No. 14-3877

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Appellees

v.

MIKE DEWINE, in his Official Capacity as Attorney General of Ohio, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

This case concerns the interpretation and application of Section 2 of the Voting Rights Act (VRA), 52 U.S.C. 10301.[1] The Department of Justice enforces the VRA, 52 U.S.C. 10308(d), and thus has a substantial interest in how courts construe its provisions. The Department regularly files amicus briefs in courts of

[1] Effective September 1, 2014, the VRA was moved from Title 42 to Title 52 of the United States Code and was assigned new section numbers. The addendum to this brief contains a chart comparing the old and new section numbers.

appeals in Section 2 cases, and filed a Statement of Interest in this case addressing the Section 2 issues. (Statement of Interest, RE 49, pp. 1479-1501).[2] The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

The United States will address:

Whether the district court correctly analyzed plaintiffs' likelihood of success on their claim under Section 2 of the Voting Rights Act.

STATEMENT OF THE CASE

1. Background

Plaintiffs challenge recent amendments of Ohio voting law brought about by the enactment of Senate Bill 238 and recent directives issued by Ohio Secretary of State Husted. Plaintiffs have focused their challenge on: (1) the reduction of time allowed for in-person absentee voting (early voting) from 35 to 28 days before the election; (2) the elimination of the period (known as Golden Week) during which citizens could register to vote and cast a ballot on the same day; (3) the elimination of any Sunday early voting hours (except for the Sunday immediately preceding the election); and (4) the elimination of any evening early voting hours. See Ohio Rev. Code § 3509.01 (2014); Husted Directive 2014-17. As relevant here,

[2] Page citations to the district court record refer to the Page ID#. See 6 Cir. R. 28(a)(1).

plaintiffs argue that these measures violate the Fourteenth Amendment and Section 2 of the Voting Rights Act.

Early voting began in 2005, after Ohio voters experienced long lines and delays during the 2004 election. (Memorandum Opinion and Order, RE 72, pp. 5848-5849). For the 2008 and 2010 elections several counties offered early voting on multiple Sundays and during evening hours. (*Id.* at 5854-5845). The counties that offered this increased access to early voting included the six counties with the highest African-American populations in the State. (*Id.* at 5855-5856). During the 2008, 2010 and 2012 elections tens of thousands of people cast ballots during Golden Week, and thousands of people registered to vote or updated their registration and voted at the same time. (*Id.* at 5897-5898).

2. District Court's Decision

On September 4, 2014, the district court preliminarily enjoined the challenged measures. (Memorandum Opinion and Order, RE 72, p. 5848).

a. Factual Findings

The district court found that African Americans used early voting at a greater rate than white voters and that lower income individuals – a group in which African Americans are overrepresented as compared to whites – benefitted most from same-day registration. (Memorandum Opinion and Order, RE 72, pp. 5891-5892, 5897-5898, 5912). It also found that Sunday voting was particularly

significant to African-American voters and that they frequently utilized it. (*Id.* at 5898-5899). Predominantly African-American churches often organized "Souls to the Polls" initiatives that provided transportation to early voting sites immediately following Sunday services. (*Id.* at 5899-5890). African Americans were also more likely, for reasons related to socioeconomic status, to have difficulty voting during normal business hours and therefore to be negatively affected by the elimination of evening hours for early voting. (*Id.* at 5882-5883, 5912-5913).

The district court examined the expert evidence. (Memorandum Opinion and Order, RE 72, pp. 5873-5893). The court credited the conclusion of plaintiffs' statistical expert that African Americans utilize early voting much more than white voters and therefore that the elimination of early voting days will disproportionately affect African Americans. (*Id.* at 5891-5892, 5912, 5914-5915). The court also credited plaintiffs' expert evidence about how certain of the so-called "Senate factors,"[3] which inform courts' Section 2 analyses, apply to African Americans in Ohio. (*Id.* at 5892). Concerning Senate factor 5, which examines the extent to which a minority population bears "the effects of discrimination in areas such as education, employment, and health," the expert determined, *inter alia*, that persistent racial inequities in these areas directly affect voting because

