LESS THAN GOLDEN: *OHIO DEMOCRATIC PARTY V. HUSTED*, THE ELIMINATION OF GOLDEN WEEK, AND THE TROUBLE WITH DE NOVO REVIEW OF FACTS

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I. INTRODUCTION

Vote denial cases are fraught with complex fact patterns, expert witnesses, and often-lengthy litigation.[1] District courts frequently undertake lengthy trials and fact finding to determine whether or not voting laws disenfranchise vulnerable parties.[2] Operating as fact finder is a key component of the district court's judicial function. In traditional vote dilution and vote denial claims, the district court's appellate counterparts review those cases for clearly erroneous decisions.[3] If a "reviewing court oversteps the bounds of its duty . . . it undertakes to duplicate the role of the lower court." [4]

In *Ohio Democratic Party v. Husted*, the Sixth Circuit overturned a district court's finding that the elimination of "Golden Week" laws in Ohio disparately impacted[5] minority populations, thus violating section 2 of the Voting Rights Act and also the Equal Protection Clause.[6] In so finding, the Sixth Circuit set aside the fact finding of the district court and substituted its own interpretation of the evidence presented at trial.[7] By undertaking de novo review[8], the Sixth Circuit acted contrary to its own precedent as well as the precedent of its sister circuits and, in its

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1. *See* Ohio Org. Collaborative v. Husted, 189 F. Supp. 3d 708 (S.D. Ohio 2016) (a ten-day bench trial with over twenty witnesses, eight of whom were expert witnesses)*;* Ohio State Conf. of the NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014) (vote denial case that hinged on statistical analysis of voting conditions)*;* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (reviewing a nine-day bench trial with "dozens of expert and lay witnesses").

2. *Ohio Org. Collaborative*, 189 F. Supp. 3d 708 (S.D. Ohio 2016) (ten-day bench trial).

3. *See* DANIEL P. TOKAJI, *Applying Section 2 to the New Vote Denial*, 50 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 439, 446 (2015)

4. *See* Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985).

5. "Disparate impact" is the legal doctrine that recognizes when a protected class of people is adversely affected by facially neutral practices or policies. *Disparate Impact*, BLACK'S LAW DICTIONARY (10th Ed. 2014).

6. *See* Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016).

7. *See id.*

8. De novo review refers to an appellate court reviewing—without deference—the facts available to the district court to determine if questions of law were answered correctly. *Appeal*, BLACK'S LAW DICTIONARY (10th Ed. 2014).

wake, denied the equal protection of the laws to Ohio voters.[9]

Part II of this casenote will highlight the background of this issue; analyzing the legislation at issue, the standard tests applied to voter denial case, and the standards of review conducted in appellate courts. Part III will analyze *Ohio Democratic Party v. Husted* in light of Sixth Circuit precedent, as well as the precedent of its sister circuits. Part IV argues that the court erred in *Ohio Democratic Party v. Husted*, how this case bears similarities to historical issue of vote denial, and why the Supreme Court should review this issue to ensure equitable outcomes.

II. BACKGROUND

Ohio Democratic Party v. Husted is prefaced by decades of legislation and jurisprudence. We will first examine the Ohio Senate Bill at issue, followed by the framework of the district court's decision. The district court's decision highlights the two-part framework under which vote denial claims are reviewed: (1) the *Anderson-Burdick* framework used for Equal Protection Clause claims, and (2) the two-part "results" test used in section 2 Voting Rights Act claims.

Second, this section will examine two types of appellate review: (1) clear error, and (2) de novo, and when these two standards of review are applied in practice. This leads into an analysis of the standard of review utilized by the Sixth Circuit in its analysis of the district court's findings.

A. Pertinent Legislation

Initially set to take effect June 1, 2014, Senate Bill 238 (S.B. 238) was passed to amend sections 3509.01 and 3511.10 of the Ohio Revised Code.[10] The legislature modified section 3509.01(B)(2) to read "ballots shall be printed and ready for use on the first day after the close of voter registration before the election."[11] This was a change from "ballots shall be printed and ready to use on the thirty-fifth day before the election."[12] The legislation cut the early voting period at the time from thirty-five days to twenty-nine days. It also eliminated the ability of absentees to register and vote on the same day during the six-day period prior to the

9. *See* Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (review of a vote denial case that hinged on statistical analysis of voting conditions); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (review of a nine-day bench trial with "dozens of expert and lay witnesses"); N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (a vote denial case in which clear-error review was used to overturn a district court).

10. *See* S. Amend. 238, 130th Gen. Assemb. (Ohio 2014).

11. *Id.*

12. *Id.*

end of registration known as "Golden Week."[13]

The legislation was first challenged in *Ohio State Conference of NAACP v. Husted*.[14] The Sixth Circuit initially upheld a preliminary injunction to enjoin enforcement of S.B. 238, but the Supreme Court later stayed that injunction.[15] The decision was eventually vacated for mootness and S.B. 238 was in full effect during the 2014 election.[16] A settlement between the parties ultimately resulted in Ohio adding another Sunday of early in-person voting and additional evening hours.[17] Dissatisfied with the results, the Ohio Democratic Party and several other plaintiffs initiated action against Ohio.[18]

B. Framework of District Court's Decision

The District Court for the Southern District of Ohio undertook a ten-day bench trial to determine whether S.B. 238 violated the Equal Protection Clause and/or section 2 of the Voting Rights Act.[19] Historically litigated in the context of poll taxes and literacy tests, vote denial claims have taken on a new form jurisprudentially.[20] Because of recent voter identification law initiatives in the wake of *Shelby County v. Holder*,[21] vote denial actions have an emerging standard when litigated in lower courts.[22] Vote denial actions are generally commenced to prove the suspect legislation either (1) violates a minority group's fundamental right to vote under the Equal Protection Clause, or (2) burdens a minority group's ability to effectively participate in the political process, per section 2 of the Voting Rights Act.[23] If proven, the court would enjoin enforcement of S.B. 238.

