No. 16-3561

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OHIO DEMOCRATIC PARTY, et al.,
Plaintiffs/Appellees,

v.

JON HUSTED, et al.
Defendants/Appellants.

On Appeal from the United States District Court
For the Southern District of Ohio

No. 2:15-cv-1802 (Judge Michael H. Watson)

BRIEF OF *AMICUS CURIAE* PUBLIC INTEREST LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Local Rule 29(c)(1), *amicus curiae* Public Interest Legal Foundation hereby submits the following corporate disclosure statement.

The Public Interest Legal Foundation is a non-profit 501(c)(3) organization. It is not a publicly held corporation and no corporation or other publicly held entity owns more than 10% of its stock.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Public Interest Legal Foundation ("PILF") is a non-partisan 501(c)(3) tax-exempt organization dedicated to promoting the integrity of American elections and preserving the constitutional balance giving states control over their own elections. PILF files *amicus curiae* briefs as a means of advancing its purpose and has appeared as *amicus curiae* in numerous cases in federal courts throughout the country.

The Plaintiffs below have brought this litigation as part of a nationally coordinated campaign seeking to transform long-standing legal standards related to federal and state election laws. Parallel challenges have been brought in Wisconsin and Virginia. Through its expertise, PILF can provide an understanding of the national implications of the changes sought in this case. PILF employs or is affiliated with national election law experts, scholars, and practitioners who can provide this court with a comprehensive history of the enforcement of these statutes and their traditional enforcement considerations.

This case interests *amicus* because PILF seeks to ensure that Ohio is not subject to federal oversight of all election law changes of the sort suspended in the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Second, PILF seeks to provide a comprehensive understanding to this Court on the national implications of the District Court's analysis and conclusions of law,

particularly as they pertain to questions of constitutional federalism. Third, PILF seeks to preserve a traditional understanding of Section 2 of the Voting Rights Act of 1965, which contains a robust requirement of causality such that a plaintiff must demonstrate that a particular election practice ultimately prevents, in fact, the ability of minorities to fully participate in the political process. Finally, PILF seeks to prevent treasured civil rights statutes such as the Voting Rights Act from being turned into mere partisan weapons to leverage federal power over state elections intended to advantage one political party and disadvantage another.

The Supreme Court has said that confidence in the integrity of the electoral process encourages citizen participation in the democratic process. *Crawford et al. v. Marion County Election Board*, 553 US 181, 197 (2008). The Ohio statutes challenged in this case promote the integrity of Ohio elections in response to demonstrated criminal activity. PILF seeks to provide a national perspective in this case which might seem, from the pleadings, to be merely an effort confined to the Buckeye State.

Pursuant to Federal Rule of Appellate Procedure 29(c) and Sixth Circuit Rule 29(5), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*

curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

All parties consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

Before the United States Supreme Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), Section 5 of the Voting Rights Act employed certain triggering formulas to impose a federal veto on all new election regulations in certain parts of the country. 52 U.S.C. §§ 10301-10508 (2014) (formerly cited as 42 U.S.C. §§ 1973-1973aa-6). This system fundamentally rearranged the constitutional order regarding federal power over state election laws. While the Voting Rights Act certainly has been instrumental in removing voting barriers for minorities, the Supreme Court in *Shelby County* decided that the preclearance enforcement mechanism in Section 5 was obsolete in that it placed all or part of sixteen states under federal control for election law changes based on decades-old circumstances. *Shelby County*, 133 S. Ct. at 2631. Nearly all of the other provisions of the Voting Rights Act passed in 1965 were unaffected by the *Shelby County* decision and remain in full effect.

Even though *Shelby County* rejected federal oversight of state elections through Section 5, a conscious effort has been made on several fronts to resurrect federal oversight of state elections. But in place of preclearance power by the executive branch, this effort seeks to import the very same standards that were used under Section 5 and attempts to have them enforced through the courts by

means of Section 2 of the Voting Rights Act. This case is part of this broader effort.

