted) based on different interpretations of these laws in counties throughout the state. Thousands of provisional and absentee voter forms obtained from 24 Ohio county elections boards established that numerous boards treat ballots that have the exact same types of errors and omissions in very different ways. The specific errors and omissions at issue, and whether the associated ballots were counted or rejected, are described in the tables attached to Plaintiffs' Proposed Findings. (*See* Pls.' Prop. Findings, R.687, Page ID# 33497-33716.) Table H summarizes which boards will count, and which boards will reject, ballots with the same types of errors and/or omissions, and reveals significant and troubling variation in how strictly boards have enforced SB205/216. (*Id.* at PageID#33710-33716.) This evidence went uncontested.

Specifically, boards in large urban counties with higher minority-voter populations—including Cuyahoga, Hamilton, and Franklin counties—enforce the new laws much more strictly and reject far more ballots as a result. By contrast, boards in small, rural counties with lower populations of minority voters—

including Adams, Carroll, Fayette, Harrison, Noble, and Wyandot counties—either do not enforce these laws strictly or do not enforce them at all. *Id.* The larger urban boards have larger staffs, are more professionalized, and have readier access to lawyers, while the smaller counties generally do not have these resources.

The counties' procedures for filling out the forms at issue, determining whether there are errors and omissions, and other relevant procedures also vary considerably. For example, Meigs officials *fill out the forms for the voter* and do not reject ballots because of errors or omissions, while Franklin requires voters to fill out the forms on their own without assistance, and ballots are rejected because of errors or omissions. The vast differences among the counties are summarized in Tables F-1 through F-10 and raise significant equal-protection concerns. (*Id.* at PageID#33686-33698.)

Damschroder admitted for Defendants that this non-uniformity is of serious concern because Ohio's voters should not be subjected to different standards across the state. (Tr., R.665, PageID#31080-31081; Tr., R.666, PageID#31093-31095, 31098-31099, 31011-31012, 31103-31106.) Yet despite that supposed concern, Defendants did *nothing* to enforce uniformity when boards' reports to Husted in multiple election cycles showed larger counties with African-American populations enforcing SB205/216's strictures and disenfranchising voters—while smaller, rural, mostly white counties are not. Tr., R.662, PageID#31145.

VII. Defendants' justifications for SB205/216 are shifting and pretextual, and the laws have a disparate impact.

Defendants attempted to support SB205/216 by proffering rationales of standardization, administrative convenience, and reducing the number of provisional ballots rejected, but these reasons are pretextual and meant to conceal discrimination against minority voters. As explained at length at trial through the testimony of Senator Turner, Representative Clyde, and expert Dr. Jeffrey Timberlake, given the context in which these bills were enacted and the fact that no sponsor came forward at trial to explain the rationale for the laws themselves, the real intent of behind these laws was discrimination.

The trial court found that the laws have a disparate effect on African-American voters. (Ord., R.691, PageID#33837.) Dr. Timberlake established that in even-numbered election years, minorities use provisional ballots more often than whites, and in presidential-election years, minority voters' absentee and provisional ballots are more likely to be rejected than whites' ballots. (*See id.* at PageID#33844.)

Dr. Timberlake, Senator Turner, and Representative Clyde presented substantial evidence regarding the Senate/*Gingles* Factors about social-and-historical conditions, showing from the "totality of circumstances" that minorities "have less opportunity than other members of the electorate to participate in the

political process." (*Id.* at PageID#33845, *citing Thornburg v. Gingles*, 478 U.S. 30, 36 (1986).)

Dr. Timberlake also defined a "Calculus of Voting" framework that shapes voter cost-benefit decisionmaking, stating that voters with blue-collar jobs are more likely to have inflexible work schedules and lack financial resources or access to a car or childcare, increasing voting burdens on them. (*Id.* at PageID#33858-33859.) Because African-Americans are more likely to be wage workers than whites, they are more likely to seek out early-voting opportunities, might be less likely to participate in elections, and will have decreased flexibility to travel to boards to cure issues with their ballots.

Defendants never offered trial testimony from SB205/216's sponsors, co-sponsors, or anyone who voted for the statutes to explain the statutes' purposes. (Defendants misleadingly refer to SB205-sponsor Senator Coley's "Testimony" (First Br. 24), but that was not sworn trial testimony in this case; it was merely a self-serving, unsworn legislative statement not subject to cross-examination.) Instead, Defendants sought to cobble together purported rationales from third-party, "interested party" testimony and offered—and offer now—pure, *post hoc* conjecture.[4]

[4] Facts related to Defendants' *res judicata* and standing arguments are provided in the relevant response sections below.

Plaintiffs successfully challenged (1) not the five fields themselves to gather information that might be helpful, but using minor errors and omissions on those forms to disenfranchise otherwise eligible voters, (2) the 30% cut in the ten-day cure-period over errors, and (3) the novel general prohibition on pollworkers offering to assist and assisting voters with their forms—given that that is what pollworkers are for.

Summary of Argument

I. Defendants' appeal

Defendants' argument overcomplicates a core problem that is very simple: SB205/216 unnecessarily disenfranchise eligible voters that even Ohio's elections boards—all Husted's appointees—acknowledge are eligible voters. But for SB205/216, these voters' votes would be counted.

Election-law Professor Edward Foley sums it up: "Only in a Kafkaesque bureaucracy, where government functionaries take pleasure in declaring "Gotcha" when they trip up citizens in the enforcement of their administrative regulations, would invalidation of a ballot solely for this kind of innocent mistake seem reasonable." *When Should A Voter's "Clerical Error" Invalidate a Ballot?* ElectionLaw@MoritzBlog, Jun. 13, 2016 (available at http://moritzlaw.osu.edu/election-law/article/?article=13257, last accessed Jul. 14, 2016).

The district court concluded that SB205/216 violated the 14th Amendment by applying this Court's precedent, which has repeatedly held that voting laws imposing anything more than minimal burdens on the right to vote trigger heightened scrutiny. Here, legitimate, eligible voters are being disenfranchised. That could hardly be characterized as a minimal burden.

Defendants' claim that SB205/216 is subject to rational-basis review runs counter to the heightened constitutional scrutiny the Supreme Court's *Anderson-Burdick* test requires when the right to vote is burdened. The district court recognized SB205/216's burdens, and thus, Defendants were required to offer more than unsubstantiated, pretextual justifications for the law. At every turn, Defendants' failed to meet this burden.

Three primary proffered state interests for the five fields merit scrutiny here, while others will be discussed below.

First, Defendants' touting of the voter-registration benefits of "mandatory" five fields on *provisional*-ballot-affirmation forms crumbles when one recognizes (and Defendants' own witnesses admitted) that disenfranchising *both absentee-* and *provisional*-ballot voters over minor errors and omissions serves no purpose when voters are otherwise determined to be eligible.

Second, Defendants' purported voter-identification/verification benefits cannot hold water given party-representative Damschroder's admission that fraud

does not justify the statutes, and the abundant record evidence that verification using the fields without disenfranchising otherwise eligible voters is possible, indeed fairer. The district court was entitled to give weight to that testimony.[5]

Third, Defendants' purported "uniformity" interest has been shattered by the undisputed, irrefutable fact that SB205/216 are being standardlessly applied throughout Ohio, with particular counties determining whether (or not) a vote is counted. Defendants have done nothing to correct this.

Because Defendants' could not credibly explain how SB205/216 furthered Ohio's interests, the district court properly found that the statutes violated the 14th Amendment.

The district court also concluded that SB205/216 violate Section 2 of the VRA after applying this Court's two-part test for such claims.

First, the court examined whether SB205/216 disparately impacted a protected minority group and correctly concluded that it did. To meet this prong, Plaintiffs were not required to show that SB205/216 made voting impossible for minorities, only that they made voting disproportionately more burdensome—a fact established by evidence that African-Americans would be disproportionately impacted.

[5] Due to space limitations, the cure-period cut and pollworker-assistance prohibitions will be discussed below.

Second, the district court assessed whether, under the totality of the circumstances, the disproportionate burden is linked to the ongoing effects of past discrimination. The court concluded that it did, finding that due to Ohio's long history of discrimination, African-Americans generally experience many more socioeconomic challenges than whites and that these challenges make it harder for them to participate in the political process. That SB205/216 violate Section 2 follows from the Court's well-supported factual findings.

ODP is not precluded from participating in the judgment below. Defendants waived any preclusion argument. And ODP did not have a full and fair opportunity to litigate these particular claims in the separate *OOC/ODP* case.

Regardless, NEOCH and CCH are separate parties who were not parties in the other case, are not in privity with ODP, and are not claim precluded merely because their counsel coordinated with ODP's counsel for judicial efficiency.

In any case, NEOCH and CCH have separate standing as they have been injured by SB205/216. Their homeless and illiterate members' and constituents' voting rights are affected, and they and NEOCH's organizational members have suffered a substantial impact on their voting-turnout plans for homeless individuals, as they must deploy resources away from absentee-focused voting to poll-transportation.

