International Municipal Lawyers Association
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Rio All-Suites Hotel
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Monday, October 5, 2015

2:30 pm – 3:30 pm and 3:45 pm – 4:45 pm

Afternoon Concurrent Panel Discussion:

The Voting Rights Act at 50

Presented by:

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The Voting Rights Act at 50

IMLA's 80th ANNUAL CONFERENCE

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Vince R. Fontana and Benjamin E. Griffith

Introduction

The Voting Rights Act of 1965 was approved by the United States Congress and signed into law by President Lyndon Baines Johnson on August 6, 1965. It has justifiably been referred to as the Crown Jewel of the Civil Rights Movement, and until 2013, two of its provisions, Section 2 and Section 5, were the most formidable weapons in the federal arsenal to fight race discrimination in voting. That arsenal is still viable, and the strong federal commitment to fight racially discriminatory practices affecting the fundamental right to vote is still intact.

The VRA turned 50 on August 6, 2015, and much has changed since then. This presentation will give local government attorneys a timely snapshot of current enforcement of the Voting Rights Act of 1965, as amended, the basics of how to defend a Section 2 vote dilution case and an overview of today's political and legal landscape, new strategies and remedies. IMLA members will hear from two litigators with a combined 90 years of civil litigation practice, a significant part of it defending municipalities and other governmental bodies in VRA litigation.

In Part I of this presentation, Vince Fontana of Garden City, New York will discuss

►defense of § 2 vote dilution cases,

►factors that influence at-large vs. SMD remedial choices,

►the impact of *Alabama Legislative Black Caucus v. Alabama* on racial gerrymandering claims and as it relates to defending a Section 2 case, and

►taking preemptive action to avoid Section 2 litigation (something akin to preventative law).

In Part II of this presentation, Ben Griffith of Oxford, Mississippi will cover

►the impact of *Evenwel v. Abbott* with respect to measuring population equality by eligible voters or general population for purposes of one person, one vote,

►summary judgment practice in § 2 litigation, including the recent Texas Voter ID case,

►the viability of Section 3 bail-in claims after *Shelby County v. Holder*;

►remedial plans embodying alternative electoral systems, and

►attorneys fees awards to prevailing parties in vote dilution litigation.

Part I: DEFENDING A SECTION 2 CASE

by Vince Fontana

INTRODUCTION

Although this presentation will be limited to a discussion of the defense of a Section 2 case, for a complete analysis we will also address certain aspects of Section 5 of the VRA and the Equal Protection clause of the United States Constitution.

A municipality's need to go into a defensive mode does not necessarily begin with the formal service of a summons and complaint. Rather, it can begin with an informal or formal investigation by the Justice Department, or a request from a member of the relevant minority community for a referendum to change the existing method of electing local legislators, usually from an at-large system to a single-member district system. A review of the case law shows law suits have been filed by various groups such as: the local NAACP, the League of Women Voters, the Mexican American Legal Defense Fund ("MALDEF"), or the Lawyers' Committee for Civil Rights. Generally, when the Justice Department starts to demand documents as part of an investigation you should assume a law suit will follow and act accordingly. Municipalities should

have the same attitude when members of the minority community begin to question the validity of the existing method of electing legislators because of the lack of minority success at the polls.

Our analysis will also discuss the role of experts in the defense of a Section 2 case as well as providing some guidance on what socio-economic data should be reviewed on a periodic basis as a means to anticipate a possible challenge to the current method of electing local legislators.

The most frequently challenged method of election is the at-large method where legislators are elected by voters in the entire community. The remedy generally sought is to create single-member districts which would include at least one district where the relevant minority can constitute a majority. There may also be a circumstance where there are two or more minority groups with sufficient numbers to possibly elect a candidate of their choosing. On other occasions neither minority group may be sufficiently large to elect their candidate of choice but by combining both groups at least one minority candidate can be elected.

There are also circumstances where the legislators are elected by the entire community but the candidates who run are selected from discrete districts. In that case, an issue that generally arises is the manner in which the lines are drawn to create these districts. Members of the minority community may complain that the lines are drawn in such a way that too many minorities are packed into one district thus depriving them of an opportunity of electing more than one member of the legislature. Or they may complain that the minority community is spread out over two or more districts thus diluting their ability to elect even one candidate.

Under the United States Constitution the federal government must conduct a national census every ten years. The last such census was in 2010. As a result of that census many communities learned of a substantial increase in their minority population or a significant redistribution of the minority population within their community. Such an increase or

redistribution may result in an increase in the number of Section 2 law suits nationally. Now that we are half-way between censuses communities with large or growing minorities should begin a pro-active approach to consider whether changes in the method of electing legislators should be adopted because of the lack of success of minority preferred candidates. These communities should also use this time to evaluate the socio-economic conditions of their minority community and try to address some of the disparities between minorities and whites.

TO WHAT DOES SECTION 2 APPLY?

Section 2 of the Voting Rights Act provides as follows:

> (a) No voting qualification or perquisite to voting or standard or 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…
>
> (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 Voting Rights Act of 1965, Section 2 Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. 1971 to 1973bb-1 (1988).