Instead of using traditional Section 2 standards as found in the Supreme Court's jurisprudence, these cases seek to import statistical tests for Section 2 liability, which were previously utilized under the Section 5 retrogression standard to block state election laws. *Allen v. State Bd. of Elections*, 393 U.S. 544, 548-49 (1969). The appropriate standard is one that looks to the totality of the circumstances, as expressed in the very language of Section 2, and does not use statistical disparities between groups of voters as the central foundation for liability.

The District Court here, despite disavowing a retrogression standard, based its decision on the bare evidence of statistical disparity to invalidate Ohio's decision to reduce its early voting period. In so doing, the District Court misunderstood Section 2 jurisprudence. Appellees seek to impose a statistical disparity test for Section 2. Thus, the decision below is inconsistent with traditional Section 2 jurisprudence, conflicts with *Shelby County*, and does not preserve the constitutional balance between states and the federal government.

ARGUMENT

I. Section 2 and Section 5 of the Voting Rights Act Employ Fundamentally Different Standards.

As originally passed, the Civil Rights Act of 1957 gave the U.S. Attorney General authority to pursue litigation against racial discrimination in voting and gave courts an avenue to enjoin election practices that were designed to restrict access to voting on the basis of race. 42 U.S.C. § 1971(c) (1964), recodified at 52 U.S.C. § 10101. But as quickly as one particular barrier could be enjoined, another more inventive one took its place. *See, e.g.*, *Lopez v. Monterey Cnty.*, 525 U.S. 266, 297 (1999) (Thomas, J., dissenting). Civil Rights litigation before 1965 often proved futile because each time a creative new restriction was put in place, new litigation had to be pursued to enjoin the new procedure.

Congress enacted Sections 2 and 5 of the Voting Rights Act in 1965 to counteract these amorphous and ever-shifting barriers to voting. 52 U.S.C. §§ 10301, 10304. Section 5 required certain states with histories of racial discrimination in voting to submit any election related change, no matter how small, to the U.S. Attorney General for approval. *Id.* Thus, discriminatory new voting restrictions could be caught and blocked before they went into effect. Section 2 was enacted at the same time, but effectively only provided an individual cause of action for intentional discrimination under the 15th Amendment until it was amended in 1982.

A. Section 5's Retrogression Standard.

Section 5 required covered jurisdictions to obtain preclearance for "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 52 U.S.C. § 10304(a). Preclearance could be obtained from either the U.S. Attorney General or from the United States District Court for the District of Columbia. *Id.* Both methods employed a retrogression standard, that is, the jurisdiction had to affirmatively prove the absence of any negative impact or diminishment of electoral access by minorities. *See generally Bush v. Vera*, 517 U.S. 952 (1996) (Section 5 "seeks to prevent voting-procedure changes leading to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

Section 5's retrogression standard for triggering an objection to an election regulation change was further modified in 2006 when Congress made it explicit that a change must be blocked if it "will have the effect of diminishing the ability" of minorities to vote. In practice, the Department of Justice or the court would look to the status quo and then analyze whether the new change in the law would diminish the electoral strength of minorities.[1] If there was any such diminishment,

[1] An election change could be submitted either to the Department of Justice or to the United States District Court for the District of Columbia for preclearance. If the Department of Justice objected to a submission, the submitting authority could also submit the change to the United States District Court for the District of Columbia for *de novo* review.

the proposed change was blocked. *See, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) ("[T]he baseline is the status quo that is proposed to be changed: If the change 'abridges the right to vote' relative to the status quo, preclearance is denied . . . .").

Under Section 5 the burden was on the submitting jurisdiction to prove the absence of any diminishment in electoral ability. *Id.* The Department of Justice was not required to show the extent or existence of diminishment. If the jurisdiction could not show through quantitative evidence that the proposed change in its election laws would have no negative effect whatsoever on minorities, that change would not be precleared. *Id.* at 336.

