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

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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MEMORANDUM

I. INTRODUCTION

Appellee has raised the following arguments in Response to Appellants' appeal from the district Court's Order dismissing this voting rights action:

> 1. A Private Cause of Action Does Not Exist for Section Two of the Voting Rights Act
>
> II. The district court properly dismissed Appellants Section 2 claims because Appellants failed to satisfy the preconditions set forth in Thornburg v. Gingles
>
> III. The District Court Correctly Dismissed Appellants Constitutional Claims Because Appellants Failed to Plausibly Allege a Discriminatory Purpose
>
> IV. The District Court Correctly Held That a Three-Judge Panel is not Required Because Appellants' Claims are Wholly Insubstantial

Appellees' arguments are wrong. The arguments are either traversed by the legislative history of §2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. §10301 et seq., as reflected in Senate Report No. 97-417, the extant en banc opinion of this Honorable Court in Armour v. State of Ohio, 925 F.2d 987 (6th Cir. 1991) or the opinions of the United States Supreme Court in, Thornburg v. Gingles, 478 U.S. 30 (1986) as reiterated recently in Allen v. Milligan, 599 U.S. 1 (2023). Aside from the above grounds, the Reply brief also suffers from the profound flaw of failure to recognize that Appellants do not merely challenge the Congressional map here, Appellants' primary overriding objection is to the map making methodology

employed by Appellees. Specifically, Rule 9 of the reapportionment process adopted and implemented by Appellees, forbid consideration of racial demographics or the role of race in Mahoning Valley, Ohio politics, a stunning violation of the express terms of the VRA where map making is concerned. Appellants contend that Appellees' Rule 9 operated to globally infect Ohio's entire map making process as well as the process that resulted in the creation of Congressional District 6, where Appellants reside and vote. Appellants requested that the district court declare whether Rule 9 is lawful. The district court and Appellees side stepped this issue by arguing unless the Gingles preconditions are met Appellants can not raise this issue. The Reply brief does not focus on the unlawfulness of Rule 9.

Instead, Appellees now rely upon the recent perfidious Eighth Circuit Opinion announced in Arkansas State Conference NAACP v. Arkansas Board of Apartment, 86 F. 4th 1204 (8th Cir. 2023), that there is no private cause of action under the VRA. Because Appellees have now adopted as their threshold position the Eighth Circuit argument that there is no private right of action under the VRA, Appellants will Reply to that argument first.

II. PRIVATE RIGHT OF ACTION

The most comprehensive arguments against the Eighth Circuit majority Opinion in Arkansas State Conference NAACP v. Arkansas Board of Appointment hereinafter ("Arkansas") is the dissenting opinion of Chief Judge Smith and the Fifth

Circuit opinion in Press Robinson, et al. v. Kyle Ardion, No. 22-30333 (5th Cir. November 10, 2023) both of which Appellants fully adopt and specifically incorporate herein by reference.

According to Chief Judge Smith:

> Admittedly, the [Supreme] Court has never directly addressed the existence of a private right of action under § 2; however, it has repeatedly considered such cases, held that private rights of action exist under other sections of the VRA, and concluded in other VRA cases that a private right of action exists under § 2. Until the Court rules or Congress amends the statute, I would follow existing precedent that permits citizens to seek a judicial remedy. Rights so foundational to self-government and citizenship should not depend solely on the discretion or availability of the government's agents for protection. Resolution of whether § 2 affords private plaintiffs the ability to challenge state action is best left to the Supreme Court in the first instance…
>
> "[F]or decades and throughout hundreds of cases a private right of action has been assumed" under § 2. Coca v. City of Dodge City, No. 22-1274-EFM, 2023 WL 2987708, at *3 (D. Kan. Apr. 18, 2023), motion to certify appeal denied, No. 22-1274-FFM, 2023 WL 3948472 (D. Kan. June 12, 2023).
>
> Both the Supreme Court and this court have assumed implicitly and explicitly- -that such a private right of action exists. See, e.g., Allen, 599 U.S. at 1 (not addressing whether § 2 contains a private right of action because the issue was not raised in the Supreme Court despite being argued below); Brnovich, 141 S. Ct. at 2321; Abbott v. Perez, 138 S. Ct. 2305 (2018); Shelby Cnty. v. Holder, 570 U.S. 529, 537 (2013) ("Both the Federal Government and individuals have sued to enforce § 2 . . . ."); Bartlett, 556 U.S. at l; LULAC, 548 U.S. at 399; Johnson v. DeGrandy, 512 U.S. 997, 1006 (1994) ("The United. States merely seeks to litigate its § 2 case for the first time, and the Government's claims, like those of the private plaintiffs, are properly before the federal courts."); Holder v. Hall, 512 U.S. 874 (1994); Voinovich, 507 U.S. at 146; Growe v. Emison, 507 U.S. 25 (1993);

