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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

GREATER BIRMINGHAM MINISTRIES, *et al.*, Plaintiffs, v. STATE OF ALABAMA, *et al.*, Defendants.	Case No. 2:15-cv-2193 (LSC) **STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending lawsuit. This matter implicates the interpretation and application of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 ("Section 2"), a statute over which Congress accorded the Attorney General broad enforcement authority. *See* 52 U.S.C. § 10308(d). The United States has a substantial interest in ensuring Section 2's proper interpretation and uniform enforcement around the country. Accordingly, the United States submits this Statement of Interest for the limited purpose of articulating the appropriate legal standard for evaluating whether there is a Section 2 violation based on a discriminatory result. As discussed below, the legal standard advanced by the Alabama Secretary of State is incorrect. The statute and well-established

precedent provide that a standard, practice, or procedure related to voting results in an unlawful denial or abridgement of the right to vote on account of race when it interacts with social and historical conditions linked to race in a manner that results in a discriminatory inequality in the electoral opportunities enjoyed by minority and nonminority voters. Beyond the articulation of the appropriate legal standard under Section 2, the United States takes no position on any other issue pending before this Court.

I. BACKGROUND

On December 2, 2015, Plaintiffs sued the State of Alabama and state officials alleging, among other claims, that the voter identification requirements in Alabama House Bill 19 (HB 19) (2011) violate Section 2. Compl. ¶¶ 36-120 (ECF No. 1); Am. Compl. ¶¶ 57-153 (ECF No. 43). Among other relief, Plaintiffs seek a declaration that HB 19 violates Section 2 and an injunction exempting particular voters from HB 19's requirements. Am. Compl. ¶¶ 191-197. They argue that absent relief, HB 19 will deny the right of eligible African-American and Latino electors to vote on account of race or membership in a language minority group. Am. Compl. ¶ 184.

On January 8, 2016, Plaintiffs moved for a preliminary injunction. Mot. for Prelim. Inj. (ECF No. 5). This Court denied Plaintiffs' motion in a written opinion and order on February 17. Opinion (ECF No. 22); Order (ECF No. 23). Plaintiffs

then filed an amended complaint, Am. Compl. (ECF No. 43), and in lieu of an answer, Defendants moved to dismiss for failure to state a claim. Ala. Mot. to Dismiss (ECF No. 47); SOS Mot. to Dismiss (ECF No. 48).

II. SECTION 2 OF THE VOTING RIGHTS ACT

A. Section 2 Applies to Voter Identification Requirements

Section 2 of the Voting Rights Act prohibits any state or political subdivision from imposing or applying a "voting qualification," "prerequisite to voting," or "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 52 U.S.C. § 10301(a). Section 14(c)(1) of the Act defines the terms "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. § 10310(c)(1).

As is plain from the statute's text, "Section 2 prohibits all forms of voting discrimination," including practices that impair the ability of minority voters to cast a ballot and have it counted on an equal basis with other voters. *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986); *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1196-98 (11th Cir. 1999); *League of Women Voters of N.C. v. North*

Carolina, 769 F.3d 224, 239 (4th Cir. 2014). Voter identification requirements are a "prerequisite to voting" and, more generally, are a "standard, practice, or procedure" with respect to voting because they determine whether a ballot will be "included in the appropriate totals of votes cast." 52 U.S.C. §§ 10301(a), 10310(c)(1). As a result, voter identification laws must comply with Section 2. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 405-07 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013); *Veasey v. Perry*, 71 F. Supp. 3d 627, 694-703 (S.D. Tex. 2014), *aff'd in part and vacated in part*, 796 F.3d 487 (5th Cir. 2015), *vacated for reh'g en banc*, 815 F.3d 958 (5th Cir. 2016).