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13. *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 623 (6th Cir. 2016).

14. Ohio State Conf. of the NAACP v. Husted, 769 F.3d 385 (6th Cir. 2014).

15. *See id.*; Ohio State Conf. of the NAACP v. Husted, No. 14-3877, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014).

16. Ohio State Conf. of the NAACP v. Husted, No. 14-404, 2014 U.S. Dist. LEXIS 165327 (S.D. Ohio Nov. 26, 2014)

17. *See Ohio Democratic Party*, 834 F.3d at 625.

18. *See* Ohio Org. Collaborative v. Husted, 189 F. Supp. 3d 708 (S.D. Ohio 2016).

19. *See id.*

20. *See* Tokaji, supra note 3, at 442 (although he does not discuss the standards of review for vote denial claims, his article sheds light onto the emerging standard of analysis courts undertake in reviewing vote denial claims).

21. Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013) (holding unconstitutional section 4(b) of the Voting Rights Act). In so holding, the court ended preclearance under section 5 of the Voting Rights Act. Preclearance prevented historically discriminatory jurisdictions from enacting new voting regulations without first subjecting such regulations to review. *Id.* at 2620. By ending preclearance, these jurisdictions were free to enact legislation without such review. While Ohio was not an affected area, the Sixth Circuit's rulings can inevitably affect areas formerly subject to preclearance.

22. *See* TOKAJI, *supra* note 3, at 455–64; *Holder*, 133 S. Ct. 2612.

23. *See generally* Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014).

1. Equal Protection Clause: The *Anderson-Burdick* Framework

Equal Protection Clause arguments are framed using the *Anderson-Burdick* framework.[24] This three-prong framework forces the court to consider:

> "[First] the character and magnitude of the asserted injury to the right protected by the [Constitution] that the plaintiff seeks to vindicate." Second, it must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule." Finally, it must "determine the legitimacy of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights."[25]

Marked by its flexibility, the *Anderson-Burdick* framework balances the interests of the state and plaintiff.[26] As applied *to Ohio Org. Collaborated v. Husted*, the district court found—via *Anderson-Burdick* framework—that S.B. 238 imposed a moderate disparate and disproportionate burden on African American voters "in two ways: (1) by reducing the overall [Early in-person] voting period, and (2) by eliminating the opportunity for [same-day registration]."[27] While appearing facially neutral, the lack of the former has, historically, disproportionately affected persons of color.[28] The burdens imposed on African Americans outweighed the benefits of preventing voter fraud, reducing costs, reducing administrative burdens, and increasing voter confidence and preventing voter confusion.[29]

2. Section 2 of the Voting Rights Act

Originally passed with the intention of prohibiting intentional discrimination, the Voting Rights Act was amended in 1982 to prohibit a state from "impos[ing]" or "apply[ing]" any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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."[30] Section 2(b) encompasses two claims: (1) vote-dilution claims, and (2) vote-denial

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24. *See* TOKAJI, *supra* note 3, at 469–70.

25. Green Party of Tenn. v. Hargett, 791 F.3d 684, 693 (6th Cir. 2016) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

26. *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 627 (6th Cir. 2016).

27. *See* Ohio Org. Collaborative v. Husted, 189 F. Supp. 3d. 708, 730 (S.D. Ohio 2016).

28. *See* TOKAJI, *supra* note 3, at 458–59.

29. *See Ohio Org. Collaborative*, 189 F.Supp. 3d at 735–59.

30. 52 U.S.C. § 10301(a) (2012).

claims.[31] Vote-denial claims are pertinent to S.B. 238's limitations on early in-person voting, as those claims allege a denial of the ability to "participate in the political process."[32]

While vote denial claims are still a developing area of election law jurisprudence, vote dilution has, historically, been the action through which groups brought claims.[33] *Shelby County v. Holder* changed the typical course of vote dilution and vote denial litigation by holding the coverage formula in section 4(b) (and, thus, the preclearance of section 5) of the Voting Rights Act unconstitutional.[34] With preclearance gone, historically vulnerable communities were once again subjected to unchecked vote denial.[35] Since *Holder*, courts have developed a two-part framework to analyze vote denial claims under section 2 of the Voting Rights Act: the legislation (1) "must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice'"; and (2) the "burden 'must in part be caused by or linked to "social and historical conditions" that have or currently produce discrimination against members of the protected class.'"[36] These two elements should be considered using a "totality of the circumstances" approach.[37] The Fifth and Fourth Circuits adopted this framework, often called the "results" test.[38]

C. Appellate Standards of Review

Standard of review refers to the level and type of deference given to a lower court while that court's decisions are reviewed; appellate review of district court decisions fall under two subheadings: (1) questions of

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31. *See* TOKAJI, *supra* note 3, at 442–45 (defining vote denial as "impediments to voting and the counting of votes;" also defining vote dilution as "practices that diminish a group's political influence, thus implicating the value of representation: a group's members being able to aggregate their votes to elect candidates of their choice.").

32. *See Ohio Org. Collaborative*, 189 F. Supp. 3d at 717.