Chisom, 501 U.S. at 380; Hous. Laws. ' Ass'n, 501 U.S. at 419; Gingles, 478 U.S. at 30; City of Mobile v. Bolden, 446 U.S. 55, 60 (1980) (plurality opinion) ("[a]ssuming ... that there exists a private right of action to enforce [§ 2]"); Mo. State Conf of the NAACP v. Ferguson-Florissant Sch. Dist., 894 F.3d 924 (8th Cir. 2018); Collier v. City of Marlin, 604 F.3d 553 (8th Cir. 2010) (en banc); Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006); Johnson-Lee v. City of Minneapolis, 170 F. App'x 15 (8th Cir. 2006) (unpublished per curiam); Afr. Am. Voting Rts. Legal Del Fund, Inc. v. Missouri, 133 F.3d 921 (8th Cir. 1998) (unpublished per curiam); Stabler v. Cnty of Thurston, 129 17.3d 1015 (8th Cir. 1997); Clay v. Bd. of Educ. of City of St. Louis, 90 F.3(1 1357 (8th Cir. 1996); Harvell v. Blytheville Sch. Dist. No. 5,71 F.3d 1382 (8th Cir. 1995) (en banc); Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., No. I, 56 F.3d 904 (8th Cir. 1995); Afr. Am. Voting Rts. Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345 (8th Cir. 1995); Williams v. City of Texarkana, 32 F.3d 1265 (8th Cir. 1994); Afr.-Am. Citizens for Change v. St. Louis Bd. of Police Comm'rs, 24 F.3d 1052 (8th Or. 1994); Jeffers v. Clinton, 992 F.2d 826 (8th Cir. 1993); Whitfield v. Democratic Party of State of Ark., 890 F.2d 1423 (8th Cir. 1989), opinion vacated and district court judgment off 'd mem. by an equally divided court, 902 F.2d 15 (8th Cir. 1990) (en banc); Roberts v. Wainser, 883 F.2d 617, 624 (8th Cir. 1989) (recognizing that "standing to sue under [§ 2 of the VISA]" includes "persons whose voting rights have been denied or impaired"); McGruder v. Phillips Cnty. Election Comm, 850 F.2d 406 (8th Cir. 1988); Buckanaga v. Sisseton Indep. Sch. Dist., No. 54-5, 804 F.2d 469 (8th Cir. 1986).

And "[s]ince 1982, more than 400 Section 2 cases have been litigated in federal court." Appellants' Br. at 7 (citing Ellen D. Katz et al., Section 2 Cases Database, Univ. of Mich. L. Sch. Voting Rights Initiative (2022), https://voting.law.umieh.edu/databaseVRI_Dataset_2021.12.31 listing 439 electronically-reported cases with judicial decisions between 1982 and 2021 addressing a substantive Section 2 claim)). "Over the past thirty years, there have been at least 182 successful Section 2 cases; of those 182 cases, only 15 were brought solely by the Attorney General." Id. at 8 (citing Katz, supra, at https://voting.aw.umch.edu/wp-content/uploads/2022/02/VR1_Codebook.pdf (defining successful cases as those where "the ultimate outcome of the lawsuit was that a

> plaintiff achieved success on the merits by proving a violation of the VRA," or where "a positive real-world outcome could be determined from the opinions reviewed, e.g. a consent decree or a positive settlement")).