As we review how best to defend a Section 2 "vote dilution" case it should be noted that at-large systems are not per se unconstitutional or necessarily in violation of the VRA. *U.S. v. City of Euclid*,580 F. Supp. 2d 584, 591 (N.D. Ohio 2008); *Benavidez v. Irving Indep. Sch. Dist*., 2014 U. S. Dist. LEXIS 113239 (N.D. Tx) *14. Furthermore, Section 2 does not confer a right to proportional representation, but rather a right to participate equally in the political process**.** *Montes v. City of Yakima*, 2014 U.S. Dist. LEXIS 117676 (E.D. Wa.) *7.

Traditionally, violations of Section 2 was asserted in "vote dilution" cases; but more recently it has been asserted in what the courts call "vote denial" cases. A vote denial case would involve a wide range of practices such as: restrictive voter identification laws; unequal access to

voter registration opportunities; unequal access to polling places; and omnibus laws combining registration and voting restrictions; and changes in early voting opportunities, all of which could impact on a minority's right to vote. *League of Women Voters of N.C. v. N.C.*, 2014 U.S. App. LEXIS 18764 (4th Cir.); *Frank v. Walker*, 2014 U.S. App. LEXIS 19108 (7th Cir.); *N.C. State Conf. of the NAACP v. McCrory*, 997 F. Supp. 2d 322 (M.D.N.C. 2014); *Ohio State Conf. of the NAACP v. Husted*, 2014 U.S. App. LEXIS 18296 (6th Cir.); *Crawford v. Marion County Election Board*, 553 U. S. 181 (2008).

This line of cases seem to have arisen as a result of the United States Supreme Court decision in *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013) wherein the Court found certain provision of Section 5 of the Voting Rights Act to be unconstitutional. See also, *N.C. State Conference of the NAACP*, 997 F. Supp. 2d at 346-7. Prior to *Shelby*, changes in voting regulations would be addressed under Section 5 of the VRA.

Although these "vote denial" cases also reference the procedures set forth in *Thornburg v. Gingles*, the approach is different from a "vote dilution" case. Therefore, we will first discuss the "vote dilution" cases under *Gingles* and then address the "vote denial" cases.

A. THE VOTE DILUTION CASES UNDER GINGLES

The leading Section 2 case is *Thornburg v. Gingles*, 478 U.S. 30 (1986) wherein the Court set forth the parameters in determining whether there has been a violation of Section 2. Initially the Court described certain preconditions that must be met by the plaintiff. *Thornburgh*, 478 U.S. at 50-51. Once these preconditions have been satisfied the court must then determine whether under the Totality of the Circumstances as described in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1971) a Section 2 violation has been proven.

1. **THE GINGLES PRECONDITIONS**

In evaluating whether a particular system of election violates the Voting Rights Act, a plaintiff must first establish each of the *Gingles* pre-conditions. They are:

1. the racial group must be sufficiently large and geographically compact to constitute a majority in a single member district;

2. the relevant minority must be politically cohesive;

3. the white majority must vote sufficiently as a block to enable it in the absence of special circumstances usually to defeat the minority preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752 (1986); *U.S. v. City of Euclid*, 580 F. Supp. 2d 584, 591 (N.D. Ohio 2008); *NAACP v. Columbia, South Carolina, et al,* 850 F. Supp. 404, 410 (D.S.C. 1993); *Etheredge v. Lexington County, S.C.*, 2009 U.S. Dist. LEXIS 13385 *15 (D.S.C.); *Benavidez v. City of Irving, Texas*, 2009 U.S. Dist. LEXIS 63079 *5-6 (N.D. Tex.); *Ga. State Conf.,* 2015 App. LEXIS at * 12; *Montes,* 2014 U.S. Dist. LEXIS *8; *Benavidez*, 2014 U.S. Dist. LEXIS *11.

Once the three *Gingles* factors are met, the court must consider whether, under the Totality of the Circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. *Etheredge*, 2009 U.S. Dist. LEXIS at *15.

Many circuits have acknowledged that it would be the very unusual case in which plaintiffs can establish each of the three *Gingles* pre-conditions but still have failed to establish a violation of Section 2 under the Totality of the Circumstances. *Ga. State Conf. of the NAACP v. Fayette County Bd. Of Comm'rs*, 2015 U.S. App. LEXIS 204 (11th Cir.) *13-14]. *Benavidez v. City of Irving, Texas*, 2009 U.S. Dist. LEXIS 63079 *8 (N.D. Tex); *U.S. v Village of Port Chester*, 2008

WL 190502 *2 (S.D.N.Y.); *NAACP v. City of Niagara Falls*, 65 F. 3d 1002, 1019 n. 21 (2d Cir. 1995); *Thompson v Glades County Bd. of County Commissioners*, 493 F. 3d 1253, 1261 (11th Cir. 2007); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ*., 4 F. 3d 1103, 1116 n. 6 (3rd Cir. 1993); *U.S. v. City of Euclid*, 580 F. Supp. 584, 593 (N.D. Ohio 2008); *Clark v. Calhoun County*, 121 F. 3d 92, 97 (5th Cir. 1994); *Teague v. Attala County*, 92 F. 3d 283, 293 (5th Cir. 1996); *U.S. v. Charleston County*, 316 F. Supp. 2d 268, 277 (D.S.C. 2003).