II. Plaintiffs' cross appeal

First, boards are using non-uniform standards to implement SB205/216 in violation of equal protection. The district court's factual findings and the undisputed evidence show that boards have implemented SB205/216's general command to reject ballots with a five-field error or omission in wildly different, standardless ways. The district court erroneously held that unequal outcomes for identically flawed ballot forms are caused by non-uniform election "systems" that boards are permitted to develop rather than non-uniform or non-existent "standards." When the correct legal standard is applied, this Court should conclude that the absence of specific standards to implement SB205/216 violates equal protection.

Second, SB205/216 violate the VRA's literacy-test prohibition. The district court found that many homeless voters are illiterate, barely literate, or suffer from mental illness; find it difficult to fill out the forms; and hesitate to ask pollworkers for assistance due to embarrassment and stigma. The court then erroneously concluded that an Ohio law that allows blind, disabled, or illiterate voters to request assistance from poll workers presents an absolute bar to this claim. But the VRA provides no such safe harbor; indeed, it forbids literacy tests precisely because they cannot be fairly administered. When the correct legal standard is applied to the factual findings and evidence, this Court should conclude that the

"perfect form" requirements imposed by SB205/216 violate the VRA's literacy-test ban.

Third, Ohio's voting system is fundamentally unfair and violates substantive due process because (a) there are no specific standards to guide boards implementing SB205/216 and as a result they reach very different conclusions about whether to count or reject identically flawed ballot forms, with urban counties tending to reject them and rural counties tending to count them, and (b) SB205/216 unfairly require clerical perfection as a voting prerequisite even if boards can identify voters and confirm their eligibility notwithstanding the purported error or omission. The district erred by concluding that only a few narrow circumstances can violate substantive due process, and failing to examine whether these circumstances are fundamentally unfair. When the Court applies the correct legal standard, it should conclude that Plaintiffs prevail on this claim.

Fourth, the VRA's materiality provision prohibits disenfranchisement over minor errors and omissions on forms. The district court awarded Defendants' judgment on this claim solely because a prior panel of this Court held that there is no private right of action. Because there is a circuit split on that issue, Plaintiffs appealed this claim to preserve their ability to seek *en banc* review of this Court's prior decision.

Fifth, the district court failed to find intentional race discrimination under the 14th and 15th amendments, despite the broad evidence before it. Even having characterized Defendants' conduct as "dog whistles"—suggesting covert intent—the court took an overly restrictive view of the evidence and did not properly apply the standard to all of the evidence before it including evidence of discriminatory implementation.

Sixth, SB205/216 do not provide adequate procedural due process before disenfranchising voters. The district court declined to reach the merits, reasoning that it was unnecessary to do so because the harm was remedied by enjoining certain portions of SB205/216. Plaintiffs appealed this claim to request that, if this Court reverses the district court's injunction—which it should not—this Court also remand this claim to the district court for a decision on the merits.

Standard of Review

When mixed questions of law and fact exist, determination of underlying facts is reviewed under the "clearly erroneous" standard. *Karam v. Sagemark Consulting, Inc.* 383 F.3d 421, 426 (6th Cir. 2004). *See also Calloway v. Caraco Pharm. Labs., Ltd.*, 800 F.3d 244, 251 (6th Cir. 2015) (district court's factual findings following bench trial reviewed for clear error). "In reviewing factual findings for clear error, 'the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.'" *Id.* (quoting Fed.R.Civ.P.

52(a)(6)). Under this standard, the Court "cannot find that the district court committed clear error where there are two permissible views of the evidence, even if we would have weighed the evidence differently." *Id.* (citation omitted).

De novo review is then proper when examining the application of the constitutional standard to a particular case's facts. *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) (*citing Ornelas v. United States*, 517 U.S. 690, 697 (1996) (*superseded on other grounds* by 18 U.S.C. § 982(a)(1))).

Argument Responding to Appeal

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Thus, "voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (citation omitted).

I. SB205/216 violate the Supreme Court's *Anderson-Burdick* balancing test for assessing 14th Amendment violations because Ohio is unnecessarily disenfranchising eligible voters, prohibiting pollworker assistance, and curtailing the cure period—while Defendants' proffered justifications for doing so are weak.

A. The *Anderson-Burdick* balancing test requires a court to weigh the voting-rights burden against the alleged state interests at stake, requiring that the State's interest be "significantly weighty" and "necessary."

When considering whether the challenged five-field laws impose an undue burden on the fundamental right to vote, the Court "must first consider the

character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate," "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," "determine the legitimacy and strength of each of those interests," and "consider the extent to which those interests make it *necessary* to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (emphasis added). *See also Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

Defendants defy this Court's precedent in insisting that a mere rational-basis test applies. First Br. 18-19. A rational-basis test applies only where there is no burden on the fundamental right to vote. *NEOCH v. Husted*, 696 F.3d 580, 592 (6th Cir. 2012). *See also Obama for America v. Husted*, 697 F.3d 423, 429-30 (6th Cir. 2012) (rejecting Ohio's effort—as here—to cloak itself in the rational-basis test for efforts to slash voting hours; holding that "severe" burden triggers strict scrutiny requiring narrow drawing to advance interest of compelling importance; applying *Anderson-Burdick* test; finding district court's finding that lower-income and less-educated voters would be disproportionately burdened not clearly erroneous).

Thus, "even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford v. Marion Cty. Elections Bd.*, 553 U.S. 181, 189 (2008). The Supreme Court has not identified "any litmus test for

measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear … it must be justified by relevant and legitimate state interests '*sufficiently weighty* to justify the limitation.'" *Id.* at 191 (quoting *Norman v. Reid*, 502 U.S. 279, 288-89 (1992) (emphasis added). "*Burdick* surely did not create a novel 'deferential "important regulatory interests" standard.'" *Id.* at 190 n.8 (emphasis added).

B. The district court's factual findings that SB205/216's five-fields burden is significant, that the general prohibition on pollworker assistance significantly burdens low-literacy voters, and that the cure period burdens homeless and low-literacy voters unable to appear within seven days—are not clearly erroneous and are amply supported by evidence.

Here, as the district court found, the injury to the fundamental right to vote is "significant," particularly on homeless and low-literacy voters. *See* Ord., R.691, PageID#33830.

The district court also found that the general prohibition against pollworker assistance in the form of helping voters fill out those new forms is also a "significant burden." The evidence established that homeless voters, many of whom are illiterate, barely literate, or suffering from disability or mental illness, are too embarrassed to reveal their conditions because of the stigma it entails. (The court heard and credited detailed testimony from NEOCH and CCH representatives about this phenomenon.) Despite recommendations that he do so,

Husted failed to test the forms for their impact on low-literacy voters. *See id.* PageID#33873, 33831-33832 (internal citations omitted).

And the district court also found that reducing the cure period from ten to seven days is burdensome, in part because voters may not receive notice of a deficiency until close to or after the cure period is over. NEOCH and CCH's homeless voters, the court found, are of limited means and would be less likely to be able to access transportation. Disproportionately illiterate or semi-literate homeless voters would need to seek and obtain assistance in reading the notice and bringing it to the board. *Id.* PageID#33832.

C. The district court rejected Defendants' proffered interests as insufficient when weighed against SB205/216's burdens, fact findings that are not clearly erroneous.

Defendants' weave random strands in an effort to cover SB205/216 from scrutiny. *See*, *e.g.*, First Br. 18-19 ("Ohio … has legitimate reasons for the provisions, including registering more voters, confirming that voters casting ballots are the same persons who received them, identifying more voters, giving boards "headroom" to prepare for the official canvass, and minimizing poll-worker errors." *See also id.* 28-33.

But the weave unravels upon inspection. The proffered interests are not "sufficiently weighty," or "*necessary*" as *Anderson* requires before burdening—much less "significantly" burdening—the right to vote.

Voter-registration benefits. To reap SB216's purported voter-registration and SB205/216's voter-verification/identification benefits (First Br. 29), why is it "necessary" (in the words of *Anderson*) to disenfranchise *all voters* who make minor errors or omissions on ballot forms even when boards are able to otherwise identify voters as eligible? That, for example, a provisional ballot form doubles as a voter-registration form if a voter is unregistered is truly noble—but why would that require disenfranchising voters (including absentee-balloters) who *are* registered but fail to provide "perfect-form" responses in Defendants' eyes?[6] That fields help match some voters to a database is splendid, but why should that require disenfranchising those who fail to provide "perfect-form" responses where the information is not needed? Defendants dodged these questions, because there is no sensible answer. To come up with new answers on appeal will further betray the pretextual nature of the supposed interest.

Voter identification/verification. (First Br. 30-31.) Defendants' representative Damschroder admitted that fraud-prevention did not justify the five-fields requirement, Tr., R.665, PageID#31052. The Court relied upon this and other evidence in its opinion. *See* Ord., R.691, PageID#33870 ("Defendant has not

[6] *See* American Law Institute, *Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes* (absentee ballots should not be invalidated if the identity of absentee voters can be verified and voter is registered and eligible to cast ballot), available at https://www.ali.org/projects/show/election-law/ (last accessed Jul. 14, 2016).

offered combatting voter fraud as a justification for requiring the additional information.")