33. *See id.*

34. *See* Shelby Cty. v. Holder, 133 S. Ct. 2612 (2013). While section 5 was not overturned, finding section 4(b) unconstitutional eliminates the possibility of jurisdictions being subjected to the preclearance for section 5 absent a new coverage formula.

35. Ohio was not subject to preclearance review. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437. Despite that, as this article demonstrates, the effect of removing preclearance review has had an effect on the jurisprudential vote denial claims nationally.

36. *See* Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014) (quoting Thornburg v. Gingles, 478 U.S. 30 (1986)).

37. *See id.*

38. Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014).

fact, and (2) questions of law.[39] Fact patterns like the one in *Ohio Democratic Party v. Husted* often contains analyses of both questions of law and questions of fact. Consequently, sometimes the delineation between the two is muddled, and determinations of fact are analyzed under the lens of de novo review.

1. Clear Error Review

Standards of clear error review dictate that factual findings of a lower court will not be disturbed unless the appellate court has a "definite and firm conviction that a mistake has been committed [by the court]."[40] Rule 52(a) of the Federal Rules of Civil Procedure sets the standard that district court findings are presumptively correct[41], and it has been a point of contention in numerous civil rights related cases.[42] Per Sixth Circuit precedent, when conducting clear error review, the court "may not substitute [their] judgment for that of the district court and 'must uphold the court's account of the evidence if it 'is plausible in light of the record viewed in its entirety.'"[43]

What constitutes a question of fact and triggers clear error review is at tension in some appellate proceedings. It is possible for appellate jurists to re-interpret findings of fact to derive new legal conclusions, and that is what is at issue in *Ohio Democratic Party v. Husted*.[44] This is fundamentally at odds with the controlling Supreme Court's standard of review in Voting Rights Act claims set forth in *Thornburg v. Gingles*.[45] *Gingles* established, "the ultimate finding of vote dilution [is] a question of fact subject to the clearly erroneous standard of 52(a)."[46] Although *Ohio Democratic Party v. Husted* is a case about vote denial rather than vote dilution, the emerging standards in vote denial jurisprudence treat the two similarly.[47] The jurisprudential developments since *Holder*, while not completely settled, have trended towards utilizing the same

39. *See* FED. R. CIV. P. 52(a)(1).

40. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). This definition is noted as the "definitive test in reviewing a district court's findings" in preeminent treatise 9C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (3d. ed. 2004).

41. *See* 9C WRIGHT & MILLER, *supra* note 40, § 2585.

42. *See* Pullman-Standard v. Swint, 456 U.S. 273 (1982) (employment discrimination, upholding district court via Rule 52); Easley v. Cromartie, 532 U.S. 234 (2001) (racial gerrymandering case setting aside three-judge district court decision despite Rule 52).

43. Lee v. Willey, 789 F.3d 673, 680 (6th Cir. 2015) (quoting Pledger v. United States, 236 F.3d 315, 320 (6th Cir. 2000)).

44. Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016) (Stranch, J., dissenting).

45. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

46. *See id.* at 78.

47. *See generally* TOKAJI, *supra* note 3.

standard of review as vote dilution cases. [48]

2. De Novo Review

De novo review is triggered when a finding is labeled a question of law.[49] De novo review undertakes to review a lower court's conclusions of law and no deference is given to these findings.[50] When analyzing a legal issue, courts have "no license to venture freely into other issues of fact."[51] Courts analyze the conclusions and have the ability to affirm decisions or to substitute their own conclusions of law.

The ability to overturn a case under de novo review hinges on a district court's legal conclusions improperly applying governing law. For example, in a preliminary injunction case like *Ohio Democratic Party v. Husted*, "whether [a] movant is likely to succeed on the merits is a question of law and is accordingly reviewed de novo."[52] An appellate court is thus free to come to legal conclusions as if it were the first to review the record.

3. Standard of Review Applied in *Ohio Democratic Party v. Husted*

The majority in *Ohio Democratic Party v. Husted* took issue with the circuit and national precedent to review defined burdens for clear error. Instead the Sixth Circuit found the definition of a "modest" burden a legal conclusion subject to de novo review.[53] The majority determined that the district court's ruling—and all definitions of burden—was a "legal conclusion[] masquerading as [a] factual allegation[]."[54] It was "yet another appeal . . . asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes."[55]

Using this standard, the majority reconsidered the evidence presented during the ten days of trial and reached a different legal conclusion based on the facts of the case.[56] Their review included both the Voting Rights Act claims and the Equal Protection Clause claims.[57] The Sixth

48. *Id.*

49. *See* 1-2 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 2.14 (4th ed. 2010).

50. *Id.*

51. *See id.*

52. Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524, 533 (6th Cir. 2014).

53. *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 628 (6th Cir. 2016).

54. *See id.* at 628 (citing Bright v. Gallia Cty., 753 F.3d 639, 652 (6th Cir. 2014)).

55. *See id.* at 622.

