Case No. 23-3910

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH L. SIMON, ET AL.
Plaintiffs-Appellants

VS.

MIKE DEWINE, ET AL.
Appellees-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF OHIO
CASE NO. 4:22-CV-00612-JRA

CORRECTED BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Percy Squire, Esq. (0022010)
341 S. Third Street, Suite 10
Columbus, Ohio 43215
614-224-6528 (T)
614-224-6529 (F)
psquire@sp-lawfirm.com
Counsel for Appellants

Case No. 23-3910

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNETH L. SIMON, ET AL.
Plaintiffs-Appellants

VS.

MIKE DEWINE, ET AL.
Appellees-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF OHIO
CASE NO. 4:22-CV-00612-JRA

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to 6th Cir. R. 26.1, Appellants make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

s/Percy Squire, Esq. December 26, 2023
Percy Squire, Esq.
Counsel for Appellants

TABLE OF CONTENTS

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

In accordance with the provisions of Fed. R. App. P. 34 and 6th Cir. R. 34(c) oral argument is requested because this appeal involves the following important issues of first impression:

1. Whether the number of voters required to satisfy the numerosity precondition developed in Thornburg v. Gingles, 478 U.S. 30 (1986) is the same where the claim alleges the political process leading to "nomination" is not equally open to participation by members of a protected class as a claim that alleges inequality in the political process leading to "election."
2. Whether a so-called "influence" or "crossover" §2 claim is distinct from an inability to nominate claim such as the claim asserted here by Appellants.
3. Whether the district court's treatment of Appellants' §2 nomination claim as a mere influence claim, rather than a claim based upon §2's separate reference to the word "nomination" versus "elections", violates the longstanding canon of statutory construction recently affirmed in Ysleta Del Sur Pueblo, et al., v. Texas, 142 S. Ct. 1929 (2022) that effect must be given to all provisions of a statute so that no part will be rendered inoperative or superfluous, void or insignificant.
4. Whether the Appellees' blanket policy of barring the introduction of racial demographic information into Ohio's redistricting process, violated the

admonition in Allen v. Milligan, 143, S. Ct. 1487 (2023) that Section 2 itself "demands consideration of race" citing Abbott v. Perez, 585 U.S. at (slip op at 4), thereby rendering Appellees configuration of the district challenged here by Appellants violative of both §2 and the Fifteenth Amendment.

STATEMENT OF JURISDICTION

Jurisdiction over this appeal arises in the United States Court of Appeals for the Sixth Circuit under the provisions of 28 U.S.C. §1291 in that the district court issued a final judgment granting Appellees' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), on October 12, 2023 RE 33 Page ID #1217. Appellants timely filed a notice of appeal on November 8, 2023, within thirty (30) days of entry of the district court's final order. RE. 35.

STATEMENT OF THE ISSUES FOR REVIEW

1. Whether the quantum of voters required to state a claim based upon violation of the "nomination" provision of §2 of 52 U.S.C. §10301 the Voting Rights Acts (hereinafter the "VRA") is the same quantum required for a claim based upon violation of the "election" provision of the VRA of Section 2, set forth in Thornburg v. Gingles, 478 U.S. 30 and Allen v. Milligan, 589 U.S. ____ (2023).
2. Whether Appellees intentional adoption of Ohio Redistricting Rule 9 that "Racial data will neither be loaded onto the computer nor shall it be utilized by the map drawers in anyway" violated §2 of the VRA, the Fourteenth, or Fifteenth Amendment.
3. Whether the district court erred when it failed to comply with the three judge district court provisions of 28 U.S.C. §2284.

STATEMENT OF THE CASE

This voting rights action was commenced on April 15, 2022. ECF Docket No. 1, RE 1. Motions for establishment of a three judge district court, class certification, a temporary restraining order, preliminary injunction, partial summary judgment and appointment of a special master were also filed seven months before the November 2022 election for Congress. RE 2, 3, and 4 on April 15, 2022. Appellees' challenged Ohio's March 2, 2022 Congressional redistricting plan (hereinafter "the Ohio Plan"). Appellants challenged the lawfulness of Appellants' separation of Warren, Ohio located in Trumbull County, Ohio from Youngstown, Ohio located in Mahoning County, two areas economically and politically linked historically with an aggregate number of Black voters that are sufficiently politically cohesive and geographically compact to a form a majority in a single member district primary election for United States Congressional Representative.

The essence of Appellants' claim was explained by Chief Judge Marbley in the companion case of Gonidakis v. Frank LaRose, Case No. 2:22-cv-0773, May 12, 2022, at Page ID No. 6322 which challenged state legislative districts, but was erroneously dismissed on grounds similar to this case as follows:

> Appellants are successors to the plaintiff class in Armour v. State of Ohio, a 1991 case challenging Ohio's redistricting practices in the greater Youngstown area. (ECF No. 92 10). The court in Armour sustained Appellants' challenges under the Fifteenth Amendment and Section 2 of the Voting Rights Act. 775 F. Supp. 1044 (N.D. Ohio 1991) (three-judge panel). The court found that "the line dividing

Youngstown between districts 52 and 53 . . . was intended to split the black community in order to dilute the potential effectiveness of the black vote," Id. at 1061, and that "a reconfigured district" would permit plaintiffs to "elect a candidate of their choice." Id. at 1060.

The court reached this conclusion after a lengthy discussion of historical discrimination in the Mahoning Valley, which it described as "a way of life . . . since blacks settled in the area at the turn of the [twentieth] century." N. at 1058-59. The opinion detailed steel companies' segregated corporate housing, the success of the Ku Klux Klan as a local political party, racism in the police force, conspicuous discrimination in city employment, denial of service by local businesses, segregated public schools, restrictive housing covenants, and exclusion from social organizations. Id. at 1053 55. The court then reviewed how that discrimination manifested in racially disparate income figures, poverty rates, educational attainment, unemployment, and political participation. Id. at 1055-56. The effects were especially pronounced in elections: because "white voters in Youngstown d[id] not support black candidates," "[n]o black ha[d] ever won a county-wide election," and "[o]nly one black candidate ha[d] ever won a city-wide election other than for school board." Id. at 1056-58. State representatives had "little incentive to consider black voters" and had "not been sensitive to [their] needs." hi. at 1058. The court concluded that "white race-based bloc voting work[ed] in conjunction with the division of the black voters to permit and indeed compel political parties to ignore minority candidates, and to discourage black candidates from seeking office." Id. at 1059…

Resting on Armour, they contend that the Ohio Redistricting Commission has produced maps in which "the voting strength of the Black residents of Youngstown is illegally and unconstitutionally diluted and abridged by a white majority voting bloc." (ECF No. 92 45). They allege violations of Section 2 of the Voting Rights Act, intentional racial discrimination under the Fourteenth and Fifteenth Amendments, and an undue burden on voting rights under the First and Fourteenth Amendments. The core of their argument is that the Commission adopted "an unlawful blanket state policy to ignore racial demographics and the totality of circumstances applicable to whether the [redistricting] Plan diminishes the Simon Parties' ability to nominate and elect representatives of choice." (ECF No. 197 at 1).