And official after official—from large counties and small—testified that they could verify both provisional and absentee ballots without all five fields, including before SB205/216 were passed (testimony that Damschroder did not dispute at trial, *see* R.665, PageID#31052-31053). *See, e.g.,* R.657 (Manifold/Franklin), PageID#29019-29020, R.656 (Burke/Hamilton), PageID#28863, 28856-28859; R.660 (Scott/Lucas), PageID#29832-29833; R.660 (Bucaro/Butler), PageID#29668; R.663 (Reed/Carroll), PageID#30299; R.663 (Larrick/Noble), PageID#30408-30409, 30414; R.663 (Bear/Harrison), PageID#30357-58, 30362; R.663 (Osman/Adams), PageID#30448-30449; *see also* R.656 (Perlatti/Cuyahoga), PageID#287552-28760; R.661 (Sauter/Summit), PageID#30031-30032; R.654 (Pedaline/Delaware), PageID#28561; R.657 (Adams/ Lorain), PageID#29079-29080, 29103-29104; R.657 (Anthony/Franklin), PageID#29124; R.658 (Morgan/Miami), PageID#29255-29256, R.663 (Crawford/Paulding), PageID#30327; R.663 (Passet/Wyandot), PageID#30479; Edwards Dep., R.644, (Cuyahoga), PageID#27162, 27169-80.

Defendants' *own* witnesses testified as much. *See* R.661 (Ward/Madison), PageID#30124; R.665 (Terry/Allen), PageID#30945; R.664 (Hood—expert), PageID#30678-30679. Terry testified that it was "unfair" to reject ballots over

minor errors. PageID#30927 (Terry). *See also* PageID#29657-29658, 296671 (Bucaro); PageID# 29018-29019 (Manifold); PageID#30039 (Sauter). (Others testified that it was fair to count ballots where identity could be verified despite some mismatched information. PageID#30357-30359, 30362 (Bear) (mismatched addresses, missing city and zipcode); PageID#30419-30420, 30430 (Larrick) (incorrect DOB, transposed SSN digits, missing field); PageID#30446-30448 (Osman).)

Defendants' expert, Dr. Hood, conceded that many of the errors causing ballots to be rejected are "trivial." Ord., R.691, PageID#33870. "Dr. Hood stated the purpose of the five-field requirement was 'to positively identify voters, not to disqualify ballots based on inconsequential errors on the part of voters,' suggesting that he may not have even understood that ballots would be thrown out for non-conformity with the requirements, much less could he offer a significant state interest in doing so." *Id.* PageID#33870.

While Defendants make much of the need for absentee-voter verification, as the district court found, R.691, PageID#33871, a bar code and one other piece of information, such as a signature, suffices. *See* PageID#29043-29044 (Manifold); PageID#29832-29833 (Scott); PageID#28934-28935 (Burke); *see also* PageID#30945 (Terry) (matching signature could suffice to identify voter).

And many counties still provide voter-history credit to voters whose ballots they must discard based on SB205/216 minor errors and omissions, which they would not do unless they could verify the voter's identity. *See, e.g.,* PageID#30076 (Sauter); PageID#29838-29839 (Scott); PageID#30142 (Ward); *see also* R.751-1, Cuyahoga "Provisional Reasons and Flags Summary," PageID#48978-48979; Edwards Dep., R.644, PageID#27168. The fact that some can send out rejection notices to voters also shows they can verify those voters' identity. *See, e.g.,* R.656 (Perlatti/Cuyahoga), PageID#28765.

The court did not clearly err in finding that while "identifying and registering voters may be persuasive as a reason to include the five fields on the form," "it is unpersuasive as a rationale for *rejecting* ballots with missing or incomplete information." Defendants had failed to "prove in any way" to the finder of fact "how disenfranchising voters who fail to conform to the requirements furthers that goal." Ord., R.691, PageID#33870-33871.

The court also found "lacking" Defendants' "justifications for preventing pollworkers from assisting voters who do not affirmatively ask for help because they are illiterate or disabled." "Poll workers," the court found, crediting Terry's testimony, "are trained and certainly more skilled at filling out forms than homeless voters. Particularly when missing or incomplete information is a problem, for instance—for instance if a voter leaves a field completely blank or

writes in a street number without an address—poll workers are much more likely to be able to help a voter than to create an error." Damschroder, the court noted, admitted he's aware of no other government workers explicitly barred from helping citizens fill out forms unless specifically requested. Ord., R.691, PageID#33873-33874. These factual and credibility findings on this subject are not "clearly erroneous" and should not be reversed.

As to the seven-day cure period, the court found, the cut does not survive heightened scrutiny. Of the 21 board officials who testified live, not one, the court observed, claimed to need the extra three days between the cure period's end and the start of the canvass. When bill sponsor Seitz told Terry the cut was intended to prevent an influx of voters while boards were preparing the canvass, Terry responded, "That doesn't happen." But Seitz sought the cut anyway. *Id.* PageID#33874-33875. In *Obama for America*, no evidence existed that local boards were struggling to cope with any burden from early voting. And so this Court did not permit the State's proffered interest to overcome the burden on voters. 697 F.3d at 432-34. Likewise here, the district court's finding is not clearly erroneous. Ord., R.691, PageID#33875-33876.

Defendants find no refuge in this Court's 2012 ruling in *SEIU*, solely on a preliminary-injunction record (the consolidated case is cited as *NEOCH v. Husted*, 696 F.3d 580, 599-600 (6th Cir. 2012). That case decided that rejecting provisional

ballots based on deficient affirmation forms was likely not, based on the record before it, a constitutionally infirm burden. As the district court here found, based on the abundant post-discovery, *trial* evidence, the factual record establishes the five-fields burden is especially great for homeless and low-literacy voters, for whom every new field adds to the forms' complexity, and thus to the risk of fatal error. Only three fields existed then (and the signature was not mandatory); now there are two more mandatory fields. And as the district court correctly found in this case, adding those two additional fields has caused a large number of rejections for errors across the entire form, without a corresponding justification for why the minor errors make disenfranchisement "necessary." Ord., R.691, PageID#33872-33873.

Defendants' purported effort to compare SB205/216 to statutes in other states sidesteps *Anderson-Burdick*'s requirement that SB205/216's burden be weighed against its necessity. But even if the Court indulges Defendants in the exercise, the comparisons only emphasize that Ohio is an outlier in insisting on disenfranchisement. None of Defendants' examples (nearly all provisional) contain language like Ohio's suggesting that ballots will be disqualified if their five-fields information is incomplete or incorrect. (Many do not even require all the five fields—for example, date of birth or identification.)

And unlike Ohio, some of the very states Defendants cite explicitly *forbid* election officials from disqualifying ballots on the basis of errors or omissions where the voter's ID can otherwise be verified. *See, e.g.,*

- VA Code § 24.2-706 ("general registrar shall not reject the application of any individual because of an error or omission on any record or paper relating to the application, if such error or omission is not material in determining whether such individual is qualified to vote absentee");
- W. Va. Code § 3-1-41(e) ("The county commission shall disregard technical errors, omissions or oversights if it can reasonably be ascertained that the challenged voter was entitled to vote.");
- Neb. Rev. Stat. § 32-1002(6) (similar).

Thus while other states narrowly tailor their requirements for identity-verification, Ohio disenfranchises voters whose identity is not in question. Defendants' comparators show just how burdensome SB205/216 are.

And even as now Defendants tout their interests in SB205/216, they were not legislative priorities for Husted, Ohio's chief elections officer. Tr., R.665, PageID#31043.

The trial court thus did not clearly err in its factual findings, or in weighing its findings regarding burden against its findings regarding purported state

interests. All findings were well supported by the voluminous record evidence. This Court should affirm judgment on Plaintiffs' 14th Amendment *Anderson-Burdick* claim.

II. SB205/216 violate VRA Section 2 because they impose voting qualifications, prerequisites, standards, practices, or procedures that deny or abridge the right to vote on account of race or color.

A. The legal standard establishes a two-part test: does the challenged practice have a disparate impact and is that burden in part caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class.

VRA Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State … in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A Section 2 violation "is established if, based on the totality of the circumstances, it is shown that the political processes … in the State … are not equally open to participation by members of" a particular racial group "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (formerly 42 U.S.C. § 1973).

The VRA "should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination." *Chisom v. Roemer*, 501 U.S.

380, 403 (1991) (internal quotation marks omitted). "With Section 2 [of the VRA], Congress effectuated a 'permanent, nationwide ban on racial discrimination' because 'any racial discrimination in voting is too much.'" *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 238 (4th Cir. 2014) ("*LWV*") (quoting *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013)).

And "Section 2, unlike other federal legislation that prohibits racial discrimination, does not require proof of discriminatory intent. Instead, a plaintiff need show only 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).