56. *See id.*

57. *See id.*

Circuit concluded that S.B. 238 only minimally burdened African Americans, and the decision of the district court to grant declaratory and injunctive relief, thus enjoining S.B. 238, was vacated, and the judgment was reversed.[58]

In deciding why African Americans were only minimally burdened by the legislation, the Sixth Circuit "appli[ed] [] legal principles to those subsidiary facts in characterizing the burden made out by those facts."[59] Finding that Ohio had a generous voting schedule relative to national standards, the court determined, despite ample evidence to the contrary, that African Americans had more than enough opportunity to participate in the political process.[60] The district court "placed inordinate weight" on statistical evidence that African Americans prefer voting at specific times.[61]

Relying heavily on the Supreme Court's *Anderson-Burdick* analysis in *Crawford v. Marion County Election Board*, the Sixth Circuit found S.B. 238, broadly applied, imposed a minimal burden on voters' rights in general.[62] S.B. 238 did not facially discriminate and, because of Ohio generous early voting opportunities, the district court fundamentally erred in applying the law to the facts.[63]

The dissent took immediate issue with the majority's standard of review, citing that none of the cases cited by the majority "dictates our standard of review here."[64] Instead, the dissent argued they "are limited to reviewing for clear error the district court's finding based on record evidence that S.B. 238[] . . . imposes a modest burden . . . on the right to vote for African Americans."[65] Under this standard, the court should have found that the district court adhered to the proper standard for finding a modest burden and that finding should not be disturbed.[66] Judge Stranch lambasted the majority's selective application of the facts discovered during district court proceedings. The majority's "blithe assertion" that it is easy to vote in Ohio was fundamentally at odds with the district court's review of the factual evidence.[67] Although differing

58. *See id.* at 640.

59. *Ohio Democratic Party*, 834 F.3d at at 628.

60. *See id.* at 628–29.

61. *See id.* at 630.

62. Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (finding voter identification laws were tired to a compelling state interest in preventing voter fraud). The voter identification challenge was brought on Equal Protection Clause grounds and analyzed using the *Anderson-Burdick* framework, but was never officially called by that name.

63. *See generally id.*

64. *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 644 (6th Cir. 2016).

65. *See id.*

66. *See id.*

67. *See id.* at 643.

minds could have interpreted facts differently, that was no basis to overturn the factual findings of the district court.

III. RELATED CASES/DISCUSSION

This section purports to demonstrate the newly created circuit split in treatment of vote denial cases. It begins with cases that adhered to clear error review in such cases, namely: (1) the Sixth Circuit in *Ohio State Conf. of the NAACP v. Husted*, (2) the Fourth Circuit in *N.C. State Conf. of the NAACP v. McCrory*, and (3) the Fifth Circuit in *Veasey v. Abbott*.

Following an analysis of cases that negatively impact *Ohio Democratic Party v. Husted*, this section will analyze the single, subsequent case follows it: the Sixth Circuit's decision in *Northeast Ohio Coalition for the Homeless v. Husted.*

A. Cases That Counter Ohio Democratic Party v. Husted

In the aftermath of *Shelby County v. Holder*, circuits began developing jurisprudence to deal with the influx of vote denial cases.[68] The Sixth, Fourth, and Fifth Circuits treated appeals in vote denial claims the same way they treated appeals in vote dilution claims—until *Ohio Democratic Party v. Husted*.

1. Sixth Circuit

Ohio State Conf. of the NAACP v. Husted (*NAACP v. Husted*), decided in 2014, was the original challenge to Ohio's S.B. 238, alleging much of the same as the petitioners in *Ohio Democratic Party v. Husted*.[69] The crux of the challenge was to enjoin enforcement of S.B. 238 and order the restoration of additional early in-person voting hours otherwise known as Golden Week.[70] The district court granted the NAACP's preliminary injunction[71], subjecting it to review by the Sixth Circuit.

The court noted that a "clear test for Section 2 vote denial claims . . . has yet to emerge," because vote dilution has historically been the legal route used to challenge vote-suppressing legislation.[72] The court noted that several circuits were already treating vote denial claims similar to

68. *See generally* TOKAJI, *supra* note 3.

69. *See generally* Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014); Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016).

70. *See Ohio State Conf. of the NAACP*, 768 F.3d at 531–32.

71. *See* Ohio State Conf. of the NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014).

72. *See Ohio State Conf. of the NAACP*, 768 F.3d at 554.

vote dilution claims, if only in the factors relevant to make a determination of undue hardship. In reviewing the district court's findings, the court found that defendants were "unable to show that the district court clearly erred by crediting [the expert witness's] statistical conclusions."[73] The court analyzed the record and found that the district court was not clearly erroneous, as a matter of fact, in determining that minority voters were disproportionately affected by S.B. 238.[74] This stands in contrast to *Ohio Democratic Party v. Husted*, in which a finding of disproportionate burden was treated as a legal conclusion, not a factual one. Although ultimately dismissed for mootness, this case demonstrates the Sixth Circuit's early leanings toward a clear error standard of review for vote denial claims.[75]

2. Fourth Circuit

N.C. State Conf. of the NAACP v. McCrory (*NAACP v. McCrory*) dealt with a sinister bill from the North Carolina legislature in the wake of *Shelby County v. Holder*.[76] The legislature enacted voter identification laws and, upon receiving voter data, created stringent restrictions on what type of identification could be used at the polls.[77] The district court did not enjoin the practice.[78] In reviewing the evidence examined by the district court, the Fourth Circuit utilized a clear error standard of review.[79] The court analyzed the "ultimate factual question of legislature's discriminatory motivation."[80]

The Fourth Circuit found that the district court "seems to have missed the forest in carefully surveying the trees."[81] By this, the court meant that although the statistical and other expert factual findings were sufficient, the court ignored "critical facts bearing on legislative intent."[82] The bill at issue was facially neutral in what it set out to accomplish; there were no overt discussions of race.[83] Despite its harmless appearance, the Fourth Circuit found the record "replete with evidence . . . in which the North Carolina legislature has attempted to

73. *See id.* at 534.

74. *See generally id.*

75. *See generally id.*

76. *See generally* N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).

77. *See id.* at 216.

78. *See generally* N.C. State Conf. of the NAACP v. McCrory, No. 1:13CV658, 2016 U.S. Dist. LEXIS 55712 (M.D.N.C., Apr. 25, 2016).

