INTRODUCTION

The Fifteenth Amendment to the United States Constitution provides that "[t]he right of citizens of the United States 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." To enforce the Fifteenth Amendment and to correct historical voting discrimination, the United States Congress enacted the Voting Rights Act of 1965 which provides a mechanism to challenge potentially discriminatory voting practices. The original language in Section 2 of the Voting Rights Act of 1965 tracked the language of the Fifteenth Amendment, providing that "[n]o voting qualification or prerequisite to voting . . . shall be imposed or applied by any State . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color."3

In 1982, Congress amended Section 2 to establish that plaintiffs can show a violation of Section 2 by proving discriminatory intent through either direct evidence or the use of a "results" standard. Under the results standard, plaintiffs can show a violation if they prove that "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."5 To determine if a certain election law causes discriminatory results, Congress instructed the courts to analyze the "totality of the circumstances" by taking into consideration the relevant social, historical, and economic conditions present in the jurisdiction.6 If the election law interacts

with the conditions to cause unequal opportunity to participate and to elect preferred candidates, the law violates Section 2.7

The initial focus of the Voting Rights Act was on the elimination of discriminatory registration practices.8 At first, registration devices, such as poll taxes and literacy tests, and administrative practices, such as limiting the places and times for registration, operated as effective barriers to minorities' right to vote.9 Then, in response to the increasing numbers of minorities registering to vote, government officials implemented vote dilution schemes, such as multimember districts.10 The use of multimember districts — districts from which two or more representatives are elected — rather than single-member districts can dilute the voting power of minorities by submerging the minority voting class in with the white majority.11

Many courts have addressed whether voter registration practices and vote dilution election structures violate Section 2.12 However, before Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division,13 there were no reported cases that dealt with a challenge to a nonvoting purge law under Section 2.14 Nonvoting purge laws authorize electoral officials to identify unqualified voters and purge them from the registration rolls in the hopes of reducing electoral fraud.15 The implications of any decisions concerning nonvoting purge laws are large because the vast majority of states utilize such laws.16

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7. See infra notes 126-38, 184-88, 193-97, 216-22 and accompanying text.
13. 28 F.3d 306 (3d Cir. 1994).
14. Ortiz v. City of Philadelphia Office of the City Comm'r's Voter Registration Div., 28 F.3d 306, 316 (3d Cir. 1994). A Section 2 violation has been found where the election officials failed to comply with the procedures set forth in a nonvoting purge law. See Toney v. White, 488 F.2d 310, 312, 316 (5th Cir. 1973); see infra notes 242-46 and accompanying text. Nonvoting purge laws have been unsuccessfully challenged as violations of the First and Fourteenth Amendments. See Hoffman v. State of Maryland, 928 F.2d 646, 649 (4th Cir. 1991); Williams v. Osier, 350 F. Supp. 646, 653 (E.D. Pa. 1972); see infra notes 230-39 and accompanying text.
16. Barber, 23 Harv. C.R.-C.L. L. Rev. at 499; see infra notes 223-25 and accompanying text.
In *Ortiz*, the United States Court of Appeals for the Third Circuit held that Section 2 plaintiffs must prove that a causal connection exists between the purge law and the alleged discriminatory results.\(^\text{17}\) The Third Circuit recognized that, under Pennsylvania's nonvoting purge law, minority voters were purged at higher rates than white voters.\(^\text{18}\) However, the court reasoned that the purge law did not interact with the relevant social, historical, and economic conditions present in the jurisdiction to cause the disparate impact on minority voters.\(^\text{19}\) The court stated that the purge law was neutrally administered and that minority voters were purged at higher rates, not because of the purge law, but because they turned out to vote in proportionately lower numbers than the white voters.\(^\text{20}\) The court concluded that the plaintiffs failed to show that they did not have equal opportunity to participate and elect their preferred candidates.\(^\text{21}\)

This Note will first review the court's decision in *Ortiz*.\(^\text{22}\) This Note will then examine the development of the results standard used in Section 2 cases.\(^\text{23}\) This Note will then review the application of Section 2 in vote dilution and registration cases.\(^\text{24}\) This Note will then critique the court's application of the results standard in *Ortiz*.\(^\text{25}\) This Note concludes that the court in *Ortiz* properly held that Pennsylvania's nonvoting purge law did not violate Section 2 because it did not cause African-American and Latino voters to be purged at disproportionately higher rates than white voters.\(^\text{26}\)

**FACTS AND HOLDING**

Pennsylvania Consolidated Statutes section 623-40 authorizes electoral officials, after giving proper notice to the affected registered voters, to purge the voters from the registration rolls for failure to vote for two years.\(^\text{27}\) Pennsylvania's nonvoting purge law has been in

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\(^{17}\) *Ortiz*, 28 F.3d at 312; see infra notes 61-64 and accompanying text.

\(^{18}\) *Ortiz*, 28 F.3d at 315-16.

\(^{19}\) Id. at 315-16, 318; see infra note 72 and accompanying text.

\(^{20}\) *Ortiz*, 28 F.3d at 313-14; see infra notes 66-67 and accompanying text.

\(^{21}\) *Ortiz*, 28 F.3d at 312-15; see infra notes 69-74 and accompanying text.

\(^{22}\) See infra notes 27-91 and accompanying text.

\(^{23}\) See infra notes 92-114 and accompanying text.

\(^{24}\) See infra notes 115-222 and accompanying text.

\(^{25}\) See infra notes 247-342 and accompanying text. The implications of the National Voter Registration Act, 42 U.S.C.A. § 1973gg (1994 Supp.), and the possible analogies between Title VII disparate-impact law, 42 U.S.C. § 2000e-2(k) (1994 Supp.), and Section 2 of the Voting Rights Act are discussed in *Ortiz*. *Ortiz*, 28 F.3d at 318-19 (Scirica, J., concurring); id. at 339-40, 346-47 (Lewis, J., dissenting); id. at 316-17; id. at 332-36 (Lewis, J., dissenting). An analysis of these two areas is beyond the scope of this Note.

\(^{26}\) See infra notes 247-342 and accompanying text.

\(^{27}\) 25 PA. CONS. STAT. § 623-40 (1994). Section 623-40 provides:
existence for forty years. The Pennsylvania legislature enacted the law to reduce the potential for electoral fraud by ensuring the maintenance of accurate and up-to-date voter registration rolls.

In January of every year, the City of Philadelphia Office of City Commissioners, Voter Registration Division, conducts a computer search to produce an “intent to purge list” of registered voters who have not voted in a primary or general election during the previous two years. Voters on the list are mailed an “intent to purge notice” which provides as follows:

NOTICE OF FAILURE TO VOTE WITHIN TWO YEARS:
To The Person Whose Name Appears on The Face of This Card:

Our Records indicate you have failed to vote for the last two years. As required by law, we will cancel your Registration, unless you vote in the next Primary or Election or File with this Commission a written request for Reinstatement (10) days prior to the next Primary or Election, signed by you, giving your present residence. This is the only notice you will receive...

During each year, the commission shall cause all of the district registers to be examined, and in the case of each registered elector who is not recorded as having voted at any election or primary during the two calendar years immediately preceding, the commission shall send to such elector by mail, at his address appearing upon his registration affidavit, a notice, setting forth that the records of the commission indicate that he has not voted during the two immediately preceding calendar years, and that his registration will be canceled if he does not vote in the next primary or election or unless he shall, within ten days of the next primary or election, file with the commission, a written request for reinstatement of his registration, signed by him, setting forth his place of residence. A list of the persons to whom such notices shall have been mailed shall be sent promptly to the city chairman of the political party of which the electors were registered as members. At the expiration of the time specified in the notice, the commission shall cause the registration of such elector to be cancelled unless he has filed with the commission a signed request for reinstatement of his registration as above provided. The official registration application card of an elector who has registered may qualify as a reinstatement of his registration or a removal notice. The cancellation of the registration of any such elector for failure to vote during the two immediately preceding calendar years shall not affect the right of any such elector to subsequently register in the manner provided by this act.

Whenever the registration of an elector has been cancelled through error, such elector may petition the commission for the reinstatement of his registration not later than the tenth day preceding any primary or election, and after a hearing on said application, if error on the part of the commission is proved, the commission shall reinstate the registration of such elector.

Id.

29. Id.
30. Id. at 518.
31. Id. (emphasis in the original).
The voters who receive the notice are purged if they fail to either vote in the next primary or election, or neglect to file a written request for reinstatement. If purged, the voter must reregister in order to vote in any future elections. Being purged does not in any way affect the right of the voter to reregister, nor does the voter face additional barriers to reregistration.

In October of 1991, City of Philadelphia City Councilman Angel Ortiz, Project VOTE, and Service Employees International Union Local 36 ("plaintiffs") filed an action in the United States District Court for the Eastern District of Pennsylvania alleging that the nonvoting purge law denied racial minorities "equal opportunity to participate in the political process and to elect representatives of their choice," and therefore violated Section 2 of the Voting Rights Act of 1965. The plaintiffs did not claim that the City administered the purge law unfairly, but rather that the law had a disparate impact on racial minorities because African-American and Latino voters were "purged from the voter registration rolls at significantly higher rates than white voters."

The District Court Opinion

The district court held that to show a violation of Section 2, the "plaintiffs must demonstrate that the voter purge law[] interacted with sociological, historical and economic factors to deny minority vot-

32. Id.
33. Id.
34. Id. at 518-19.
35. Id. at 516-17; see 42 U.S.C. § 1973 (1988). Project VOTE is a national nonprofit organization which was performing voter registration drives in Philadelphia to increase voter participation. Ortiz, 824 F. Supp. at 516. Service Employees International Union represented janitorial employees, 60% of whom were members of racial minorities. Id.

In addition to the alleged violation of the Voting Rights Act, the plaintiffs also alleged that the defendant violated the First and Fourteenth Amendments of the Constitution by failing to "use a less discriminatory alternative to maintain accurate voter registration rolls." Id. at 516. The plaintiffs filed a motion for a preliminary injunction to preclude the City of Philadelphia from any further purging of voters. Id. On October 29, 1991, in a Memorandum and Order, the district court denied the motion, holding that: (1) the First and Fourteenth Amendments were not violated; and (2) there was insufficient evidence to show a violation of Section 2 of the Voting Rights Act of 1965. Id. at 540-42. Shortly before the November, 1992, elections, the plaintiffs again moved for a preliminary injunction which the District Court again denied, citing its October 29, 1991, Memorandum and Order. Id. at 517. The plaintiffs appealed this decision to the Third Circuit which dismissed the motion for failure to timely prosecute. Id. (citing Ortiz v. City of Philadelphia, No. 92-1822 (3d Cir. Dec. 17, 1992)). A four day trial was then commenced in the District Court on November 10, 1992. Ortiz, 824 F. Supp. at 517. In its decision, the District Court focused on the alleged violation of Section 2 of the Voting Rights Act, and incorporated its October 29, 1991, Memorandum and Order to address the First and Fourteenth Amendments. Id. at 516, 540-42.

36. Ortiz, 824 F. Supp. at 516.
ers equal access to the political process." The court noted that a showing of statistical disparity in purge rates does not by itself prove a violation of Section 2. The court stated that the statistical disparity is only a part of the totality of circumstances which must be considered in determining whether an election procedure denies minorities equal opportunity to participate in the political process. The court then proceeded to make extensive findings of fact concerning the totality of circumstances.