However, failure to meet any one of the *Gingles* pre-conditions will result in dismissal of the lawsuit. *Benavidez*, 2014 U.S. Dist. LEXIS *11-12; *Montes*, 2014 U.S. Dist. LEXIS * 37; *Ga. State Conf*., 2015 U.S. Dist. LEXIS. *12-13; *Overton v. City of Austin*, 863 F. 2d 538 (5th Cir. 1989); *Gomez v City of Watsonville*, 863 F. 2d 1407, 1413 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 1534 (1989); *McNeil v. Springfield Park District*, 851 F. 2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S. Ct. 1769 (1989); *Dillard v. Baldwin County Commissioners*, 376 F. 3d 1260, 1265 (11th Cir. 2004); *Harris v. City of Texarkana*, 2015 U.S. Dist. LEXIS 2785 *15-16 (W.D. Ark.); *Montes v. City of Yakima*, 2014 U.S. Dist. LEXIS 117676 *9 (E.D. Wa.).

2. **THE SENATE REPORT FACTORS**

In addition to establishing each of the three *Gingles* pre-conditions a court must conduct an analysis of seven additional factors frequently referred to as the "Senate Report Factors", and two additional factors. They are:

1. The extent of historical, official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise 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 might 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 racial appeals;

7. The extent to which members of a minority group have been elected to public office in the jurisdiction.

The two additional factors are:

8. Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

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

Senate Report at 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-7; *Montes*, 2014 U.S. Dist. LEXIS *9-10; *Benavidez*, 2014 U.S. Dist. LEXIS *14; *Ga. State Conf*. 2015 U.S. Dist. LEXIS *13; *Benavidez v. City of Irving Texas*, 2009 U.S. Dist. LEXIS 63079 (N.D. Tex).

However, it should be noted that this list is not comprehensive or exclusive and that there is no requirement that any particular number of factors be proven, or that a majority of these point

one way or another. Rather, courts are to engage in a searching, practical evaluation of the past and present reality and take a functional view of the political process. *Gingles,* 478 U.S. at 45; *Ga. State Conf*., 2015 U.S. Dist. LEXIS *13; *U.S. v. Osceola County*, 475 F. Supp. 2d 1220, 1228 (M.D. Fla. 2006); *U.S. v. Village of Port Chester*, 2008 WL 190502*3; *NAACP v. City of Columbia, S.C*., 850 F. Supp. at 404, 426 (D.S.C. 1993) (the Senate Report factors are neither comprehensive nor exclusive). The court must consider all evidence that reasonably bears upon the opportunity that the challenged system in fact provides for minorities to participate and elect candidates of their choice.

The court in *NAACP* v. *City of Columbia, 850 F. Supp. 404 (D.S.C. 1993),* added two additional factors to the Totality of the Circumstances analysis beyond the seven original Senate Factors and two supplemental factors. Factor 10 considered by the court addressed the minority's support for the 4-2-1 system adopted by the voters to elect members of the City Council (four were elected in SMD, two at-large, and the Mayor also elected at-large). The court found that the black community had endorsed the 4-2-1 plan at issue in the lawsuit. 850 F. Supp. at 426. The eleventh factor considered by the court was that the 4-2-1 Plan provided "genuine influence for blacks than the system proposed by the plaintiffs, while also 'deracializing' matters that come before the council of particular concern to the black community." *Id*. This case seems to be the only one whereby the nine Totality of the Circumstances factors were expanded upon by a court.

3. <u>ANALYSIS OF THE GINGLES PRE-CONDITIONS</u>

1. **The minority must be sufficiently large and geographically compact enough to constitute a majority in a single member district.**

If the relevant minority cannot meet this requirement as in the case where the minority population is too small or they are substantially integrated throughout the community, the challenged system (usually at-large) cannot be responsible for minority voters' inability to elect

its candidates of choice. *U.S. v. Osceola County*, 475 F. Supp. 2d at 1227-1228. To satisfy this requirement one must first determine what the relevant minority is. In some cases it would be African-Americans only, in other communities it would involve Hispanics only, and still in others it could be a combination of African-Americans and Hispanics. In still other communities the relevant minority could be American Indians, or Asians. See, *Buckanaga v. Sisseton Indep. Sch. Dist. 54-5*, 804 F.2d 469 (8th Cir. 1986); *Lee v. City of Los Angeles*, 2015 U.S. Dist. LEXIS 23063 (C.D. **Cal.)** where the relevant minorities included Koreans, African-Americans and Hispanics. As immigrants from other countries begin arriving in the United States in sufficient numbers, the list of minorities to be considered in the context of Section 2 will expand. How this will play out where the minority is "Asian" but their country of origin has a history of animosity toward one another cannot be determined at this time but it can potentially impact an analysis where attempts are made to combine the two groups to determine if the minority group I sufficiently large to be a majority in a single member district.

Once the minority population is identified the next inquiry is what percentage of the total population, voting age population and citizen voting age population are the relevant minority. Also relevant is the percentage of the total registration that are white and the relevant minority community.