Although as pointed out by Chief Judge Smith the United States Supreme Court has arguably not addressed whether there is a private right of action under §2, Congress has explicitly addressed it. In point of fact, Senate Report No. 97-417 97th Congress, 2d Senate Report of the Committee on the Judiciary, states on page 30.

> Whitcomb, White, Zimmer, and their progeny dealt with electoral system features such as at-large elections, majority vote requirements and districting plans. However, Section 2 remains the major statutory prohibition of all voting rights discrimination. It also prohibits practices which, while episodic and not involving permanent structural barriers, result, in the denial of equal access to any phase of the electoral process for minority grow members.
>
> If the challenged practices relates to such a series of events or episodes, the proof sufficient to establish a violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers. Of course, the ultimate test would be the White standard codified by this amendment of Section 2: whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.
>
> The requirement that the political processes leading to nomination and election be "equally open to participation by. the group in question" extends beyond formal or official bars to registering and voting, or to maintaining a candidacy.
>
> As the Court said in White, the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality"

> Finally, the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965. See, Allen v. Board of Elections, 393 U.S. 544 1909).

Id. at p. 30. (Emphasis added.)

This language from the above legislative history of the VRA, makes clear that §2 both provides a cause of action against electoral practices that result in the denial of equal access to "any phase" of the electoral process, and states explicitly that Congress intended for a private rights of action to exist under §2.Moreover, the U.S. Supreme Court entertained private §2 causes of action in both Gingles and Allen . Congress expressly provided for a private cause of action in S. Rep. 97-417.Accordingly , Appellees' argument that a private right of action does not exist is unsound. There is no national authority to support it.

This Honorable Court has entertained §2 cases brought by individual plaintiffs in Armour, Mixon, Sundquist, and others, e.g. Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988). There is no authority in either this Circuit or the United States Supreme Court that supports Appellees' no §2 private right of action argument. Accordingly, for the reasons stated above Appellants respectfully request that Appellees' private rights of action argument be rejected.

III. THE ROLE OF RACE IN §2 LITIGATION

Appellees' Rule 9 is violative of Section 2. Rule 9, which barred consideration by Ohio legislative district map makers of the role played by race in Ohio politics

or the Mahoning Valley, disregards the express concern §2 was enacted to address. According to the Brennan Center for Justice "Section 2 remains an irreplaceable tool for ensuring map makers discretionary choices do not shut minority votes out of a seat at the table." See, Brief of Amicus Curiae the Brennan Center for Justice, U.S. Supreme Court Case No. 21-1086, 21-1087. John M. Merrill v. Evan Milligan, appeal from the United States District Court for the Northern District of Alabama, (hereinafter "Brennan Center"). "Section 2 requires map makers to factor in the existence and severity of racially polarized voting when designing maps… a map maker may not favor district maps that severely disadvantage minority voters if there are reasonable alternatives that would not have the same discriminatory effect." Id.

It is Appellants' claim that unless consideration of racial demographic data is included in map making methodology, a map maker is unable to comply with the VRA duty to ascertain the role of race in the politics of the locale being mapped. It is axiomatic that in order to assess the impact of a phenomenon it must be identified, isolated and analyzed. Here the phenomenon, the role of race, was intentionally ignored as an official policy of the State. Appellants requested a declaration from the district court concerning this issue and were disregarded and told Appellants had no rights under the VRA the State was obliged to respect because there numbers were insufficient.