The district court made findings on the existence of a disparate impact on minorities and on the existence of numerous sociological, historical and economic factors. The factors the court analyzed included the factors set forth in the legislative history of Section 2. The court made determinations as to the following: (1) the extent of racially polarized voting; (2) the extent of racial appeals in political campaigns; (3) the extent of election official nonresponsiveness to the particularized needs of minorities; (4) the extent of socioeconomic discrimination against minorities; (5) the extent of historic official discrimination; (6) the extent to which minorities had been denied access to the candidate slating processes; and (7) the extent to which minorities were elected to political offices. The court also determined whether the policies underlying the nonvoting purge law were tenuous.

The district court found that, although there was no evidence of intentional discrimination, African-American and Latino voters were purged from the voter registration rolls at disproportionately higher rates than white voters in the years 1989 through 1992. The court also found that racially polarized voting was present in Philadelphia, that a "general pattern" of racial appeals existed in political cam-

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37. Id. at 525 (citing Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).
38. Id. at 525-26.
39. Id. at 526.
40. Id. at 526-39; see infra notes 41-55 and accompanying text.
42. Id. at 526.
43. Id. at 526-38; see infra notes 45-53 and accompanying text.
44. Ortiz, 824 F. Supp. at 539; see infra notes 54-55 and accompanying text.
45. Ortiz, 824 F. Supp. at 526-31. The Third Circuit summarized the plaintiffs' expert's analysis of the purging activities in the following table:

<table>
<thead>
<tr>
<th>Year</th>
<th>Whites Slated For Purging</th>
<th>Estimated Purge Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>4.1% / 3.9%</td>
<td>4.5% / 4.0%</td>
</tr>
<tr>
<td>1989</td>
<td></td>
<td>11.7% / 11.1%</td>
</tr>
<tr>
<td>1990</td>
<td>8.5% / 7.9%</td>
<td>24.7% / 20.8%</td>
</tr>
<tr>
<td>1991</td>
<td>17.3% / 13.2%</td>
<td>6.6% / N/A</td>
</tr>
<tr>
<td>1992</td>
<td>6.4% / 6.4%</td>
<td></td>
</tr>
</tbody>
</table>

The evidence before the district court showed disparities among African-Americans, Latinos, and whites in the following: educational attainment, home ownership, discrimination in housing, acquisition of adequate health care, rates of unemployment, discrimination in employment, and average income. Based on this evidence, the court found that these "substantial socioeconomic disparities among African-American, Latino and white residents of the city of Philadelphia ... affect[ed] the ability of [African-Americans and Latinos] to participate in the political process and to elect their candidates of choice." The district court further found that racial minority voters exercised their right to vote at lower rates than white voters. The court observed that this disparity in voting rates could, at least in part, be attributable to the socioeconomic status of minorities and the unresponsiveness of city officials to particularized needs of minorities.

The evidence concerning racially polarized voting showed that, in Philadelphia mayoral elections since 1975, the African-American candidates received approximately 96-98% of the African-American vote while receiving only 5-25% of the white vote. Testimony concerning the existence of racial appeals revealed that race was used to influence elections in a variety of ways including: "(1) associating African-American candidates with prominent but controversial African-Americans such as Jesse Jackson and Louis Farrakhan in an effort to appeal to the white vote; (2) altering pictures and commercial advertisements based upon race; [(3)] attacking candidates who support minority issues; and [(4)] omitting minority candidates from campaign literature." Examples of unresponsiveness to particularized needs of minorities included failure to provide community development funding, unequal distribution of city services, and abuse of racial minorities by the police department.

The district court set forth the following statistical information as part of a larger table showing lower rates of voter turnout for racial minorities:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>White</th>
<th>Black</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>69.7</td>
<td>67.2</td>
<td>48.6</td>
</tr>
<tr>
<td>1988</td>
<td>72.5</td>
<td>62.1</td>
<td>54.2</td>
</tr>
<tr>
<td>1989</td>
<td>45.3</td>
<td>30.5</td>
<td>20.8</td>
</tr>
<tr>
<td>1990</td>
<td>54.3</td>
<td>37.4</td>
<td>30.5</td>
</tr>
<tr>
<td>1991</td>
<td>67.2</td>
<td>58.3</td>
<td>44.7</td>
</tr>
</tbody>
</table>

As to whether historical voting-related discrimination existed, the district court found that there was no historical discrimination that would infringe upon racial minorities' participation in the political process. The court also did not find that there was evidence of discrimination which would deny racial minorities access to the candidate slating process. The court also found that, because of a strong minority presence in the Philadelphia City Council and the Pennsylvania legislature, African-American and Latino candidates did not face difficulty in being elected to public offices.

Finally, the district court found that the policy considerations underlying the voter purge law were substantial. The court found that the desire to "police fraudulent registrations and maintain current voter registration information" furthered the State's interest in preventing fraud in the elections.

After making these extensive findings of fact, the district court concluded that Pennsylvania's nonvoting purge law was not a per se violation of Section 2. The court held that, although minority voters were clearly purged at higher rates than white voters, the purge law did not interact with socioeconomic and historical conditions to be-

<table>
<thead>
<tr>
<th>YEAR</th>
<th>House Total</th>
<th>Minority</th>
<th>[%]</th>
<th>Senate Total</th>
<th>Minority</th>
<th>[%]</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>34</td>
<td>10</td>
<td>29%</td>
<td>8</td>
<td>3</td>
<td>32%</td>
</tr>
<tr>
<td>1980</td>
<td>34</td>
<td>11</td>
<td>32</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1982</td>
<td>29</td>
<td>12</td>
<td>41</td>
<td>7</td>
<td>7</td>
<td>42</td>
</tr>
<tr>
<td>1985</td>
<td>29</td>
<td>13</td>
<td>44</td>
<td>7</td>
<td>3</td>
<td>42</td>
</tr>
<tr>
<td>1986</td>
<td>29</td>
<td>13</td>
<td>44</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>1988</td>
<td>29</td>
<td>13</td>
<td>44</td>
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<tr>
<td>1990</td>
<td>29</td>
<td>13</td>
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<tr>
<td>1992</td>
<td>27</td>
<td>13</td>
<td>44</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Ortiz, 824 F. Supp. at 537.

51. Id. at 532.
52. Id. at 533.
53. Id. at 538. As of the date of the district court opinion, seven of the seventeen Philadelphia City Council seats were held by minorities. Ortiz, 28 F.3d at 315. The composition of the Pennsylvania legislature was as follows:

54. Ortiz, 824 F. Supp. at 539.
55. Id. Additional justifications included:
   (1) reducing the chances of errors in the administration of the electoral process;
   (2) enhancing the public's confidence that the electoral process is not subject to fraud, error or abuse;
   (3) facilitating prompt and accurate notice to party organizations and candidates of facts concerning the electorate;
   (4) enabling city commissioners and county board of electors to determine the number of election workers to be employed; and
   (5) cost effectiveness.

56. Ortiz, 824 F. Supp. at 539.
come "the dispositive force depriving minority voters of equal access to the political process."

On appeal to a three judge panel of the United States Court of Appeals for the Third Circuit, the plaintiffs argued that the standard that the district court applied was incorrect and therefore the court erred in finding that the nonvoting purge law did not have a disparate impact on racial minorities in violation of Section 2. The plaintiffs asserted that the district court had "negated the totality of the circumstances test set out by Section 2 in holding that if the purge statute was not 'the dispositive force depriving minorities of equal access to the political process' then, under the 'totality of the circumstances,' there was no violation of the Voting Rights Act." The Third Circuit rejected the plaintiffs' arguments.

THE THIRD CIRCUIT'S OPINION

The Causal Connection Requirement

The court read the "dispositive force" language in the district court's opinion to mean that a Section 2 plaintiff challenging an election practice must prove that the particular practice caused the alleged discrimination. Therefore, the court defined the legal issue as "whether the district court erred by factoring into its 'totality of the circumstances' analysis the question of whether or not the purge statute caused minorities to be deprived of equal access to the political system." The court concluded that "Section 2 plaintiffs must show a causal connection between the challenged voting practice and the prohibited discriminatory result." The court stated that the plaintiffs had to show that the voting practice interacted with socioeconomic and historical conditions to cause unequal access to the political process.

In reaching its decision, the court stated that the purge law was a legitimate means of accomplishing the State's substantive interest in preventing fraud in elections. The court noted that voters were

57. Id.
58. Ortiz, 28 F.3d at 308. In the appeal, the plaintiffs dropped their First and Fourteenth Amendment claims. Id. at 308 n.3. The Third Circuit noted that although the plaintiffs' claim was in regards to the 1991 election, the issues were not moot because the complaint was "capable of repetition yet evading review." Id. (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975)).
59. Ortiz, 28 F.3d at 310.
60. Id. at 313, 318.
61. Id. at 310 n.4.
62. Id. at 310.
63. Id. at 312.
64. Id. at 310.
65. Id. at 314.
purged under the law, not because of racial, religious, sexual, or socio-economic discrimination, but only because they did not vote for two years and chose not to vote in the next election or request reinstatement after receiving the purge notice. According to the court, racial minorities were purged at higher rates only because they turned out to vote in proportionately lower numbers than white voters. The court noted that "a protected class is not entitled to [Section] 2 relief merely because it turns out in a lower percentage than whites to vote."

The Two Elements of a Section 2 Claim

The court recognized that there are two elements a plaintiff must show to establish a Section 2 claim. First, the plaintiff must show that a minority group had less opportunity to participate in the political process. Second, the plaintiff must show that the minority group had less opportunity to elect representatives of its choice. The court agreed with the district court's finding that the nonvoting purge law did not interact with socioeconomic or historical conditions to cause the disparate purge rates and therefore did not prevent Philadelphia minorities from participating in the political process. The court stated that the district court had also made an explicit finding that the minorities were not prevented from electing representatives of their choice to office. The court concluded that there was no basis for the plaintiffs' claim of relief because the plaintiffs had failed to establish the necessary elements of a Section 2 cause of action.

THE DISSenting OPINION

Judge Timothy K. Lewis dissented. Judge Lewis agreed that Section 2 required a causal connection between the electoral practice
— the nonvoting purge law — and the prohibited discriminatory result. Judge Lewis also agreed that the court was required to determine whether the nonvoting purge law interacted with external conditions to restrict minorities' political opportunities.

Judge Lewis asserted that the court failed to consider whether the nonvoting purge law interacted with the socioeconomic and historical conditions to cause the disparate impact on minorities. Judge Lewis maintained that the court actually required the plaintiffs to prove more than this causal connection. Judge Lewis reasoned that the court required the plaintiffs to show that the nonvoting purge law operated independently of the socioeconomic and historical conditions to cause the disparate impact on minority voters. Judge Lewis stated that, under the court's view of the causal connection required, the plaintiffs would have had to prove that the nonvoting purge law caused the disparate socioeconomic conditions rather than the disparate impact.

Judge Lewis argued that the purge law did interact with the socioeconomic and historical conditions set forth in the district court's opinion to prevent racial minorities from equal participation in the political system. Judge Lewis asserted that the plaintiffs had established a causal connection by showing that social and economic disadvantages and discriminations were present and that minority voters exercised their right to vote at lower rates than white voters. Judge Lewis based his assertion on footnote 114 of the Senate Report for the 1982 amendment to Section 2. Footnote 114 provides that if a plaintiff can show socioeconomic discrimination and depressed levels of minority political participation, no further causal nexus needs to be proven.