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

Like other circuits, the Sixth Circuit requires a two-part analysis when evaluating a Section 2 vote-denial claim. *Veasey v. Abbott*, 796 F.3d 487, 504 (5th Cir. 2015) (adopting and applying two-part test), *reh'g en banc granted*, 815 F.3d 958 (5th Cir. 2016); *LWV*, 769 F.3d at 240 (same). *See also Ohio St. Conf. of the NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014) ("*NAACP II*").

First, the court examines whether the challenged practice has a disparate impact on a protected minority group. Plaintiffs need not show that the challenged practice makes voting impossible for minorities; they need only show that the practice makes voting disproportionately more burdensome for minorities. *NAACP II*, 768 F.3d at 552.

Second, if a court finds a disparate impact, it then must assess whether "that burden [is] in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class." *NAACP II*, 768 F.3d at 554 (quoting *Gingles*, 478 U.S. at 47).

At both stages, the court must look at the "totality of the circumstances," engaging in "an intensely local appraisal of the design and impact of the challenged electoral practice." *Gingles*, 478 U.S. at 78.

As part of the "totality of the circumstances" evaluation, the court looks at nine factors originally identified in the Senate Judiciary Committee majority report accompanying Section 2's 1982 amendments (the "Senate Factors"). *NAACP II*, 768 F.3d at 554-55. These factors include the history of voting-related discrimination in the jurisdiction; the extent of racially polarized voting in the jurisdiction; and the extent to which minority-group members bear the effects of past discrimination in areas such as education, employment, and health that hinder their ability to participate effectively in the political process. *See Gingles*, 478 U.S.

at 36-37. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* at 45 (citation and quotation marks omitted).

The Senate Report accompanying the Section 2 amendments listed several factors that might be probative of a violation, and the Supreme Court added others. *Gingles*, 478 U.S. at 36-37. These Senate/*Gingles* factors include the following:

(1) a history of official discrimination that touched the rights of minority citizens to register, vote, or otherwise participate in the democratic process,

(2) the extent to which elections are racially polarized,

(3) the use of voting practices or procedures that may enhance the opportunity for racial discrimination,

(4) denial of access to a candidate-slating process,

(5) the extent to which members of the minority group bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) the use of overt or subtle racial appeals in political campaigns,

(7) the extent to which minority citizens have been elected to public office,

(8) a significant lack of responsiveness by elected officials to the particularized needs of the minority group members, and

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

Id. at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982)).

Evidence of intent to discriminate is probative of a Section 2 violation but not required. *Id.* at 43-44; Instead, "plaintiffs can prevail under Section 2 by demonstrating that a challenged election practice has resulted in the denial or abridgement of the right to vote based on color or race." *Chisom*, 501 U.S. at 394.

B. The district court made findings of disparate impact and an interaction with social and historical conditions that are not clearly erroneous, and properly applied the right Section 2 test to find SB205/216 discriminatory.

The district court applied the two-part test described above. Ord., R.691, PageID#33890.

As to disparate impact, after hearing all experts' testimony, the district court found and gave "great weight to Dr. Timberlake's conclusions that across all even-numbered election years, minorities use provisional ballots more often than whites, and that in presidential election years, the absentee ballots and provisional ballots of minority voters are more likely to be rejected than those of white voters." Ord. 47, R.691, PageID#33844. The court found defense experts' views irrelevant, or deserving of little-to-no weight. *Id.*

And the court's findings were grounded in and supported by additional record evidence that eight of the nine Senate/*Gingles* factors

regarding social and historical conditions exist here. Pls.' Prop. Findings, R.687, PageID#33686-33687. Defendants neither claim nor show that the court's findings are clearly erroneous. They merely attempt futilely to avoid application of the law to the facts the Court found and in the record.

C. Defendants' efforts to avoid VRA Section 2's prohibition on discrimination are futile because they offer the wrong test.

Instead of addressing or challenging the court's findings, Defendants attempt to evade this Court's causal test—which the district court applied—offering instead their own novel theory of how the VRA should not actually protect voting rights. *See* First Br. 41-48; 51-55. Defendants assert that the causal test the district court applied, which looks at the Senate Factors and socioeconomic factors present in Ohio as part of the totality of the circumstances test, is incorrect. Insisting that the Court must consider the *Gingles* preconditions used in vote-*dilution* cases, Defendants seek a causal test that looks at the Senate Factors only after the court has found that the challenged practice—absent any socioeconomic or other factors—decreases minorities' ability to vote. *See id*.

Two of the three *Gingles* preconditions relate only to redistricting cases and do not apply outside of that context. *See Gingles*, 478 U.S. at 50-51 (preconditions include that minority group is "sufficiently large and geographically compact to constitute a majority" in a district and that majority voting bloc consistently defeats

minority candidates). Defendants' invocation of the preconditions is thus a non-sequitur.

Regardless, the Supreme Court has already explained that "'[t]he 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.'" *Id.* at 47. Thus, the district court's analysis examining SB205/216's interaction with Ohio's social and historical conditions—as the Supreme Court requires—was sound.

Non-Sixth Circuit cases Defendants rely upon are distinguishable, as the racial disparities in those cases were not caused by the challenged practices along with their interaction with social and historical conditions but, rather, by other causes completely. *See Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989) (challenging appointment process for school board where cause of racial disparities was not process itself but minorities' decision not to seek school-board seats and no finding that this was connected to socioeconomic factors); *Ortiz v. City of Philadelphia*, 28 F.3d 306, 313-14 (3d Cir. 1994) (statute was not cause of minorities being purged from voter rolls; voters' decision not to vote was).

Defendants' claims that the district court improperly failed to establish an objective benchmark and used a retrogression standard likewise fail. *See*, *e.g.*, First Br. 46-48. As this Court and others have already found, the need for an objective

benchmark is limited to the vote-dilution and VRA Section 5 contexts. *NAACP II*, 768 F.3d at 556; Ord., R.691, PageID#33892 (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)). In a vote-denial case, the benchmark is "inherently provide[d]" in the text of the statute, and it is "straightforward—under the challenged law or practice, how do minorities fare in their ability 'to participate in the political process' *as compared to other groups of voters*?" *NAACP II*, 768 F.3d at 556. The district court here made just such an inquiry with the result: African-Americans have less ability to participate in the political process as compared to whites as a result of SB205/216. *See* Ord., R.691, PageID#33894.

The case Defendants cite in support of its benchmark argument, *Holder v. Hall*, 512 U.S. 874 (1994), is the same vote-dilution case the *NAACP II* appellants unsuccessfully invoked. In *Holder*, the plaintiffs challenged the county's failure to replace the only form of government that the county in question had ever had with an entirely new form (*id.* at 877-78) and the Court found that where there was no other form of government available for comparison, this change was "inherently standardless" and could not be analyzed under Section 2. *Id.* at 885.

Here, Plaintiffs have challenged Defendants' practice of disenfranchising voters who would always have expected their votes to be counted and, thus, its "effect … can be evaluated by comparing the system with that rule to the system without that rule." *See id.* at 880-81. No need exists for some "hypothetical

benchmark." Further, *Moore v. Detroit School Reform Board*, 293 F.3d 352, 363-68 (6th Cir. 2002), another case on which Defendants rely, is irrelevant to the instant analysis because that case held that Section 2 does not apply to appointive systems. *Id.* at 363 (citing *Mixon v. Ohio*, 193 F.3d 389, 407-08 (6th Cir. 1999)).

Defendants further err in asserting that the district court wrongly compared Ohio's current laws to prior laws and, as a consequence, imported a Section 5 retrogression standard into its Section 2 analysis.[7] First Br. 42-43, 52. As this Court explained in *NAACP II*, "[t]he district court did not improperly engage in a retrogression analysis in considering the opportunities available to African Americans to vote [early in-person] under the prior law as part of the "totality of circumstances inquiry." 768 F.3d at 557-58 (quotation marks omitted).

Section 2 examines the burdens that voting laws, practices, and procedures place on minorities as compared to other members of the electorate. 52 U.S.C. § 10301(b) ("less opportunity than other members of the electorate to

[7] The State's retrogression argument appears to be based in part on a failure to comprehend *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Contrary to Defendants' assertions, *Shelby County* did not find that applying a disparate-impact retrogression standard was an intrusive requirement and thus strike it down. Rather, *Shelby County* found only that VRA Section 4's coverage formula was unconstitutional because it had not been updated. *Id.* at 2631. The Court held nothing regarding Section 5 or its retrogression standard. *Id.* ("We issue no holding on § 5 itself, only on the coverage formula.").

participate in the political process and to elect representatives of their choice"); *NAACP II*, 768 F.3d at 557-58.

In contrast, Section 5 compares "the position of racial minorities with respect to *their* effective exercise of the electoral franchise," *Beer*, 425 U.S. at 141 (1976) (emphasis added), under the status quo as compared to the opportunities they would have under a system with the proposed changes. *NAACP II*, 768 F.3d at 557-58. Accordingly, "[Section] 5 prevents nothing but backsliding," while Section 2 prohibits "discrimination more generally." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 321-35 (2000).