After the 2006 amendments, Section 5 operated in such a way that bare statistical evidence of retrogression automatically resulted in freezing any change to state election practices. Submissions were often blocked when no evidence of retrogression was presented, simply because the submitting jurisdiction could not prove the total absence of any discriminatory effect. *See, e.g.*, Objection Letter of Loretta King, Assistant Attorney General, to Thurbert E. Baker, Attorney General of Georgia (May 29, 2009), *available at* http://www.justice.gov/crt/records/vot /obj_letters/letters/GA/1_090529.pdf. Furthermore, any ambiguity weighed against the jurisdiction. *McCain v. Lybrand*, 465 U.S. 236, 257 (1984). And finally, there was no consideration given to the totality of the circumstances or any non-

discriminatory factors or reasons for the change in election procedures. *See, e.g.*, *LaRoque v. Holder*, 650 F.3d 777, 794 (D.C. Cir. 2011).

This was the state of federal veto power over the ability of States to control their own elections under Section 5 until a few years ago. After *Shelby County* in 2013, however, this statistical tripwire has been suspended. But instead of continuing to stop truly discriminatory election practices using the remaining traditional Section 2 jurisprudence, the Department of Justice and other plaintiffs are attempting to graft the *de minimis* statistical thresholds used in Section 5 onto the enforcement of Section 2. This is both unprecedented and inconsistent with *Shelby County* but also offends the statutory construction of the Voting Rights Act. The District Court was incorrect to invalidate the reduction in the early voting times because its analysis relied on a theory of Section 2 at odds with the law. Bare statistical data that supposedly shows some kind of retrogression in the electoral influence of minorities is not the essence of a Section 2 claim. While the District Court did not employ a retrogression standard in the sense of comparing present minority statistics with past, it used a bare statistical comparison between minorities and other voters, which is precisely what was done previously under Section 5. Op., R.117, PageID#6219-20.

B. Section 2 Jurisprudence, Based on *Gingles*, Dictates a Totality of the Circumstances Standard.

Unlike Section 5, Section 2 applies nationwide and functions as a ban on racial discrimination in voting with enforcement provided by litigation in federal court. As amended in 1982, it forbids any "standard, practice, or procedure" that "results in a denial or abridgment 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 contrast to the retrogression standard in Section 5, the clear language of Section 2 targets denial of the right to vote "on account of" race. The first subsection bans election laws that were enacted with a discriminatory intent, but the second sub-section also prohibits election laws that have discriminatory results pursuant to amendments made to Section 2 in 1982. This brief will focus on the proper standard that should be used when applying the results subsection. That standard it requires a far more robust showing than a statistical demonstration that a given minority might be less likely to be able to vote at a certain time, use a particular voting practice more often than non-minorities, or possess certain types of documentation at different rates. But this is exactly what the District Court did here. The District Court found a violation of Section 2 because the early voting period law resulted "in minorities having less opportunity *than other members of the electorate* . . . ." Op., R.117, PageID#6219.

Since being amended in 1982, Section 2 creates a cause of action when a particular election practice was not necessarily enacted with a racially discriminatory intent, but had the result or effect of discriminating on the basis of race. The foundational case for the application of this "results" section is *Thornburg v. Gingles*, 478 U.S. 30 (1986). Though the case involved a redistricting plan challenge, it provides the central guidance for courts addressing Section 2 challenges. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 40-41 (1993); *Johnson v. De Grandy*, 512 U.S. 997, 1011-13 (1994).

The *Gingles* Court laid out three necessary preconditions for a plaintiff to proceed with a claim that Section 2 has been violated:

Precondition #1:

> [T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.

Id. at 50.

Precondition #2:

> [T]he minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.

Id. at 51.

Precondition #3:

> [T]he minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Id. at 51.