Judge Lewis disagreed with the court's view that Philadelphia minorities' opportunity to elect representatives of their choice had not been restricted. Judge Lewis asserted that the district court had only made a factual finding as to what extent minority candidates had

76. Id. at 322 (Lewis, J., dissenting).
77. Id. at 323 (Lewis, J., dissenting) (citing Gingles, 478 U.S. at 47).
78. Id. at 323-24 (Lewis, J., dissenting).
79. Id. at 322-23 (Lewis, J., dissenting).
80. Id. at 323 (Lewis, J., dissenting).
81. Id. at 325 (Lewis, J., dissenting).
82. Id. at 336 (Lewis, J., dissenting).
83. Id. at 325, 326-27 (Lewis, J., dissenting).
84. Id.; see S. Rep. No. 97-417, supra note 2, at 29 n.114.
86. Ortiz, 28 F.3d at 340 (Lewis, J., dissenting).
been elected to office, which alone did not determine whether minorities' opportunity to elect representatives had been restricted. 87

Judge Lewis also argued that the court erred in requiring the plaintiffs to separately prove that their opportunity to elect their preferred candidates had been restricted. 88 Judge Lewis stated that Section 2 plaintiffs do not need to show both that they had less opportunity to participate in the political process and that they had less opportunity to elect their preferred candidates. 89 Instead, Judge Lewis reasoned that Section 2 plaintiffs need only prove that an election law restricts their opportunity to participate because that law will inevitably impair "the plaintiffs' ability to influence the outcome of an election." 890 Judge Lewis concluded that the plaintiffs had established a Section 2 violation by demonstrating a restriction on the opportunity of minorities to participate in the political process. 891

BACKGROUND

THE VOTING RIGHTS ACT

The United States Congress enacted the Voting Rights Act of 1965 to correct historical voting discrimination and, to that end, provided a mechanism to challenge potentially discriminatory voting practices in Section 2. 92 The initial focus of the Voting Rights Act was to increase minority registration through the elimination of discriminatory registration practices such as poll taxes and literacy tests. 93 Over one million additional minorities registered to vote between 1965 and 1972. 94 Because of the success of this initial focus, states implemented electoral schemes such as race gerrymandering, majority run-off elections, and multimember districts in order to dilute the new voting power of the minorities. 95

Section 2 of the Voting Rights Act

Before its amendment in 1982, Section 2 of the Voting Rights Act provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any

87. Id. at 340-41 (Lewis, J., dissenting).
88. Id. at 344 (Lewis, J., dissenting).
89. Id. at 345 (Lewis, J., dissenting).
90. Id.
91. Id. at 345-46 (Lewis, J., dissenting).
94. S. REP. No. 97-417, supra note 2, at 6.
95. Wright, 28 How. L.J. at 592-93.
State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.'\textsuperscript{96}

For many years, there was confusion as to the appropriate standard to be used in determining whether a Section 2 violation had occurred.\textsuperscript{97} Some courts required proof of discriminatory intent by government officials in adopting or maintaining an electoral practice, while other courts only required a showing of discriminatory results.\textsuperscript{98} In the 1980 case of \textit{City of Mobile v. Bolden},\textsuperscript{99} the United States Supreme Court, intending to end the confusion, held that proof of discriminatory results would not establish a violation of Section 2.\textsuperscript{100} In 1982, in response to \textit{Bolden}, Congress amended Section 2 to "clearly establish the standards intended by Congress for proving a violation of that section."\textsuperscript{101}

\textbf{The Amended Section 2}

The amended Section 2 of the Act provides as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section 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) of this section 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: \textit{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.\textsuperscript{102}

\textsuperscript{97} Wright, 28 How. L.J. at 594.
\textsuperscript{98} Id.
\textsuperscript{99} 446 U.S. 55 (1980).
\textsuperscript{100} \textit{City of Mobile v. Bolden}, 446 U.S. 55, 65 (1980); Wright, How. L.J. at 595.
\textsuperscript{101} S. Rep. No. 97-417, supra note 2, at 2.
As a result of the 1982 amendment, a plaintiff no longer needs to prove discriminatory intent by direct evidence in order to establish a violation of Section 2. Under the amended section 2, a plaintiff can either prove such direct intent or use a “results” standard. A plaintiff can establish the discriminatory results of a voting practice or structure through a totality of the circumstances analysis. The Senate Report (“Report”) sets forth the following objective factors (“Senate factors”) to be used in such an analysis:

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;
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.

104. S. Rep. No. 97-417, supra note 2, at 28. The Senate Report described the results standard as follows: “If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section.” S. Rep. No. 97-417, supra note 2, at 28.
These Senate factors are not exclusive, nor is there a “requirement that any particular number of factors be proved, or that a majority of them point one way or the other.”

In regards to Senate factor number five — the extent to which minorities bear the effects of socioeconomic discrimination which hinders their participation in the political process — the Report provides guidance as to how that factor can be established. In footnote 114, the Report notes that courts have recognized that disparate socioeconomic conditions “tend to depress minority political participation.” Therefore, “[w]here these conditions are shown, and where the level of [African-American] participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation.”

The Report notes that these factors were taken from cases which had addressed the validity of vote dilution laws, laws which are permanent structural barriers to equal participation in the democratic process. The Report further notes that the Senate factors may not necessarily be relevant to purge laws because, unlike vote dilution laws, purge laws are episodic barriers. However, the Report states that “purging of voters could produce a discriminatory result if fair procedures were not followed ... or if the need for a purge were not shown or if opportunities for re-registration were unduly limited.” The Report emphasizes that Section 2 applies to all forms of voting discrimination, and the ultimate test should be the following: “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.”

Court Interpretations of Amended Section 2

Interpretation and Application of the Amended Section 2 In Vote Dilution Cases

In Thornburg v. Gingles, the United States Supreme Court had its first opportunity to interpret the 1982 amendment to Section 2.116

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In *Gingles*, registered African-American voters of North Carolina sought relief under Section 2, claiming that several districts in the State's legislative redistricting plan resulted in vote dilution, thereby unlawfully restricting their ability to elect representatives of their choice.\(^{117}\) The plaintiffs challenged one single-member and six multi-member districts called for under the redistricting plan for the North Carolina Senate and House of Representatives.\(^{118}\)

The United States District Court for the Eastern District of North Carolina, using the "totality of the circumstances" analysis, made factual findings as to the presence of the Senate factors.\(^{119}\) The district court found that there had been historic official discrimination against African-Americans with respect to voting practices, and that there had also been historic social and economic discrimination resulting in a lower socioeconomic status for African-Americans.\(^{120}\) The district court also found that racial appeals in political campaigns were common.\(^{121}\) Finally, the district court found that few African-Americans had been elected to political offices in the challenged districts, and that all of those districts exhibited severe racially polarized voting.\(^{122}\)

Based on these findings, the district court held that, under the totality of the circumstances, the redistricting scheme violated Section 2 because it resulted in vote dilution for African-Americans in all seven districts.\(^{123}\) The Attorney General of North Carolina, Lacy H. Thornburg, appealed the decision with respect to five of the multi-member districts.\(^{124}\) The Supreme Court affirmed the judgment of the district court with respect to four of the districts, and reversed with respect to the fifth.\(^{125}\)

The Supreme Court first noted that the amended Section 2 and its legislative history clearly required the trial court to analyze the "totality of the circumstances."\(^{126}\) The Court reasoned that "[t]he essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [African-American] and white voters to elect their preferred representatives."\(^{127}\) The Court noted that be-

\(^{117}\) Id. at 34-35.
\(^{118}\) Id. at 35.
\(^{120}\) Id. at 374.
\(^{121}\) Id.
\(^{122}\) Id. at 365-67.
\(^{123}\) Id. at 376.
\(^{124}\) *Gingles*, 478 U.S. at 33, 42.
\(^{125}\) Id. at 80.
\(^{126}\) Id. at 79.
\(^{127}\) Id. at 47.
cause the Senate factors were "neither comprehensive nor exclusive," the determination of unequal access must be done with a "practical evaluation" or "functional view" of the political process.\textsuperscript{128} Taking a "functional view," the Court stated that only two of the Senate factors were important in determining whether multimember districts caused vote dilution: racially polarized voting and the extent to which minorities have been elected to office.\textsuperscript{129} The Court noted that other Senate factors "are supportive of, but not essential to, a minority voter's claim."\textsuperscript{130} The Court stated that minority voters challenging the validity of a multimember district must prove that such an electoral structure "operates to minimize or cancel out their ability to elect their preferred candidates."\textsuperscript{131} The Court noted that unless racially polarized voting was present, the use of multimember districts generally would not abridge the opportunity for minority voters to elect representatives of their choice.\textsuperscript{132} Therefore, the Court stated that a showing of racially polarized voting and a determination of the extent of minorities in public offices was essential.\textsuperscript{133}

However, the Court cautioned against relying on a showing that minorities had successfully been placed in office in a particular election as proof that racially polarized voting did not exist.\textsuperscript{134} The Court noted that "special circumstances," such as incumbency or absence of

\begin{quote}
\textsuperscript{128} Id. at 45 (citations omitted).
\textsuperscript{129} Id. at 48-49 n.15.
\textsuperscript{130} Id. at 48-49 n.15 (emphasis in original).
\textsuperscript{131} Id. at 48. The Court stated that Section 2 plaintiffs challenging multimember districts must prove that their ability to elect their preferred candidates has been impaired because "it is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'" Id. at 48-49 n.15 (quoting 42 U.S.C. § 1973 (1988) (effective June 29, 1982)).
\textsuperscript{132} Gingles, 478 U.S. at 48. The Court stated that finding the presence of racially polarized voting is essential to proving two of the three threshold circumstances that must be shown by a Section 2 plaintiff to prove that use of multimember districts "impair[s] minority voters' ability to elect representatives of their choice." Id. at 50, 55-56.
\textsuperscript{133} The Court noted that a plaintiff must show that "a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." Id. at 48-49. To prove this, the minority group must show three circumstances. Id. at 50. The group must show that: (1) it has a sufficient number of people in a compact geographical area so as to create a majority if that area were a single-member district; (2) it is "politically cohesive"; and (3) the white majority votes in a bloc so as to "usually defeat the minority's preferred candidate." Id. at 50-51. The Court stated that by proving circumstance number (3), "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." Id. at 51.
\textsuperscript{134} The Court further stated that the existence of legally significant racially polarized voting will prove circumstance numbers (2) and (3). Id. at 55-56.
\end{quote}
opponents, rather than the lack of racially polarized voting, could be
the reason for a minority candidate's success. Because of this possi-
bility, the Court stated that a trial court should take into considera-
tion the possibility of special circumstances in determining the
existence of legally significant racially polarized voting.

The Court held that as to four of challenged multimember dis-
tricts, the district court had properly found that the multimember dis-
tricting structure had interacted with the important, relevant factors
to result in unequal opportunity for minorities to participate in the
political process and elect representatives of their choice. Accordingly, the Court affirmed the district court's judgment for these four
districts. However, the Court reversed with respect to the fifth dis-
trict, finding that the district court erred because it failed to properly
factor into its totality of the circumstances analysis the fact that Afri-
can-American candidates had experienced sustained political success
in that district. The Court ruled that this success could not be ex-
plained by special circumstances.

In Harvell v. Ladd, the United States Court of Appeals for the
Eighth Circuit considered the special circumstances issue. In Har-
vell, African-American voters challenged an election scheme that re-
quired a candidate to receive a majority of the votes before she could
be elected to the Blytheville School Board in Blytheville, Arkansas.
The plaintiffs alleged that electing the eight members of the school
board from one multimember district caused vote dilution for the Afri-
can-American voters in the district.