Section 2 and Section 5 *both* apply to election-law changes that make voting or registration more difficult. As the *Bossier Parish* Court explained, Section 5 applies "only to retrogression," whereas Section 2 challenges "involve *not only* changes but (much more commonly) the status quo itself." 528 U.S. at 334 (emphasis added). The Supreme Court has specifically explained that "some parts of the § 2 analysis may overlap with the § 5 inquiry." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003). And "no case explicitly holds that prior laws or practices cannot be considered in the Section 2 "totality of circumstances analysis." *NAACP II*, 768 F.3d at 557-58 (quotation marks omitted). Thus, as the district court did in the instant case, courts may—and should—look to past practices as part of the Section 2 totality-of-the-circumstances analysis.

Defendants' constitutional-avoidance and clear-statement arguments are similarly meritless. First Br. 43, 48.

As for Defendants' constitutional-avoidance argument, a Section 2 analysis is an intensely local analysis that focuses on the impact of the challenged provisions within the context of the state or locality in which they are implemented. *See, e.g.*, *Gingles*, 478 U.S. at 78 (Section 2 involves "an intensely local appraisal"); *NAACP II*, 768 F.3d at 559 ("[t]he focus is on the internal processes of a single State or political subdivision and the opportunities enjoyed by that particular electorate. Section 2's text does not direct courts to compare opportunities across States.").[8] As such, the district court's findings regarding SB205/216 and Section 2 here do not reach beyond Ohio's borders or bear on the constitutionality of other states' practices. Thus, contrary to Defendants' assertions, there is no "close [constitutional] case" to avoid. This Court should not avoid a ruling affirming the district court on those grounds.

The State's clear-statement argument fairs even worse. The VRA applies to the regulation of any "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301(a). And the Supreme Court has instructed that the VRA is to be interpreted as broadly as possible. *Chisom*, 501

[8] Even if state comparisons were appropriate, as explained in the *Anderson-Burdick* section above, Ohio would flunk the comparison because other states' statutes are not as draconian as Ohio's effort to disenfranchise voters even where eligibility is not in question.

U.S. at 403. Thus, no question exists that Congress intended that Section 2 apply to *all* voting practices and procedures that make it harder for minorities to participate in elections and elect the candidate of their choice.

And Defendants' reliance upon the separate court's findings in *Ohio Organizing Collaborative v. Husted*, Case 2:15-cv-01802 (First. Br. 54) fail because, as discussed in the res judicata section below, there was no full and fair opportunity to litigate: that court sharply limited the time for discovery on claims that required hand examination of thousands of ballots. The case as a result did not have nearly the benefit of the evidentiary record available here.

The district court's findings were not clearly erroneous and this Court should affirm its conclusions regarding VRA Section 2.

III. The district court correctly heard Plaintiffs' claims.

Plaintiffs sought leave to file the second supplemental complaint on October 30, 2014, just months after SB205/216 went into effect. R.429, PageID#15269. Several months later, on August 7, 2015, the district court granted the motion. R.452, PageID#15763. The court entered a *nunc pro tunc* order clarifying that the supplemental complaint was deemed filed as of October 30, 2014, the date on which Plaintiffs sought leave. R.642, PageID#27143-27148.

In the meantime, on May 8, 2015, a separate plaintiff, the Ohio Organizing Collaborative ("OOC"), sued Secretary Husted, virtually copying and pasting the

NEOCH five-fields claims. Case 2:15-cv-01802, Doc.1. OOC sought to relate its case to *NEOCH*, which the defendants opposed. *See* Doc.10. The original judge kept the case. Doc.16.

On August 15, 2015, a new party—ODP—sought to substitute for OOC in the case ("*OOC/ODP*"), while simultaneously moving to dismiss the claims overlapping with *NEOCH*. Doc.33. ODP did not seek NEOCH's or CCH's consent to join the suit. The defendants vigorously opposed the claims' dismissal. Doc.35. The court granted ODP's motion to substitute, but denied the motion to dismiss the overlapping claims. Doc.40. The court also denied the plaintiffs' motion for an extension of the discovery and trial schedules. Doc.32.

Despite having succeeded in keeping the five-fields claims in the *OOC/ODP* case, Husted took no action to forestall litigation of the same claims in *NEOCH,* or to object to overlapping discovery. The *OOC/ODP* trial began on November 16, 2015 and concluded on December 3, 2015. The *NEOCH* trial commenced on March 16, 2016 and lasted until March 31, 2016. The *OOC/ODP* court issued its judgment on May 24, 2016. Two weeks later, on June 7, 2016, the *NEOCH* court issued its decision.

Having created the situation with their opposition to begin with, Defendants now complain about being made to address the same claims twice.

A. The district court correctly granted Plaintiffs' motion to supplement their complaint, which was filed in October 2014, long before the trial in the 2015-filed *OOC v. Husted* case.

Exercising its broad discretion to grant a Rule 15 supplemental pleading, the district court thoroughly addressed and rejected the same opposition arguments Defendants raise here. Ord., R.452, PageID#15770-15788. Because of space constraints, Plaintiffs refer the Court to that order for a discussion of how the new claims were sufficiently related to the old to warrant supplementation. *Id.; see also* R.439, Pls.' Reply, PageID#15678-15694. Defendants themselves filed a notice that SB216 resulted in "changes in Ohio statutory law that modify the Consent Decree," thus admitting the claims' relatedness. *Id.*, PageID#15782.

And denying the motion to supplement would only have meant an entirely new lawsuit; it would not have saved Defendants from having to defend against the claims. Ord., R.452, PageID#15786. Given the court's familiarity with the voting-rights matters at issue, supplementation served judicial economy.

Defendants now introduce another theory of prejudice: that the court should have denied the supplementation motion because it supposedly forced Defendants to defend similar claims in two different trials—first *OOC/ODP*, then *NEOCH*. But Defendants can hardly be heard to claim prejudice on this basis when *they* opposed ODP's motion to dismiss the overlapping five-fields claims in *OOC*/*ODP*. They were aware of the supplementation-motion long before. And they omit that

the district court's *nunc pro tunc* ruling confirmed that the *NEOCH* suit was filed months before the *OOC*/*ODP* lawsuit.

B. ODP is not precluded, and in any case ODP did not "adequately represent" NEOCH and CCH, who are thus not bound by any precluded claims.

Defendants claim that ODP is precluded from bringing the five-fields claims, but Defendants have waived the res-judicata affirmative defense by failing to timely assert it. *See* Fed.R.Civ.P. 8(c); *Totalplan Cop. of Am. v. Colborne*, 14 F.3d 824, 832 (2d Cir. 1994); *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988). The *OOC* court ruled for them on May 24, two weeks before the June 7 *NEOCH* decision; yet Defendants brought no motion to amend their answer or otherwise alert the *NEOCH* court, including no motion to alter the judgment.

Further, unlike *Hutcherson v. Lauderdale Cnty.*, 326 F.3d 747, 756-57 (6th Cir. 2003), no special circumstances exist meriting *sua sponte* res judicata. Again, Defendants made no effort to avoid the overlapping claims, instead, vigorously opposing ODP's efforts to dismiss them. They thus acquiesced in litigating in multiple cases.

In any case, ODP is not precluded because it did not have a "full and fair opportunity to litigate" its claims. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-81 (1982). "Redetermination of issues is warranted if there is reason to doubt

the quality, extensiveness, or fairness of procedures followed in prior litigation." *Id.* at 481. And courts may consider "other compelling circumstances" when assessing fullness and fairness of prior litigation. *Richardson v. Miller*, 101 F.3d 665, 668 (11th Cir. 1996) (citing Restatement 2d of Judgments § 29 (1982)).

Here, the *OOC/ODP* court forced ODP to litigate the overlapping five-fields claims against its will. The trial proceeded on an expedited schedule that did not permit adequate time for discovery, hampering ODP's ability to fully develop the factual bases for its claims. The difference in volume of evidence between *OOC* and *NEOCH* reflects the difference in opportunity to litigate. These claims required aggressive fights with elections boards to obtain and review thousands and thousands of ballot forms.

Even if ODP were precluded, however—which it is not—NEOCH and CCH are not. ODP does not "adequately represent" these organizations' interests the way, for example, a trustee, guardian, or other fiduciary would. *See Taylor v. Sturgell*, 553 U.S. 880, 894, 900 (2008). ODP, NEOCH, and CCH are three independent organizations with different priorities (ODP is partisan; the others are strictly non-partisan, focused on advocacy for homeless people). The fact that they filed joint pleadings to promote judicial efficiency is irrelevant. ODP joined *OOC*, moreover, without NEOCH's or CCH's consent. The latter were not parties to that matter and had no opportunity to be heard. *See id.* at 892-93.

C. NEOCH and CCH have organizational, associational, and third-party standing.

Because of space constraints, and considering that Defendants have treated a threshold standing challenge as a throw-away argument at the end of their brief, Plaintiffs refer this Court to the reasoning and evidence recounted in the district court's order finding standing for Plaintiffs, R.691, PageID#33806-33812, 33859-33866, as well as to Plaintiffs' Proposed Findings. R.687, PageID#33422-33428, 33473-33477.