Question: What data do you use to determine the statistics necessary to analyze whether a minority is sufficiently large and geographically compact to satisfy the first *Gingles* pre-condition? Clearly the voting age population as refined by citizenship set forth in the latest census data, is the most reliable. *U.S. v. Village of Port Chester*, 2008 WL 190502 *8 (S.D.N.Y.); *U.S. v. Osceola County,* 475 F. Supp. 2d at 1229. In addition to census data, registration data can be used if such data are sufficiently reliable. See, *U.S. v. Osceola County*, 475 F. Supp. 2d at 1230; *U.S. v. Village*

of Port Chester, 2008 WL 190502*7; *Johnson v. DeSoto County Bd. of Comm*., 204 F. 3d 1335, 1341-2 (11th Cir. 2000). Once the relevant statistics have been established the parties must determine what percentage of the minority community must be included within a single member district to satisfy the first *Gingles* pre-condition. Where Hispanics and Asians are the relevant minority, citizenship may become an issue, more so than when the minority community consists of blacks. If the Hispanic community migrated from Puerto Rico, citizenship will not be an issue. See, *U.S. v. Osceola County, supra***.**

This issue was squarely addressed by the United States Supreme Court in *Bartlett v. Strickland,* 2009 U.S. LEXIS 1842.

The case began in a rather odd way. State officials contended that they were required to draw election districts in such a way as to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority was less than 50% of the voting age population in the district to be drawn. Also involved is the relevance of the state's constitutional requirement that in any districting plan, the state constitution's "Whole County Provision" must be considered.

The relevant district was District 18 which, under the Whole County Provision would have a black voting age population of 35.33 %; and if blacks were split among two counties they would have a voting age population of 39.30 %. In neither case could a district be drawn with a black voting age population of more than 50%.

At the trial level the court considered whether the defendant state officials had established each of the *Gingles* pre-conditions. *Id.* at *14. As to the first *Gingles* requirement, the trial court concluded that, although blacks were not a majority of the voting age population in the district, the

district was a "de facto" majority-minority district because blacks could get enough support from cross-over majority voters to elect their candidates of choice. *Id*.

Without detailing the Supreme Court's analysis, the bottom line is that a minority must be able to show a district containing at least 50.1% of the voting age population to satisfy the first *Gingles* pre-condition in a Section 2 "vote dilution" case. The Court noted, but did not decide that in a Section 5 context it would be appropriate to create a district with less than a 50.1% minority voting age population. Nor did the Court preclude a political subdivision from creating a cross-over district. The Court held, however, that a state is not required to create a cross-over district in a Section 2 challenge. *Id*. at *38-39.

Another question is raised by *Strickland*. Does this analysis change if two minorities, for example, blacks and Hispanics, can be combined to satisfy the first *Gingles* pre-condition? If the two minorities can meet a four part test, theoretically they may be combined to satisfy the first *Gingles* factor:

(1) whether the members have similar socio-economic backgrounds resulting in common social disabilities and exclusion;

(2) whether the members have similar attitudes toward significant issues affecting the challenged entity;

(3) whether the members have consistently voted for the same candidates;

(4) whether the minorities consider themselves united, even in situations in which they could benefit independently. *Nixon v. Kent County*, 790 F. Supp. 738, 743-4 (W.D. Mich. 1992); *LULAC v. Midland Independent School Dist*., 812 F. 2d 1494, 1500-1 (5th Cir. 1987); *Romero v. City of Pomona*, 665 F. Supp. 853, 857 (C.D. Cal. 1987); *Campos v. City of Baytown*, 840 F. 2d 1240 (5th Cir. 1988), *cert denied*, 490 U.S. 905, 109 S. Ct. 3213 (1989). Based on the

Strickland analysis, presumably the combined minorities must total 50.1 % of the citizen voting age population in at least one district. Not relevant to this analysis, however, is whether the two minorities must be of equal strength or would it be appropriate for one minority to constitute a larger percentage. See, *Lee, supra*, 2015 U.S. Dist. at *24-25.

The next topic relevant to the first *Gingles* pre-condition addresses the question, what size legislature must be used to determine if the relevant minority can create at least one district wherein they could constitute a majority. The short answer is that the analysis must be based on a district plan with the same number of legislators as presently exists. For example, if the county commission maintains an at-large system of seven commissioners, the court must use seven districts to determine if the first *Gingles* pre-condition has been met.

Furthermore, in deciding whether the first *Gingles* pre-condition has been satisfied, the court must determine if the theoretical district is "compact" and "contiguous". If in order to create a majority- minority district a plaintiff must violate all rules concerning compactness and contiguity, the proposed district should be rejected and the first *Gingles* pre-condition not satisfied. See, *League of Women Voters v. City of Chicago*, 757 F.3d 722, 726-727 (7th Cir. 2014).

This aspect of the first *Gingles* pre-condition would also impact on any potential remedy once a violation has been found. If no remedy can be fashioned, plaintiff loses even though, theoretically, each of the *Gingles* pre-conditions has been met. See, *Marylanders For Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1052-3 (D. Md. 1994).