Notice that the second and third preconditions impose an element of causality, or outcome effect, on a Section 2 claim. Under the second precondition, a claim may not proceed without the existence of racially polarized voting. Under the third precondition, a claim may not proceed unless the practice or procedure can be shown to have a real-world electoral impact that ultimately denies to minorities the equal opportunity to effectively participate and elect candidates of choice. These two *Gingles* preconditions ask the question whether the challenged procedure actually made any difference in preventing minorities from fully participating in the political process. They are questions aimed at electoral realities, not statistical hypotheticals.

After establishing the three preconditions, the *Gingles* Court described the next step by which certain factors must be present in order to meet the "totality of the circumstances" portion of Section 2 and to find that a violation has occurred. These factors were taken from the Senate Judiciary Committee's majority report on the 1982 amendment to Section 2 and they include:

1. The extent of any history of official discrimination in the jurisdiction that touched the right of minorities to register, vote, or otherwise participate in the electoral process;

2. The extent to which voting in elections is racially polarized;

3. The extent to which the jurisdiction has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination;

4. Whether minority candidates have been denied access to any candidate slating process;

5. The extent to which minorities in the jurisdiction bear the effects of discrimination in education, employment, and health that hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which minorities have been elected to public office.

Senate Report No. 97-417, 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 117, 206-07. Again, these factors relate to empirical electoral circumstances faced by minorities, not hypothetical and theoretical statistics.

It is certainly true that some of the analysis in *Gingles* would only fit in the reapportionment context, two central thresholds can be discerned for all Section 2 claims.

First, the plaintiff must show than a discriminatory effect came about "on account of" race. There must be some *causal nexus* between the supposed statistical retrogression and some concrete indicia of discrimination, such as weighing evidence under the Senate factors. Second, the disparate impact must *result in actual real world unequal access* to the political process. Ultimately, a plaintiff must do more than show a statistical difference in how an election law falls on different racial subgroups by demonstrating how the election law actually impairs access to the electoral process. Because every election change will fall differently to some extent on different racial subgroups, appellants would have federal law act as an automatic one-way ratchet to aid only one group. This is what the District Court did here in its analysis of the first part of the test under *Gingles*. It did not consider or find evidence of actual real world unequal access to the political process. It merely found that the early voting period change statistically affected racial subgroups differently based on anecdotal evidence. Op., R.117, PageID#6158, 6160, 6220.

In contrast, if, based on the totality of the circumstances, a plaintiff can show that the statistical differences were generated by one or more of the Senate factors

or other indicia of discrimination that result in actual real-world unequal access to the political process, then Section 2 is violated. *Gingles*, 478 U.S. at 44-46, 50-51. A plaintiff must show some causality between disparate treatment, disparate impact, and a demonstrable impact on actual election outcomes and access to the political process. If Section 2 liability were to lie in simple statistical disparity, absent causality and unsupported by a board non-quantitative body of evidence, then that version of Section 2 may well face serious constitutional challenge in light of *Shelby County*. In addition, if plaintiffs were not required to show some close nexus between statistical retrogression and actual disparate treatment and electoral results, then the words "totality of the circumstances" and "on account of" in Section 2 would be without meaning. It is not enough, as the District Court did here, to anchor a finding of liability on some statistical disparity between how a racially neutral law falls. Op., R.117, PageID#6220.

II. This Case Represents One of Several Deliberate Attempts to Graft a Retrogression Standard Onto Section 2.

In reaction to the Supreme Court's decision in *Shelby County*, the Department of Justice and many other groups brought cases around the country to reinstate federal control over state elections based on a theory that incorporates a statistical retrogression standard, this time using Section 2 in place of Section 5. Two months after the Supreme Court decided *Shelby County*, the Justice Department filed a challenge to Texas's voter photo identification law as a

violation of Section 2 because of statistically disparate impact. *See Veasey v. Abbot*, No. 14-41126 (5th Cir.). Suits were also filed in Wisconsin and North Carolina in 2013. *See Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *NAACP v. McCrory*, No. 16-1468 (4th Cir.). This next round was launched in 2015 and includes Wisconsin, Virginia, and Ohio. *See One Wisconsin Institute v. Nichol*, No. 15-cv-324 (W.D. Wis.); *Lee v. Virginia State Board of Elections*, No. 15-cv-357 (E.D. Va.).