79. *See McCrory*, 831 F.3d at 219–220.

80. *Id.* at 220.

81. *Id.* at 214.

82. *Id.*

83. *See* Voter Information Verification Act, 2013 N.C. Sess. Laws 381.

suppress and dilute the voting rights of African Americans."[84] The district court correctly analyzed the discriminatory result of the legislature's actions, but failed to analyze the discriminatory intent behind the act.[85] The Fourth Circuit found that the district court fundamentally and clearly erred in its capacity to create factual conclusions.

The check on a lower court's factual findings demonstrates the role of clear error in appellate review: to determine if a "definite and firm . . . mistake has been committed [by the court]."[86] In this case, that mistake was found in the district court's failure to adequately analyze the evidence presented.

3. Fifth Circuit

Veasey v. Abbott involved a photo identification requirement in Texas. Senate Bill 14 required all individuals to present a valid form of identification in order to vote, with that valid form of identification having very narrow and specific requirements.[87] Factual findings in the district court determined that 4.5% of Texas's eligible voting population, 608,470 citizens, lacked proper ID to vote following the enactment of Senate Bill 14, and 534,512 of those voters did not qualify for a disability exemption.[88] The bill was challenged for having a discriminatory effect and a discriminatory purpose, and claims were brought under the Fourteenth and Fifteenth Amendment, as well as section 2 of the Voting Rights Act.[89] The district court found that S.B. 14 did have a discriminatory effect and discriminatory purpose, and also found the bill constituted a poll tax and unconstitutionally burdened the right to vote.[90]

Drawing from the Fourth and Sixth Circuits, the Fifth Circuit analyzed the discriminatory effect claims in light of the two-part framework that utilizes the text of section 2 of the Voting Rights Act as well as the Supreme Court's guidance from *Gingles*. The court adopted the framework, and in doing so "evaluate[d] the district court's discriminatory effect finding for clear error."[91] The court exhaustively analyzed the district court's findings in light of the two-part framework,

84. *See N.C. State Conf. of the NAACP*, 831 F.3d at 223.

85. *See generally id.*

86. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

87. *See* Veasey v. Abbott, 830 F.3d 216, 225 (5th Cir. 2016).

88. *See id.* at 250.

89. *See id.* at 227.

90. *See id.* at 225.

91. *See id.* at 249–50.

and subsequently found that there was no clear error in its finding of discriminatory effect.[92] The staggering 4.5% of voters who lacked proper ID were disproportionately minority voters.[93]

B. Cases Following in Ohio Democratic Party v. Husted*'s Footsteps*

1. Sixth Circuit: *Northeast Ohio Coalition for the Homeless v. Husted*

The Sixth Circuit solidified its precedent several weeks after its decision in *Ohio Democratic Party v. Husted*. In *Northeast Ohio Coalition for the Homeless v. Husted*, the Sixth Circuit reviewed, de novo, and reversed a district court's decision to enjoin enforcement of Senate Bills 205 and 216.[94] The issue with Senate Bills 205 and 216 were that they (1) instructed boards of elections to reject absentee ballots that did not perfectly match voting records, (2) reduced post-elections days to perfect absentee ballots, and (3) limited the ability of poll workers to help in-person voters.[95]

Dr. Jeffrey Timberlake, an expert witness for the plaintiffs, persuaded the court that his regression analysis of voter trends indicated that African Americans were more likely to have their ballots rejected, and were thus unduly burdened by Senate Bills 205 and 206.[96] While the district court was convinced, the Sixth Circuit found otherwise.

The Sixth Circuit reviewed the "district court's legal conclusions de novo and factual findings for clear error."[97] They affirmed the district court's finding that rejecting in-person and mail-in absentee ballots that did not complete the address and birthday fields with technical precision caused an undue burden.[98] They reversed the rest of the district court's decision relating to undue-burdens and disparate impact of minority voters.[99] In so doing, the Sixth Circuit reexamined Dr. Timberlake's conclusions and determined that the provisions in question did not disparately impact minority voters.[100] While such review is historically limited to clear-error review in vote dilution claims, the Sixth Circuit followed its own precedent from *Ohio Democratic Party v. Husted* and

92. *See id.* at 249–50.

93. *See Abbott*, 830 F.3d at 250.

94. *See* Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016) (hearing by a different three-judge panel)

95. *See id.* at 618.

96. *See id.* at 621–22.

97. *See id.* at 625.

98. *See Ne. Ohio Coal. for the Homeless*, 837 F.3d 612.

99. *See generally id*.

100. *See id.*

reviewed these formerly factual claims de novo because they believe such decisions were legal—not factual—in nature.[101] The "opinion does not quarrel with the district court over its recitation of the record or of any credibility determinations made by the district court . . . [but] the district court's legal conclusions from that record are in certain parts erroneous."[102]

In an impassioned dissent, Judge Keith lambasted the Sixth Circuit for improperly applying de novo review of factual conclusions where clear-error review has, historically, been the standard form of analysis.[103] Citing Sixth Circuit precedent, Keith noted, "[This court] cannot find that the district court committed clear error where there are two permissible views of the evidence, even if we would have weighed the evidence differently."[104]

IV. ARGUMENT

By engaging in de novo review instead of clear error review, the Sixth Circuit substitutes its own interpretation of the record for one in place of interpretations that were soundly within the discretion of the district court.