> In the redistricting context, Section 2 looks to the "results' of proposed or actual plans, rather than the intent behind them. See, Gingles 478 U.S. at 43-44 (discussing repudiation of the "intent test" in the Senate Report accompanying Congress's 1982 amendments, in favor of a results test). It does not proscribe particular methods of redistricting, absent a showing that the practice results in a denial or abridgement of voting rights on account of race…
>
> Armour continues to stand for the proposition that Black residents across the Mahoning Valley form a community of interest, bound together by common history and challenges, which the state previously has endeavored to divide across strategically placed district lines. That community was worth keeping intact through the redistricting process, regardless of whether the Voting Rights Act require it.

Id.

The district court referred Appellants' Complaint to a United States Magistrate Judge. The Magistrate noted, at the time of filing the Complaint here the March 2 Plan was the subject of ongoing litigation pending in the Supreme Court or Ohio. See, Meryl Neiman, et al. v. Secretary of Stale Frank LaRose, et al., Case Nos. 2022-0298 and 2022-0303. On July 19, 2022, the Supreme Court of Ohio declared the March 2 Plan invalid, finding it did not comply with Article XIX, Section 1(C)(3)(a) of the Ohio Constitution. The United States Supreme Court on June 30, 2023 granted the petition For writ of certiorari tiled by petitioners Matt Huffman, President or the Ohio Senate, et al. and vacated the Supreme Court or Ohio's judgment and remanded the matter to the Supreme Court or Ohio for limiter consideration in light or Moore v. Harper, 143 S.Ct. 2065 (2023). Petitioners in

Neiman subsequently filed an application for dismissal on September 5, 2023, which the Supreme Court of Ohio granted on September 7, 2023. See https://www.supremecourt.ohio.gov/Clerk/ems/#/caveinfo/2022/0298 (last visited September 11, 2023). ECF Docket No. 27, PageID No. 1162.

Prior to dismissal by the Ohio Supreme Court, Appellees moved in this action on May 5, 2022, to dismiss the Complaint. RE 15 and 18. An election was conducted in November 2022, that utilized the challenged plan. Prior to the election , no action whatsoever was taken by the district Court to address any of the claims for interlocutory relief requested by Appellants. The district Court referred the motions to dismiss to the Magistrate on June 12, 2023, eight months after the election. RE 25. On September 12, 2023, the Magistrate recommended that Appellees' motion under Fed. Civ. P. 12(b)(6) be granted RE. 27.

On October 12, 2023, the district Court adopted the Magistrate's Report and Recommendation. Thereafter the district Court denied Appellants' motion for a three judge district Court, temporary restraining order and class certification RE. 33.

Appellants timely appealed on November 8, 2023 RE 35.

STATEMENT OF THE FACTS

On August 23, 2021, the Ohio Redistricting Commission (hereinafter "Commission") began a series of regional hearings to accept testimony from Ohio citizens in relation to the reconfiguration of Ohio's Congressional districts, based upon the 2020 census results, under procedures set forth in comprehensive amendments to the Ohio Constitution approved by Ohio voters in 2015. See, Ohio Constitution, Article XI. ECF Docket No. 1, Page ID No. 3.

On the very first day of hearings, Appellant, the Honorable Reverend Kennth L. Simon made the following prescient statement to the Commission.

Co-Chair, Senator Vernon Sykes [01:32:14] Questions? Seeing none, thank you very much, Reverend Kenneth Simon.

> Simon [_____] Chairman Sykes, and to the legislators and to this wonderful audience, my apologies, I did not intend to speak today, but I was moved by the young man who spoke so passionately. Urn, I'm chairman of the Community Mobilization Coalition for the Greater Youngstown Area, a group of 18 minority organizations organized for the express purpose of voter registration, voter education and voter mobilization. We've been in existence for twenty-two years and affecting the political, hopefully, climate here in the city of Youngstown. I've been through this process before, along with many of us in this room, where we appear before our legislators. I've been down to Columbus appearing before a Senate education committee and giving testimony, and others have traveled distances to go down and testify. They're concerned people in this room who've taken time out of their schedules to come here and give their passionate testimony. And the passion that the young man displayed hits at the heart of all of our pain is that the sad reality is that we're going to have these sessions and we're going to listen to all of this testimony. And we're going to go

> behind closed doors and do what we've been doing, voting along party lines. And that's the sad reality and that's the pain that that young man was trying to convey. We spend all of this time in a formality and then we go back behind closed doors and we, we're not going to do the right thing, we're going to do what we've been doing, voting along party lines because, and it's not because we don't care, it's because we care about the wrong thing. [applause] We don't care about the people. I hope that you all would prove us prove me wrong. I hope that you would prove me wrong. But the sad reality is that's how it has been. I have been through hearings and hearings and testifying, and we just keep doing the same thing because we don't hear the people. We're loyal to our parties. And that has got to stop in The State of Ohio. Please prove me wrong. Thank you. [applause]

See, Transcript August 23, 2021, Redistricting Hearing, Youngstown State University. Ex. A. ECF Docket No. 1-2, Page ID No. 47.

The "March 2 Plan" was enacted by the Commission on March 2, 2022, Complaint. Exhibit A. ECF Docket No. 1-3. The March 2 Plan violates the Federal Voting Rights Act and the Fourteenth and Fifteenth Amendment, because it was developed without consideration of racial demographic information or the historical findings of racial discrimination delineated in Armour, 775 F. Supp. 1044 (N.D. Ohio 1991).