The Brennan Center Allen amicus brief contradicts Appellees and the district court's position as follows:

> Although Section 2 constrains a mapmaker's choices, it is, by careful design, a narrow intervention. The Court's Gingles framework limits the application of Section 2 to situations in which a jurisdiction's purportedly race-neutral redistricting rules, or a mapmaker's discretionary choices in applying those rules, take advantage of racially polarized voting and legacy of purposeful discrimination to produce districts that make it impossible for politically cohesive minority voters to participate equally in the electoral process and to elect candidates of their choice. Thornburg v. Gingles, 478 U.S. :10, 47 (1986); see also Bartlett v. Strickland, 556 U.S., 1, 18-19 (2009) (Kennedy, J). By contrast, where a mapmaker's choices are not the cause of minority voters' political ineffectiveness, Section 2 offers no recourse.
>
> Mapmakers can violate Section 2 in one of two ways: (1) by dividing a sizeable and politically-cohesive group of minority voters into districts dominated by a hostile majority that will not engage in coalition building across racial lines; or (2) by concentrating minority voters into a small number of districts in which they form a supermajority, thereby depriving that group of any reasonable opportunity for electoral success in neighboring districts. See, Voinovich v. Quilter, 507 U.S. 146, 153 (1993). Compare e.g., Baldus v. Members of Wis. Gov. Accountability Bd., 849 F. Supp. 2d 840, 854-57 (E.D. Wis. 2012) (finding liability under Section 2 where Milwaukee's Latino population was divided into two legislative districts, effectively diluting its voting power), with Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 980, 1052 (D.S.D. 2004) (finding liability under Section 2 where South Dakota's Native American population was packed into a single, majority minority district).
>
> Both kinds of violations require a showing of a racially polarized voting, which exists only when white and minority voters cast ballots along racial lines with such regularity that race plays an outsized and usually determinative role in electoral politics. See, H.R. Rep. No. 109-478, at :14 (2006) ("Racially polarized voting occurs when voting blocs within the minority and white communities cast ballots along racial lines and is the clearest and strongest evidence the Committee has

> before it of the continued resistance [sic] within covered jurisdictions to fully ac…

The Reply brief fails to recognize the Appellants not only challenge Appellees' District 6 map, they also challenge Appellees methodology which failed to comply with the standard of care required by the VRA concerning consideration of the role of race in the politics of the jurisdiction.

IV. GINGLES FACTORS

Appellees have also argued that the district court properly dismissed Appellants' §2 claim because Appellants failed to satisfy the preconditions set forth in Gingles. Appellees are wrong again. Gingles is factually distinguishable from this case.

Gingles arose in the context of a challenge to the use of a multimember redistricting plan in a jurisdiction with a majority vote and run off requirement. Unlike this case, the Gingles complaint alleged that the use of a multimember districting scheme diluted the Plaintiffs ability to elect a representative of choice. Allen arose in a similar context. Appellants here do not challenge the inability to elect. Furthermore, Ohio has no majority vote requirement.

The Senate Report on Section 2 states:" §2 applies to "any phase" of the electoral process, not just elections. Section 2 expressly provides it is applicable to either nomination or election claims. Appellees have cited no authority for the argument that the Gingles preconditions apply to all manner of §2 cases. Instead,

Appellees argue a nomination claim is nothing more than an influence claim. That argument is fallacious because an intensely local appraisal of indigenous political reality in the Mahoning Valley and primary elections in legislative contests would demonstrate that the primary election is usually the dispositive contest. Hence, Appellants are not merely trying to influence the outcome of an election as Appellees contend, they desire to control it.

While Appellants produced evidence to demonstrate the ability to satisfy the Gingles numerously precondition in a primary election, the focus on this precondition is a red herring for the following reason. In this case Appellants requested a declaration that Appellees' statewide policy of ignoring all racial demographic data is a violation of Appellees duty under §2, especially where as here evidence of historically racial bloc voting, racially polarized voting and racial discrimination in voting was brought to the attention of defendants at the outset of the process by Reverend Simon and the Armour three- judge district court opinion. Black voters statewide were effected by Appellees' failure to adhere to Section 2. Rule 9 infected the entire process, not just the Mahoning Valley . Accordingly reliance on the Gingles preconditions as a requirement precedent to relief for Blacks statewide is illogical at best and unfortunately racially sinister.