B. A Section 2 Results Claim Entails a Two-Step Inquiry, Assessed Based on the Totality of Circumstances

A violation of Section 2 can be established by proof of "discriminatory results alone." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *Burton*, 178 F.3d at 1196. Section 2(b) provides that a violation:

> 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 [protected class] 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); *see also Gingles*, 478 U.S. at 44. Section 2 requires an intensely local and practical assessment of the "totality of circumstances," 52 U.S.C. § 10301(b), in order to determine whether the challenged voting practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [nonminority] voters" in the jurisdiction to participate in the political process and elect their preferred representatives. *Gingles*, 478 U.S. at 47; *see also Chisom*, 501 U.S. at 403 (noting that the Voting Rights Act must "be interpreted in a manner that provides the broadest possible scope in combating racial discrimination" (internal quotation marks and citation omitted)).

Courts conduct a two-step inquiry to determine whether a challenged practice results in denial or abridgement of the right to vote under Section 2. First, the court assesses whether the practice bears more heavily on minority citizens than nonminority citizens. This first step incorporates both the likelihood that minority voters are disproportionately affected under the practice and their relative ability to overcome material burdens that the practice imposes. *See*, *e.g.*, *League of Women Voters*, 769 F.3d at 240, 245; *see also Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 555-56 (6th Cir. 2014), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Gonzalez*, 677 F.3d at 406; *Veasey*, 71 F. Supp. 3d at 694; *Miss. State Chapter, Operation PUSH v. Allain*, 674

F. Supp. 1245, 1252-56 (N.D. Miss. 1987), *aff'd sub nom. Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400, 413 (5th Cir. 1991).

Second, if a disparity is established, the court must determine whether it is "caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class." *League of Women Voters*, 769 F.3d at 240 (internal quotation marks and citation omitted). This second step requires the court to engage in an "'intensely local appraisal of the design and impact of' electoral administration" in the jurisdiction at issue to determine whether the challenged law works in concert with conditions tied to race discrimination to produce a discriminatory result. *Id.* at 240-41 (quoting *Gingles*, 478 U.S. at 78); *see also Husted*, 768 F.3d at 556-57; *Gonzalez*, 677 F.3d at 407; *Operation Push*, 932 F.2d at 405; *Veasey*, 71 F. Supp. 3d at 694-95.

The causal question is not whether the challenged practice standing alone causes the disproportionate impact on minority voters, *see* SOS Mot. to Dismiss 43-45; it is whether the practice "interacts with social and historical conditions" linked to racial discrimination to produce an "inequality in the opportunities enjoyed by [minority] and [nonminority] voters[,]" *Gingles*, 478 U.S. at 47; *see also Johnson v. Governor of Fla.*, 405 F.3d 1214, 1230 n.31 (11th Cir. 2005) (en banc) (noting that the manner in which "electoral practices interact with social or historical conditions," including "racial biases in society," may establish the

required causal link (citing *Gingles*, 478 U.S. at 47)); *Askew v. City of Rome*, 127 F.3d 1355, 1385-86 (11th Cir. 1997); *Gonzalez*, 677 F.3d at 406.[1] In other words, Section 2 requires courts to examine whether a jurisdiction's decision to impose a particular voting practice amplifies current or lingering effects of race discrimination in the jurisdiction. *See Gingles*, 478 U.S. at 44 n.9 (explaining that Section 2 corrects "an active history of discrimination," deals with the "accumulation of discrimination[,]" and prohibits practices that "perpetuate the effects of past purposeful discrimination").[2]

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[1] Both parties have cited *Nipper v. Smith*, 39 F.3d 1494, 1514-15, 1519 (11th Cir. 1994) (en banc), for its discussion of causality. *See* SOS Mot. to Dismiss 43; Pls.' Resp. to SOS 51-52 (ECF No. 57). Only one of the other seven participating judges joined the relevant portion of Chief Judge Tjoflat's opinion, and so the lead opinion does not establish the law of the Circuit on this point. *See Nipper*, 39 F.3d at 1547 (Edmondson, J., concurring) (declining to join Part II of the lead opinion); *id.* (Hatchett, J., dissenting); *see also, e.g.*, *Johnson v. Hamrick*, 196 F.3d 1216, 1220 (11th Cir. 1999) (recognizing the limited precedential value of the lead opinion in *Nipper*).