Appellants in this action, Reverend Simon, Reverend Macklin and Ms. Youngblood (hereinafter "the Simon Parties") challenged the policy of non consideration of racial demographics in connection with developing the March 2, 2022 Congressional Plan, as well as the Plan itself. In other words, Appellants in this action sought to invalidate the March 2 Plan and enjoin certification of the

results of any election utilizing this Plan for election of representatives for the proposed 6th Congressional District because the process utilized by Appellees to develop their Plans violated the Voting Rights Act and ignored the historical findings of official racial discrimination in Ezell Armour, et al. v. The State of Ohio, Case No. 775 F. Supp 144 (N.D. Ohio 1991). Intentionally disregarding the mandate of the Voting Rights Act of 1965, as amended, concerning racial demographics and Appellees' overt adoption of an explicit process policy to disregard racial demographics in connection with district configuration rendered the March 2 Plan invalid. The focus of Appellants challenge is the separation of the geographically economically, culturally and historically linked Youngstown-Warren area and their Black communities into two separate Congressional districts.

Appellants moved to enjoin issuance of certificates of nomination or election for representative based on an Ohio Congressional district map that does not combine the cities of Youngstown and Warren, Ohio and the Eastern suburbs of Cleveland into a single district, or includes any county south of Mahoning County into the same Congressional district as Youngstown. See, Complaint, Exhibit D, ECF Docket No. 1-5, Page ID No. 5754.

SUMMARY OF THE ARGUMENT

Appellees violated §2 of the VRA and the Fourteenth and Fifteenth Amendments to the Constitution by barring, during the redistricting process, the introduction by Appellants and consideration of racial demographic data and evidence of historic racial discrimination in Ohio's Mahoning Valley. The district Court erred when it employed the same Gingles framework standard of liability on Appellants' §2 "nomination" claim that is applicable to a §2 "election" claim. Appellants' evidence demonstrated the ability to comply with the Gingles framework, however, the district court improperly ignored the difference under Ohio law of the number of votes required to "nominate" in a single member district versus the number of vote required to "elect". The opinion of the district Court wrongfully ascribed a meaning so broad to the "election" language in §2 of the VRA that it assumes the same meaning as the "nomination" provision, thereby improperly rendering the term "nomination" inoperative and superfluous.

STANDARD OF REVIEW

This court reviews a 12(b)(6) dismissal de novo, Wingle v. JP Morgan Chase Bank, 537 F. 3d 565, 572 (6th Cir.) The Court accepts the plaintiff's factual allegations as true and view[s] the complaint in the light most favorable to the plaintiff, but [is] not required to accept legal conclusions or unwarranted factual

inferences as true." Moody v. Mich. Gaming Control Bd., 847 F. 3d 399, 402 (6th Cir. 2017).

ARGUMENT

I. OPERATION OF SECTION 2

Section 2 of the Voting Rights Act, (hereinafter "VRA") prohibits enforcement of any voting qualification, prerequisite to voting, standard, practice, or procedure that results in the denial or abridgement of the right to vote on account of race, color, or language minority status.

Appellants currently reside in what has been proposed by Appellees as the 6th U.S. Congressional District. Based upon the testimony of the architects of the proposed districts, Mr. Ray DiRossi and Ohio Republican Legislative leaders, the methodology employed to configure Ohio Congressional district's encompassing Mahoning and Trumbull Counties in particular, and throughout Ohio generally, violated the VRA because the proposed districts result in Appellants having less opportunity than other members of the electorate to participate in the political process and to nominate a representative of choice.

The Voting Rights Act and Constitutional violations complained of herein, were intentional. Appellees were fully aware of their duties under the VRA and 15th Amendment, but opted to intentionally violate these duties, the previous findings of racial discrimination in Armour, and the clear language of Section 2 of the VRA,

in favor of partisan advantage. Appellees' racial discrimination and failure to follow federal law, harmed Appellants' class in Mahoning and Trumbull County.

The conduct of Appellees' described herein should have operated to invalidate the March 2 Plan because, despite having been advised of the historical findings of a three judge district Court in Armour concerning racial discrimination in districting , the duty under the VRA to engage in an intensely local appraisal of indigenous political reality in Ohio and Mahoning Valley, and the totality of circumstances test set forth in the Senate Report enacting Section 2, Appellees gave specific instructions to their staff responsible for the drawing of district maps, to disregard race, racial bloc voting or any other racial consideration in connection with district configuration. This is directly contrary to the mandate of the VRA.

Support for this assertion is found in the following exchange that occurred during hearings before the Ohio Redistricting Commission on September 9, 2021.

> Ray DiRossi: Urn, [00:03:30] I am Ray DiRossi and as was mentioned, I'm from the caucus staff for the Senate Majority Caucus and my colleague Blake Springhetti, caucus staff for the Ohio House Majority Caucus. Urn, co-chairs and distinguished members of the Redistricting Commission, it's great to be with you today.
>
> Sykes: Uh, thank you to the co-chairs and to Mr. Springhetti and Mr. DiRossi. Thank you, uh, for the work that you put together, uh, put, so you could present to us to get, today. Excuse me. Uh, my question is specific to, urn, how this current map complies with, uh, any provisions of the Voting Rights Act and what provisions of the Voting Rights Act [00:22:30] d- did you consider in constructing this map that you presented, or these maps that you presented today?

Ray DiRossi: Co-chairs, Leader Sykes, thank you for the question. We did not use demographic data or racial data in the production of our maps.
Sykes: Any follow up.

Vernon Sykes: Yes, please.

Sykes: Thank you for answering the question. Uh, so are there any provisions of the Voting Rights Act in which you considered while you drew the, or while you drew these maps [00:23:00] before us today?

Ray DiRossi: I guess I would ... Co-chairs I guess I would say it on my previous statement, we did not use racial data or demographic data for the map, but we feel that the map complies with all the provisions of the Ohio Constitution.

Sykes: Thank you. Uh, I appreciate your answer, and I, I certainly appreciate the brevity of it. Uh, can you explain why you didn't consider any parts of the Voting Rights Act in your consideration of these maps [00:23:30] before us today?

Ray DiRossi: Well, I said we didn't consider racial data or demographic data in our maps, but we were directed not to use that data by the legislative leaders, and so we did not use it.

Audience: (laughs)

Vernon Sykes: Yeah. [inaudible 00:23:46].

Sykes: So I, I would count myself as a legislative leader and I don't think that I shared that information with you and I, this is not an ambush, this is simply a question. The Voting Rights Act is certainly, uh, a part of our, uh, [00:24:00] election and electoral fabric. Uh, and so really just trying to get a better idea of how we are, or not in compliance with that, with these maps. So, urn, hopefully we can have some deeper conversations about that, but, but again, thank you for your responses.