In determining the extent to which minorities had been elected to
office, the United States District Court for the Eastern District of Ar-
kanas found that, for the sixteen years prior to the trial, the percent-
age of African-American school board members had been proportional

135. Id. The Court's nonexclusive list of special circumstances included "absence of
an opponent, incumbency, or the utilization of bullet voting." Id. at 57, 57 n.26.
137. Id. at 80.
138. Id.
139. Id. at 77.
140. Id.
141. 958 F.2d 226 (8th Cir. 1992), appeal after remand sub nom., Harvell v. Blythe-
ville Sch. Dist. No. 5, 33 F.3d 910 (8th Cir. 1994), vacated, No. 93-1009EAJ, 1994 U.S.
App. LEXIS 32295 (8th Cir. Nov. 16, 1994).
142. Harvell v. Ladd, 958 F.2d 226, 230 (8th Cir. 1992), appeal after remand sub
143. Id. at 228. This majority requirement was put in place in 1987. Id. Prior to
1987, the candidate who received the most votes won the election, a majority of the
votes was not required. Id. This pre-1987 process is known as "bullet voting" or "single-
shot voting." Id. at 228 n.2.
144. Harvell, 958 F.2d at 228.
to the percentage of African-Americans eligible to vote.\textsuperscript{145} Because of this sustained minority presence, the district court held that the plaintiffs had not shown there had been a violation of Section 2.\textsuperscript{146}

On appeal, the Eighth Circuit stressed the need for proper factual findings in order to aid in the complex analysis needed in vote dilution cases.\textsuperscript{147} The court held that the district court had made no factual findings on the existence of racially polarized voting, and had also failed to consider special circumstances that might explain the success of the minorities being elected to the school board.\textsuperscript{148} The court remanded the case to the district court to make these factual findings.\textsuperscript{149}

In \textit{Chisom v. Roemer},\textsuperscript{150} the Supreme Court faced another Section 2 challenge to a multimember district.\textsuperscript{151} In \textit{Chisom}, the plaintiffs challenged the election scheme used to elect the seven justices of the Louisiana Supreme Court.\textsuperscript{152} Five were elected from five single-member districts, with the other two being elected from a multimember district.\textsuperscript{153} The plaintiffs, representing a class of 135,000 African-American voters from one of the four parishes in the multimember district, alleged that the election of two justices from the multimember district “‘dilute[d] minority voting strength’ in violation of [Section] 2 of the Voting Rights Act.”\textsuperscript{154} The United States District Court for the Eastern District of Louisiana held that, under the \textit{Gingles} analysis, the multimember district did not violate Section 2.\textsuperscript{155} The plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit.\textsuperscript{156}

While the appeal was pending, the Fifth Circuit held in \textit{League of United Latin American Citizens Council No. 4434 v. Clements}\textsuperscript{157} (“LU-
that judicial elections did not fall within the scope of Section 2. In "LULAC," the court stated that Section 2 provided two separate and distinct rights — the opportunity to participate in the political process and the opportunity to elect representatives of their choice — and so a Section 2 plaintiff need only prove an abridgement of one or the other. The court based its holding on the language of Section 2(b) that "[members of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The Fifth Circuit further held in "LULAC" that judges were not "representatives" under Section 2 and therefore a challenge to an electoral practice that affects the opportunity for minorities to elect judges of their choice to office could not be brought under Section 2. However, the court noted that a practice that affected the separate right to equal opportunity to participate could be brought under Section 2. Following its decision in "LULAC," the Fifth Circuit remanded "Chisom" to the district court with orders to dismiss.

The Supreme Court rejected the Fifth Circuit's decision that Section 2 created two separate and distinct rights. The Court reasoned that these two elements — the opportunity to participate in the political process and the opportunity to elect preferred representatives — are "inextricably linked." Accordingly, the Court held that all Section 2 plaintiffs must prove both elements to bring a successful claim.

The Court noted that any restriction on the opportunity for minorities to participate in the political process would "inevitably" lead to a restriction on the ability to elect representatives of their choice. However, the Court further noted that the reverse is not true; a showing of the inability to elect preferred representatives is not sufficient by itself to establish a violation of Section 2. According to the Court, the plaintiff must also show that, under the totality of the circumstances, the practice at issue had the purpose or effect of "substitut[ing] or eliminat[ing]" the opportunity of minority voters to elect a candidate of their choice.

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159. "Id." at 624-25.
160. Id. (quoting 42 U.S.C. § 1973(b) (as amended June 29, 1982)).
161. Id. at 623-31.
162. Id. at 625, 629.
163. Chisom, 917 F.2d at 188.
165. Id. at 397 (citing White v. Regester, 412 U.S. 755 (1973), Whitcomb v. Chavis, 403 U.S. 124 (1971)).
166. Id. at 398.
167. Id. at 397.
168. Id.
cumstances, the opportunity to participate in the political process has also been abridged.\textsuperscript{169}

The Court concluded that Section 2 should be interpreted in "the broadest possible scope" to remedy racial discrimination.\textsuperscript{170} The Court stated that the word "representatives" in Section 2 should be read to describe "the winners of representative, popular elections."\textsuperscript{171}

Therefore, the Court reversed the Fifth Circuit, holding that judicial elections are covered by Section 2, and remanded the case to the Fifth Circuit for determination of the multimember district vote dilution claim.\textsuperscript{172}

In \textit{Salas v. Southwest Texas Junior College Dist.},\textsuperscript{173} the Fifth Circuit considered whether the use of an "at-large" system of electing members to the Southwest Texas Junior College Board ("Board"), rather than single member districts, violated Section 2.\textsuperscript{174} The Hispanic plaintiffs asserted that the at-large system limited their ability to elect their preferred representatives.\textsuperscript{175}

The United States District Court for the Western District of Texas found that Hispanics comprised 57\% of the voting age population and 53\% of the registered voters in the Southwest Texas Junior College District ("District").\textsuperscript{176} The district court found that only two Hispanics had ever been members of the Board during its forty-four year existence.\textsuperscript{177} The district court also found that racially polarized voting and bloc voting were present in the District, as well as significant

\textsuperscript{169} \textit{Id.} While the Supreme Court in \textit{Gingles} stated that a Section 2 plaintiff must prove the inability to elect representatives of their choice by the use of the three circumstances, it is only a threshold requirement. \textit{Gingles}, 478 U.S. at 48-51, 50-51 n.17. The Court stated this must be proven to establish that the plaintiff has been injured. \textit{Id.} at 50-51 n.17. The plaintiff must still show that the opportunity to participate has been abridged. \textit{Id.} at 79. However, because racially polarized voting and the extent to which minorities have been elected to office are used to determine the three circumstances, abridgment of the opportunity to participate is normally also established without further proof required. Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1116 n.6 (3d Cir. 1993) (stating that while the three \textit{Gingles} factors are only threshold factors, additional proof beyond the Senate Report factors is not ordinarily required to show unequal opportunity to participate) (citing \textit{Gingles}, 478 U.S. at 48 n.15), \textit{cert denied}, 114 S. Ct. 2779 (1994).

\textsuperscript{170} \textit{Chisom}, 501 U.S. at 403 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

\textsuperscript{171} \textit{Id.} at 399.

\textsuperscript{172} \textit{Id.} at 404.

\textsuperscript{173} 964 F.2d 1542 (5th Cir. 1992).

\textsuperscript{174} \textit{Salas v. Southwest Texas Junior College Dist.}, 964 F.2d 1542, 1543 (5th Cir. 1992).

\textsuperscript{175} \textit{Id.} at 1543.


\textsuperscript{177} \textit{Id.} at *4.
disparities in both education levels and income levels between Hispanics and whites.\textsuperscript{178}

While acknowledging the presence of discrimination in the District, and the fact that Hispanics had been underrepresented on the Board, the district court held that the plaintiffs had equal opportunity to participate in the political process and elect representatives of their choice.\textsuperscript{179} The court stated that minorities could solve the underrepresentation problem "by simply running candidates and turning out to vote."\textsuperscript{180}

As a threshold matter, the Fifth Circuit considered whether the members of a protected class who also are a majority in the district can bring a vote dilution claim under Section 2.\textsuperscript{181} The court held that such members were not precluded from bringing a vote dilution claim for two reasons: (1) the Voting Rights Act protects language and racial minorities, not numerical minorities; and (2) election practices can dilute the voting strength of the protected class, causing a lower voting turnout regardless of the fact that the protected class is a voting majority.\textsuperscript{182} After reaching this conclusion, the court applied the totality of the circumstances test of Section 2.\textsuperscript{183}

In its evaluation of which Senate factors were relevant and important in this situation, the Fifth Circuit noted that a court must keep in mind that the ultimate consideration is the totality of the circumstances test.\textsuperscript{184} The court stated that underlying this consideration "is an inquiry into causation — whether the given electoral practice is responsible for plaintiffs' inability to elect their preferred 

Although the court agreed that racially polarized voting, bloc voting, and socioeconomic disparities were present and relevant to a totality of the circumstances analysis, the court also stated that "a protected class is not entitled to [Section] 2 relief merely because it turns out in a lower percentage than whites to vote."\textsuperscript{185} The court noted that, while Section 2 plaintiffs could prove that the lower turn-

\footnotesize{\textsuperscript{178} Id. at *5-6. Concerning the education levels, the district court found that of persons over the age of 25, 41.6\% of Hispanics were functionally illiterate compared to 4.1\% of whites; 20.5\% of Hispanics were high school graduates versus 64\% of whites; and 81\% of the total number of residents with college degrees were white. Id. at *5. Concerning the income levels, the district court found that 37\% of Hispanic families were below the poverty line versus 11\% of white families. Id.}

\footnotesize{\textsuperscript{179} Salas, 1991 WL 367969, at *7.}

\footnotesize{\textsuperscript{180} Id.}

\footnotesize{\textsuperscript{181} Salas, 964 F.2d at 1547.}

\footnotesize{\textsuperscript{182} Id. at 1550-51.}

\footnotesize{\textsuperscript{183} Id. at 1551.}

\footnotesize{\textsuperscript{184} Id. at 1554.}

\footnotesize{\textsuperscript{185} Id.}

\footnotesize{\textsuperscript{186} Id. at 1551-55, 1556.}
out was the result of practical impediments to voting or of historical official discrimination in voting, the plaintiffs in this case did not do so.\footnote{Id. at 1555-56.} The court affirmed the district court’s holding that "the cause of the Hispanic voters’ lack of electoral success [was the] failure to take advantage of political opportunity, rather than a violation of [Section] 2."\footnote{Id. at 1556.}

In \textit{Wesley v. Collins},\footnote{791 F.2d 1255 (6th Cir. 1986).} a convicted African-American felon and a public interest organization challenged the validity of a Tennessee law which prevented convicted felons from voting while imprisoned.\footnote{Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986).} The plaintiffs claimed that the law had a disparate impact on minorities because a disproportionately higher number of African-Americans were convicted of felonies.\footnote{Id. at 1260.} The United States District Court for the Middle District of Tennessee granted the defendant’s motion to dismiss for failure to state a claim upon which relief could be granted, concluding that the law did not cause an unlawful vote dilution under the Voting Rights Act of 1965.\footnote{Wesley v. Collins, 605 F. Supp. 802, 814 (M.D. Tenn. 1985), aff’d, 791 F.2d 1255 (6th Cir. 1986).} The United States Court of Appeals for the Sixth Circuit affirmed.\footnote{Wesley, 791 F.2d at 1262.}

The Sixth Circuit first noted that "[a Section 2] violation is established if, based upon the ‘totality of the circumstances,’ the challenged legislation ‘results’ in unlawful dilution."\footnote{Id. at 1259-60 (quoting 42 U.S.C. § 1973 (as amended in 1982)).} The Sixth Circuit noted that a showing of disparate impact is not sufficient to establish a \textit{per se} violation of Section 2, but “merely directs the court’s inquiry into the interaction of the challenged legislation” with the relevant socio-economic and historical factors.\footnote{Id. at 1260-61 (citing \textit{Gingles}, 590 F. Supp. at 354).} The court stated that the list of factors from the Senate Report is “neither exclusive nor controlling” and a determination of which Senate factors are relevant must be done on a case-by-case basis.\footnote{Id. at 1260.} The court further stated that the weights to be placed in balancing the relevant factors must also be done on a case-by-case basis because there is “[n]o formula for aggregating the factors.”\footnote{Id. (quoting United States v. Marengo County Comm’n, 731 F.2d 1546, 1574 (11th Cir. 1984), cert. denied, 469 U.S. 976 (1984)).}