The arguments of the plaintiffs in these cases depart from traditional Section 2 jurisprudence as established in *Gingles* and advocate for an unprecedented federal usurpation of control over state elections. Instead of considering the fact that there was no barrier to voting during any of the early voting periods and that the times and places for voting are equally open to all, these claims instead focused on statistical differences in the likely use of those periods by different races. If that difference is greater than zero, according to the Plaintiffs/Appellees, the voting rules at issue violate Section 2. The District Court fundamentally adopted this analysis.

Such an analysis matches the statistical inquiry used in a Section 5 retrogression analysis, but not a consideration of a causal link with actual disparate treatment and the actual results of the electoral system as required by *Gingles* and the plain language of Section 2. In a Section 5 review, the Department of Justice

may well have concluded that an election law change should be blocked when a disproportionate number of minorities populate the group of affected voters. For example, if a polling place were moved such that African-American voters were shown to have to travel 50 feet more on average and white voters 50 feet less, an objection under Section 5 might be appropriate. Such bare statistical differences could have triggered a Section 5 objection, but they cannot form the foundation for liability under Section 2. Based on the evidence before the District Court here, the Plaintiffs/Appellees have shown nothing more than an anecdotal statistical disparity.

In a Section 2 claim, something more than a calculation as to how a racially neutral administrative rule lands among differing racial groups is necessary. And simply showing the presence of a few of the Senate factors is not enough.

Section 2 does not rely on the concept of reduction or diminishment, as did Section 5. Instead, the language of Section 2 focuses on whether an equal opportunity to participate in the political process exists. 52 U.S.C. § 10301. The plain language of Section 2 mandates a broad "totality of the circumstances" inquiry into the practice or procedure in question. 52 U.S.C. § 10301(b). Section 2 inherently incorporates concepts of causality. A violation of Section 2 in challenges to at-large election systems, for example, occurs only after racial

minority groups are effectively shut out of the political process because their preferred candidates actually lose elections more often than not.

The broad totality of the circumstances inquiry also provides defendants an opportunity to establish defenses such as mitigating measures to remedy discrimination from long ago, increases in minority participation and office holding, and other measures. *See, e.g.*, *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th Cir. 1995); *Teague v. Attala Cnty., Miss.*, 92 F.3d 283 (5th Cir. 1996). The District Court here refused to recognize these factors, including *increased* registration and participation by minorities.

Fundamentally, Section 2 examines whether the electoral system in question is equally open to participation by racial minorities. The standard is not whether minorities take equal and full advantage of those equal opportunities. The plain terms of the statute look forward and ask whether a practice or procedure results in unequal opportunities to vote.

III. A Retrogression Standard Should Be Rejected.

A. A Retrogression Standard Conflicts with *Shelby County*.

In *Shelby County*, the Supreme Court struck down Section 4 of the Voting Rights Act. Section 4 determined which states were subject to Section 5 preclearance obligations. *Shelby County*, 133 S. Ct. at 2631. The plaintiffs had

successfully challenged the coverage formula, which was based on turnout data from the 1964, 1968, and 1972 presidential elections. *Id.* at 2619-20. Thus, the Supreme Court effectively halted the enforcement of Section 5 by finding that the coverage parameters were an outdated intrusion into state sovereignty to run their own elections.

In striking down the coverage of Section 5, the Court noted that the statistical retrogression standard of review used in Section 5 enforcement placed a heavy burden on states. *Id.* at 2631. This observation is very significant for the efforts to permit a Section 2 claim to rest on statistical disparities, further weakening the constitutionality of the regimen. The Court spoke disapprovingly of this statistical standard:

> In 2006, Congress expanded § 5 to prohibit any voting law "that has the purpose of or will have the effect of *diminishing* the ability of any citizens of the United States," on account of race, color, or language minority status, "to elect their preferred candidates of choice." In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.