[3] As explained below, the "Senate factors" are a non-exhaustive list of nine factors that are relevant in analyzing many Section 2 claims. See pp. 9-11, *infra*.

they mean that African Americans experience "disparate access to transportation," greater difficulty in taking "time off to vote during regular business hours," and more difficulty in arranging childcare. (*Id.* at 5880-5882 (citations omitted)). This expert also concluded that there is a history of race-based voting discrimination in Ohio, that voting in Ohio is racially polarized, that the State had a recent history of election-related racial appeals, and that African Americans in Ohio are "significantly underrepresented, 'both historically and contemporarily, in the most important, visible and influential elected state posts.'" (*Id.* at 5879-5885 (citations omitted)).

b. Constitutional Claim

The court concluded that plaintiffs were likely to succeed on the merits of their constitutional claim. To determine whether the challenged limitations impose an unjustified burden on the right to vote of African Americans, lower income individuals, and the homeless, the court applied the balancing test that the Supreme Court adopted in *Anderson* v. *Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). This test balances the burden on the voting rights of the identified groups against the State's justifications for the challenged measures. (Memorandum Opinion and Order, RE 72, pp. 5895-5896). The court determined that the essence of plaintiffs' claim "is the equal treatment of all voters within Ohio's [early voting and absentee] voting scheme." (*Id.* at 5896). The

court accordingly determined that "a heightened form of scrutiny" applies. (*Id.* at 5897).

After weighing the evidence, the court concluded that "the overall degree of burden on voting imposed by SB 238 and Directive 2014-17 [is] significant although not severe." (Memorandum Opinion and Order, RE 72, p. 5900). The court next concluded that the defendants' "offered justifications [fraud prevention, cost, and uniformity] fail to outweigh the burdens imposed." (*Id.* at 5902).

c. Section 2 Claim

The court also ruled that plaintiffs were likely to succeed on the merits of their Section 2 claim. The court first rejected the defendants' argument that SB 238 and Directive 2014-17 cannot violate Section 2 when many other States offer fewer early voting opportunities. (Memorandum Opinion and Order, RE 72, p. 5909). The court explained that "the evaluation of a § 2 claim require[s] an intensely local appraisal of the design and impact of the challenged electoral practice." (*Ibid.* (citations and internal quotation marks omitted)).

Next, the court held that it is relevant under Section 2 that SB 238 and Directive 2014-17 reduce some early voting opportunities previously available. The court rejected defendants' argument that such a comparison erroneously imports into a Section 2 claim the retrogression standard used under Section 5 of the Voting Rights Act, 52 U.S.C. 10304. (Memorandum Opinion and Order, RE

72, p. 5909). The court determined instead that the fact that the law decreased previously available early voting was relevant under Section 2's totality-of-the-circumstances test. (*Ibid.*). It was particularly relevant to the ninth Senate factor, the tenuousness of a jurisdiction's policy justification for the voting practice at issue, because that factor looks at whether a voting practice "markedly departs from past practices." (*Id.* at 5911 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 29 n.117)).

The court then weighed the relevant factors. The court particularly stressed the fifth and ninth Senate factors. It concluded that "[t]he burdens created by SB 238 and Directive 2014-17 arise largely from the lower socioeconomic standing of African Americans in Ohio, which, per the fifth [Senate] factor, can be seen as resulting from past and current discrimination." (Memorandum Opinion and Order, RE 72, p. 5913). And it concluded that "the policies underlying these measures can be described as tenuous at best" and that "SB 238 and Directive 2014-17 depart markedly from past practices." (*Id.* at 5914).

Finally, the court explained that Section 2 is violated here not because minorities' opportunity to vote is totally eliminated, but because "the socioeconomic and other factors identified by the Plaintiffs coupled with the reductions to [early] voting caused by SB 238 and Directive 2014-17 result in fewer voting opportunities for African Americans than other groups of voters, as it

will be more difficult for African Americans to vote during the days and hours currently scheduled than for members of other groups." (Memorandum Opinion and Order, RE 72, p. 5914).