Ray DiRossi: Thank you.

See, Exhibit C, DiRossi Testimony, pp. 789-790. RE 1-5

This testimony is clear evidence that the legislative leadership in Ohio, intentionally disregarded whether proposed districts would dilute Black voting strength or the existence among other things, of racial block voting or any of the other Senate Report factors.

According to Mr. DiRossi, the lead representative for Appellees in the redistricting process, the State not only intentionally decided to ignore race and the Voting Rights Act, but also previous judicial findings of official racial discrimination in legislative redistricting in Ohio set forth in Armour.

The gravamen of Appellants' claim is the wholesale disregard by Appellees of their duty in connection with drawing legislative districts to consider whether the boundaries adopted deprive Black voters of an equal opportunity to participate in the political process and to nominate representatives of choice. Here Appellees violated both the 15th Amendment are VRA by adopting a specific policy to totally disregard the impact of racial bloc voting, and the Senate Report factors underlying the VRA, on their proposed districts.

The right to vote is a "precious" right, Harper v. State Bd. of Elections, 383 U.S. 663, 670 (1966), "of the most fundamental significance under our constitutional

structure," Burdick v. Takushi, 504 U.S. 428, 433 (1992) (internal quotation marks omitted).

Section 2 of the Voting Rights Act provides, in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b)
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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).

Congress enacted the Voting Rights Act for the broad remedial purpose of ridding the country of racial discrimination in voting.

Ohio and the Mahoning Valley have a documented history of imposing racially discriminatory voting requirements. See, e.g., Ezell Armour, et al. v. The State of Ohio, et al., 775 F. Supp. 1044 (N.D. Ohio 1991) (Black voting age residents who challenged constitutionality of apportionment of the Ohio House of

Representative were entitled to relief because the challenged boundary intentionally minimized or cancelled out the voting strength of minority vote).

A Black candidate has never been elected to a Mahoning and Trumbull County office. The Appellees should have taken notice of this. The Armour Opinion and redistricting hearing testimony of Appellant Simon concerofning Mahoning Valley history was brought to Appellees' attention on the first day of Regional Hearings See Simon August 23, 2021 Testimony Exhibit A. ECF Docket No. 1-2 Appellants also submitted testimony and a Proposed District map to Appellees at the September 14, 2021 , See Exhibit D of Complaint.

The challenged Congressional Redistricting Plan, the Congressional District encompassing Youngstown, Ohio in Mahoning County has been joined with areas south of Mahoning County stretching over 160 miles where racial bloc voting abounds. The new district results in illegal and unconstitutional dilution of the Mahoning Valley Black vote by impairing the ability of the Mahoning Valley Black voters to nominate a United States Congressional representative of choice, due to the submersion of Black voting strength into the counties of Columbiana, Caroll, Jefferson, Harrison, Belmont and Washington instead of the more racially diverse adjacent Stark, Summit or Cuyahoga Counties. Had the Appellees considered racial

block voting , this result would have been apparent based upon the 2020 Presidential election results alone. The proposed district stretches from Youngstown, Ohio to Marietta, Ohio a distance of 164 miles. The proposed district has a negligible Black population. The proposed district includes ten Ohio counties. Appellants presented a proposed district to Appellees that included areas North and Northwest of Mahoning and Trumbull counties and would constitute a district with a black voting majority. See Complaint, Exhibit D

The Black residents of Youngstown and Warren when combined with areas North and Northwest are a sufficiently large and geographically compact population to prevail in a Congressional District primary election, are politically cohesive, vote as a bloc, the White majority in Appellees' proposed district votes sufficiently as a bloc to enable it to defeat the Blacks' preferred candidate. Under the totality of the circumstances, the March 2 Plan results in the denial and abridgment of the right to vote on account of race or color in violation of Section 2 of the Voting Rights Act. The March 2 Plan dilutes Black voting strength and deprives Appellants of an equal opportunity to nominate representatives of their choice. The Armour Opinion, which Appellees failed to consider, detailed a history of discrimination in Youngstown in employment practices, in the city's school system, sentencing and other fundamental

areas. If Appellees' had considered Appellants' evidence it would have learned the following:

a. The history set forth in Armour of official discrimination in the Mahoning Valley that touched the right of Blacks to register, vote, or otherwise to participate in the democratic process should have been considered by Appellees;

b. Voting in the Mahoning Valley and the counties in the newly proposed 6th District is racially polarized;

c. Blacks in the Mahoning Valley bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process, as evidenced by the record setting murder rate in Youngstown;

d. Political campaigns have been characterized by overt and subtle racial appeals;

e. No Black has been elected to county-wide elections for County Commissioner or Common Pleas Judges in Mahoning or Trumbull County.; and

f. As outlined in the case of Youngblood v. County Commissioner, Sixth Circuit, Case No. 19-3877, elected officials in Mahoning County have been unresponsive to the particularized needs of the Black community in Mahoning County.

Appellants' request to enjoin the November 2022 and future elections under the Plan should have been granted as a threshold matter in this action for the reason Appellees have stated publicly that the challenged districts were configured without any regard whatsoever to whether the proposed districts impair Appellants' ability to participate equally in the electoral process and nominate representatives of choice. Appellees, despite the clear admonitions of the VRA that no voting…standard

practice or procedure shall be imposed in a manner that dilutes Black voting strength and the historical findings of official racial discrimination set forth by this Court in Armour v. Ohio, 775 F. Supp. 1044 (6th Cir. 1991) concerning the role of race in elections in Mahoning County, Ohio, adopted a wholesale policy of ignoring racial demographics in Mahoning County elections[1]. The motion to dismiss should not have been granted for the reason Appellees' conduct violated the clear instruction of the United States Supreme Court concerning the procedure that should be followed to comply with §2 of the VRA. See, Thornburg v. Gingles, 478 U.S. 30 (1986) and Allen v. Milligan, 599 U.S. __(2003).

In point of fact, Thornburg, the United States Supreme Court stated both amended §2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, courts, and implicitly legislative bodies configuring legislature districts, must consider the "totality of the circumstances" and determine, based "upon a searching practical evaluation of the past and present reality,' S. Rep. at 30 (footnote omitted), whether the proposed structure results in the political process being equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,"' Rogers, supra, at 621, quoting Nevett v. Sides, 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of

[1] [R]edistricting legislatures will almost always be aware of racial demographics, but that sort of race consciousness does not lead inevitably to impermissible race discrimination. See, Shaw v. Reno, 509 U.S. 630, 646. Here Appellees configured districts without any consideration of racial demographics and therefore drew districts that failed to take into account historical and previous judicial findings of racial block voting..

the design and impact" of the contested electoral mechanisms. 458 U.S. at 458 U. S. 622. In this appeal the issue is whether Appellees violated §2 and Armour by totally disregarding race when they configured the district challenged here. The clear answer to this question, as explained below, is yes.