[2] Thus, properly applied, this two-step framework does not risk "sweeping away almost all registration and voting rules." SOS Mot. to Dismiss 51. *But see Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). Nor does application of the Section 2 discriminatory results standard raise constitutional concerns. *See* SOS Mot. to Dismiss 50-51. Courts have "unanimously affirmed" the constitutionality of the Section 2 results test and nationwide application of that test to facially neutral election laws. *Bush v. Vera*, 517 U.S. 952, 991 (1996) (O'Connor, J., concurring); *see also, e.g.*, *Jordan v. Winter*, 604 F. Supp. 807, 811 (N.D. Miss.) (three-judge court), *aff'd sub nom. Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1556-63 (11th Cir. 1984); *United States v. Blaine Cnty.*, 363 F.3d 897, 903-09 (9th Cir. 2004); *Jones v. City of Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984); *Major v. Treen*, 574 F. Supp. 325, 343-49 (E.D. La. 1983) (three-judge court); *see also Husted*, 768 F.3d at 553 ("Regarding Defendants' federalism arguments, we find Congress's statement in Section 2 that it applies to any discriminatory 'standard, practice, or procedure' provides a sufficiently clear statement of its intention to change the federal-state balance to encompass a 'standard, practice, or procedure' . . . if it produces discriminatory results in a way prohibited by Section 2."). The Secretary suggests that this Court should question Section 2's application to laws like HB 19 based on the "constitutional avoidance" discussions of cases involving felony

Under both elements of this two-part framework, courts must assess the particular challenged practice—not merely the type of law generally at issue—and must consider the "totality of circumstances" under which the law operates. *League of Women Voters*, 769 F.3d at 240; *see also Burton*, 178 F.3d at 1198; *Gonzalez*, 677 F.3d at 405-06. This inquiry is guided in part by nine "'typical factors'" set forth in Section 2's legislative history, generally known as the Senate Factors, although "'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *Burton*, 178 F.3d at 1196-97 n.20, 1198 (quoting *Gingles*, 478 U.S. at 36, 45); *see also LULAC v. Perry*, 548 U.S. 399, 426 (2006); *League of Women Voters*, 769 F.3d at 240; *Husted*, 768 F.3d at 554; *Gonzalez*, 677 F.3d at 405-06.[3] These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

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disenfranchisement, SOS Mot. to Dismiss 49-50, but felony disenfranchisement provisions have received unique treatment under Section 2 of the Voting Rights Act, in light of the specific mention of disenfranchisement based on crime in the text of Section 2 of the Fourteenth Amendment. *See Johnson*, 405 F.3d 1214; *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (en banc); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc). Such cases have not raised doubts over applying Section 2 of the Voting Rights Act to other prerequisites to voting.

[3] These factors, which apply to all Section 2 claims, differ from the three *Gingles* preconditions, which apply only to Section 2 vote dilution claims. *See, e.g.*, *Burton*, 178 F.3d at 1197-99.

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

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

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

7. the extent to which members of the minority group have been elected to public office in the jurisdiction[;]

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]

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

Gingles, 478 U.S. at 36-37 (citing S. Rep. No. 97-417, at 28-29 (1982)). The Senate Factors are "neither comprehensive nor exclusive," and "other factors may also be relevant and may be considered." *Id*. at 45 (quoting S. Rep. No. 97-417, at 29). The Senate Factors are designed to consider the relevant jurisdiction's conduct and, as to several factors, the conduct of other governmental entities and private individuals. *See, e.g., id.* at 80; *Gomez v. City of Watsonville*, 863 F.2d 1407, 1417-19 (9th Cir. 1988); *cf. White v. Regester*, 412 U.S. 755, 765-70 (1973)

(addressing evidence relating to the target jurisdiction, other government entities, and private individuals, in the context of a constitutional vote dilution claim). Examining the Senate Factors helps courts to determine whether the challenged practice, in light of current social and political conditions in the jurisdiction, causes a denial or abridgement of the right to vote on account of race.