PRACTICAL TIPS FOR EVALUATING THE FIRST GINGLES FACTOR

It is assumed that each municipality generally knows the racial and ethnic make-up of its population and has voter registration data, by race and by precinct. This latter information would

be available from the board of elections. Finally, we assume information is available showing voting precinct lines.

If the municipality has an at-large system of electing its legislature but the selection process for candidates is by specific districts, the municipality already has the basic information in place to try to create a single member district system that contains a determinable number of whites and minorities. Although this analysis may not be specific enough for use at trial it should be specific enough for a preliminary analysis on whether a theoretical single member district with a majority-minority voting age population can be created. However, early on in the defense of a Section 2 case it would be necessary to retain an expert to analyze and plot out whether a single-member-district can be formed.

At such time as a specific districting plan must be draw, concepts of contiguity and compactness of the districts will also be relevant; and it will be necessary, wherever possible to follow traditional redistricts concepts which would take into consideration natural boundaries (such as rivers, main roads, city or county boundaries), and communities of political and socio-economic interests. It will also be necessary to consider whether a proposed district unfairly packs more minorities into one district than would be required to give the minority an opportunity of electing their candidates of choice or would it dilute the minority population to preclude them from electing their candidates of choice. See, *Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp.2d 1285 (M.D. Ala. 2013), *judgment vacated and remanded*, 135 S. Ct. 1257 (2015). However, for this initial analysis the usual concepts of drawing district lines need not be followed.

After this initial analysis is completed and a more specific analysis is required there are experts who have the capacity to take all data and draw specific district lines.

2. and 3. Whether the relevant minority is politically cohesive; and whether the white majority usually votes as a block to defeat the minority preferred candidate.

Rather than concentrate on the technical aspects of establishing the existence of racially polarized voting, we will address the more procedural aspects of establishing these two *Gingles* pre-conditions. A showing that a significant number of minority group members usually vote for the same candidate is one way of proving the political cohesiveness necessary to a vote dilution claim and consequently establishes minority bloc voting within the context of Section 2. *Gingles*, 106 S. Ct. at 2769-70.

The first issue to resolve is what elections are to be reviewed to determine whether racial polarized voting exists. Elections for the relevant village, town, city or county, in which a member of the minority community is a candidate, would be of primary relevance. These elections are referred to as "endogenous/interracial" elections *Jamison v. Tupelo*, 471 F. Supp. 2d at 710); and while they may be deemed more probative of racial polarized voting, "exogenous" elections, i.e. those not involving the relevant municipality, but where a minority candidate ran, do have some probative value. *Id.; see also, U.S. v. Village of Port Chester*, 2008 WL 190502*13; *U.S. v. City of Euclid,* 580 F. Supp. 2d 584, 589 (N. D. Ohio 2008). *In NAACP v. City of Thomasville,* 401 F. Supp. 2d 489, 497 (M.D.N.C. 2005). the court held that the elections to be reviewed should be limited to those elections in which a minority candidate was on the ballot, and should include a sample of elections large enough to enable the court to determine whether minority voters have had success in electing representatives of their choice.

Next the court must determine the degree of success by minority candidates, or do white voters "usually" defeat minority preferred candidates. What "usually" happens must be determined on a case-by-case basis. In *City of Thomasville,* the court noted that when the candidates of choice

of black voters were black, the candidate won three out of eight times. When a second candidate of choice was identified in that same election, that candidate won four out of five elections. 401 F. Supp. at 499. Under these circumstances, the court noted, the use of at-large elections does not "usually" result in the candidates of choice of black voters losing. *Id*.

Although there was no apparent consensus in *Gingles* concerning the issue of "causation", i.e. why voters voted the way they did, Justice O'Connor and three other Justices stated that while "causal factors" may not be relevant to the existence of racially polarized voting, they should be admitted on the question whether white bloc voting will consistently or usually defeat minority candidates. *Gingles*, 114 S. Ct. at 2792. *In City of Euclid*, the court rejected the City's argument that the reason for the minority group's lack of success at the polls was due to apathy and low voter turnout. 580 F. Supp. 2d at 591. *In Reed v. Town of Babylon,* 914 F. Supp. 843, 877-8 (E.D.N.Y. 1986), the court rejected defendant's argument that minority losses was due to partisan voting rather than racial bias. See also, *Goosby v. Town of Hempstead*, 180 F. 3d 476 (2d Cir. 1999); *City of Tupelo*, 471 F. Supp. 2d at 713-714. In the *City of Holyoke* case, 72 F. 3d 973 (1st Cir. 1995), the court held that plaintiff's cannot prevail on a Section 2 case if there is significant prevalent evidence that whites voted as a block for reasons wholly unrelated to racial animus. However, the court cautioned that if partisan affiliation is nothing more than a proxy for illegitimate racial considerations, the argument will fail.