II. STANDARD OF LIABILITY

Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, prohibits voting practices and procedures that discriminate on the basis of race, color, or membership in a language minority group. "The essence of a § 2 claim is that a certain electoral laws, practices, or structures interact with social and historical conditions to cause an inequality in the opportunities enjoyed by protected voters to elect their preferred representatives." Gingles, 478 U.S. at 47. Appellees failed to determine whether the proposed districts caused inequality despite a permanent injunction from Armour and the duty to consider the totality of circumstances.

Gingles arose in the context of a North Carolina challenge to a multi member districting scheme. There was also a general election run off requirement, unlike Ohio where in a plurality will suffice to win an election for U.S. Representatives.

The Court in Gingles stated expressly it was not deciding which standards apply to other types of claims of establishing a bright line rule. The Court stated:

> We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority

> in a single-member district, alleging that the use of a multi-member district impairs its ability to influence elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claims that multi-member districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of challenged multi-member districts, are fully pertinent to other sorts of vote-dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.
>
> In a different kind of case, for example a gerrymander case, Appellants might allege that the minority group that is sufficiently large and compact to constitute a single-member district has been split between two or more multi-member or single member districts, with the effect of diluting the potential strength of the minority vote. *1052 Id. at 46 D. 12,106 S. Ct. at 2764 n. 12; at 50 n. 16, 1.06 S. Ct. at 276711. 16. (emphasis added).

Here the size and scope of the Simon Class was not determined because the case was dismissed. However, the Simon Parties submitted a proposed District to the Appellees on September 16, 2021, Complaint, Exhibit D, that suggests a district where Black voters would satisfy the first Gingles precondition, in a primary election, where party nominees are selected.

According to the 2020 Census, Ohio's current population is 11, 779, 488. See, *2020 Census*, P.L. 94-171. An Ohio Congressional district will have a representative ratio of 1:787,527 citizens. The Simon Parties proposed a district, as indicated at Complaint, Exhibit D, that instead of separating the Black community in Warren, Ohio, from the Black community in Youngstown, Ohio, joined these communities.

Under the district proposed by the Simon Parties, the total voting aged white population is 333,776. The total voting aged Black population is 284,338. When this total voting block is further divided to approximately one half of the voters that nominally participate in a partisan primary election, the Simon Parties class would be sufficiently large and geographically compact to prevail in a single member primary election. The data in Exhibit D was compiled by Dr. Mark J. Sallings, Maxine Goodman Levin College of Urban Affairs, Cleveland State University. Exhibit D clearly demonstrates that 284,338 votes is sufficient to niminate. This assertion is supported by the historical data below of which this Court may take judicial notice.

VOTES REQUIRED TO "NOMINATE" REPRESENTATIVE OF CHOICE - OHIO 6TH CONGRESSIONAL DISTRICT* - THE MARCH 2 PLAN PLACES TRUMBULL COUNTY IN THE NEW 14th DISTRICT

	Total	**Democratic**	**Republican**	**Other**
Status of 6th Congressional District on 10/29/2012	485,212	76,652	94,315	318,205
2012 Primary Election		37,374 (Wilson)	56,905* (Johnson)	
		8,117 (Adulewicz)	10,888 (Smith)	
	Total:	45,491	67,793	
		General Election Winner - Johnson		
2014 Primary Election		22,359		

		(Garrison)	(Johnson)
		8,292	
		(Howard)	(n/a)
	Total:	30,651	
		General Election Winner - Johnson	
2016 Primary Election		(Lorenetz)	(Johnson)
		General Election Winner - Johnson	
2018 Primary Election		22,024	50,271
		(Roberts)	(Johnson)
		7,534	9,501
		(Lange)	(Blazek)
	Total:	29,558	59,772
		General Election Winner - Johnson	
2020 Primary Election		30,628	57,790
		(Roberts)	(Johnson)
			8,721
			(Morgan)
	Total:		66,511
		General Election Winner - Johnson	
2022 Primary Election		8,649	57,292
		(Lyras)	(Johnson)
		7,002	9,237
		(Jones)	(Anderson)
		5,084	2,634
		(Alexander)	(Morgenstern)
	Total:	20,735	70,099
		General Election Winnder - Johnson	

*Source: Ohio Secretary of State "Official Election Results, 2012-2022)

VOTES REQUIRED TO "NOMINATE" REPRESENTATIVE OF CHOICE - OHIO 13TH CONGRESSIONAL DISTRICT 2012-2020*- THE 13th DISTRICT FORMERLY ENCOMPASSED MAHONING AND TRUMBULL COUNTIES

	Total	**Democratic**	**Republican**	**Other**
Status of 13th Congressional District on 10/29/2012	479,111	105,659	53,296	319,856
2012 Primary Election		(Ryan) (unopposed)	(Agana) (unopposed)	
		General Election Winner - Ryan		
2014 Primary Election		45,585 (Ryan)	(Pekarak)	
		8,016 (Luchansky)	(n/a)	
	Total:	98,732		
		General Election Winner - Ryan		
2016 Primary Election		88,154 (Ryan)	(Morkel)	
		10,578 (Luchansky)	(unopposed)	
	Total:	98,732		
		General Election Winner - Ryan		
2018 Primary Election		54,967 (Ryan)	(DePizzo)	
		4,908 (Luchansky)	(unopposed)	
	Total:	63,070		
		General Election Winner - Ryan		

2020 Primary Election	61,813 (Ryan)	19,327 (Hagan)
		(Winner of 5 Candidates)
Total:		29,380
	General Election Winner - Ryan	

*Source: Ohio Secretary of State "Official Election Results, 2012-2022)

DISTRICT COMPOSITION 2012-2020

	District 6	District 13
2012	Scioto	Summit
	Lawrence	Portage
	Jackson	Mahoning (Part)
	Gallia	Trumbull
	Meigs	
	Washington	
	Athens	
	Noble	
	Monroe	
	Belmont	
	Muskingham	
	Gurensey	
	Harrison	
	Tuscarawas	
	Caroll	
	Jefferson	
	Columbiana	
	Mahoning (Part)	