While the court found that several of the Senate factors — such as historical official discrimination — were present and relevant, the court emphasized that Tennessee’s legitimate interest in disen-
franchising convicted felons was an important factor to be considered.\textsuperscript{198} The court noted that the law was neutrally administered because a voter could only be disenfranchised if that individual committed an act proscribed by the law, not because of race or any other immutable characteristic.\textsuperscript{199} Accordingly, the court concluded that the disparate impact did not "result" from the challenged state law and therefore Section 2 was not violated.\textsuperscript{200}

In \textit{Irby v. Virginia State Board of Elections},\textsuperscript{201} the plaintiffs challenged a Virginia law requiring an appointment system, rather than an election, to select school board officials.\textsuperscript{202} In the counties in which the plaintiffs resided, the percentage of African-Americans on the school boards was considerably lower than the percentage of African-Americans in the general population.\textsuperscript{203} The plaintiffs argued that they had proven discriminatory results by showing that African-Americans were "underrepresented on school boards in relation to their numbers in the general population."\textsuperscript{204} The United States District Court for the Eastern District of Virginia rejected the argument, and held that the plaintiffs did not prove that the appointive system caused the disparity.\textsuperscript{205}

The United States Court of Appeals for the Fourth Circuit affirmed the district court, finding no "causal link between the appointive system and [African-American] underrepresentation" on the

\begin{center}
\begin{tabular}{lccc}
\hline
County & General Population & School Board
\hline
Halifax & 40\% & " & 22.2\% " \\
Nottoway & 37\% & " & 20.0\% " \\
Prince Edward & 37\% & " & 25.0\% " \\
City of Petersburg & 61\% & " & 44.4\% " \\
\hline
\end{tabular}
\end{center}

\textit{Irby}, 889 F.2d at 1355 (citations omitted).

\textsuperscript{204} \textit{Irby}, 889 F.2d at 1358.

\textsuperscript{205} \textit{Fitz-Hugh}, 693 F. Supp. at 434.
school boards.\textsuperscript{206} The Fourth Circuit stated that the evidence showed that African-Americans were simply not seeking school board positions at levels commensurate with the percentage of African-Americans in the general population.\textsuperscript{207}

Application of Amended Section 2 to Registration Statutes

The initial focus of the Voting Rights Act was to increase minority registration through the elimination of discriminatory registration practices such as poll taxes and literacy tests.\textsuperscript{208} The Act was immediately successful, with many disenfranchisement registration practices being found invalid under the Act, and many states relaxing voter registration requirements.\textsuperscript{209} Although Congress, in the 1982 amendment of Section 2, focused mainly on vote dilution schemes implemented to dilute the voting power of minorities, and most of the post-1982 amendment cases have involved such vote dilution schemes, Section 2 applies to all forms of voting discrimination.\textsuperscript{210} The first challenge to registration practices under amended Section 2 came in \textit{Mississippi State Chapter, Operation PUSH, Inc. v. Mabus} ("\textit{Operation PUSH}”).\textsuperscript{211}

In \textit{Operation PUSH}, the United States Court of Appeals for the Fifth Circuit upheld the United States District Court for the Northern District of Mississippi's finding that two Mississippi registration laws, one requiring dual registration and one prohibiting satellite registration sites, violated Section 2.\textsuperscript{212} Mississippi's dual registration statute required a voter to register twice: first with the county registrar to be able to vote in county, state and federal elections; and second with the municipal clerk for municipal elections.\textsuperscript{213} Mississippi also effectively restricted the registering of voters at places other than the county registrar's office.\textsuperscript{214} Furthermore, most county registrar's of-

\begin{itemize}
  \item \textsuperscript{206} Irby, 889 F.2d at 1359.
  \item \textsuperscript{207} Id. at 1358. The court gave as an example the fact that, since 1971, every African-American person who formally requested appointment to the school board in Buckingham County was placed on the board. Id.
  \item \textsuperscript{208} Wright, 28 How. L.J. at 592.
  \item \textsuperscript{209} Mark T. Quinlivan, Comment, \textit{One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention In the Realm of Voter Registration}, 137 U. Pa. L. Rev. 2361, 2370-71, 2371 n.67 (1989).
  \item \textsuperscript{210} See S. REP. No. 97-417, supra note 2, at 19-30; see, eg., supra notes 115-207 and accompanying text (discussing the facts and holdings of Gingles, Harvell, Chisom, Salas, Wesley, and Irby); Steve Barber et al., Comment, \textit{The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act}, 23 Harv. C.R.-C.L. L. Rev. 483, 518 (1988).
  \item \textsuperscript{211} 932 F.2d 400, 401 (5th Cir. 1991); Barber, 23 Harv. C.R.-C.L. L. Rev. at 522.
  \item \textsuperscript{212} Mississippi State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400, 401-02 (5th Cir. 1991).
  \item \textsuperscript{213} Id. at 402.
  \item \textsuperscript{214} Id.
\end{itemize}
fices maintained office hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, with many offices closed during lunch hour. 215

Under a totality of the circumstances analysis, the district court noted that factors relating to voting behavior (such as racially polarized voting, discriminatory voting practices, candidate slating practices and racial appeals in campaigns), even if present, were not relevant to a determination of the discriminatory impact of registration practices. 216 However, the district court found that the presence of disparities between African-Americans and whites in socioeconomic areas such as employment, income, education, and housing were relevant. 217

The district court found that African-Americans were less likely than whites to be able to take off work to register during limited registration office hours because the jobs they held would not allow them to do so. 218 The court also found that African-Americans were less able to travel to the registration offices, especially in rural areas, because African-Americans owned disproportionately fewer automobiles than whites. 219

The district court found that the interaction between the registration laws and the socioeconomic conditions "resulted in the disfranchisement [sic] of a substantial number of [African-American] citizens who are unable, because of disproportionate lack of transportation, disproportionate inability to register during working hours, or other reasons, to travel to the offices of the county registrar to register to vote." 220 The district court held that the registration laws violated Section 2 because they had a disparate effect on the number of African-American registrations, resulting in less of an opportunity to participate in the political process. 221 The Fifth Circuit affirmed the district court's decision in all respects. 222

PURGE LAWS

The Purpose and Procedures of Nonvoting Purge Laws

Forty-nine states and the District of Columbia use some type of a purge law to reduce the potential for vote fraud by identifying unqual-

216. Id. at 1263-65.
217. Id. at 1255-56.
218. Id. at 1256.
219. Id.
220. Id. at 1264.
221. Id. at 1268.
222. Operation PUSH, 932 F.2d at 413.
ified voters and purging them from the registration rolls.223 A voter becomes unqualified if she dies, moves, changes names, has been declared mentally incompetent, or has been convicted of a crime that requires a forfeiture of her right to vote.224

Thirty-five states and the District of Columbia utilize a “purge for failure to vote” type of purging mechanism to remove unqualified voters.225 These nonvoting purge laws remove voters after they have not

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223. Barber, 23 HARV. C.R.-C.L. L. REV. at 483. The state of North Dakota does not have a voter registration system and therefore has no need for a purge law. See id. at 499 n.85.


225. Id. at 499. While Barber cites forty states as utilizing nonvoting purge laws, Delaware, Maryland, Michigan, Utah, and Washington have repealed their nonvoting purge laws. Compare table infra (showing that thirty-five states and the District of Columbia presently utilize nonvoting purge laws) with Barber, 23 HARV. C.R.-C.L. L. REV. at 550, app. A (showing that forty states and the District of Columbia utilized nonvoting purge laws at the time of Barber's Comment).
voted for a specific number of years. The assumption is that, be-

<table>
<thead>
<tr>
<th>Code</th>
<th>Years</th>
<th>Purge Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>FLA. STAT. Ann. § 98.065 (West Supp. 1995)</td>
<td>yes</td>
<td>two years*</td>
</tr>
<tr>
<td>GA. Code Ann. § 34-625 (Supp. 1994)</td>
<td>yes</td>
<td>three years</td>
</tr>
<tr>
<td>HAW. REV. STAT. § 11-17 (1985)</td>
<td>no</td>
<td>general election</td>
</tr>
<tr>
<td></td>
<td></td>
<td>and preceding</td>
</tr>
<tr>
<td></td>
<td></td>
<td>primary</td>
</tr>
<tr>
<td>IDAHO Code § 34-435 (1981)</td>
<td>no</td>
<td>four years</td>
</tr>
<tr>
<td>ILL. ANN. STAT. ch. 10, ¶¶ 6-58, 5-24, 4-17 (Smith-Hurd 1939)</td>
<td>yes</td>
<td>four years</td>
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<tr>
<td>IND. Code Ann. §§ 3-7-9-1 - 3-7-9-7 (Burns 1993 &amp; Cum. Supp. 1994)</td>
<td>yes</td>
<td>four years</td>
</tr>
<tr>
<td>MINN. STAT. Ann. § 201.171 (West 1992)</td>
<td>no</td>
<td>four years</td>
</tr>
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<td></td>
<td></td>
<td>general election</td>
</tr>
<tr>
<td>NEV. REV. STAT. § 293.545 (1987)</td>
<td>yes</td>
<td>general election</td>
</tr>
<tr>
<td>N.M. STAT. Ann. § 1-4-28 (Michie Cum. Supp. 1994)</td>
<td>yes</td>
<td>four years</td>
</tr>
<tr>
<td>N.C. GEN. STAT. § 163-69 (1994)</td>
<td>yes</td>
<td>four years</td>
</tr>
<tr>
<td>OHIO REV. CODE Ann. § 3503.21 (Baldwin 1994)</td>
<td>yes</td>
<td>four years</td>
</tr>
<tr>
<td>OR. REV. STAT. § 247.565 (1993)</td>
<td>yes</td>
<td>two years</td>
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<tr>
<td></td>
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<td>general elections</td>
</tr>
<tr>
<td>S.C. Code Ann. §§ 7-3-20, 7-3-30 (Law Co-op. 1976)</td>
<td>yes</td>
<td>four years</td>
</tr>
<tr>
<td>VA. CODE Ann. § 24.2-428 (Michie 1993)</td>
<td>yes</td>
<td>four years</td>
</tr>
<tr>
<td>W. VA. CODE § 3-2-27 (Supp. 1994)</td>
<td>yes</td>
<td>period covering</td>
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<tr>
<td></td>
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<tr>
<td></td>
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<td>four years</td>
</tr>
<tr>
<td>WYO. STAT. Ann. §§ 22-3-115 - 22-3-116 (1992)</td>
<td>yes</td>
<td>general election</td>
</tr>
</tbody>
</table>

a. The nonvoting purge is not required but is one of three optional purging methods available to voting officials who must incorporate at least one of the three in their biennial registration list maintenance program. FLA. STAT. Ann. § 98.065 (West Supp. 1995).

b. However, the failure to give or receive notice will not affect cancellation of the registration. R.I. GEN. LAWS Ann. § 17-10-1 (Cum. Supp. 1994).

c. However, the failure to receive notice will not affect the cancellation. VA. CODE Ann. § 24.2-428 (Michie 1993).

d. Trigger period is after nonreturn of a mailed confirmation notice. W. VA. CODE § 3-2-27 (Supp. 1994).