Id. at 2626 (internal citations omitted) (emphasis added). While not directly challenged in *Shelby County*, the strict retrogression standard used in Section 5 implicates constitutional concerns of federalism. Incorporating retrogression mechanics into a Section 2 analysis is profoundly constitutionally suspect.

B. A Retrogression Standard Misapplies Supreme Court Section 2 Precedents.

Using a statistical retrogression standard to support liability under Section 2 is a plain misapplication of the Supreme Court's Section 2 jurisprudence, particularly of the test established in *Gingles*. The *Gingles* decision does not support the application of a statistical disparate impact test. *Gingles*, particularly the third precondition, relies heavily on notions of electoral causality, where minorities ultimately lose because of the electoral practice. The Court explained:

> The "right" question . . . is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. . . . In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors."

Gingles, 478 U.S. at 44. What *Gingles* said here differs a great deal from the idea that a statistical disparate impact between races analysis gives rise to Section 2 liability. Instead, the Court refers to "equal opportunity" and empirical election results. *Id.* at 44-46. That is simply not the analysis that the District Court employed here.

Nowhere does *Gingles* support a statistical disparity test for Section 2 liability whenever an election law, equally open to all and facially race neutral, has some *de minimis* statistical difference in how the law interacts with racial subgroups. If conformity with the law is equally open to all, any differentiation in

impact is highly detached from legitimate federal interests under Section 2. Absent a showing that an election regulation was enacted with discriminatory intent, denies equal opportunity to participate in the political process, or has real world electoral impact on the ability to elect candidates of choice, Section 2 is simply not implicated.

C. Other Circuits Have Refused to Employ a Retrogression Standard for Section 2 Liability.

In *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), the Seventh Circuit rejected a statistical disparate effect challenge to Wisconsin's voter identification requirement. The court observed that "Section 2(b) tells us that Section 2(a) "does not condemn a voting practice just because it has a disparate effect on minorities." *Id.* at 753. Rather, Section 2(b) says that Section 2(a) requires that the evidence demonstrate a denial of the right to vote on account of race. *Id.* According to the court, "unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter" as far as Section 2 is concerned. *Id.* Moreover, none of the evidence at trial, like in the trial below here, demonstrated that minorities have less opportunity to get photo IDs. *Id.* Whether or not minorities are statistically less likely to use those opportunities "does not violate § 2." *Id.*

In so far as the impact of a voting regulation on "opportunity," that effect cannot be assessed in isolation, but must be considered along with the "entire voting and registration system." *Id.* On the whole, the Seventh Circuit found that

minorities did "not seem to be disadvantaged by Wisconsin's electoral system as a whole." *Id.* Using a pure statistical retrogression standard, as was advocated by the Plaintiffs/Appellees below, risks dismantling every piece of a state's voting system on the showing of mere statistics. *Id.* at 754 ("At oral argument, counsel for one of the two groups of plaintiffs made explicit what the district judge's approach implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2."). The District Court below did exactly what the lower court did in *Frank*. And this incorrect analysis is not corrected by running through the Senate factors.

VI. Conclusion

The District Court was incorrect in finding that Ohio's changes to its early voting period violated Section 2 of the Voting Rights Act. The Plaintiffs/Appellees are arguing for the adoption of a drastically lower threshold for Section 2 enforcement—one that will effect an end-run around the Supreme Court's precedents and that erodes the Elections Clause of the Constitution. States have the power to run their own elections. Upholding the District Court would result in advancing centralized authority with control over state elections, which would invariably erode liberty. As the Supreme Court stated in *Shelby*, "the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the

liberties that derive from the diffusion of sovereign power.'" *Shelby County*, 133 S. Ct. at 2623 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)). The judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Sixth Circuit Rule 29(c)(7), I certify the following:

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d) and Sixth Circuit Local Rule 29(d) because it contains 4,869 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) and Sixth Circuit Rule 32(a)(5) and (6) because it has been set in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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