3. Denials Of Stay Motions

On September 10, 2014, the district court denied the State's motion for a stay pending appeal. (Order, RE 82, pp. 5989-5993). On September 12, this Court denied the State's motion for a stay pending appeal, explaining that "we cannot say that Defendants have carried their burden to make a *strong* showing that [they are] likely to succeed on the merits." Doc. 23-2 at 6 (citation omitted).

SUMMARY OF ARGUMENT

The district court correctly applied Section 2 of the Voting Rights Act. In particular, it correctly considered SB 238 and Directive 2014-17 within their historical context, properly relying on relevant Senate factors, and recognizing the significance under the totality-of-the-circumstances test of the fact that these provisions resulted in minority voters no longer having the ability to participate in the political process on the same basis as other members of the electorate. It also correctly recognized that, under Section 2's intensely localized inquiry, Ohio's law is not insulated from challenge simply because other States offer fewer early voting opportunities, and correctly determined that a Section 2 violation can result

not only from complete denial of the right to vote but also from abridgement of that right.

ARGUMENT

THE DISTRICT COURT CORRECTLY APPLIED SECTION 2 OF THE VOTING RIGHTS ACT

To assess the likelihood of success of plaintiffs' Section 2 claim, the district court looked at whether plaintiffs were "likely to succeed in establishing that SB 238 and Directive 2014-17 interact with social and historical conditions to cause an inequality in the opportunities to vote afforded African-American voters in Ohio." (Memorandum Opinion and Order, RE 72, p. 5911). This was the correct inquiry.

A. Section 2 Applies To Voting Practices That Abridge Minorities' Opportunities To Vote And To Have Their Votes Counted

Section 2 of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "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). In response to *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), which held that Section 2 prohibited only intentionally discriminatory practices, Congress amended Section 2, restoring the evidentiary standard developed in earlier cases – a standard that did not require proof of discriminatory intent. See S. Rep. No. 417, 97th Cong., 2d Sess. 15, 27-28 (1982) (Senate Report). Thus,

Section 2 supports both a discriminatory intent claim and, as in this case, a discriminatory results claim.

Under Section 2(b), a violation is established by showing that, "based on the totality of the circumstances," members of a racial group "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). Thus, a court evaluating a Section 2 results claim must engage in a fact-intensive, localized inquiry to determine whether, as a result of the challenged practice, members of a protected class have less opportunity relative to other members of the electorate in that State or locality to participate in the political process and to elect candidates of their choice. See *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986).

In its report on the 1982 amendments, the Senate Judiciary Committee (Senate Committee) identified several factors that may inform a court's evaluation of whether a challenged practice or procedure denies minority voters, on account of race, an equal opportunity to participate in the political process and to elect representatives of their choice. These "Senate factors" are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report 28-29. The Senate Committee identified two additional factors that may have probative value to a plaintiff's Section 2 claim:

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

Id. at 29. This list is non-exhaustive, and no particular factor or number of factors need be proved to sustain a Section 2 claim. See Senate Report 29.

Though the State argues (DeWine Br. 53-55) that the Senate factors are relevant only in the vote dilution context, that is simply not true. The Supreme Court 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." *Gingles*, 478 U.S. at 47; see also *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 440 (2006) (Section 2 requires courts to consider whether the "political, social, and economic legacy of past discrimination" against racial minorities may well "hinder their ability to participate effectively in the political process.") (citations omitted). Although vote dilution claims have comprised the majority of Section 2 claims, the statute also applies to discriminatory practices that prevent or hinder an eligible voter from casting a ballot or having his or her ballot counted. See *Gingles*, 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution."); Senate Report 30 ("Section 2 remains the major statutory prohibition on all voting rights discrimination."). Courts have examined the relevant Senate factors in such cases. See *Farrakhan* v. *Gregoire*, 590 F.3d 989 (9th Cir.) (analyzing a vote denial claim under relevant Senate factors), rev'd en banc on other grounds, 623 F.3d 990 (9th Cir. 2010); *Gonzalez* v. *Arizona*, 677 F.3d 383, 405-406 (9th Cir. 2012) (en banc) (finding these factors relevant in a Section 2 challenge to Arizona's voter ID law), aff'd on other grounds sub nom. *Arizona* v. *Inter Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013). Indeed, in *Smith* v. *Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 596 n.8

(9th Cir. 1997), the court expressly rejected the suggestion "that the 'Senate factors' apply only to 'vote dilution' claims."