Other types of purging mechanisms include door-to-door canvasses and election authority hearings. Barber, 23 HARV. C.R.-C.L. L. Rev. at 512. 226. Barber, 23 HARV. C.R.-C.L. L. Rev. at 499. See supra note 225 (indicating the period of time of nonvoting that triggers the purge in each state).
because the person has not voted during the specified period of time, the person has died, moved, or become otherwise unqualified.227

Of those states that require purging for failure to vote, most states' nonvoting purge statutes require notices to be sent to voters slated for purging, informing them on how to prevent such action.228 All states allow a voter to reregister if that voter is purged.229

Challenges to Nonvoting Purge Laws

Nonvoting purge laws have been unsuccessfully challenged as violations of the First and Fourteenth Amendments to the United States Constitution.230 In Hoffman v. State of Maryland,231 the United States Court of Appeals for the Fourth Circuit rejected the plaintiffs' argument that Maryland's nonvoting purge law violated their First Amendment rights.232 The plaintiffs argued that the purge law violated their First Amendment freedom of speech right because the purge law prevented them from making an expression of dissatisfaction by not voting.233 The Fourth Circuit held that, even assuming that such a First Amendment right existed, the right would not be violated because maintaining accurate and up-to-date voter registration rolls to prevent vote fraud was a substantial state interest.234

In Williams v. Osser,235 the United States District Court for the Eastern District of Pennsylvania rejected the plaintiffs argument that Pennsylvania's nonvoting purge law violated their Fourteenth Amendment equal protection rights.236 The plaintiffs alleged that the
purge law violated the Equal Protection Clause because it treated persons who had not voted for two consecutive years differently from those who had voted within the two year period. The court found that because the purge law neither discriminated on the basis of a suspect classification, such as race or wealth, nor absolutely barred the plaintiffs from voting, the purge law was only subject to a "reasonable basis" review standard. Using this standard, the court found that the state's legitimate interest in preventing fraudulent voting outweighed the "minimal" burden on an individual to either vote once every two years or provide notice to the election officials.

Until Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division, there were no reported cases that involved a challenge to a nonvoting purge law as a violation of Section 2. However, a Section 2 violation had been found where election officials failed to comply with the procedures set forth in a nonvoting purge law. In Toney v. White, defendant Myrtis Bishop, the Voter Registrar of Madison Parish, Louisiana, failed to comply with the requirements set forth in Louisiana's nonvoting purge law concerning the procedures for notification and reinstatement of purged registrants. This failure to comply resulted in a substantially higher number of African-Americans being purged than would have

STAT. § 623-40 (1994) (providing that a voter may retain her registration if she votes in the next election following the purge notification, or requests reinstatement within ten days of the next election following the notification).

238. Id. at 650.
239. Id. at 652-53. The court noted that the State, in order to curb fraudulent voting, had a legitimate interest to purge not only registrants who had moved or died, but also those who had failed to vote for two years because, in either situation, political operatives could fraudulently cast votes in the nonvoting registrant's name. Id. The court found that, in addition to prevention of fraud, the State had a legitimate interest in maintaining up-to-date, accurate registration rolls for the "preservation of public confidence in the electoral process, and determination of the number of election workers to be employed." Id. at 653. As to the burden on individuals to either vote or provide notice, the court noted that "[t]he burden does not nearly approach the requirements of initial registration." Id.
240. 28 F.3d 306 (3d Cir. 1994).
242. See Toney v. White, 488 F.2d 310, 312, 316 (5th Cir. 1973) (en banc); see infra notes 243-46 and accompanying text.
243. 488 F.2d 310 (5th Cir. 1973) (en banc).
244. Toney v. White, 348 F. Supp. 188, 189-194 (W.D. La. 1972), aff'd, 488 F.2d 310 (5th Cir. 1973) (en banc). Louisiana's nonvoting purge law required the registrar to purge registrants who had not voted within the past four consecutive years. Id. at 190. Registrants slated to be purged were required to be mailed written notice that they were about to be purged, and that they had the right to appear before the registrar within ten days in order to be reinstated, which entitled the registrant to vote as before. Id. at 190-91. The purge law also required that a notice be published in a newspaper. Id. at 191. As was the written notice, this published notice was required to inform the
been purged if the purge law requirements had been followed. The United States Court of Appeals for the Fifth Circuit affirmed the district court's holding that, although there was no evidence of purposeful discrimination, African-Americans had been discriminated against in violation of the Fifteenth Amendment and Section 2.

ANALYSIS

In Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division, the United States Court of Appeals for the Third Circuit stated that, in order to establish a violation of Section 2 of the Voting Rights Act of 1965, Philadelphia City Councilman Angel Ortiz and the other plaintiffs (“plaintiffs”) had to prove a causal connection between the nonvoting purge law and the disparate impact on the ability of minorities in Philadelphia to both participate in the political process and elect representatives of their choice. The plaintiffs had to establish this causal connection by showing that the purge law interacted with the relevant socioeconomic and historical conditions to cause minorities to have unequal access to the political system. The Third Circuit held that the purge law did not prevent minorities from participating in the political process because the law was not the “cause” of the disparate purge rates among minority and white voters.

Bishop mailed proper written notices to 141 registrants, 130 of whom were African-Americans, but failed to reinstate those that appeared for reinstatement. Furthermore, in the published notice, Bishop failed to inform the registrants that they had the right to be reinstated. Additionally, Bishop conducted the purge in the thirty day period prior to the election. The purge law did not fix a time at which the registrars where to perform the purges, the Louisiana Attorney General had issued an opinion that “if the Registrar waits until 30 days before an election to begin the performance of his duties, this would not be within the spirit of the law.” In addition to misapplying the nonvoting purge statute, Bishop neglected to enforce a separate purge statute which required registrars to purge those persons who had only voted by absentee ballot in the prior two-year period, and who had not substantiated their right to vote by absentee ballot. Most of the absentee voters were white, and therefore, because of the failure to enforce the purge statute, fewer whites were purged than should have been purged. The Fifth Circuit noted that “the results of the election could well have depended on the absentee vote and thus on the failure to purge this list.” The district court had made an explicit finding that Philadelphia minorities’ opportunity to elect representatives of
Judge Timothy K. Lewis dissented. Judge Lewis agreed that the plaintiffs had to establish a causal connection between the purge law and the disparate impact. However, Judge Lewis argued that the court actually required the plaintiffs to prove more than this causal connection. Judge Lewis reasoned that the court required the plaintiffs to prove that the purge law was the sole cause of the disparate impact on minorities because the court stated that the societal disadvantages experienced by minorities in Philadelphia were not their choice had not been abridged. Ortiz, 28 F.3d at 314-15. However, the district court found that "minority candidates experience difficulty in electing representatives to office" in its discussion of Senate Report factor number seven: the extent to which members of the minority group have been elected to public office. Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div., 824 F. Supp. 514, 538 (E.D. Pa. 1993), aff'd, 28 F.3d 306 (3d Cir. 1994). In making that statement, the district court was making a determination on the existence of that factor; not whether Philadelphia's minorities had less opportunity to elect candidates of their choice. Id. at 537-38; Ortiz, 28 F.3d at 340 (Lewis, J., dissenting).

The extent to which members of a minority group have been elected to political office is only one factor in the totality of the circumstances analysis. See supra notes 105-10 and accompanying text. This factor, by itself, does not prove whether or not minorities had less opportunity to elect candidates of their choice. See supra notes 126-36, 145-49, 177-88, 196-97, 203-07 and accompanying text. Furthermore, if a court finds that a significant number of minorities are in elected offices and wants to use this fact to disprove a Section 2 plaintiff's claim that their ability to elect preferred representatives has been impaired, the court must consider the presence of special circumstances. See supra notes 134-36, 147-49 and accompanying text.

In Ortiz, the district court did not consider whether any special circumstances were the reason for the strong minority presence on the Philadelphia City Council and in the Pennsylvania state legislature. Ortiz, 824 F. Supp. at 537-38; Ortiz, 28 F.3d at 342-43 (Lewis, J., dissenting). Therefore, this Senate factor could not be used to determine that Philadelphia's racial minorities' opportunity to elect representatives of their choice had not been impaired. Ortiz, 28 F.3d at 342 (Lewis, J., dissenting); see supra notes 134-36, 147-49 and accompanying text.

Because the district court had made a factual finding only on the extent to which minorities had been elected to public offices, and because it did not determine whether any special circumstances were present to explain the minorities' success in being elected to office, it did not and could not make an explicit finding that the opportunity of Philadelphia minorities to elect their preferred candidates had not been impaired. Ortiz, 28 F.3d at 342-43 (Lewis, J., dissenting). Judge Timothy K. Lewis in dissent properly found that the court erred when it concluded that the district court had made such a finding. Ortiz, 28 F.3d at 340 (Lewis, J., dissenting).

However, this misstatement does not affect the court's conclusion that Section 2 had not been violated. See infra note 269. The plaintiffs had to establish both elements of a Section 2 cause of action. See infra note 269. The court properly found that the plaintiffs did not prove that the opportunity to participate in the political process had been abridged, and so it was immaterial whether or not the district court made an explicit finding as to the opportunity to elect preferred candidates. See infra notes 270-76, 297-342 and accompanying text. The court only offered the evidence as additional, although unnecessary, proof that a Section 2 cause of action had not been established by the plaintiffs. Ortiz, 28 F.3d at 315.

251. Ortiz, 28 F.3d at 319 (Lewis, J., dissenting).
252. Id. at 322 (Lewis, J., dissenting); see supra notes 76-77 and accompanying text.
253. Ortiz, 28 F.3d at 323 (Lewis, J., dissenting); see supra notes 79-81 and accompanying text.
relevant in the case. In other words, Judge Lewis asserted that the court required the plaintiffs to prove that the purge law operated independently of the societal conditions to cause unequal access to the political system, rather than proving that the purge law interacted with the societal conditions to cause inequality.

The court's reasoning is superior to Judge Lewis' reasoning. The majority of the court stated that the societal conditions in Philadelphia were not relevant because the conditions did not interact with the purge law to cause unequal access. The court used the proper causal connection standard for Section 2 by discussing the relevance of the factors in the Senate Report ("Senate factors"). On the other hand, Judge Lewis, in dissent, misrepresented the court's requirement and failed to establish a causal connection between the purge law and the discriminatory results.