PRACTICAL TIPS FOR EVALUATING THE SECOND & THIRD FACTOR

An analysis of these two factors involves a review of the number of minority's who have been candidates for public office and their success rate. Also relevant is the support these candidates received from the white community. As a preliminary matter it will be helpful to review local elections over the past ten years where a minority candidate actually ran or where the minority

publicly supported a non-minority candidate. All elections within the confines of the relevant municipality regardless of the position contested should be analyzed. These would include state assembly and senate, county elections and even school board elections What contests will be used at trial is another matter; but for preliminary analysis purposes as many elections as possible should be reviewed. An expert should also be retained at an early stage to give the municipality time to gather the information necessary to fully analyze which elections showed racial polarized voting.

It would also be helpful to develop some background on each candidate and what the local press said about them. It is not unusual for individuals who are active in the community to be on various boards and commissions. How the white community related to them would also be helpful.

THE SEVEN SENATE REPORT FACTORS

Once each of the three *Gingles* pre-conditions have been met a plaintiff must be prepared to address each of the seven Senate Report Factors and two additional factors. However, as noted above, there is no requirement that plaintiffs satisfy each factor; nor is it clear what degree of proof would be required. For our purposes we will discuss each Factor in light of the evidence usually proffered by plaintiffs. *Gonzales v. City of Aurora*, 2006 WL 681048*5; *U.S. v. City of Euclid*, 580 F. Supp. 2d at 587.

FACTORS 2 and 7 address the extent to which voting is racially polarized (Factor 2), and the extent to which members of the minority group have been elected to public office (Factor 7). The issue of racially polarized voting (Factor 2) is included in an analysis of the Second and Third *Gingles* pre-conditions as is Factor 7. The courts have universally held that the Second and Seventh Senate Factors are the most important Factors in a Section 2 Vote Dilution case. The remaining Senate Factors are supportive of, but not essential to a minority voter's claim. *Gingles*, 478 U.S. at 48 n. 15; *U.S. v. City of Euclid*, 580 F. Supp. 2d at 591; *U.S. v. Osceola County*, 475 F. Supp.

2d at 1232; *Gomez v. City of Watsonville*, 863 F. 1407, 1412 (9th Cir. 1988), *cert denied*, 489 U.S. 1080, 109 S. Ct. 1534 (1989); *Goosby v. Town of Hempstead*, 180 F. 3d 476 (2d Cir. 1999); *Gonzales v. City of Aurora*, 2006 WL 681048*7 (N.D. Ill.); *U.S. v. Charlston County*, 365 F. 3d 341, 345 (4th Cir. 2004).

In *City of Aurora*, the court noted that Hispanic citizen voting age population was 18.9% of the City's total and had two of 12 aldermen, one elected and one appointed. Although Hispanics have not been elected to office in direct proportion to the citizen voting age population, they have not been shut out of office. *Id*. at *8.

Although no group has a right to proportionate representation, if it has elected representatives at a rate proportionate to its numbers that would generally nullify any attempt to declare an electoral system violative of Section 2. *Buchanon v. City of Jackson,* 683 F. Supp. 1515, 15221 (W.D. Tenn. 1988); *Collins v. City of Norfolk*, 679 F. Supp. 551, 562 (E.D. Va. 1988).

However, even where there is minority success at the polls that does not necessarily negate other evidence that racial polarized voting does exist. For example, when a successful minority ran as an incumbent or unopposed or if elected after the institution of litigation or when there were less white candidates than the number of seats to be filled thus guaranteeing a minority to be elected, those successes are less persuasive than a head-to-head contest between a minority and white in which the minority candidate prevails with sufficient support from all races. *Gingles*, 106 S. Ct. at 2779-80. A key element in the analysis is "sustained" success of minority candidates "over time" resulting in "nearly proportionate representation." *Id*. at 2779.

In a case in which I represented the City of Chattanooga the city council had five members; and the black population was approximately 20% of the total. For several years prior to the filing of the law suit a black had been elected to the city council. In other words the minority community

had proportional representation. Nevertheless the court found a violation of Section 2 because no other black could get elected. The black member of the council was so popular he often received enough votes to be appointed deputy mayor. However, that was insufficient for the court.

FACTOR 1: The extent of historical, official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise participate in the democratic process.

The history of discrimination in any given community can be established by an analysis of several factors.

They would include a review of prior litigation in which it was alleged there was discrimination in housing and education. For example, in *City of Euclid*, in 1976 (20 years before the filing of this Voting Rights Act case), the United States Department of Housing and Urban Development informed city officials that Euclid was not in compliance with Title 8 of the 1968 Civil Rights Act, which prohibited racial discrimination in the sale or rental of housing units. *City of Euclid*, 580 F. Supp. 2d at 591. The court also noted that private organizations filed a lawsuit against the City for its failure to comply with the fair housing requirements of federal law. *Id*. As part of the settlement of that case, in 1981 the City agreed to retain the services of the Cuyahoga Plan of Ohio, which is a fair housing group, to investigate unfair real estate practices in *Euclid*. *Id*. Audit testing of that group revealed that Euclid continued to experience a significant level of racial steering. *Id*. at 591. In addition, there was evidence that many citizens and city officials complained about "block-busting", i.e., efforts of realtors to urge white homeowners in a particular area of the City to sell their property quickly because blacks were moving into the neighborhood. *Id*. The court in *City of Euclid* also heard testimony on the degree of racial segregation in the City that lead to racial segregation in the City's schools. *Id*. at 591-2.