B. The District Court Correctly Applied Section 2

1. Section 2 Applies To The Challenged Voting Provisions

Before discussing the key features of the district court's correct Section 2 analysis, we address the State's arguments that Section 2 should not apply at all to the challenged voting provisions. See DeWine Br. 42-48. The plain language of Section 2 forecloses these arguments: States can use "[n]o" voting "standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group]," 52 U.S.C. 10301(a). The VRA broadly defines the right to vote as encompassing "all action necessary to make a vote effective," including, among other things, "registration[,] * * * casting a ballot, and having such ballot counted properly." 52 U.S.C. 10310(c)(1); see also *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 566-567 (1969) (noting Congress intended to give the VRA the broadest possible scope in enacting Section 2's expansive language); *Chisom* v. *Roemer*, 501 U.S. 380, 403-404 (1991) (noting Congress, in amending Section 2 in 1982, retained its broad protections).

Indeed, the 1982 Senate Report recognizes that Section 2 "protects the right of minority voters to be free from election practices, procedures or methods, that

deny them the same opportunity to participate in the political process as other citizens enjoy." Senate Report 28. Moreover, appellants do not cite any case that has held that an early voting or voter registration law falls outside of Section 2's purview. That is because there are none. Instead, courts have applied Section 2 in these contexts. See, *e.g.*, *Brown* v. *Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012); *Jacksonville Coal. for Voter Prot.* v. *Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004). Because the text of the VRA and Supreme Court precedent make clear that Section 2 applies to registration and early voting procedures, there is no ambiguity to resolve under the constitutional avoidance doctrine that the State invokes (see DeWine Br. 44-46).

The State also argues (DeWine Br. 44-46) that Section 2 cannot be constitutionally applied here because Congress made no express findings about discrimination in early in-person voting when it enacted Section 2. But it should be obvious that Congress did not intend to delineate every conceivable discriminatory voting practice a State might impose. Indeed, anyone with even the most casual acquaintance with the VRA would recognize that the State's argument runs afoul of the statute's history and application. See Senate Report 15-43. Congress enacted Section 2 to protect against both obvious and subtle forms of racial discrimination in voting and not as a per se prohibition on certain types of voting practices. It did not need to make specific findings about early voting

practices in order for the statute to validly reach such laws. See Senate Report 42-43 (citing *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970)); *id.* at 43 (explaining that Congress need not make detailed "finding[s] of discrimination in the areas to which [Section 2] applies" because it invalidates election laws only "where a court finds that discrimination, in fact, has been proved").[4]

The State's federalism argument fares no better. The State argues (DeWine Br. 47-48) that the VRA does not contain the sort of clear statement necessary to alter the federal-state balance and reach early voting. But the VRA expressly proscribes discriminatory state practices and makes Congress's intent to alter the federal-state balance abundantly clear. See 52 U.S.C. 10301(a). Certainly, absent legislation under the Elections Clause or other congressional authority, States retain their traditional power to regulate elections. Yet the Fourteenth and Fifteenth Amendments, and the legislation Congress enacts pursuant to its authority to enforce those amendments, properly constrain a State's exercise of its reserved powers. As the Supreme Court has repeatedly recognized in upholding

[4] The State cites *Johnson* v. *Governor of Florida*, 405 F.3d 1214 (11th Cir.), cert. denied, 546 U.S. 1015 (2005), in support of its argument (DeWine Br. 46). But the constitutional avoidance issue in *Johnson*, a challenge to a felon-disenfranchisement law, was based entirely on the court's conclusion that Section 2 of the Fourteenth Amendment affirmatively permits such laws. *Id.* at 1229-1230. Nothing similar is present here.

the VRA's provisions against similar arguments to the ones the State makes here, "the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282 (1999); see also *id.* at 284-285; *City of Boerne* v. *Flores*, 521 U.S. 507, 518 (1997); *City of Rome* v. *United States*, 446 U.S. 156, 178-180, 182 n.17 (1980).