After misrepresenting the court's causal connection requirement, Judge Lewis went on to misinterpret the court's statement that "Section 2 plaintiffs must demonstrate that they had less opportunity both (1) to participate in the political process, and [(2)] to elect representatives of their choice." (emphasis in original) (quoting majority opinion at 314). Judge Lewis reasoned that the court had incorrectly concluded that each element of a Section 2 claim was distinct and must be proven separately. Judge Lewis concluded that the court misread Chisom v. Roemer, 501 U.S. 380 (1991), and, in so doing, created an alternative ground for dismissing a Section 2 claim. Judge Lewis argued that the court overlooked the relationship between the two parts of a Section 2 action because the court overlooked the fact that plaintiffs can establish a Section 2 violation by showing that an election law has impaired their opportunity to participate in the political process. Judge Lewis reached this conclusion because he found that "looking exclusively to electoral results, [the court] concludes that the plaintiffs cannot prevail, because there is no evidence that the purge law has denied them fair access to the political process or impaired their ability to influence the outcome of elections." (emphasis added). "Electoral results" referred to the court's statement that the district court had made an explicit finding that Philadelphia's minorities did not have less opportunity to elect representatives of their choice. The court did not look "exclusively" to the electoral results in its conclusion. The court reached its conclusion based on its finding that the purge law could not have interacted with the socioeconomic conditions to cause unequal access to the political process. The court stated that "Ortiz, in failing to establish causation, has also failed to satisfy both elements of a Section 2 cause of action and, accordingly, has failed to establish a basis upon which his requested relief could be granted." The court did not overlook the relationship between an abridgment of the opportunity to participate and an abridgment of the opportunity to elect.
Causal Connection Requirement for Section 2

The Third Circuit Applied the Correct Causal Connection Standard For Section 2

The language of Section 2, the legislative history, and the case law all support the finding of the court in Ortiz that "Section 2 plaintiffs must show a causal connection between the challenged voting practice and the prohibited discriminatory result." The language of Section 2(a) provides that "[n]o voting . . . standard, practice, or procedure shall be imposed . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race." The legislative history suggests that courts must use a totality of the circumstances analysis to determine whether the challenged electoral practice operates to abridge minorities' opportunity to participate in the political process and to elect candidates of their choice. And, the courts in Thornburg v. Gingles, Salas v. Southwest Texas Junior College Dist., Mississippi State Chapter, Operation PUSH, Inc. v. Mabus ("Operation PUSH"), Irby v. Virginia State Board of Elections, and Wesley v. Collins all required a showing of a causal connection between the challenged practice and the discriminatory results. Accordingly, a court must determine whether a challenged electoral practice interacts with socioeconomic and historical conditions to deny or abridge minorities equal access to the political process.

260. Ortiz, 28 F.3d at 312; see infra notes 261-69 and accompanying text.
264. 964 F.2d 1542 (5th Cir. 1992).
265. 932 F.2d 400 (5th Cir. 1991).
267. 791 F.2d 1255 (6th Cir. 1986).
268. Thornburg v. Gingles, 478 U.S. 30, 47 (1986); see supra notes 126-28 and accompanying text; Salas v. Southwest Texas Junior College Dist., 964 F.2d 1542, 1554 (5th Cir. 1992); see supra notes 184-88 and accompanying text; Mississippi State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400, 404-05, 413 (5th Cir. 1991); see supra notes 216-22 and accompanying text; Irby v. Virginia State Board of Elections, 889 F.2d 1352, 1359 (4th Cir. 1989), cert. denied, 496 U.S. 906 (1990); see supra notes 205-07 and accompanying text; Wesley v. Collins, 791 F.2d 1255, 1259-62 (6th Cir. 1986); see supra notes 194-200 and accompanying text.
269. See supra notes 127, 195, 220 and accompanying text (discussing the facts and holdings of Gingles, Wesley, and Operation PUSH respectively).

Denial or abridgement of the opportunity to participate in the political process is one of the two elements that plaintiffs must prove to establish Section 2 violations. See supra notes 164-66 and accompanying text. The plaintiffs must also show that their opportunity to elect representatives of their choice has been abridged. See supra notes 164-66 and accompanying text. The United States Supreme Court, in Chisom, held that a plaintiff must prove both elements of a Section 2 cause of action. Chisom, 501
The court in Ortiz did determine whether the nonvoting purge law interacted with any of the conditions to cause minority voters to be removed from registration rolls at disproportionately higher rates. The court properly upheld the district court's finding that the nonvoting purge law could not interact with the socioeconomic conditions to cause the disparate impact because, in light of the conditions, the minorities who were purged had already overcome the conditions by registering to vote. Because the law could not interact with the conditions, the court correctly held that, under the totality of the circumstances analysis, the conditions were not relevant.

Furthermore, the district court's finding that minorities were purged at disproportionately higher rates than whites did not in and of itself constitute a violation of Section 2. The disparate effect was only a part of the totality of the circumstances that the district court was required to consider. In all respects, the ultimate test under Section 2 is always "whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to partici-

U.S. at 398; see supra notes 164-66 and accompanying text. However, by proving the first element, the plaintiff also proves the second. Chisom, 501 U.S. at 397.

The Supreme Court noted that any restriction on the opportunity for minorities to participate in the political process would inevitably lead to a restriction on the ability to elect representatives of their choice. Id. This means that if Section 2 plaintiffs show that a law impairs access to the political process, the plaintiffs have also shown that their ability to elect their preferred representatives has been restricted. Id. Therefore, the plaintiffs have satisfied both elements of the Section 2 cause of action. See supra notes 164-66 and accompanying text.

The Supreme Court further noted, however, that a showing of the inability to elect preferred representatives is not sufficient, by itself, to establish a violation of Section 2. Chisom, 501 U.S. at 397; see supra notes 167-69 and accompanying text. The plaintiffs must also show that their access to the political process has been impaired because of the election law. Chisom, 501 U.S. at 397. The inability to elect preferred representatives does not lead to impaired access to the political process. Id.; see supra notes 167-69 and accompanying text. Therefore, proving the inability to elect preferred candidates does not prove impaired participation. Chisom, 501 U.S. at 397; see supra notes 167-69 and accompanying text. Plaintiffs who only show the inability to elect preferred candidates have not satisfied both elements of the Section 2 cause of action. See supra notes 164-66 and accompanying text.

The court in Ortiz properly found that the plaintiffs did not show that the purge law caused unequal access to the political process, and, therefore, did not show an abridgement of the opportunity to elect preferred representatives. See infra notes 270-76, 297-342 and accompanying text. The plaintiffs failed to satisfy both elements of a Section 2 claim. See supra notes 270-76, 297-342 and accompanying text.

See Ortiz, 28 F.3d at 315-16.

See id.; see infra notes 308-42 and accompanying text.

See Ortiz, 28 F.3d at 316; see supra notes 126-29, 184-88, 194-200, 205-07, 216-22 and accompanying text (discussing the facts and holdings of Gingles, Salas, Wesley, Irby, and Operation PUSH respectively).

See Ortiz, 824 F. Supp. at 526-31; see supra note 45; see Wesley, 791 F.2d at 1260-61.

See Wesley, 791 F.2d at 1260-61; see supra note 194-97 and accompanying text.
participate and to elect candidates of their choice." The court in Ortiz correctly applied this test to the district court's finding because the disparate result did not occur at the point of access to minority participation in the political process. However, Judge Lewis argued that the court actually required more than this causal connection. Judge Lewis stated that a fair reading of the entire district court's analysis showed that the district court used the "dispositive force" language to mean that the plaintiffs had to show that the purge law interacted with other conditions to cause the discriminatory effect. However, Judge Lewis interpreted the court's support of the district court's decision to mean that the court "adopt[ed] the view that in order to have established a violation of [Section] 2, the plaintiffs would have needed to prove that the nonvoting purge operated independently of social and historical conditions to cause the inequality of which they complain." Judge Lewis asserted that the court required a showing that the purge law was the sole cause of the disparate impact on minorities. Judge Lewis interpreted the court's causal connection requirement to mean that the plaintiffs had to show that the purge law caused the conditions (rather than the discriminatory result) that restricted the minority voters' opportunity to participate in the political process.

In support of its interpretation of the court's causal connection requirement, Judge Lewis cited, in part, the following language in the court opinion: "The societal disadvantages cited by the plaintiffs and the dissent just are not relevant... the record reveals no link between the societal conditions and factors recited by the dissent and the electoral practice... challenged by [the plaintiffs]." Judge Lewis interpreted "the record reveals no link" to mean no causal link and, therefore, argued that the court required the plaintiffs to prove that the nonvoting purge law caused the disparate societal conditions. Judge Lewis reasoned that because the court required the purge law to be the sole cause of the disparate impact, "[i]n the court's view, the

276. See Ortiz, 28 F.3d at 315-16; see infra notes 308-20 and accompanying text.
277. Ortiz, 28 F.3d at 322 (Lewis, J., dissenting).
278. Id. at 322-23 (Lewis, J., dissenting).
279. Id. at 323 (Lewis, J., dissenting).
280. Id. (emphasis added).
281. Id. at 323-24 (Lewis, J., dissenting).
282. Id. at 325 (Lewis, J., dissenting).
283. Id. at 316; id. at 324 (Lewis, J., dissenting).
284. Ortiz, 28 F.3d at 324 (Lewis, J., dissenting).
essence of a [Section] 2 claim is that a certain electoral law actually causes whatever circumstances might contribute to the deprivation of political equality of which a plaintiff complains." 285

If the court's causal connection requirement was what Judge Lewis interpreted it to be, it would have been an improper one. 286 Under this interpretation, the plaintiffs would have had to prove that the purge law caused the conditions that prevented the minority voters from turning out to vote at the same rate as white voters. 287 The plaintiffs would have had to prove that the purge law caused the disparities between racial minorities and whites in educational attainment, home ownership, housing, health care, rates of unemployment, and income. 288 Judge Lewis correctly noted that such a reading of the causal connection did not comport with the causal connection set forth by the United States Supreme Court in Gingles, and used in Operation PUSH and other Section 2 cases. 289 The courts in all of these cases required proof of a causal connection between the challenged election law and the discriminatory results, not between the law and the relevant conditions. 290

However, Judge Lewis incorrectly interpreted the court's opinion. 291 The court, in stating that there was no link between the conditions and the purge law, meant that there was no interaction between the conditions and the electoral practice, not that there was no causal link between them. 292 As discussed previously, the court used the proper causal connection requirement as set forth in Gingles. 293

Judge Lewis' Dissent Failed To Establish A Connection Between The Purge Law and Disparate Minority Impact

Judge Lewis argued that the district court's factual finding of substantial disparities in education, employment, and wealth was the fac-

285. Id. at 325 (Lewis, J., dissenting).
286. See supra notes 260-69 accompanying text.
287. See supra notes 280-82 and accompanying text.
288. See supra notes 47-48 and accompanying text (discussing the facts and holding of the district court decision in Ortiz).
289. Ortiz, 28 F.3d. at 325, 328 n.13, 329 n.14 (Lewis, J., dissenting).
290. Gingles, 478 U.S. at 47; see supra notes 126-28 and accompanying text; Salas, 964 F.2d at 1554; see supra notes 184-85 and accompanying text; Operation PUSH, 932 F.2d at 404-05, 413; see supra notes 216-22 and accompanying text; Irby, 889 F.2d at 1359; see supra notes 205-07 and accompanying text; Wesley, 791 F.2d at 1259-62; see supra notes 194-95 and accompanying text.
291. See infra notes 290-91 and accompanying text.
292. Ortiz, 28 F.3d at 315-16.
293. See supra notes 255-74 and accompanying text.
tor of "primary importance" among all the Senate factors. Judge Lewis repeatedly asserted that Pennsylvania's nonvoting purge law could and did interact with these socioeconomic conditions to cause minorities to be purged at disparate rates. However, as the court noted, Judge Lewis never explained how he made this causal connection.

Judge Lewis' Improper Reliance On Footnote 114 In Establishing the Causal Connection Between the Nonvoting Purge Law and Disparate Minority Impact

Judge Lewis relied on footnote 114 in the Senate Report to establish the causal connection between the purge law and the discriminatory results. Footnote 114 in the Senate Report provides that where "disproportionate educational[,] employment, income level and living conditions arising from past discrimination" are shown, and "where the level of [African-American] participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio[ ]economic status and the depressed level of political participation." Judge Lewis noted that the district court had found that racial minorities in Philadelphia suffered socioeconomic disadvantages, and that racial minority voters exercised their right to vote at lower rates than white voters. As a result, Judge Lewis stated that no further causal nexus needed to be proven because the plaintiffs had shown disparate socioeconomic conditions and depressed political participation.