Section (a) explains why the Sixth Circuit wrongly decided *Ohio Democratic Party v. Husted*. Within (a) section, section (i) explains exactly what went wrong in the opinion, section (ii) explains why vote denial claims should be treated the same as vote dilution claims, and why that has a bearing on appellate review, and section (iii) demonstrates how clear error review would have yielded a different result, and why that result was correct in place of the current decision. Section (b) of this argument postulates (i) what the consequences of the Sixth Circuit's decision are going forward, and (ii) what needs to change in Sixth Circuit jurisprudence going forward, or what decisions need to be made at a higher level.

A. Ohio Democratic Party v. Husted *Was Wrong*

History demonstrates a pattern of discriminatory voting practices. The passage of the Voting Rights Act ensured that inequitable voting practices would have to withstand a heightened judicial scrutiny or face

101. *See* Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016); *see also Ne. Ohio Coal. for the Homeless*, 837 F.3d 612.

102. *See generally Ne. Ohio Coal. for the Homeless*, 837 F.3d at 638.

103. *See id.* at 655–57 (Keith, J. dissenting).

104. *Id.* at 655.

enjoinment.[105] Frequently mentioned throughout this paper is the claim of vote dilution under section 2 of the Voting Rights Act, which ensured that racial minorities would have a fair chance to elect a candidate of their choice without their claims being diluted by the majority population.[106] Vote dilution claims were litigated for decades in an effort to wipeout invidious legislation that did not give minorities their fair chance to elect the candidates of their choice through practices of gerrymandering and at-large elections.[107]

As evidenced by the case law presented, there is an emerging framework and standard of review that mirrors the vote dilution framework.[108] The framework and standard of review ensures that vote denial claims will protect minority populations in the face of different types of detrimental legislation. The Fourth, Fifth, and Sixth Circuits found common ground and forged a way to protect minority votes. When precedent seemed to be settled, though, the Sixth Circuit removed deference to the district courts in analyzing disparate impact and undue burdens. Instead, overzealous justices have taken the clean jurisprudential slate and attempted to define the "proper" standard of review in newly developing vote denial claims.

1. Where the Sixth Circuit Went Wrong in *Ohio Democratic Party v. Husted*

From the first line of the opinion, the Sixth Circuit swayed in the wrong direction. In stating that this was "yet another appeal . . . asking the federal courts to become entangled, as overseers and micromanagers, in the minutiae of state election processes," the Sixth Circuit seemingly aimed to make more of a political statement than they did an impartial ruling of law.[109] The line was a commentary on federalism, and purports to suggest that states should be given more deference when it comes to the promulgation of voting laws.

In taking a states-rights stance, the court overlooks the legislative purpose of the Voting Rights Act and the Equal Protection Clause. Prior to the enactment of the Voting Rights Act, some states enacted discriminatory voting laws that inhibited the ability of minority populations to vote.[110] The Voting Rights Act acted as a check on that state power, weeding out discriminatory practices in the, shall we say,

105. *See* TOKAJI, *supra* note 3, at 443.

106. *See id.* at 442–43.

107. *See id.*

108. *See generally id.*

109. *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 622 (6th Cir. 2016).

110. *See* TOKAJI, *supra* note 3, at 442.

"minutiae of state election processes."[111] Here, the court seemingly argues that that a federal court should not involve itself in such issues. This begs the question: when *should* court become involved as "overseers and micromanagers" of state election processes and enforce the Voting Rights Act? This answer is unclear. What is clear, though, is how the court found a way to rule in favor of states' rights.

The Sixth Circuit used de novo review to substitute its own view of the facts in place of the district court's view. While under clear error review this would be improper, under de novo review a judge can argue that the district court came to improper legal conclusions. That is what the court did. The majority opinion discounts precedent as an incorrect view of what clear error review is supposed to be, thereby bolstering their case to use de novo review. Once the majority cleared that hurdle, they reinterpreted the facts and came to a different conclusion on how large of a burden repealing Golden Week would be. In his dissent, Judge Stranch immediately saw through the façade and fired back at the majority's "overseers and micromanagers" line, noting that it is healthy to scrutinize state voting regulations.[112]

In its Equal Protection Clause analysis, the Sixth Circuit found error in the district court characterizing the burden as "modest."[113] Although the court noted that African Americans are more likely to use early in-person voting, it found that limiting the number of days did not "actually make[] voting harder for African Americans."[114] Because removing early voting days did not make it harder, and because the legislation was generally applicable, the Sixth Circuit determined that the burden was minimal as opposed to moderate.[115] The court failed to take into account any of the reasons African Americans vote early, and why voting early makes it easier and more accessible. Instead, the court substituted its own view that voting is easy.

In finding that the district court erred in its disparate impact analysis, the majority discredited the findings of the plaintiff's expert witness. The court dismissed the plaintiff's claims as "unsubstantiated" because the statistical evidence presented "merely . . . contains a large margin of error for black registration rates," and there is no other evidence aside from that study to support their case.[116] Given that the first prong of a vote denial claim under section 2 was not met, the court dismissed the

111. See *id.*

112. See *Ohio Democratic Party*, 834 F.3d at 640–41.

113. *See generally* Ohio Org. Collaborative v. Husted, No. 2:15-cv-1802, 2016 U.S. Dist. LEXIS 85699 (S.D. Ohio 2016).

114. *Ohio Democratic Party*, 834 F.3d 620 at 631.

115. *See id.* at 627.