Finally, the State claims (DeWine Br. 48) that the National Voter Registration Act (NVRA) somehow immunized SB 238 and Directive 2014-17 from a Section 2 challenge. This argument conflicts with the NVRA's plain language. Congress specifically provided that nothing in the NVRA "authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965." 52 U.S.C. 20510(d)(2) (formerly codified at 42 U.S.C. 1973gg-9).

2. The District Court Applied The Correct Legal Standard

In determining that plaintiffs are likely to succeed on the merits of their Section 2 claim, the district court correctly applied the law. We focus here on three key ways in which the district court correctly applied Section 2, each of which appellants attack. First, the district court correctly considered SB 238 and Directive 2014-17 within their historical context, properly recognizing the relevance under the totality-of-the-circumstances test of the fact that these provisions reduced voting opportunities. Second, the court correctly recognized that, under Section 2's intensely localized inquiry, Ohio's law is not insulated from

challenge simply because other States offer fewer early voting opportunities. Third, the district court correctly determined that a Section 2 violation can result from abridgement of the right to vote, and thus that plaintiffs need not prove that the right to vote was completely denied.

a. The Fact That SB 238 And Directive 2014-17 Reduced Previously Available Voting Opportunities Is Relevant Under Section 2's Totality Of The Circumstances Test

The district court correctly evaluated SB 238 and Directive 2014-17 within the relevant historical context, and rightly rejected the notion that this analysis "grafts a § 5 'retrogression' analysis onto a § 2 claim." (Memorandum Opinion and Order, RE 72, p. 5909). Previous voting practices are relevant under Section 2 because they are pertinent in determining whether a less discriminatory alternative exists and in analyzing the "totality of circumstances."

i. The district court properly relied on *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000). In *Bossier Parish*, the Supreme Court determined that the impact of alternative voting procedures is highly relevant in assessing whether an existing practice violates Section 2: "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* at 334. Thus, in Section 2 cases, which can involve "not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* 'results in [an] abridgement

of the right to vote' or 'abridge[s] [the right to vote]' relative to what the right to vote *ought to be*, the status quo itself must be changed." *Id*. at 334 (citation omitted); (see also Memorandum Opinion and Order, RE 72, pp. 5909-5910).

A State's previous voting practices are undoubtedly relevant in determining whether a less discriminatory alternative exists. This is especially true when the previous practices constitute a potential remedy a State may develop to address a Section 2 violation – a point recognized in *Gingles*'s discussion of causation. See 478 U.S. at 50 n.17 (explaining that plaintiffs in a vote dilution Section 2 case must show that there is some alternative to the challenged practice that *would* provide them with more equal electoral opportunity). And the logic of looking at previous practices is consistent with guidance from Congress and the Supreme Court that courts adjudicating Section 2 claims are to conduct "a searching practical evaluation of the '*past* and present reality'" of the political process within the defendant jurisdiction. See Senate Report 30 (emphasis added); accord *Gingles*, 478 U.S. at 44-45.

Appellants rely heavily on *Holder* v. *Hall*, 512 U.S. 874 (1994), to argue that SB 238 and Directive 2014-17 must be compared to "an objective, non-arbitrary benchmark" and that the prior law cannot supply the benchmark. DeWine Br. 38-41; Ohio General Assembly Br. 35-36. They misinterpret *Holder*, a case that, correctly understood, has no application here.