However, the causal nexus footnote 114 describes is not the causal connection that must be shown between the nonvoting purge law and the discriminatory results. The causal nexus in footnote

294. Ortiz, 28 F.3d at 332 (Lewis, J., dissenting); S. Rep. No. 97-417, supra note 2, at 28-29. The dissent noted that the following factors could discourage participation in the political process and so may also be considered:

[A] history of official discrimination in voting, efforts made with the design or effect of limiting the political power of minority groups, the difficulty minority constituents have experienced in trying to elect their preferred candidates, and a lack of responsiveness on the part of elected officials to the particular needs and concerns of minority communities.

Ortiz, 28 F.3d at 332 (Lewis, J., dissenting). For the complete list of Senate Report factors, see supra note 106 and accompanying text.

295. Ortiz, 28 F.3d at 321, 332, 336 (Lewis, J., dissenting).

296. Id. at 317.

297. Id. at 325, 326-27 (Lewis, J., dissenting); see S. Rep. No. 97-417, supra note 2, at 29 n.114.


299. Ortiz, 28 F.3d at 325-26 (Lewis, J., dissenting); see supra notes 47-49 and accompanying text (discussing the factual findings of the district court in Ortiz).

300. Ortiz, 28 F.3d at 326-27 (Lewis, J., dissenting).

301. See infra notes 302-06 and accompanying text.
114 is only used to establish the existence of factor number five in the Senate Report.\textsuperscript{302} Senate factor number five is "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process."\textsuperscript{303} In other words, footnote 114 eliminates the need for a Section 2 plaintiff to prove that disparate socioeconomic conditions caused the depressed levels of political participation.\textsuperscript{304} If disparate socioeconomic conditions and depressed voter participation are shown, the existence of Senate factor number five is established.\textsuperscript{305}

As a result, the plaintiffs in Ortiz still needed to establish a causal connection between the purge law and the discriminatory result by proving that the purge law interacted with factor number five, and any other relevant factors or conditions, to cause the discriminatory result.\textsuperscript{306} Judge Lewis failed to make the causal connection between the nonvoting purge law and the disparate rate of minorities that were purged from the registration rolls.\textsuperscript{307}

The Nonvoting Purge Law Could Not Interact With Socioeconomic Conditions to Cause the Disparate Impact

Judge Lewis used Operation PUSH to show how electoral practices, in that case registration laws, interacted with socioeconomic conditions to cause discriminatory results.\textsuperscript{308} In Operation PUSH, the United States Court of Appeals for the Fifth Circuit properly found that the registration laws interacted with the socioeconomic conditions of African-Americans to cause African-Americans to register in disproportionately lower numbers than white citizens.\textsuperscript{309} However, Judge Lewis' analogy to Operation PUSH failed to prove the causal connection for the nonvoting purge law in Ortiz.\textsuperscript{310}

The registration laws present in Operation PUSH were structured so that they interacted with the socioeconomic conditions present in that jurisdiction to cause a disproportionately lower number of one group of persons to be able to register, African-American citizens, than a similarly situated group of persons, white citizens.\textsuperscript{311} These
two groups were similarly situated in that both were groups of unregistered citizens.\textsuperscript{312}

The laws in \textit{Operation PUSH} controlled the point of access to the political process, registration to vote.\textsuperscript{313} The laws interacted with socioeconomic conditions to prevent disproportionately higher numbers of African-American citizens from registering to vote.\textsuperscript{314} Therefore, the laws prevented equal access to the political process for African-Americans causing them to have an unequal opportunity to participate in the political process, a violation of Section 2.\textsuperscript{315} The registration laws in \textit{Operation PUSH} controlled an area of the political process which affected the opportunity of minorities to participate and elect their preferred candidates.\textsuperscript{316}

The area of the political process controlled by Pennsylvania's non-voting purge law is not the registration process nor is it the voting process.\textsuperscript{317} The law does not control an area that would affect the opportunity for participation and election of preferred candidates.\textsuperscript{318} The law only comes into effect after a person has registered and has chosen not to vote.\textsuperscript{319} Therefore, the purge law could not interact with socioeconomic conditions to abridge such opportunity because it by itself could not abridge the opportunity to participate in the political process.\textsuperscript{320}

Judge Lewis argued that the socioeconomic conditions present in Philadelphia depressed the level of participation by minorities in the political process — i.e. registered minorities voted at lower rates than registered whites — which the purge law compounded.\textsuperscript{321} There are

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\item \textsuperscript{312} See supra notes 212-22 and accompanying text.
\item \textsuperscript{313} See supra notes 212-15 and accompanying text.
\item \textsuperscript{314} See supra notes 217-20 and accompanying text.
\item \textsuperscript{315} See supra notes 220-21 and accompanying text.
\item \textsuperscript{316} See supra notes 212-15 and accompanying text.
\item \textsuperscript{317} See supra notes 29-34 and accompanying text.
\item \textsuperscript{318} See supra notes 29-34 and accompanying text.
\item \textsuperscript{319} Ortiz, 28 F.3d at 315; see supra notes 30-34 and accompanying text.
\item \textsuperscript{320} Ortiz, 28 F.3d at 315-16. The purge law itself could not abridge the opportunity to participate in the political process because it was undisputed that the nonvoting purge law has been administered fairly and neutrally, and that ample opportunity for reregistration was given. Id. at 313 (quoting Ortiz, 824 F. Supp. at 539); id. at 314. The Senate Report notes that purging laws may produce discriminatory results "if fair procedures were not followed . . . if the need for a purge were not shown or if opportunities for re-registration were unduly limited." S. Rep. No. 97-417, supra note 2, at 30 n.119 (citations omitted). See Toney v. White, 488 F.2d 310, 312, 316 (5th Cir. 1973) (en banc) (involving unfair procedures); see supra notes 240-44 and accompanying text.

While the majority stated that there was no authority requiring a showing of need for a purge law, the dissent argued that Title VII disparate impact law, 42 U.S.C. 2000e-2(k) (1994 Supp.), by analogy, supports such a requirement. Ortiz, 28 F.3d at 316; id. at 332-35 (Lewis, J., dissenting). A discussion on the analogy of Title VII is beyond the scope of this Note.
\item \textsuperscript{321} Ortiz, 28 F.3d at 325-27 (Lewis, J., dissenting).
\end{itemize}
three possible reasons why minority voters did not vote at the same rate as white voters: (1) voter apathy; (2) historical official discrimination in the voting process; or (3) practical impediments caused by the voting process.\textsuperscript{322} As to the first reason, the nonvoting purge law could interact with disproportionately higher minority voter apathy to cause minorities to be purged at higher rates.\textsuperscript{323} However, as the Fifth Circuit stated in \textit{Salas}, "a protected class is not entitled to [Section] 2 relief merely because it turns out in a lower percentage than whites to vote."\textsuperscript{324}

The second reason for the lower minority voting turnout in Philadelphia could be historical official discrimination.\textsuperscript{325} However, the district court in \textit{Ortiz} made an explicit factual finding that the evidence did not establish historical official discrimination in voting.\textsuperscript{326}

Third, there may be practical impediments to voting for minorities in that the voting procedures used in Philadelphia could interact with the disparate socioeconomic conditions of minorities to cause them to vote at lower rates than whites.\textsuperscript{327} While this may be true, the purge law is only applied to persons who have already accessed the political process, and so the law could not interact with the socioeconomic conditions to prevent participation.\textsuperscript{328} The purge law only applies to persons who have already registered, have not voted for two years, and have chosen not to either vote in the next election or request reinstatement.\textsuperscript{329}

Because the purge law applies only to persons who have registered, it must be determined whether the purge law causes registered minority voters to have unequal opportunity to participate in the political process as compared to registered white voters.\textsuperscript{330} The court in \textit{Ortiz} noted that the purge law was neutrally administered and therefore the only reason a registered voter, whether white or minority, was purged was because she did not vote within the prior two years and did not vote in the next election or request reinstatement.\textsuperscript{331} Therefore, the court was correct in finding that the minority voters were purged at disproportionally higher rates than whites, not

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\textsuperscript{322} See supra notes 186-88 and accompanying text (discussing the facts and holding of \textit{Salas}).
\textsuperscript{323} See supra notes 260-69 and accompanying text (discussing causal connections); see also supra notes 186-88 and accompanying text (discussing the facts and holding of \textit{Salas}).
\textsuperscript{324} \textit{Salas}, 964 F.2d at 1556.
\textsuperscript{325} See supra notes 187-88 and accompanying text.
\textsuperscript{326} \textit{Ortiz}, 824 F. Supp. at 532.
\textsuperscript{327} See supra notes 187-88 and accompanying notes.
\textsuperscript{328} See supra notes 317-20 and accompanying text.
\textsuperscript{329} See supra notes 30-34 and accompanying text.
\textsuperscript{330} See supra notes 102, 312-17 and accompanying text.
\textsuperscript{331} \textit{Ortiz}, 28 F.3d at 314.
\end{flushleft}
because of the purge law, but because the minority voters did not vote at the same rate as whites.\textsuperscript{332}

In order to find that the purge law causes the disparate impact, future plaintiffs would have to argue that the purge law interacts with Philadelphia's voting procedures which interact with the socioeconomic conditions to cause the disparate impact on minorities.\textsuperscript{333} However, Section 2 plaintiffs must show that the challenged law causes the discriminatory results.\textsuperscript{334} In this situation, future plaintiffs will have to challenge the voting procedures, not the purge law.\textsuperscript{335}

Judge Lewis discussed at length how, by taking a functional view of the totality of the circumstances, it was evident that the burdens of registration and reregistration were significant for the socioeconomically disadvantaged minority citizens.\textsuperscript{336} Judge Lewis essentially argued that Philadelphia's purge law interacted with the reregistration requirements which interacted with the socioeconomic conditions to cause the disparate impact on minorities.\textsuperscript{337} As the court noted in its conclusion, this may be true.\textsuperscript{338} The court argued that, hypothetically, a plaintiff may be able to show that Philadelphia's voter registration laws interact with the socioeconomic conditions to cause discriminatory results.\textsuperscript{339} However, as the court also noted, voter registration laws were not before the court.\textsuperscript{340} The plaintiffs should have challenged the registration laws, not the purge laws.\textsuperscript{341} Whether a person is registering for the first time or reregistering after being purged, the voter registration laws — not the purge law — control the process.\textsuperscript{342}

CONCLUSION

In the first recorded case involving a challenge to a nonvoting purge law under Section 2 of the Voting Rights Act of 1965, the United States Court of Appeals for the Third Circuit, in Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Divi-
sion, held that Ortiz and the other plaintiffs ("plaintiffs") failed to establish the required causal connection between Pennsylvania's non-voting purge law and the disparate rate at which African-Americans and Latinos were purged from Philadelphia's registration rolls. The Third Circuit held, in part, that the neutrally applied purge law did not interact with the disparate socioeconomic conditions present in Philadelphia to cause unequal minority access to the political process.

As the court noted in its opinion, it is difficult to imagine a situation where a benign, neutrally administered nonvoting purge law would discriminate against minorities. The time and resources the plaintiffs expended in mounting their challenge against Pennsylvania's purge law should have been directed towards Philadelphia's registration laws, or possibly its voting procedures. Philadelphia's registration laws and/or voting procedures could very well interact with the societal disparities and disadvantages in Philadelphia to restrict minority access to the political process. However, the plaintiffs failed to challenge those laws and procedures, and therefore missed the opportunity to determine the cause of the lower voting rate for African-Americans and Latinos in Philadelphia.

Gregory C. Schaecher—'96

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343. 28 F.3d 306 (3d Cir. 1994).
344. Ortiz v. City of Philadelphia Office of the City Comm'r's Voter Registration Div., 28 F.3d 306, 315 (3d Cir. 1994); see supra notes 67-72 and accompanying text.
345. Ortiz, 28 F.3d at 315-16.
346. Id. at 317-18.