VOTES REQUIRED TO "NOMINATE" REPRESENTATIVE OF CHOICE - OHIO 6TH CONGRESSIONAL DISTRICT 2022

Ohio's 6th Congressional District is made up of 11 counties in Eastern Ohio. The district runs along the Pennsylvania and West Virgina borders, following the Ohio River on its meandering journey south. The nine full counties that make up the 6th Congressional District include: Belmont County, Carroll County, Columbiana County, Harrison County, Jefferson County, Mahoning County, Monroe County, Noble County, and Washington County. The 6th Congressional District also includes large portions of Stark County and Tuscarawas County.
Source: Representative Johnson Website

	Democratic	**Republican**
2022 Primary Election	8,649 (Lyras)	57,292 (Johnson)
	7,002 (Jones)	9,237 (Anderson)
	5,084 (Alexander)	4,936 (Morgenstern)
		2,634 (Zelenitz)
Total:	20,735	74,099

General Election Winner - Johnson

The district court conclusion that Appellants could not satisfy the Gringles numerosity requirement is contradicted by these figures. The number of votes required to nominate would have clearly been exceeded if Youngstown and Warren were not placed into separate districts.

III. INFLUENCE CLAIM OR NOMINATION CLAIM

Appellees contend that the Simon Parties are merely asserting an influence claim which is barred in the Sixth Circuit by reason of the decisions in Growe v. Emison, 507 U.S. 25 (1993) and Cousins v. Sunquist, 145 F.3d 818 (6th Cir. 1998).

Appellees' argument is incorrect. Growe stated explicitly "to establish a vote-dilution claim with respect to a multimember district plan, an Appellant must establish three threshold conditions." This case does not deal with a multimember districting plan. Growe was factually similar to Gingles, both involved multimember plans. Appellees also contend that an influence claim is barred by Cousins v. Sundquist, 145 F. 3d 818 (6th Cir. 1998). Although there is dicta in Cousins concerning an influence claim, the decision did not turn on the size of the minority voting group. Cousins rested on inability to meet the third Gingles precondition, proof of racial block voting. The claim of the Simon Parties is because of the duties imposed under §§2 of the VRA and the findings in Armour, the Appellees' should have considered racial demographics when drafting the 6th Congressional District and not applied the same standard applicable to an election claim. Moreover, the majority opinion in Cousins is merely the minority or dissenting opinion in Armour. Armour has not been reversed by the United States Supreme Court. A circuit panel, such as Cousins, can not override a three-judge district court, where the appeal is directly to the United States Supreme Court. See, 28 U.S.C. §1253. See, Shapiro v. McKeanan 577 U.S. 39 (2015). Armour has not been reversed.

The Simon Parties became involved in Ohio's redistricting process from its outset. They are now faced with having to vote for Congressional representation in a racially discriminatory district. Given the Appellees'clear malfeasance in the

creation of this predicament, Appellants' request , which was totally ignored by the district court prior to the 2022 election, to enjoin final certification of the May 3 primary election results pending the outcome of litigation concerning the March 2, 2022 map should have if not granted should have at a minimum be entertained by the district court. Instead the Simon parties were relegated by the district court to back-of-the-bus treatment; thus, this appeal.

The district court reliance on Growe does not alter the analysis.Growe does not require a different result as this action pertains to a "nomination" claim .Growe concerned deference to State proceedings, where the state proceedings were an adequate remedy. Ohio's State procedure, as evidenced by its unlawful bar of racial demographic data is not.Thornburg makes this clear.

In Thornburg, the United States Supreme Court stated both amended §2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, courts, and implicitly legislative bodies configuring legislature districts, must consider the "totality of the circumstances" and determine, based "upon a searching practical evaluation of the past and present reality,' S. Rep. at 30 (footnote omitted), whether the proposed structure results in the political process being equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,"' Rogers, supra, at 621, quoting Nevett v. Sides, 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design

and impact" of the contested electoral mechanisms. 458 U.S. at 458 U. S. 622. Appellees argue that Appellants are not entitled to a remedy because of their inability to satisfy the Gingles numerosity preconditions. Appellees are wrong. Appellees are focused on an election claim. Not the type of claim asserted here which neither Thornburg nor Allen addresses.

Contrary to Appellees argument and the district court's conclusion, the claim asserted here by the Simon Parties is not an influence claim that by aggregating Black voters in Mahoning and Trumbull County, Ohio into a single Congressional District that their numbers will enable them to merely influence a general election for a representative seat. The Simon claim, is that the 6th Congressional District as configured results in the process leading to nomination of a candidate of choice not being equally open to the Simon parties. Appellees arguments are is based on a misreading of Thornburg v. Gingles, 478 U.S. 30 (1986), Growe v. Emison, 507 U.S. 25 (1993), and Bartlett v. Strickland, 556 U.S. 1 (2009). All of these cases involve either a challenge to a multimember district scheme in a jurisdiction, with a majority vote requirement, or involve claims that the challenged districts resulted in inability to elect rather than nominate.

The recent nomination of J.D. Vance for an Ohio U.S. Senate seat with 32.2% of the vote is proof that a single district majority vote is not required to nominate in Ohio. It is illogical to suggest that in order to state a §2 claim challenging the

impairment of the ability to nominate, requires a 50% Gingles precondition threshold to state a claim under VRA, when 50% of the vote is not required to prevail in an Ohio primary election. None of the opinions cited by Appellees dealt with a Section 2 "nomination" claim. Armou,r pointed this out was not incorrect law and it has never been reversed.

The Armour opinion provided a thorough evaluation of past reality in the Mahoning Valley. It also devised an analytical framework based upon a functional view of representative selection in the Mahoning Valley. Armour did not involve a multimember district claim, a claim in a jurisdiction with a majority vote requirement, a claim based on a coalition of voters, a so-called influence claim. Armour involved a claim concerning whether the challenged districting resulted in the political process leading to nomination, which is the decisive contest in the Mahoning Valley was equally open. Gingles nor its successor opinions deal with a nomination claim. No opinion cited by Appellees deals with a "nomination" claim. Despite this analytical deficit , Simon can satisfy the Gingles preconditions if they are placed into the nomination context.