Holder involved a Section 2 vote dilution challenge to a Georgia county's decision to use a single-commissioner form of government rather than a multimember county commission. Justice Kennedy's opinion announcing the judgment of the Court simply observed that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2." *Holder*, 512 U.S. at 881. Applying that principle to a challenge to the size of a governing body, Justice Kennedy concluded that "[t]he wide range of possibilities" with respect to size "makes the choice inherently standardless." *Id.* at 885 (citation and internal quotation marks omitted); accord *id.* at 889 (O'Connor, J., concurring).

Plaintiffs here, however, do not assert a vote dilution claim. Vote dilution claims traditionally challenge electoral practices such as methods of election for government bodies. Vote dilution claims, as the Supreme Court has repeatedly recognized, pose a complex question: in a democratic system, when dealing with a racial group that is a numerical minority within the relevant jurisdiction, how is a reviewing court to distinguish between impermissible discrimination and "mere * * * political defeat at the polls?" *Whitcomb* v. *Chavis*, 403 U.S. 124, 153 (1971); see also *Johnson* v. *De Grandy*, 512 U.S. 997, 1012-1013 (1994) (exploring the difficulty).

This case, by contrast, poses no such analytic difficulty in either determining whether a violation exists or if a feasible remedy can fashioned. With regard to the first inquiry, the statistical evidence credited by the court shows the relative equality of participation rates between African-American voters and white voters in recent years and shows the likelihood that implementation of the challenged procedures will result in an electoral structure where the ability to participate is not equal. With regard to the second inquiry, a review of the past electoral features, which did provide the requisite equality of electoral opportunity, provides the framework for an effective remedy.

Thus, the nature of plaintiffs' claim does not call for an existing electoral system to yield to a standardless or arbitrary benchmark. The relevant comparison is made based on the conditions that are expected to prevail after the challenged voting practice is implemented. The prior electoral system also may provide both relevant background regarding both the purpose and the consequences of the restrictions, as well as a detailed gauge of the likely effect of the new voting practice, as described in further detail in the next section (see pp. 21-23, *infra*). Congress clearly concluded that "[i]f the procedure [being challenged] markedly departs from past practices[,] * * * that bears on the fairness of its impact." Senate Report 29 n.117.

The district court properly looked at prior use by African-American and white voters of early voting, the relative impact on African-American and white voters of the cutbacks to early voting, Sunday voting, and same-day registration, and the effects of these cutbacks on the relative ability of African-American and white voters to participate in the political process under the system created by SB 238 and Directive 2014-17. The racial voting patterns of the prior system provide significant data about how minorities will fare under the current system. Those prior voting patterns are thus very relevant for determining whether the current rules disproportionately affect minorities' ability to participate in the political process.

ii. Ohio's previous voting practices are relevant under Section 2 also because they are critical to the "totality of circumstances" analysis required by the statute. First, the past practices are relevant because the district court credited evidence that Ohio had a history of official voting-related discrimination against racial minorities (Senate factor 1). (Memorandum Opinion and Order, RE 72, pp. 5897-5912). The decision by a State with a history of official voting discrimination to abrogate voting procedures that had benefitted minority voters undoubtedly bears on the totality-of-circumstances analysis guided by these Senate factors. Cf. *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 439 (2006) (finding a Section 2 violation under a totality-of-circumstances analysis

based in part on the fact that the voting changes in question had "undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive").

Moreover, the decision to scale back minority voting opportunities is all the more relevant where, as the district court found here, a jurisdiction's recent "voting practices or procedures * * * enhance the opportunity for discrimination against the minority group" (Senate factor 3). (Memorandum Opinion and Order, RE 72, pp. 5897-5912). Further, the fact that the reason African Americans relied heavily on the eliminated early voting and same-day registration opportunities related to lower socio-economic standing tied to discrimination (Senate factor 5) was also significant. (*Id.* at 5913). Additionally, in considering the tenuousness of the State's justifications for SB 238 and Directive 2014-17 (Senate factor 9), it was important that those measures "markedly depart[ed] from past practices." (*Id.* at 5912 (citing Senate Report 29 n.117); *id.* at 5914).