V. CONSTITUTIONAL CLAIMS

Appellees have alleged that Appellants' Constitutional claims must fail because of a lack of proof concerning intent. It is beyond question that the decision of Appellees to ignore racial demographic data and its impact on the map challenged by Appellants was intentional. The statements of Appellees outlined in the Appellants' opening brief make clear that the legislative leadership in Ohio gave specific instructions to Ohio mapmakers to ignore all racial data, including the location of Black voters. The question posed by Appellants is not only whether this purposeful practice of ignoring racial discrimination violated §2 but whether it violates the Constitution.

The legislative history of §2 states in 1965 there simply was no need for Congress to choose between those two aspects of Section 2. It was possible in 1965 to regard Section 2 both as a restatement of the Fifteenth Amendment, and also as reaching discrimination whether or not intent could be established. The reason is that there was no general understanding in 1965 among scholars, practitioners, or the lower courts that the Fourteenth and Fifteen Amendments, themselves, always required proof of discriminatory intent to establish a violation.

Depending do the circumstances and the evidence of the particular case alleging a violation of those Amendments, the Supreme Court focused its analysis

sometimes on a discriminatory purposes sometimes discriminatory results and sometimes on both.[1]

Appellants' Constitutional claims are based entirely upon the explicit state policy of ignoring racial demographics not withstanding having received from Appellants evidence of racial bloc voting and polarization in the challenged jurisdiction, as well as throughout Ohio.

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

[1] Prior to the passage of the Act, the Supreme Court had indicated that a finding on unconstitutional vote dilution could rest upon proof of either purpose or discriminatory results. Fortean v. Dorsey, 379 U.S. 433 (1965), and that position was reaffirmed the following year. Burns v. Richardson, 384 U.S. 73 (1966) (See discussion of these eases at PP. 46-47 infra.) in Palmer v. Thompson, 403 U.S. 219 (1971), the Court held that proof of discriminatory Intent was not determinative of whether there was a violation of Equal Protection and that the relevant focus was the practice's actual impact. The Palmer opinion also cited the 1960 Fifteenth Amendment case, Gomillion v. Lightfoot, 364 U.S. 339 and other earlier decisions and rejected the contention that they were precedent for reading an intent test in the Constitution. "[T]he focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." 403 U.S. at 225. in this same period, the Court had similarly rejected the relevance of intent is comparable challenges to official action under the First Amendment. United States v. O'Brien. 391 U.S. 367 (1968).

E.g., Wright v. Rockefeller, 376 U.S. 52 (1964). There plaintiffs had only alleged a discriminatory purpose in attacking a reapportionment. Based on the sole issue before it, the Court ruled against the plaintiffs, but in the opinion did not suggest that only purposeful discrimination was constitutionally cognizable. in Palmer, supra; Fortson, supra.

See generally, J. Ely, "Legislative and Administrative Motivation in Constitutional Law. ' 79 Yale L.J. (1970). (In Ely's view, the Supreme Court's confusion about the possible role of the legislative motive in the previous few terms had reached "disaster proportions.") P. Brest. "Palmer v. Thompson, An approach to the Problem of unconstitutional Legislative Motive." 1971 Sup. Ct. Rev. 95. This state of the law was reflected in the Supreme Court's analysis of the Voting Rights Act, itself, in 1966. South Carolina v. Katzenbach discussed the power of Congress to reach beyond the direct prohibitions of the Constitution. The Court only discussed this Power in the context of upholding the literacy test suspension despite its earlier derision in Lassiter v. Northampton, and did not feel compelled to do so in upholding the Constitutionality of Section 5 preclearance. Yet since Section 5 undisputably reaches changes in the law which may only have a discriminatory effect. reference to Congress' enforcement power to go beyond the Amendments themselves would seem to have been necessary if there had been a clearly understood intent requirement for the Fifteenth Amendment in 1965.

377 U.S. 533, 662 (1964)

Id. at 555, n. 29

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, bringing 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).

VII. 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. In the alternative Appellants respectfully request that the Court certify this appeal to the United States Supreme Court under 28 U.S.C. Section 1254(2) in light of the conflicting opinion in Arkansas.

Respectfully submitted,

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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 4966 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, March 14, 2024, upon counsel of record.

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