Gingles made it clear that the criteria announced were not to be applied blindly or in a bright line fashion. In point of fact, Gingles footnote 12 states:

> The claim we address in this opinion is one in which the Appellants alleged and attempted to prove that their ability to elect the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider

> whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claim that multimember districts operate to dilute the vote of geographically cohesive minority groups that are large enough to constitute majorities in single-member districts, and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Id.

There is no authority for the proposition that a nomination claim filed in a jurisdiction without a majority vote requirement must meet the Gingles election claim precondition of a majority in a single member district. Gingles merely requires it to be shown in the absence of the challenged structures, Appellants can be successful politically.Such a showing is made in Exhibit D to Appellants'Complaint.

Appellees contend that the Simon Parties are merely asserting an influence claim. Influence claims are not barred in the Sixth Circuit by reason of the decision in Growe v. Emison, 507 U.S. 25 (1993) and Cousins v. Sunquist, 145 F.3d 818 (6th Cir. 1998). Appellees argument to the conytrary is incorrect. Growe stated explicitly "to establish a vote-dilution claim with respect to a multimember district plan, a Appellant must establish three threshold conditions." This case does not deal with a

multimember districting plan. Growe was factually similar to Gingles, both involved multimember plans. Appellees also contend that an influence claim is barred by Cousins v. Sundquist, 145 F. 3d 818 (6th Cir. 1998). Although there is dicta in Cousin concerning an influence claim, the decision did not turn the size of the minority voting group. The decision rested on inability to meet the third Gingles precondition, proof of racial block voting.Cousins , a Circuit Panel decision can not overrule a decision of a three judge district court. Hence Appellees' reliance on Cousins is misplaced,

IV. STATUTORY CONSTRUCTION OF §2

The district court's treatment of Appellants' §2 redistricting claim predicated on the inability to "nominate" a representative of choice as nothing more than a redundancy of a §2 claim that alleges inability to "elect," violated settled rules of statutory construction. Specifically, the Supreme Court has stated it will avoid a [statute's] reading which renders some words altogether redundant." Gustufson v. Alloyd, Co., 513 U.S. 561 (1995). "A word is known by the company it keeps." (the doctrine of noscitura sociis)…we…avoid ascribing to one word a meaning so broad then it is inconsistent with its accompanying words." Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961). Words must be understood against the background of what Congress was attempting to accomplish. See, Reves v. Ernst & Young, 494 U.S. 56 (1990) In §2 Congress used two distinct terms, "nomination" and "election." This

suggests Congress wanted to protect both processes, not just the election process discussed in Gingles and Allen or within the other election cases relied upon by the district Court, none of which addressed "nomination." Accordingly, the Gingles prerequisite conditions applicable to an "election" claim, while relevant to the requirement to show potential for political success in the absence of the challenged structure, should not be foisted onto a claim that alleges inability to "nominate" especially where as here, neither logic, state law no Gingles or Allen v. Milligan compel that result, because under Ohio law nomination and election entail entirely separate political strategies and processes.

Under these circumstances, when engaged in the "business of interpreting statutes…differences in language…convey differences in meaning." Henson v. Santander Consumer USA, Inc., 582 U.S. ____ (2017). The district Court's application of the same numerosity standard to Appellants' nomination claim that is applied to an election claim renders Congress' distinct use of both terms separately ,superfluous. In other words the term "nomination", according to the district Court could have been left out of §2because according to the district court the same standard applies whether it's a nomination or an election. However, there is no authorityin either Gingles or Allen to support that proposition relied upon by the district court.

V. DUTY TO FOLLOW 28 U.S.C. §2284 PROCEDURE

In light of the foregoing, the failure of the district court to convene a three-judge district Court violated Section 2284 and the en banc opinion in Armour v. State of Ohio, 925 F. 2d 987 (6th Cir. 1991), which involved a §2 redistricting challenge where, as here, it was alleged Plaintiffs failed to meet the Gingles numerosity threshold condition. As was done here, the district judge referred the §2 claim and 15th Amendment challenge to a Magistrate Judge followed by dismissal, based upon the Gingles preconditions.

In reversing the district Court's determination that the claim was due to the perceived lack of a single member district majority insubstantial, the en banc Court stated:

> Rather than assigning the case to a magistrate under § 636, the District Court should have invoked the provisions of § 2284 which provides that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality . . of the apportionment of any statewide legislative body." (Emphasis added.)… The theories of liability and the proof underlying both the constitutional and statutory claims are intimately related, and the normal method of adjudicating such claims is by a three judge district court convened under § 2284. See Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L'Ed.2d 25 (1986). A unanimous Supreme Court referred to "[s]ubject matter of this kind [as] regular grist for three-judge court." Chapman v. Meier 420 U.S. 1m 14,95 S. Ct. 751, 759, 42 L.ed.2d 766 (1975). Justice Harlan observed in an earlier Voting Rights case:
>
> While I consider the question of whether § 5 authorizes a three-judge court a close one, it is clear to me that we would not avoid very many three-judge courts whatever we decide [under the Voting Rights Act] . [G]enerally a plaintiff attacking it state statute . . . could also make al least a substantial constitutional claim that the state statute is

> discriminatory in its purpose or effect. Consequently, in the usual case a three judge court would always be convened under 28 U.S.C. § 2281…
>
> Allen v. State Board of Elections, 393 U.S. 544, 583 n. 1, 89 S.Ct 817, 840 n.1, 22 L.Ed.2d 1 (1969) (Harlan, J., concurring and dissenting). See also, Sullivan v. Crowell, 444 Stipp. 606, 615 n. 6 (W.D.Tenn. 1978) (three-judge court) (discussing scope of jurisdiction granted three judge court in apportionment eases).
>
> Although § 2284 seems to contemplate "the filing of a request for three judges" by a party and a determination by the district judge of the need for such a court, the "shall" language of the statute quoted above appears to make the convening of such a court a jurisdictional requirement once it becomes clear that there exists a non-frivolous constitutional challenge to the apportionment of a statewide legislative body. Our test for "non-frivolousness" requires that the district court determine whether a substantial constitutional claim exists as a prerequisite to the convening of a three-judge court, but the district court's task is limited. See, Jones v. Branigin, 433 L.2d 576 (6th Cir. 1970), cert. denied, 401 U.S. 977, 91 S.Ct. 1205, 28 L.Ed.2d 327 (1971). A claim is unsubstantiated only when it is obviously without merit or clearly determined by previous case law.' *Ex parte, Poresky* 290 U.S. 30, 32, 54 S.Ct . 3, 4, 78 L.Ed. 152 (1933); Piper v. Swan, 319 F. Stipp, 908 (E.D.Tenn. 1970). Moreover, the sufficiency of the complaint for three-judge jurisdictional purposes must be determined by the claims stated in the complaint and not by the way the facts turn out. See, Morales v. Turman, 430 U.S. 322, 324, 97 S. C 1189, 1190, 51 L.Ed. 2d 368 (1977); Calloway v. Briggs, 443 F.2d 296, 298 (6th Cir.), cert. denied. 404 U.S. 916, 92 S.Ct. 230, 30 L.Ed.2d 190 (1971).