The necessity of looking to past practices to determine whether an abridgement of minority voting rights has occurred is particularly apparent in the context of plaintiffs' claim that the limits placed on Sunday voting burden African Americans much more than whites. Under the election laws previously in place, "Souls to the Polls" became an integral part of the voting experience for many

African Americans, and thus many African Americans – who often lacked ready transportation – came to rely on these initiatives. (See Memorandum Opinion and Order, RE 72, pp. 5899-5900, 5912). Thus, in order to understand how a limitation on Sunday voting "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," *Gingles*, 478 U.S. at 47, a court should not look only at the new voting practice. It must instead look at the practice within its historical context; so viewed, it is easy to see how it disproportionately burdened African Americans.

In short, a "totality of the circumstances" analysis that isolated SB 238 and Directive 2014-17 from their historical context would make no sense. A court cannot possibly determine how a voting practice "interacts with social and *historical* conditions," *Gingles*, 478 U.S. at 47 (emphasis added), without situating that practice within its historical context. Under the correct analysis the district court conducted here, that historical context is critical to evaluating the relevant Senate factors.

b. The District Court's Determination That Plaintiffs Are Likely To Succeed On The Merits Of Their Section 2 Claim Does Not Call Into Question Other States' Laws

The State repeatedly argues that if the district court were correct that SB 238 and Directive 2014-17 violate Section 2, that would mean that other States offering

fewer early voting opportunities must also be violating Section 2. That is not how Section 2 works.

The language of Section 2, the Senate Report, and Supreme Court precedent reveal plainly that a Section 2 analysis is highly context- and fact-specific. Section 2 is violated if "based on the totality of circumstances," political processes are not "equally open to participation" to minority voters in a particular "State or political subdivision." See 52 U.S.C. 10301(b); see also Senate Report 28-29 (calling for an analysis of conditions in the "state or political subdivision" or "jurisdiction"); *Gingles*, 478 U.S. at 44-45 (discussing the Senate Report). As the district court explained, "the evaluation of a § 2 claim requires an intensely local appraisal of the design and impact of the challenged electoral practice." (Memorandum Opinion and Order, RE 72, p. 5909 (citing *Stewart* v. *Blackwell*, 444 F.3d 843, 878 (6th Cir. 2006)).

Because Section 2 demands a totality-of-the-circumstances approach, there is no particular formula for determining whether a voting practice that violates Section 2 in one jurisdiction also will violate Section 2 in another jurisdiction, or, conversely, that the failure to establish a Section 2 violation in one jurisdiction will preclude finding a Section 2 violation elsewhere. Whether a particular plaintiff can prove a violation of Section 2 depends upon a court's examination of the relevant Senate factors – *e.g.*, the history of discrimination in that jurisdiction, coupled with

an analysis of present voting opportunities, and the socioeconomic circumstances of minority and non-minority voters attributable to the effects of racial discrimination. See *Gingles*, 478 U.S. at 44-45. Appellants repeatedly point out that other States offer fewer early voting opportunities than Ohio, and seem to think that should insulate Ohio's law from a Section 2 challenge. But there is simply no support for this approach. Moreover, a focus on comparing Ohio to other States ignores both the fact that Ohio instituted early voting in response to significant problems in the 2004 election and that minorities in Ohio have come to rely on it as a means to achieve an equal participation level.

c. Section 2 Is Violated When Minorities' Right To Vote Is Abridged, Not Just When It Is Completely Denied

Appellants argue (Ohio General Assembly Br. 31-35) that, because this is a vote denial case and not a vote dilution case, Section 2 is only violated by a practice that results in a complete denial of the right to vote. That is incorrect.