C. That a Challenged Law or Practice Provides Facially Neutral "Equal Treatment" Does Not Defeat a Section 2 Results Claim

Here, the Secretary of State suggests that Section 2's discriminatory results test is a mere "equal treatment requirement." SOS Mot. to Dismiss 42; *id.* at 46. That is incorrect. In response to the Supreme Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which had held that Section 2's statutory text prohibited only intentionally discriminatory practices, Congress amended Section 2 to make clear that a statutory violation did not require a showing of discriminatory intent and to restore the evidentiary standard developed in earlier cases. *See Gingles*, 478 U.S. at 43-45; S. Rep. No. 97-417, at 15, 27-28, 30. As the Supreme Court has explained, the "essence" of the discriminatory results test is that a challenged law or practice, even when facially neutral, "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [nonminority] voters" to participate in the political process and to elect their preferred representatives. *Gingles*, 478 U.S. at 47; *see also id.* at 71 n.34 ("[I]t is patently [clear] that Congress has used the words 'on account of race

or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." (quoting S. Rep. No. 97-417, at 27-28 n.109) (alteration in original)). Accordingly, Section 2 "invalidates facially neutral practices with discriminatory effects even in the absence of purposeful discrimination." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 368 n.15 (2000) (Souter, J., concurring in part and dissenting in part); *see also League of Women Voters*, 769 F.3d at 238 & n.4; S. Rep. No. 97-417, at 29 n.117.

The Secretary of State relies primarily on *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014), but the *Frank* panel's anomalous and incorrect "equal-treatment" standard, *see id.* at 754, would effectively restore the discriminatory intent requirement from which Congress decisively departed. Indeed, the standard advocated by the Secretary of State would impose an even higher burden than was required to prove intentional discrimination under *Bolden*. *Frank*'s "equal-treatment" test focuses solely on the form of the challenged law or practice and whether decisionmakers take different actions with respect to individuals based on their race. Such proof is only one means of establishing intentional discrimination. Litigants may also prove intentional discrimination by showing that decisionmakers acted uniformly but with the intent to disadvantage minority

citizens.[4] That is, the Secretary's suggested "equal treatment" standard is even *more* onerous than the intent requirement Congress rejected as overly restrictive and therefore cannot be the appropriate measure of a Section 2 results violation.

D. Section 2 Does Not Require Plaintiffs to Prove that a Practice Results in Outright Disenfranchisement or Depressed Minority Turnout

Nor is there any need under Section 2 for plaintiffs to establish that the challenged practice makes it impossible for minority voters to participate in the political process or that it depresses minority turnout. *See* SOS Mot. to Dismiss 44, 46. Section 2 prohibits "abridgement" as well as the outright "denial" of the right to vote. 52 U.S.C. § 10301(a); *see also Williams v. Taylor*, 529 U.S. 362, 404-05 (2000) (describing the "cardinal principle of statutory construction" to "give independent meaning" to distinct statutory terms). Section 2 is clear that a violation is established where voters have "less opportunity" to participate relative to other voters, not "no" opportunity. 52 U.S.C. § 10301(b); *see also Operation PUSH*, 932 F.2d at 409; *Black's Law Dictionary* (9th ed. 2009) (defining "abridge" as "reduce or diminish"); S. Rep. 97-417, at 30 (prohibiting practices that "result in the denial of equal access to any phase of the electoral process"); *Chisom*, 501 U.S.