Here, the district court viewed Appellants' claim as a mere influence claim instead of the nomination claim it is. The district Court also failed to recognize that Appellants filed a claim that Appellees intentionally discriminated against Appellants, brining this action outside of a §2 analysis only. The presence of

evidence that Appellees acted intentionally is alone enough to bring this action within the mandatory procedures under 28 U.S.C. §2284.

Federal courts generally have a "'virtually unflagging"' obligation to hear and decide cases within their jurisdiction. Sprint, 571 U.S. at 77 (quoting Colo. River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976)). Federal courts "have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."' Id. (quoting Cohens v. Virginia, 6 Wheat. 264, 404 1821)). "Parallel state-court proceedings do not detract from that obligation"; instead, contemporaneous federal and state litigation over the same subject matter is the norm. Id. The availability of the federal courts to adjudicate federal claims is essential to protecting federal rights especially, as relevant here, the right to vote free of intentional racial discrimination.

Appellants second claim under the VRA that Appellants intentionally split the black population of the Mahoning County Valley into two districts in order to dilute the effectiveness of the minority vote. This claim is indistinguishable from a claim under the Fifteenth Amendment.

The Fifteenth Amendment states:

> Section 1. Right of citizens to vote Race or color not to disqualify.
>
> The right of citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

> Section 2. Power to enforce amendment.
>
> Congress shall have power to enforce this article by appropriate legislation.
>
> This amendment prohibits states from intentionally discriminating on the basis of race in matters having to do with voting. City of Mobile v. Bolden, 446 U.S. 55, 61,10 S. Ct. 1490, 1496, 64 L. Ed. 2d 47 (1980).

Although courts are reluctant to provide relief on claims that a district has been gerrymandered to protect an incumbent's seat, see Davis v. Bandemer, 478 .S. 109, 138-43, 106 S. Ct. 2797, 2813-15, 92 L. Ed. 2d 85 (1986) and 478 U.S. at 143-60, 106 S. Ct. at 2815-24 (O'Connor, J., concurring), this rule does not hold when the manipulations were conducted on a race-conscious basis. There is "little point ... in distinguishing discrimination based on an ultimate objective of (keeping certain white incumbents in office from discrimination borne of pure racial animus." Ketchum v. Byrne, 740 F.2d 1398, 1406-10 (7th Cir. 1984), cert. denied, 471 U.S. 1135,105 S. Ct. 2673, 86 L. Ed. 2d 692 (1985). See also Garza v. City of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied,_____ U.S._____ , 111 S. Ct. 681, 112 L. Ed. 2d 673 (1991) (Fifteenth Amendment violation was proven when officials chose to fragment the Hispanic vote in order to preserve incumbencies). See also, Gomillion v. Lightfoot, 364 U.S. 339, 346, 81 S. Ct. 125, 130, 5 L. Ed. 2d 110 (1960) ("When the legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.")

Gomillion v. Lightfoot, 364 U.S. 339, 342 81 S. Ct. 125, 127, 5 L. Ed. 2d 110 (1960), states that "the Fifteenth Amendment nullifies sophisticated as well as simple-minded modes of discrimination." The deliberate combination of over 700,000 persons from a 95% white district with areas of Youngstown or were nearly half black in flagrant disregard of the VRA was not color blind. Accordingly, plaintiffs have stated a claim current redistricting violates both the Fourteenth and Fifteenth Amendments.

The Supreme Court stated in Constantin, supra at page 1048 and Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 58 S. Ct. 334, 82 L. Ed. 319 (1938) that once a three-judge court is properly convened, it was jurisdiction to determine "all the questions in the case, local as well as federal." The failure of the district Court to convene a three judge district court requires the district court opinion to be vacated for lack of subject matter jurisdiction. See, Armour, 925, F. 2d 987 (6th Cir. 1991).

CONCLUSION

For the above reasons the Simon Parties respectfully request that this action be reversed and remanded to the district court for the convening of a three judge district court.

Respectfully submitted,

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)
Percy Squire Co., LLC
341 S. Third St., Suite 10
Columbus, OH 43215
614-224-6528 Telephone
614-224-6529 Facsimile
psquire@sp-lawfirm.com

CERTIFICATE OF COMPLIANCE

In accordance with the provisions of Fed. R. App. P. 32, the undersigned certifies that this appellate brief complies with the type limitations of this Rule.

1. The brief contains no more than 8955 words in its entirety.
2. The brief has been prepared in 14-point Times New Roman typeface using Microsoft Word.

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via the electronic mail service, January 2, 2024, upon counsel of record

s/Percy Squire, Esq.
Percy Squire, Esq. (0022010)

ADDENDUM

Complaint	RE 1 PageID #1
Motion for Three Judge Court	RE 2 PageID #462
Motion for Class Certification	RE 3 PageID #471
Motion for Temporary Restraining Order	RE 4 PageID #488
March 2 Plain	RE 1-4 PageID #521
Armour Three Judge Court Opinion	RE 4-2 PageID #522
DiRossi Testimony	RE 1-5 PageID #789
Adoption of Rule 9	RE 4-4 PageID #3632
Proposed Plan	RE 1-5 PageID #5755
Appellants Redistricting Hearing Testimony	RE 1-5 PageID #38 and 47
Appellees Motions to Dismiss	RE 15 PageID #1048 and RE 18 PageID #1094
Appellant Oppositions to Motions to Dismiss	RE 20 PageID #1108
Appellees' Reply	RE 21 PageID #1141 and RE 23 PageID #1144
Referral Order	RE 25 PageID #1158
Report and Recommendation	RE 27 PageID #1160
Objection to Report and Recommendation	RE 31 PageID #1193
Order Approving Report and Recommendation	RE 33 PageID #1207

Notice of Appeal	RE 35 PageID #1214
Judge Marbley Opinion S.D. Ohio Case #2:22-cv-0773	Re 201 PageID #6322