It is clear that total denial of the right to vote is not necessary to make out a successful Section 2 claim: the statute, by its terms, also prohibits the "abridgement" of access to the franchise on account of race or color. See 52 U.S.C. 10301(a). The relevant question is whether minority voters have "less opportunity" relative to white voters "to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b) (emphasis added). Thus, to prevail under Section 2, a plaintiff need not prove that the challenged

practice results in a complete denial of the right to vote. Rather, all a plaintiff needs to establish is that the challenged practice "result[s] in the denial of equal access to *any phase* of the electoral process for minority group members." Senate Report 30 (emphasis added); see *id.* at 28 ("Section 2 protects the right of minority voters to be free from election practices * * * that deny them the same opportunity to participate in the political process as other citizens enjoy.").

Section 2(b)'s focus on "less opportunity" is consistent with Section 2(a)'s prohibition of those voting practices that result in a "denial *or abridgement*" of the right to vote. 52 U.S.C. 10301(a) and (b) (emphasis added). After all, in a dilution case, minority voters are not denied the right to vote; their votes simply have less weight than those of other voters. The abridgement of minority voters' access to the political process is also a Section 2 violation. Thus, as the court recognized here, evidence that SB 238 and Directive 2014-17 result in minority citizens having less opportunity than other members of the electorate to cast in-person ballots cannot be rebutted by positing that this unequal opportunity may be overcome if individuals simply devote sufficient resources to surmounting socioeconomic disparities or other obstacles or by seeking out alternative means of registering or casting a ballot.

Courts have recognized that the possibility that minority voters could overcome barriers created by state law does not immunize a law from scrutiny

under Section 2. See *United States* v. *Marengo Cnty.*, 731 F.2d 1546, 1568-1569 (11th Cir. 1984) (rejecting notion that the State could defend practices that resulted in reduced African American political participation by claiming black "voter apathy"); *United States* v. *Texas*, 252 F. Supp. 234, 252 (W.D. Tex.) (rejecting the argument that people who did not care enough to pay a poll tax well in advance of the election were "not intelligent enough or competent enough to manage the affairs of the government"), aff'd, 384 U.S. 155 (1966). The district court here thus correctly refused to apply a per se rule under which minorities' right to vote may be abridged with impunity so long as it is not completely denied.

CONCLUSION

This Court should affirm the district court's holding that plaintiffs are likely to succeed on the merits of their claim that SB 238 and Directive 2014-17 violate Section 2 of the Voting Rights Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, under Federal Rule of Appellate Procedure 32(a), that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE was prepared using Word 2007 and Times New Roman, 14-point font. This brief contains 6109 words of proportionately spaced text.

s/ Nathaniel S. Pollock
NATHANIEL S. POLLOCK
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Date: September 19, 2014

CERTIFICATE OF SERVICE

I certify that on September 19, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Nathaniel S. Pollock
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
49	Statement of Interest	1479-1501
72	Memorandum Opinion and Order	5848-5918
82	Order	5989-5993

Voting Rights Act of 1965

Act Section	Former US Code Citation			New US Code Citation	
	Title	Sec		Title	Sec
1	42	1971 nt		52	10101 nt
2	42	1973		52	10301
3	42	1973a		52	10302
4	42	1973b		52	10303
5	42	1973c		52	10304
6	42	1973d	Rep.		
7	42	1973e	Rep.		
8	42	1973f		52	10305
9	42	1973g	Rep.		
10	42	1973h		52	10306
11	42	1973i		52	10307
12	42	1973j		52	10308
13	42	1973k		52	10309
14	42	1973*l*		52	10310
15	42	1971		52	10101
16	42	1973m	Elim.		
17	42	1973n		52	10311
18	42	1973*o*		52	10312
19	42	1973p		52	10313
20	42	1973q		52	10314
201	42	1973aa		52	10501
202	42	1973aa-1		52	10502
203	42	1973aa-1a		52	10503
204	42	1973aa-2		52	10504
205	42	1973aa-3		52	10505
206	42	1973aa-4		52	10506
207	42	1973aa-5		52	10507
208	42	1973aa-6		52	10508
301	42	1973bb		52	10701
302	42	1973bb-1		52	10702
303	42	1973bb-2	Rep.		
304	42	1973bb-3	Rep.		
305	42	1973bb-4	Rep.		