116. *Id.* at 639.

second prong, the social and historical conditions that produced discrimination.[117] The court concluded that there were "abundant and convenient opportunities for all Ohioans to exercise their right to vote."[118]

In both analyses, the Sixth Circuit ignored substantial, reputable evidence that S.B. 238 disproportionately affects African Americans. While one could argue that their legal and factual conclusions were soundly grounded, it is hard to believe the court approached the issues impartially because of their apparent disdain for becoming "entangled" in state election issues. The Sixth Circuit used its position to push a federalist view of election law.

2. Why Vote Denial Appeals Should Be Treated the Same as Vote Dilution Appeals

Vote denial and vote dilution are both cognizable claims under section 2 of the Voting Rights Act.[119] Both claims safeguard the electorate from discriminatory government action, though what type of government action is the key difference. Despite their differences, both were promulgated when the Voting Rights Act was amended in 1982 with the purpose of protecting the right to vote.[120] As evidenced by both court opinions and scholarly work, the "results" language of section 2 applies to both vote dilution and vote denial claims.[121]

Vote dilution claims have a more expansive jurisprudential history than vote denial claims and the precedent surrounding such claims is sufficiently developed.[122] In those cases, the standard was to use clear error review when reviewing questions of fact. Now, with vote denial claims on the rise, the Sixth Circuit is using the lack of jurisprudential history in vote denial claims to usher in a new form of review.[123] It is nonsensical, particularly given the fact that vote denial claims and vote dilution claims were treated similarly up until this case. The factual conclusions are based on the "results" language of section 2. The burdens imposed are not a legal conclusion; the burdens imposed are a matter of fact, and they have been treated as such in vote dilution claims for several decades.

The historical treatment of vote dilution claims is of marked

117. *See id.*

118. *Id.* at 640.

119. *See* TOKAJI, *supra* note 3, at 442.

120. *See id.*

121. *See id.*

122. *See id.*

123. *See Ohio Democratic Party*, 834 F.3d 620.

importance in determining why vote denial should be treated similarly. A much more contemporary reason springs from the *Shelby County* decision, and how that decision affected both vote dilution and vote denial claims.[124] As evidenced in preceding sections, *Shelby County* had a detrimental effect. The preclearance regime of the Voting Rights Act "stopped would-be vote denial from occurring in covered jurisdictions."[125] Since section 4(b) was declared unconstitutional and preclearance has consequently been rendered useless, legislatures are better equipped to enact vote denial legislation.[126]

Vote denial claims have seen an increased workload since the *Shelby County* decision.[127] Areas formerly covered by the Voting Rights Act for their discriminatory history now have the ability to enact vote denial legislation under the guise of protection from voter fraud.[128] Engaging in de novo review and overturning well-reasoned factual conclusions of district courts gives these areas a free license to enact vote denial legislation. Ohio already felt the effects the Sixth Circuit's decision to overturn, with some people waiting in half-mile lines over a period of several hours just to vote.[129] Access is not as convenient as the Sixth Circuit makes it out to be, and that is why their use of opinion to overturn the district court is so damaging to voters.

3. How a Clear Error Review of the Record Would Have Differed

A clear error review of the district court's decision would have yielded opposite results. It is certainly true that there were two possible views of the factual conclusions of the district court, but clear error review accounts for such a difference. If a "district court's account of the evidence is plausible in light of the entire records, [a] court may not reverse that account[]."[130]

As the dissent pointed out, the district court's extensive review of the records—which heavily relied on "expert and anecdotal evidence"—was

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124. *See generally* TOKAJI, *supra* note 3.

125. *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 239 (4th Cir. 2014).

126. *See id.*

127. *See* TOKAJI, supra note 3, at 440–41.

128. *See League of Women Voters*, 769 F.3d at 246.

129. Libby Nelson, *There are 4000 People in a Half Mile Voting Line in Cincinnati Today. This isn't Okay.*, VOX (Nov. 6, 2016), http://www.vox.com/presidential-election/2016/11/6/13542680/there-are-4000-people-in-a-half-mile-voting-line-in-cincinnati-today-this-isn-t-okay.

130. Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 656 (6th Cir. 2016) (citing T. Marzetti Co. v. Roskam Baking Co., 680 F.3d 629, 633 (6th Cir 2012) ("If the district court's account of the evidence is plausible in light of the entire record, this court may not reverse that accounting, even if convinced that, had it been sitting as trier of fact, it would have weighed the evidence differently.")).

not only plausible, but also "well-supported."[131] The record was "replete with specific evidence supporting plaintiffs' claims."[132] The tests utilized by the district court adhered to the established precedent set forth in previous vote denial cases.[133] Namely, the district court utilized the two-part "results" test set forth in *NAACP v. Husted* in its determinations regarding the Voting Right Act. Further, the district court used the *Anderson-Burdick* framework in its Equal Protection clause analysis.

In an effort to not regurgitate the dissents argument, the above presented information is sufficient to establish that a clear error review of the records would have been well within the discretion of the district court. While the majority could have reasonably been upheld if they were a district court, the use of de novo review, as Judge Keith put it in another case, "infects its entire analysis" and causes it to err in its holding.[134]

B. What Will Happen Going Forward?

The following is conjecture on what will likely happen should this regime of de novo review continue and possibly expand, as well as what needs to be done to ensure equity going forward. Section (i) discusses how historical conditions led to the enactment of the Voting Rights Act and how recent cases have affected its legacy. Section (ii) discusses what would need to happen to ensure de novo review does not become widespread.

1. What Are the Consequences Going Forward?

Going forward, the use of de novo review might spread beyond the Sixth Circuit. The Sixth Circuit already further established its precedent in *Northeast Ohio Coalition for the Homeless v. Husted*, but what will further expansion look like?[135]

As discussed earlier, the majority's statement that the federal court was involving itself in the minutiae of state election processes represents a political statement. Such a rallying cry bears similarities to the 1950s—before the promulgation of the Voting Rights Act—when the

131. *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 645 (6th Cir. 2016).