In addition to the points made there, evidence showed that homeless voters had been disenfranchised for five-fields reasons in the 2014 and 2015 elections, showing the risk of disenfranchisement to those members who intend to vote in 2016. *E.g.,* R.746-1, P-2398, PageID# 47527-47528; R.746-5, P-2486, PageID#47723-47724; R.773-1, P-7017, PageID#53207-53212; R.773-1, P-7018, PageID#53213-53214.

Argument for Cross Appeal

I. The district court erred in not entering judgment for Plaintiffs on Count 5: Equal Protection (*Bush v. Gore* lack of uniform standards) because the record shows that Ohio's counties enforce SB205/216 completely differently and in a standardless manner.

The district court correctly found that Plaintiffs established the existence of "varied Board practices" regarding whether a five-field error or omission will cause a ballot to be rejected. The handful of examples the court cited reflect only a

fraction of the uncontested evidence introduced at trial (see Pls.' Prop. Findings, Tables B-H, R.687-3 through 687-9, PageID#33646-33716). That evidence shows Ohio's boards have reached different conclusions when deciding whether to reject ballots that have one or more of many different types of errors and omissions. The specific examples the court cited as evidence of "varied board practices" include incorrect street numbers, missing or incorrect street names, addresses that cannot be confirmed by the board's post-election review, commercial rather than residential addresses, birthdates with a wrong day or month, and birthdate fields with the current date rather than the voter's birthdate. Ord., R.691, PageID#33828-33829. The court also correctly found that some boards apply different standards to voters *within* the same county. Specifically, the Fairfield and Lucas boards "might or might not accept" a commercial address, and the Cuyahoga and Harrison boards "might or might not" accept a birthdate with the correct year but wrong day or month. Ord., R.691, PageID#33829.

Facially, these different outcomes would appear to violate the Equal Protection Clause. But despite these factual findings, the court ruled against Plaintiffs on this claim because it concluded, without explanation, that these "varied Board practices" are not different "standards" that violate equal protection, but instead are "different systems for implementing elections" that boards have the lawful expertise and discretion to develop. Ord., R.691, PageID#33879-33880.

Because the court's analysis and conclusion in applying its findings and the record are legally incorrect, its judgment should be reversed.

First, the court misconstrued the legal standard. The Supreme Court did not hold in *Bush v. Gore*, 531 U.S. 98 (2000), that non-uniform "standards" are unconstitutional whereas non-uniform "systems" are perfectly lawful. The Supreme Court instead held that when county elections boards must decide whether and how to count ballots that are imperfectly punched, resulting in one or more hanging chads, equal protection is violated by "the absence of specific standards to ensure … equal application" of the "general command to ascertain [the voter's] intent." *Id*. at 105-06.

In other words, the question before the Supreme Court was whether specific *standards* existed that would ensure the equal *application* (i.e., protection) of the legal rule that Florida's election boards must ascertain the voter's intent. The Court did not consider whether boards could develop different election systems. Indeed, the Court explained that such a question was not before it. *Id.* at 109 ("The question before the Court *is not* whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.") (emphasis added). Thus, the district court's legal conclusion here that boards are properly "'exercis[ing] … their expertise' in 'develop[ing] different systems for

implementing elections,' *Bush*, 531 U.S. at 109," does not state or apply the correct legal standard, and its judgment thus should be reversed.

The district court rather should have applied the *Bush* standard, namely, will "specific standards … ensure … equal application" of the "general command" in SB205/216 that boards reject ballots where the accompanying form has a five-field error or omission? The undisputed evidence and the district court's factual findings require this question to be answered with a resounding no.

As the district court's factual findings reflect, Plaintiffs proved that there are numerous circumstances where there are no specific standards that can ensure equal application of the law. Pls.' Prop. Findings, Tables B-H, R.687-3 to 687-9, PageID#33646-33716. Indeed, this unchallenged evidence established that *voters who live in different counties and make the exact same type of error or omission on their ballot forms* are treated very differently and in a standardless manner. Some boards interpret and apply SB205/216 strictly and throw out many ballots, whereas other boards interpret and apply SB205/216 liberally (if at all) and throw out few (if any) ballots. This state of affairs cannot comport with equal protection. If the ballot of an absentee voter in Cuyahoga County is rejected solely because he left the birthdate field blank on the accompanying envelope, while the ballot of an absentee voter in Meigs is counted even though she left the birthdate field blank on the accompanying envelope, then the fundamental guarantee of equal protection is

betrayed. And since neither the General Assembly nor the Secretary has identified specific standards that will ensure SB205/216's equal application, the law cannot stand. Indeed, as recited in the Statement of the Case above, defense representative Damschroder admitted that boards' non-uniform SB205/216 application is of serious concern, and that there are myriad ways in which voters can unwittingly err on each of the five fields. Tr., R.665, PageID#31058-31061. Damschroder further admitted that introducing new complexity into an administrative system can have bad, unintended (or intended) consequences that are hidden from surface view at the time the changes are made. Tr., R.665, PageID#31057-31058. He admitted that the non-uniform application of SB205/216 were anticipatable at the time the statutes were adopted. Tr., R.666, PageID#31092-31093, 31095-31096. And yet he admitted that Husted's done nothing to investigate or fix the problem. *See*, *e.g*, Tr., R.665, PageID#31070.

Thus, given the voluminous, undisputed record evidence and the district court's own factual findings, the Court need not remand this claim to the district court. The evidence establishes a plain equal-protection violation, and this Court should accordingly reverse and remand directing that judgment be entered for Plaintiffs on this claim.

II. The district court erred in not entering judgment for Plaintiffs on Count 1: Voting Rights Act (Literacy Tests) because literate and non-disabled voters cannot request assistance from pollworkers, and illiterate homeless voters hesitate to request assistance due to the embarrassment and stigma of illiteracy.

The VRA's literacy-test provision prohibits denying the right to vote over a failure to comply with any "test or device." 52 U.S.C. § 10501(a). A test or device includes a requirement that the voter demonstrate "the ability to read, write, understand, or interpret any matter" as a prerequisite for voting. 52 U.S.C. § 10501(b)(1). The House Report explained that between 1890 and 1954, several states with large African-American populations had enacted voting laws that required voters, as a prerequisite to being permitted to vote, to demonstrate the ability *to read and/or write* (Mississippi-1890, South Carolina-1900, Alabama-1901, Virginia-1902), Georgia-1908, Oklahoma-1910, Louisiana-1921), and *to complete an application form* (Louisiana-1898, Virginia-1902, Mississippi-1954), among other types of tests. H.R. Rep. No. 89-439, at 11-12. The House Report included the following findings:

- The challenged "constitutional interpretation tests ... *'perfect form' requirements*, and ... citizenship-knowledge tests" were "vague, arbitrary, hypertechnical or unnecessarily difficult." *Id*. at 13 (emphasis added).

- Evidence from civil-rights lawsuits showed that white citizens frequently were not subjected to these requirements; instead, they were used as a means to discriminate against African-American citizens. *Id*. at 12-13.
- Literacy test laws "*are not capable of fair administration…. [T]he laws requiring that application forms be completed perfectly*, without errors, omissions, or assistance, *are patently arbitrary and could not be fairly applied in any sense.*" *Id*. at 15.

The district court's findings regarding the SB205/216's impact fall squarely within the VRA's prohibition of "perfect form requirements" that are "arbitrary, hypertechnical or unnecessarily difficult." As an initial matter, the district court correctly found that thousands of ***educated and literate*** voters failed to fill out the five fields correctly and completely because they "either disregarded or misunderstood what was being asked." Ord., R.691, PageID#33827-33828, 33830. The district court further found that "[d]emanding perfect, or near perfect, adherence to the five-field requirement ... imposes a significant burden for homeless voters," many of whom "are illiterate, barely literate, and/or mentally ill." Ord., R.691, PageID#33830. The district court found that this burden was exacerbated by SB205/216's prohibition on poll-worker assistance, which "burdens persons with low literacy, particularly if they are embarrassed to reveal their illiteracy due to the stigma it entails." Plaintiffs introduced "ample evidence

that many of their members fall into this category, and that illiteracy or low literacy levels are prevalent among the homeless. Homeless voters suffer disproportionately from disabilities, including mental illness, which can also hamper their ability to fill out forms.... They may write poorly and have handwriting that is difficult to read or, due to mental illness, they struggle to focus on basic tasks without help." The court concluded, "All of these issues combine to create difficulties for homeless voters in filling out forms without assistance like the absentee ID envelope and the provisional ballot affirmation." Ord., R.691, PageID#33831.

The court further found that SB205/216's prohibition on poll-worker assistance (which applies absent an affirmative request for help due to blindness, disability or illiteracy) had adversely impacted homeless voters because "[b]oard staff members were more hesitant to engage with voters and offer help when it appeared to be necessary, and ... homeless voters have been more likely to make mistakes because of the lack of help." *Id*.