In the 2006 VRA case brought against the City of Port Chester the court referenced a 2005 Consent Decree between the U.S. and Westchester County pertaining to language assistance at the polls. 2008 WL 190502*16. The court also considered the 1985 City of Yonkers housing and desegregation case as evidence of a history of discrimination against minorities in the County. *Id*. Plaintiff's expert also testified that Port Chester failed to provide sufficient Spanish language assistance at polling places in the City during the period 2001-2006. *Id*.

Other examples of a history of discrimination in Port Chester included testimony that Hispanic voters were treated differently from white voters; that there were no Spanish speaking employees at city hall who would be able to take a complaint from a Spanish speaking voter; in a 1991 campaign for a seat on the school board, more than 40 Hispanic voters were turned away from the polls during the election because of poll workers' inability to locate their names on voter lists.

In *U.S. v. Osceola Count,y* 475 F. Supp. 2d 1220, 1235 (M.D. Fla. 2006). the court took note of problems with registering Hispanic voters because information was not available in Spanish and there were no Spanish speaking workers available to answer questions or provide assistance; and the election process in the 1990's was conducted in English, with ballots, voter guides, signs and forms available only in English and no effort had been made to recruit bilingual poll workers or have bilingual elections staff. During the 2000 elections, Hispanics suffered from discrimination at the polls when they were turned away without being allowed to vote, refused assistance, forbidden to use their own interpreters, asked for multiple forms of identification (unlike non-Hispanic voters) and treated in a hostile manner by poll workers. *Id*.

The court also made note of the fact that in 2002 the County signed a consent decree to provide information and assistance to voters in Spanish. *Id.*

FACTOR 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 might enhance the opportunity for discrimination against the minority group.

Although the courts have recognized that at-large methods of electing local legislators is not per se unconstitutional or a violation of the VRA, at-large elections coupled with other practices or procedures does impact on a minority's ability to elect their candidates of choice. *NAACP v. City of Thomasville*, 401 F. Supp. 2d 489, 497 (M.D.N.C. 2005).

In *U.S. v. Osceola County* the court found Factor 3 was present because the County Commissioners were elected to staggered terms and are based on residency districts or numbered posts. This practice, in essence, imposes majority vote requirements which are one-on-one elections for each available seat, a system which makes it very difficult, if not impossible, for a minority to elect its preferred candidate. 475 F. Supp. 2d at 1233-34. The court's suggestion was for all commissioners to run at once without numbered posts, so that a minority group could all vote cohesively for a single candidate, and if the non-minority split their votes among various candidates, the minority would have a reasonable chance to elect its preferred candidate. *Id*. at 1234.

The court was also critical of the requirement for run-off elections for primary elections, which allows non-minorities to run more than one candidate in the primary election, and then, in the run-off, to solidify their votes to defeat the minority candidate. *Id*. According to the court, the solution to the problem would be a single member district plan. *Id*.

In *Village of Port Chester,* the court was concerned with Village elections being held in March, rather than November. 2008 WL 190502*18.

In *City of Euclid,* the court found fault with the at-large system in conjunction with a numbered post system because it deprives minority voters of the opportunity to elect a candidate by single-shot voting. 580 F. Supp. 2d at 592; see also *City of Rome v. U.S.*, 446 U.S. 156, 184 n. 19, 185 n. 21 (1980); *Collins v. City of Norfolk*, 679 F. Supp. 557, 564 (E.D. Va. 1988).

FACTOR 4: If there is a candidate-slating process, whether the members of the minority group have been denied access to that process.

The salient question for purposes of Senate Factor 4 is, where there is an influential official or unofficial slating organization, what is the ability of minorities to participate in that slating organization and to receive its endorsement. *City of Euclid*, 590 F. Supp. 2d at 592; *Village of Port Chester*, 2008 WL 190502*18-19.

FACTOR 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.

Statistically minorities, whether Hispanic or African-American have a lower socio-economic level than whites, whether in education, home ownership or any of the other statistics maintained by the census bureau.

For the most part, courts have determined that it is not necessary for a plaintiff to demonstrate that these disparities have been the proximate cause of low minority participation and success. In fact, low turnout and success is presumed to be exacerbated by these socio-economic disparities. *Buckanaga v. Sisseton Indep. School District No. 54-5*, 804 F. 2d 469 (11th Cir. 1986); *U.S. v. Osceola County*, 475 F. Supp. 2d at 1233; *U.S. v. City of Euclid*, 590 F. Supp. 2d at 592. In *U.S. v. Village of Port Chester*, 2008 WL 190502*19-20, plaintiff's expert acknowledged that, although lower socio-economic status leads to lower levels of political participation, he agreed that the Hispanic community is on average younger and more recently arrived in the United States, and

that that could contribute to lower Hispanic voter turnout. See also, *Jamison v. Tupelo*, 471 F. Supp. 2d at 715 (voter turnout is affected by socio-economic status); *Gonzales v. City of Aurora*, 2006 WL 681048*8-9.

