

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DISTRICT**

THE HONORABLE REVEREND	:	CASE NO. 4:22-cv-612
KENNETH L. SIMON, ET AL	:	
	:	RELATED CASE NOS. 2:21-CV-2267
PLAINTIFFS,	:	AND 4:88-CV-1104
	:	
VS.	:	CIRCUIT JUDGE JOAN L. LARSEN
	:	JUDGE SOLOMON OLIVER
GOVERNOR MIKE DEWINE, ET AL.	:	JUDGE JOHN R. ADAMS
	:	
DEFENDANTS.	:	
	:	
	:	
	:	
	:	

**SIMON PARTIES' REPLY TO DEFENDANTS' MEMORANDUM IN
OPPOSITION TO MOTION OF THE SIMON PARTIES TO ALTER OR AMEND
JULY 1, 2024, ORDER, ECF #54**

Defendants' Opposition to the Simon Parties' Motion to Alter or Amend this Honorable Court's July 1, 2024 Order continues to distort the basis for Plaintiffs' claim and the clear language of the United States Supreme Court Opinion in Thornburg v. Gingles. Defendants' Opposition states "Plaintiffs have repeatedly styled their §2 claim as a "nomination" claim to avoid the well-established Gingles preconditions and avail themselves of Armour." ECF Docket No. 57 PAGEID 1858.

The exact opposite is true. Plaintiffs want the Court to follow Gingles. Gingles states in connection with 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.

Gingles states that the criteria announced in that case were not to be applied universally. In point of fact, Gingles footnote 12 states:

The claim we address in this opinion is one in which the plaintiffs 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.

Contrary to the Defendants' argument, Plaintiffs have not cited Armour, as stated by Defendants, as support for the efficacy of an influence claim. Plaintiffs cite Armour for its record concerning the historic role of race in Mahoning Valley politics. Congress and Gingles state, in assessing a §2 claim "courts and implicitly legislative bodies...must consider the totality of circumstances in connection with whether a violation of §2 has occurred. Armour has been cited by Plaintiffs for its historical record in assessing the "totality of circumstances: in the Mahoning Valley, not as authority to overcome the Gingles preconditions.

The failure of either this Honorable Court's July 1, 2024 Opinion or the Reply to cite any authority to support the assertion that Congress' insertion of the word "nomination" into §2 has no significance is why the July 1, 2024 Opinion should be altered.

Section 2 states:

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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 52 U.S.C. § 10301.

(Emphasis added.)

Neither the July 1, 2024 Opinion nor Defendants' Reply cite any authority to traverse the plain text of §2. Section 2 which says "nomination" or "election."

The district court's treatment of Plaintiffs' §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 *noscitur 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 “the ability to nominate”. Accordingly, the Gingles pre-requisite 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 nor Gingles or any other authority support that conclusion.

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 standards to Plaintiffs’ 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 §2 because according to the district court the same standard applies whether it’s a nomination or an election. However, there is no authority in either Gingles, which happens in footnote 12 to say the exact opposite, or any other judicial authority to support the dangerous proposition adopted by the district court. The Reply does not cite any authority to the contrary. Accordingly, Plaintiff respectfully requests that the July 1, 2024 Opinion be vacated to the extent it contains language concerning the legal significance of the term “nomination” in §2, given Congress’ inclusion of the word and the absence of any authority to rebut the argument that Congress intended the word to have significance or it would not have put it into the statute.

/s/ Percy Squire
Percy Squire (0022010)
Percy Squire Co., LLC
341 S. Third Street, Suite 10
Columbus, Ohio 43215
(614) 224-6528, Telephone
(614) 224-6529, Facsimile
psquire@sp-lawfirm.com
Attorney for Simon Party Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by operation of the United States District Court, Northern District of Ohio electronic filing system, on July 24, 2024.

s/Percy Squire, Esq.
Percy Squire (0022010)
Attorney for Simon Party-Plaintiffs