132. *Id.* at 646.

133. See Ohio Org. Collaborative v. Husted, 189 F. Supp. 3d. 708 (S.D. Ohio 2016); Ohio State Conf. of the NAACP v. Husted, 43 F. Supp. 3d 808 (6th Cir. 2016); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016).

134. *See Ne. Ohio Coal. for the Homeless*, 837 F.3d at 657.

135. *See generally id.*

Supreme Court neglected to "challenge the 'wisdom'" of literacy tests.[136]

As noted by the dissent, a "[s]tate might conclude that only those who are literate should exercise that franchise."[137] Literacy tests, along with poll taxes and other various forms of vote denial, were the reason the Voting Rights Act was promulgated.[138] States could not be trusted to satisfactorily safeguard the federal constitutional right to vote, so broad protections were needed to protect that right.[139]

The states that were most invidious with their discrimination were subjected to preclearance under section 5 of the Voting Rights Act.[140] Since *Shelby County v. Holder*, those states are much more capable of enacting vote denial legislation. As evidence by the influx of vote denial claims, some already enacted such legislation. With such action being taken by states, it is more than inopportune a time to give power back to the states who the Voting Rights Act was enacted to constrain.

While district courts could reasonably rule in favor of states as well, *Ohio Democratic Party v. Husted* and *Northeast Ohio Coalition for the Homeless v. Husted* demonstrate how appeals courts could involve themselves in the perpetuation of disparately burdensome legislation. A judicial philosophy that is informed by notions of states' rights and enabled by a de novo standard of review could usher in a new era of invidious and unchecked legislation. That is, unless the Supreme Court steps in and answers one particular question about vote denial claims.

2. What Should Happen Going Forward?

What will happen going forward is unclear. The Sixth Circuit has at least two judges who disagree with the court's standard of review, making it possible for an opinion that breaks from the newly established precedent should both sit on the bench for a vote denial case.[141] The likelihood of such an occurrence is slim, but it is entirely possible for it to occur. Despite that possibility, this split likely requires an affirmative decision by the Supreme Court.

The Supreme Court has never decided a vote denial case under the "results" language of section 2.[142] An appeal to the Supreme Court

136. *See Ohio Democratic Party,* 834 F.3d at 640.

137. *See id.*

138. *See id.*; *see also* TOKAJI, *supra* note 3, at 442.

139. *See Ohio Coal. for the Homeless*, 837 F.3d at 657.

140. *See* TOKAJI, *supra* note 3, at 440.

141. *See Ohio Democratic Party,* 834 F.3d 620 (Stranch, J. dissenting); *see Ohio Coal. for the Homeless,* 837 F.3d 612 (Keith, J. dissenting).

142. *See* TOKAJI, *supra* note 3, at 445.

would solidify whether the "results" of discriminatory legislation are a question of fact or a question of law. In answering that question, the court would make a definite statement on what form of review should be used when reviewing vote denial claims. There is a need for such review, particularly given that the majority opinion finds the defining of a burden to be a question of law and "not a factual finding."[143] Such an unchecked departure from historical precedent requires intervention.

Now that the 2016 Presidential election has passed, some cases in litigation during the election cycle will inevitably be mooted. Despite that, the rise of vote denial legislation will likely continue given the pattern seen in the wake of *Shelby County v. Holder*. Although the court could likely rule against the arguments presented out in this article and comport with Sixth Circuit precedent, the need for a definitive answer is present. It is inherently inequitable to have a circuit split on the standard of review used in a federal case. The lack of a judicial uniformity at the federal level necessitates intervention, particularly when it comes to review of a federal constitutional right.

V. CONCLUSION

Ohio Democratic Party v. Husted was decided incorrectly. The Sixth Circuit went against its own precedent and the precedent of its sister circuits when it engaged in de novo review of traditionally factual conclusions. The court made obvious its opinion on the case from the first sentence, finding such federal intervention in state election law proceedings to be meddlesome. This antiquated view of the level of discretion that needs to be given to states in election law is the reason the Voting Rights Act was initially passed.

States, historically, engaged in facially neutral yet discriminatory practices to suppress minority votes. Vote denial legislation—poll taxes, literacy tests, and the like—was sufficiently barred by the Voting Rights Act's preclearance requirements. After *Shelby County v. Holder*, the Voting Rights Act lost its bite and vote denial legislation found its way back into contemporary jurisprudence, even in areas, such as Ohio, that were never subject to preclearance. District courts have acted as vigilant fact-finders in vote denial cases since *Shelby County*. As noted by the dissents in Ohio Democratic Party v. Husted and Northeast Ohio Coalition for the Homeless v. Husted, the records of district courts are replete with evidence to make it plausible that minorities are burdened by vote denial legislation.

Despite the district court's informed finding that the elimination of

143. *See Ohio Democratic Party*, 834 F.3d at 628.

Golden Week by S.B. 238 disparately impacted and moderately burdened African Americans, the Sixth Circuit substituted its own interpretations of the record and reversed that decision. The district court's view of the evidence was wholly plausible in light of the record, but that was immaterial due to the Sixth Circuit engaging in de novo review. If de novo review expands past the Sixth Circuit, vote denial legislation could find a new home in modern America. It is for that reason that the Sixth Circuit erred in *Ohio Democratic Party v. Husted*, and for the reason the Supreme Court needs to hear a vote denial case.