The court also credited the testimony of NEOCH executive director Brian Davis, who explained that "homeless persons have pervasive and profound problems filing out the forms," and that "[n]ot being able to read or fill out forms correctly is embarrassing and humiliating for many of NEOCH's members, and they hesitate to ask for help." Ord., R.691, PageID#33809. The district court also

credited Davis' testimony that because NEOCH's members "had difficulty filling out" absentee ballot application forms for the 2014 election, NEOCH will no longer give those forms to its members but instead will drive them to the polls. *Id*.

Finally, the court credited CCH board member Donald Strasser's testimony. Strasser explained "that 'without assistance, a homeless person could [not] complete the entire form' and that due to the complexity and amount of print on the form, 'some homeless people would just tear it up and say, you know, to hell with it.'" Ord., R.691, PageID#33830. (citation omitted). The district court further found that the forms "are, in the words of one Board official, 'pretty complex' with 'a lot of wording, a lot of stuff crammed into' them," and that they "can trip up even educated, literate voters." *Id*.

Given these findings, the court erred when it concluded that Plaintiffs could not prevail on their literacy test claim because a state law allows voters who are blind, disabled, or illiterate to request assistance from poll workers. (Ord., R.691, PageID#33906.) The evidence at trial established that (1) thousands of educated and literate voters (who cannot benefit from a state law allowing blind, disabled, or illiterate voters to request assistance) had failed to fill out the forms completely and correctly, and (2) homeless voters often do not ask for help because of the embarrassment and stigma of illiteracy, and cannot complete the forms as a result.

Together and separately, these factual findings establish a violation of the VRA's literacy-test prohibition.

Moreover, SB205/216's stringent requirements are precisely the type of perfect-form requirements the VRA was intended to protect against because they require ballots to be thrown out for "hypertechnical" mistakes and are not capable of fair administration. As discussed elsewhere in this brief, the evidence established that SB205/216 are being administered vastly differently from county to county (i.e., not being fairly administered), and that ballots are being thrown out for clerical (i.e., hyptertechnical) errors even though the voters can be identified, and their eligibility to vote can be confirmed, despite the clerical error or omission. (See Pls.' Prop. Findings, Table A, R.687, PageID#33497-33645.)

The district court thus erred in entering judgment for Defendants on Plaintiffs' literacy-test claim, and this Court should reverse, ordering judgment to Plaintiffs.

III. The district court erred in not entering judgment for Plaintiffs on Count 7: Substantive Due Process given that it is fundamentally unfair to (a) have a standardless voting system where ballots with identical errors are counted by some counties and rejected by others, and (b) discard ballots solely due to a lack of clerical perfection.

"The Due Process Clause protects against extraordinary voting restrictions that render the voting system 'fundamentally unfair.'" *NEOCH*, 696 F.3d 580, 597 (6th Cir. 2012) (internal quotations and citations omitted). Although the

"fundamentally unfair" standard has not been precisely defined, this Court has held that a voting system may be "fundamentally unfair" if it is "devoid of standards and procedures," *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008), if "non-uniform standards" cause "significant disenfranchisement and vote dilution," *NEOCH*, 696 F.3d at 597 (internal quotations and citation omitted), or if voters are disenfranchised solely because they relied on poll workers' erroneous instructions, *Hunter v. Hamilton Cty. Bd. of Elections*, 635 F.3d 219, 243-44 (6th Cir. 2011).

The record here establishes ample evidence of fundamental unfairness. The district court correctly found that SB205/216's completeness requirements as applied caused the disenfranchisement of thousands of absentee and provisional voters who cast ballots in Ohio's 2014 and 2015 general elections and "either disregarded or misunderstood what was being asked." Ord., R.691, PageID#33827-33828. The court also found the existence of "varied Board practices" regarding whether to count or reject ballots with the same errors or omissions. *Id.*

The record contains considerable additional unrebutted evidence of fundamental unfairness. The "varied Board practices" discussed by the district court are only a small example of the boards' sweeping non-uniform treatment of ballots under SB205/216. Pls.' Prop. Findings, Tables B-H, R.687-3 to 687-9,

PageID#33646-33716. Although space-limitations constrain discussion of all of the evidence, a few additional examples are noteworthy:

- Cuyahoga, Franklin, and Lorain counties' boards reject provisional ballots if voters write their names in cursive instead of printing it—but Lucas, Meigs, Noble, and Warren's boards count such ballots. Pls.' Prop. Findings, Table B, R.687-3, PageID#33647.
- Delaware, Franklin, Lawrence, Summit, and Warren's boards reject ballots if there is a mismatching first or last name; but Adams, Allen, Harrison, Meigs, Noble and Wyandot boards count such ballots. *Id.* PageID#33648-33649.
- Butler, Cuyahoga, Fairfield, Hamilton, Lawrence, Lorain, Lucas, Miami, Richland, Summit, and Warren's boards reject ballots if the birthdate is missing—but Adams, Carroll, Fayette, Harrison, Meigs, Paulding, and Wyandot count such ballots. Pls.' Prop. Findings, Table D, R.687-5, PageID#33673-33674.
- Cuyahoga and Lucas's boards reject ballots if the voter provides two forms of identification and one is incorrect—but Allen, Carroll and Meigs count such ballots. Pls.' Prop. Findings, Table E, R.687-6, PageID#33681.

And so on. *See* Pls.' Prop. Findings, Tables B-H, R.687-3 to 687-9, PageID#33646-33716. Unequal treatment of voters who make the exact same

mistakes on their ballot forms is fundamentally unfair. Defendants as much admitted so. *See* Tr., R.665, PageID#31058-31061.

Even more troubling is the fact that SB205/216 require boards to reject absentee and provisional ballots because of five-field errors and omissions ***even though*** the boards can otherwise confirm the voter's identity and eligibility to vote. Tr., R.657, PageID#29019-29020; Tr., R.656, PageID#28812-28813. Indeed, boards must give "credit" to voters whose ballots are rejected due to a five-field issue by updating their history to show they voted in that election—which boards can do precisely because they are able to confirm the voter's identity and eligibility to vote. Tr., R.656, PageID#28812-28813. And board officials testified that it is unfair to disenfranchise voters simply because they make a mistake on one of the five fields when their identity and eligibility can otherwise be verified. Tr., R.657, PageID#29017-29019; Tr., R.660, PageID#29657-29658. Professor Foley agrees: "When the government knows it has an authentic ballot from a valid voter, the government should not be disqualifying the ballot according to some 'Gotcha' theory of clerical perfection." E. Foley, *When Should a Voter's "Clerical Error" Invalidate a Ballot?*, June 13, 2016, available at http://moritzlaw.osu.edu/election-law/article/?article=13257, last accessed Jul 13, 2016.

Given this evidence, the court erred when it concluded that Plaintiffs had not demonstrated a "fundamentally unfair" voting system. Contrary to the district

court's legal analysis, Plaintiffs are not confined to the precise factual scenarios that this Court has identified as violating due process (i.e., significant disenfranchisement or pollworker error). Instead, the correct question is whether SB205/216 create a voting system that is fundamentally unfair.

The evidence establishes that Ohio's voting system is fundamentally unfair for two reasons. First, boards must reject ballots solely because of immaterial errors or omissions on the accompanying forms even though they can confirm the voters' identity and eligibility. Second, boards vary tremendously as to whether and how to enforce SB205/216—and while urban counties with many minority voters strictly construe and enforce the laws (and so throw out many ballots), rural counties with far fewer minority voters liberally construe and/or do not enforce the laws (and so throw out few ballots). Together and separately, these facts rise to the level of a substantive-due-process violation. Because the district court applied the wrong legal standard, its judgment should be reversed.

IV. The Sixth Circuit should reverse *en banc* its prior holding that kept the district court from entering judgment for Plaintiffs on Count Two: The Materiality Provision of the Voting Rights Act (Immaterial Errors/Omissions)

The VRA's materiality provision provides in relevant part that the right to vote should not be denied "because of an error or omission on any record or paper … if such error or omission is not material in determining whether such individual is qualified under State law in such election ...." 52 U.S.C. § 10101(a)(2)(B).

"[T]he word 'vote' includes all action necessary to make a vote effective, including ... having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election." 52 U.S.C. § 10101(a)(3)(e).

An earlier Sixth Circuit panel has held that there is no private right of action under this provision. *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000). The Eleventh Circuit later held that a private right of action *does* exist under the materiality provision of the VRA, criticizing the Sixth Circuit's reasoning and providing a detailed legislative history in support of its contrary result. *Schwier v. Cox*, 340 F.3d 1284, 1294-96 (11th Cir. 2003).

These trivial five-fields errors and omissions discussed above are not material to determining whether a voter is qualified to vote and should not be permitted to disenfranchise voters, in violation of the VRA's materiality provision. Plaintiffs make this argument to preserve *en banc* or Supreme Court review.

V. The district court erred in its analysis by failing to consider all of the evidence that would have justified entering judgment on Count 9: 14th & 15th Amendments (intentional race discrimination).

The 14th Amendment's equal-protection clause forbids race discrimination. And the 15th Amendment provides that "[t]he right … to vote shall not be denied or abridged by ... any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Plaintiffs prevail if they show that when

the State enacted *or implemented* challenged laws, it did so with the intent to discriminate based on race. *Brand v. Motley*, 526 F.3d 921, 924 (6th Cir. 2008) (alleged racial discrimination in prison-housing assignments stated claim); *Heyne v. Metropolitan Nashville Pub. Schs.*, 655 F.3d 556 (6th Cir. 2011) (alleged racial discrimination in student punishment may establish violation).