[4] Such a claim requires neither facial discrimination nor proof of invidious racial animus (*i.e.*, ill feelings toward minorities). *See, e.g.*, *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 & n.1 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part); *see also LULAC v. Perry*, 548 U.S. at 440 (noting that taking away political opportunity just as a minority group is about to exercise it "bears the mark of intentional discrimination that could give rise to an equal protection violation").

at 408 (Scalia, J., dissenting) (explaining that Section 2 would be violated if "a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites").[5] The possibility that minority voters could undertake efforts to overcome material, state-imposed burdens does not immunize a challenged law from Section 2 scrutiny. *See, e.g.*, *United States v. Dallas Cnty. Comm'n*, 739 F.2d 1529, 1536 (11th Cir. 1984); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1568-69 (11th Cir. 1984); *Teague v. Attala Cnty.*, 92 F.3d 283, 294-95 (5th Cir. 1996). For this reason and others—such as the type of election, the issues involved, and the competitiveness of the election—aggregate minority turnout could increase even while the pool of minority voters has more difficulty and *less opportunity* to cast a regular ballot *relative to other voters* because of impediments posed by a challenged practice.[6]

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[5] *See also League of Women Voters*, 769 F.3d at 243, 244-47 (discussing the application of Section 2 to the repeal of same day registration and out-of-precinct voting provisions); *Husted*, 768 F.3d at 552-53 (early in-person voting); *Operation Push*, 932 F.2d at 402 (dual registration requirement and prohibition on satellite registration); *Poor Bear v. Cnty. of Jackson*, No. 5:14-cv-5059, 2015 WL 1969760, at *7 (D.S.D. May 1, 2015) (in-person absentee voting); *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-95, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (polling place closures); *Brown v. Dean*, 555 F. Supp. 502, 505-06 (D.R.I. 1982) (polling place location). In typical vote dilution cases, minority voters similarly experience no outright disenfranchisement; the votes they cast simply provide an inequitable opportunity to elect their candidates of choice. *See Gingles*, 478 U.S. at 42-48 (holding that minority plaintiffs who cast ballots but could not equitably elect candidates of choice had proven a Section 2 violation).

[6] The Fifth Circuit's decision in *LULAC v. Clements*, 999 F.2d 831, 867 (5th Cir. 1993) (en banc), required "proof that participation in the political process is in fact depressed among

E. Section 2 Results Claims are Intensely Fact-Dependent

Finally, a finding of liability in any given Section 2 case does not determine whether imposition of the same type of law elsewhere violates Section 2. *See League of Women Voters*, 769 F.3d at 243-44; *Husted*, 768 F.3d at 559; *cf. White v. Regester*, 412 U.S. at 765-70 (striking down use of multi-member districts in two Texas counties despite allowing such districts in Indiana two years earlier in *Whitcomb v. Chavis*, 403 U.S. 124 (1971)). Instead, Section 2 requires an intensely local inquiry "peculiarly dependent upon the facts of each case" and the jurisdiction's "past and present reality." *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted).[7] Only after conducting this "searching practical evaluation," *Gingles*, 478 U.S. at 47, 79, can this Court determine whether the design and impact of Alabama House Bill 19 interacts with current and lingering effects of race discrimination in Alabama to deny or abridge the right to vote on account of race within the meaning of Section 2.

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minority citizens" only to establish one Senate Factor to be considered with other factors in the totality of the circumstances —Factor Five—and not as a prerequisite to Section 2 liability. SOS Reply Br. 20 (ECF No. 62).

[7] For this reason, courts reviewing Section 2 claims have "repeatedly emphasized the necessity for very detailed findings of facts," *Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5*, 804 F.2d 469, 472, 477-78 (8th Cir. 1986), and Section 2 claims are generally ill-suited for resolution at the motion to dismiss stage, *see, e.g.*, *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (per curiam) (reversing the grant of a motion to dismiss); *Gonzalez*, 677 F.3d 383 (resolving a Section 2 claim upon summary judgment); *Frank*, 768 F.3d 744 (full trial on the merits); *Veasey*, 71 F. Supp. 3d 627 (full trial on the merits).

III. CONCLUSION

For the preceding reasons, in evaluating Plaintiffs' Section 2 claims, this Court should apply the established legal standard for a discriminatory results claim under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

Date: July 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to counsel of record.

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