Plaintiffs need not show that the challenged legislation was motivated *solely* by a discriminatory purpose, but they must show that such intent was *a* motivating factor. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66, 97 S. Ct. 555 (1977). This determination "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. at 266.

Although such cases are rare, racially disproportionate impact of facially neutral legislation may be one such piece of evidence. *Id*. *See also Tex. Dept. of Housing and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2522 (2015) ("Recognition of disparate-impact liability … plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.").

Other types of probative evidence may include the decision's historical background, the sequence of events leading up to the decision, and procedural or

substantive departures from the normal legislative process. *Village of Arlington Heights*, 429 U.S. at 266-67. Also, "[t]he legislative ... history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id*. at 268. If discriminatory intent is established, then the State must prove it would have passed the same legislation even without the discriminatory purpose. *Id*. at 271 n.21.

No court has held these considerations are *exclusive*. Pretext and deliberate ignorance are other traditional ways of proving intent. *See*, *e.g.*, Cicero *v. Borg-Warner Automotive, Inc*., 280 F.3d 579. 592 (6th Cir. 2002) (shifting explanation raises issue of whether proffered reason truly motivated decision); *Norris v. San Francisco*, 900 F.2d 1326 (9th Cir. 1990) (reversing district court's no-race-discrimination finding; proffered rationale cannot be "accepted at face value").

"Legislators are extremely unlikely to admit [discriminatory] motivations." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 718 (2006).

Yet as the Order finds, a legislator and a board member were caught expressing racial animus in advocating for SB205/216. R.691, PageID#33855, 33898. Given the above ways of identifying discrimination, the district court applied an unwarranted restricted view of the record in its decision. It did not consider all of the evidence to call Defendants out for intentional race

discrimination—even though the Court was so "deeply troubled" it characterized Defendants' pattern of conduct as "dog whistles." Ord., R.691, PageID#33886. But that metaphor refers to racist conduct that is intentional, yet hidden from view.[9] A dog whistle's target audience should be able to hear it: when a federal court finds it, the court must not ignore it as unsufficiently overt.

The court's approach seems to imply that absent more overt expressions by legislators, there can never be sufficient evidence of intentional discrimination. The 14th and 15th Amendments' protections are thus rendered meaningless.

Aspects of the record the Court ignored in its analysis included the following:

- The discriminatory impact it had already found.
- The Secretary looked the other way as boards *implemented* SB205/216 in unequal fashion (discriminatory purpose in *implementation* as a motivating factor in this as-applied challenge).
- The proffered interests are not just unpersuasive; they are pretextual, when the legislators fail to testify offering any explanation, Defendants offer explanations belied by the record, and Damschroder contradicts the briefs

[9] "Dog whistles" are "coded racial appeals that carefully manipulate hostility toward nonwhites." López, Ian Haney, *Dog Whistle Politics: How Coded Racial Appeals Have Wrecked the Middle Class*, Preface, ix, Oxford University Press, 2014.

admitting that purported fraud and security of the ballot do not support SB215/216.

- Husted did nothing to correct SB215/216's divergent enforcement among large minority, and small mostly white counties.
- Husted failed to investigate 2012 presidential general-election efforts to intimidate black voters in Cleveland, but he fired elections-board members who resisted his efforts to cut back Sunday voting from which he knew black voters were taking disproportionate advantage.
- Husted never engaged the black legislators to discuss voting concerns.

See generally Ord., R.691 and Pls. Prop. Findings, R.687. Plaintiffs are space limited from highlighting all of the evidence the Court overlooked sufficient to find intentional discrimination. The record and the district court's own findings provided enough information for an intentional-discrimination finding, but the Court did not consider all of the evidence in relation to this claim.

Yes, courts in 2016 may be reluctant to call out other public officials for intentional discrimination, but a district court, when it hears dog whistles, should at least have to consider that evidence, and not be permitted to overlook it.

Reversal for further consideration on this claim is important, because an intentional 14th and 15th Amendment-discrimination finding will qualify Defendants to be "bailed in" under VRA Section 3 to mandatory preclearance of

their voting-rights changes. 52 U.S.C. § 10302(c) (providing for the court finding discrimination to retain jurisdiction, or for the Department of Justice, to preclear any voting-rights changes).

And that might finally stop Defendants' serial voting-rights violations and curtail the amount of litigation federal courts have to hear on these issues.

VI. If this Court enters judgment for Defendants on Plaintiffs' other claims, then it should also remand Count 3 (procedural-due process) to the District Court to reach the merits of that claim.

The district court denied the procedural-due-process claim without addressing its merits, appearing to conclude that it was unnecessary to do so because of its resolution of the other claims challenging SB205/216. Plaintiffs appeal this denial solely to preserve this claim in case this Court reverses the district court's injunction of SB205/216—which the Court should not—in which case the procedural due process issues will again be ripe and this Court should remand the procedural due process claim to the district court to address it on its merits.

Conclusion

Plaintiffs thus request that the Court

(1) affirm the district court's judgment as to the *Anderson-Burdick* and VRA Section 2 claim,

(2) recommend based upon the conflict with the Eleventh Circuit that this Court *en banc* reverse the prior panel's

holding that voters have no private cause of action to protect themselves on the VRA's materiality protection,

(3) reverse and remand on the VRA literacy-test, equal-protection/*Bush v. Gore*, procedural-due-process, substantive-due-process, and 14th and 15th Amendment intentional-discrimination claims for entry of judgment on those claims, or for additional district court fact finding on the intentional-discrimination claims based on the trial record, and reconsideration in light of this Court's ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief contains 16,499 words (exclusive of the items not counted under 6 Cir. R. 32(b)(1)), as determined by the word-count function of the word-processing system used to prepare the brief, and thus complies with the type-volume limitation set forth in Appellate Rule 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I certify that on July 14, 2016, I filed the foregoing document electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/ Subodh Chandra
Subodh Chandra

One of the Attorneys for Plaintiffs-Appellees NEOCH and CCH

DESIGNATION OF DISTRICT COURT RECORD

Appellees/Cross-Appellants Northeast Ohio Coalition for the Homeless, Columbus Coalition for the Homeless, and Ohio Democratic Party designate the following district court documents:

Doc No.	Name of Document and Date	PageID#
210	Consent Decree	4970-4975
429	Motion for leave to file Second Supplemental Complaint	15269-15279
439	Plantiffs' reply in support of Second Supplemental Complaint	15685-90
452	Order granting leave to file Second Supplemental Complaint	15763-15788
453	Second Supplemental Complaint	15789-15830
642	Nunc Pro Tunc Order granting motion to correct record	27143-27148
644	Deposition of Betty Edwards	27151-27186
654	Trial Transcript, Volume 1	28393-28681
656	Trial Transcript, Volume 2	28683-28945
657	Trial Transcript, Volume 3	28946-29171
658	Trial Transcript, Volume 4	29172-29412
659	Trial Transcript, Volume 5	29413-29608
660	Trial Transcript, Volume 6	29609-29904
661	Trial Transcript, Volume 7	29905-30147
663	Trial Transcript, Volume 9	30245-30524
664	Trial Transcript, Volume 10	30525-30853
665	Trial Transcript, Volume 11	30854-31083
666	Trial Transcript, Volume 12	31084-31179
672	Declarations of Individual Voter Witnesses	31493-31513
672-7	Declaration of Katherine Galko	31502
672-13	Declaration of Ronald Gilbert	31503
672-15	Declaration of Sally Miller	31510
687	Plaintiffs' Proposed Findings of Fact and Conclusions of Law	33421-33495

687-7	Plaintiffs' Proposed Findings of Fact and Conclusions of Law, Table F-Procedural Issues	33685-33698
691	Final Judgment	33794-33908
697	Notice of Cross-Appeal	33925-33927
698-101	Sen. Bill Seitz Testimony, November 6, 2013	35386-35387
698-102	Sen. Bill Seitz Testimony, January 14, 2014	35388-35390
698-98	Sen. William Coley, II Testimony, October 16, 2013	35377-35378
698-99	Sen. William Coley, II Testimony, November 19, 2013	35379-35380
704-2	P-17, Absentee ballot summary spreadsheet for Nov 2014	35832-35869
729-2	P-1003, 2014 Summit Minutes	37915-39698
729-3	P-1004, 2015 Summit Minutes	39772-39821
746-1	P-2398, Voter packet for Faith McCullough	47527-47528
746-5	P-2486, Voter packet for Faith McCullough	47723-47724
751-1	Cuyahoga "Provisional Reasons and Flags Summary"	48978-48979
773-1	P-7017, Voter packet for Calvin Arnold	53207-53212
773-2	P-7018, Voter packet for Robert Davis	53213-53214
776-1	NEOCH's Third Supplemental Interrogatory Responses	53677-53679