It is often helpful to demonstrate an increase in the number of minorities employed by the municipality and in the school system. Of course, if the municipality has only hired minorities in menial positions that will not be very helpful in the defense of the case. If, before a suit is brought a review of hiring practices is undertaken and corrected that will be a move in the right direction.

Minority graduation rates from high school are also subject to review even though a city, county or town may not be directly involved in the school system. Some times the Justice Department will sue both a city and a school district. Therefore cooperation between the municipality and the school district to correct discriminatory practices, before a suit is brought may avoid litigation.

FACTOR 6- Whether political campaigns have been characterized by racial appeals.

Courts rarely spend a great deal of time describing racial appeals in elections in their decisions. The testimony at trial on this issue will often come from an expert historian who would peruse decades of newspaper articles and campaign literature to find any hint of a racial appeal within a given campaign or community. See, *Gonzales v. City of Aurora*, 2006 WL 681048*9.

Racial appeals have taken the following forms: using photographs of African-American opponents in their campaign literature; using campaign literature that preyed on fears that African-American students would be bussed to town schools and warning that urban encroachment from New York City would occur. *U.S. v. City of Euclid*, 580 F. Supp. 2d at 593; *Goosby*, 956 F. Supp. At 342; *U.S. v. Village of Port Chester*, 2008 WL 190502*20-22.

OTHER FACTORS

In addition to the seven Senate Factors, courts will generally review two other issues. They include:

FACTOR 8. Whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority community; and

FACTOR 9. Whether the policy underlying the state or political subdivision's use of voting qualification, prerequisite to voting, or standard practice or procedure, is tenuous.

In *Gonzales* the court rejected plaintiff's claim that whites were unresponsive to Hispanics needs when there was only one example of one alderman's behavior that was demonstrably indifferent to the minority group's concerns. 2006 WL 681948*10.

The significance of the responsiveness/non-responsiveness issue is really up to the plaintiff to raise. Defendants can always proffer evidence that the community is responsive to the needs of the minority community but responsiveness will not trump a defendant's failure to prevail on the seven Senate Factors. See, *Village of Port Chester*, 2008 WL 190502*30. In *Tupelo* the defendants had created a bi-racial committee to address the needs of the minority community. However, the fact that this committee was created two weeks before trial negated its value on the issue of responsiveness. 471 F. Supp. 2d at 715.

In *City of Euclid,* the court found the defendant unresponsive to the minority community on housing issues, and the absence of minority participation in employment by the City. The court found that where blacks were employed by the City, they were consigned to locker and toilet facilities. 580 F. Supp. 2d at 593.

The last issue to be addressed is the tenuousness of adopting and maintaining the at-large system. This issue is often given short shrift by the courts. Furthermore, this is more relevant to the issue of intent rather than impact or effect, which is the standard of proof under Section 2 of

the VRA. However, tenuousness may be relevant to an inquiry as to whether the existing policy is unfair. *Houston v. Haley*, 663 F. Supp. 346, 355-6 (N.D. Miss. 1987). There are also circumstances where state policy mandates a particular electoral system.

In *Buchanan v. City of Jackson,* 683 F. Supp. 1515, 1536 (W.D. Tenn. 1988), the court acknowledged that at-large elections are a necessary consequence of a commission form of government and therefore their use is not tenuous.

REMEDY IN A VOTE DILUTION CASE

Assuming the court concluded that an at-large system of election had a dilutive effect on a minority group's ability to elect their candidates of choice, the next question is, what would be an appropriate remedy. The short answer would be a single member district plan. However, that may be easier said than done.

The first question asked is who has the initial obligation to develop a plan that would correct a Section 2 violation? Generally, the courts give the municipal defendant the first opportunity to develop a plan which would then be reviewed by the court. *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 935 (D.S.D. 2007). If a defendant refuses to propose a plan, or fails to prepare a plan that remedies a Section 2 violation, then the court must do so. *Id.* See also, *Williams v. City of Texarkana*, 32 F. 3d 1265, 1268 (8th Cir. 1994). If the court develops a plan it is generally obligated to use a strict SMD plan. However, a defendant can propose a combination system such as part at-large and part single-member district or even a cumulative voting plan, as long as the proposed remedy does in fact remedy the violation.

In *City of Martin,* the court adopted an at-large plan using cumulative voting. The City would have six city council members elected in a staggered cycle of 3 and 3. Furthermore there would be no designated positions or numbered posts and candidates could be from any part of the

City. 475 F. Supp. 2d at 936. Under a cumulative voting scheme each voter will have up to three votes which can be cast for one, two, or three candidates. Id. The winners would be the three candidates with the highest number of votes. *Id.*

In *City of Euclid*, the district court also acknowledged that the defendant should have the first opportunity to prepare a remedial plan. 523 F. Supp. 2d 641, 644 (N.D. Ohio 2007); *Reynolds v. Sims*, 377 U.S. 533, 586, 84 S. Ct. 1362 (1964)) but that plan must correct the Section 2 violation. See also, *Bone Shirt v. Hazeltine*, 461 F. 3d 1011, 1022-23 (8th Cir. 2006). In *City of Euclid*, a single member district plan was adopted by the court. To create a SMD plan, the court or defendant must ensure that there are sufficient members of the minority community within a district and roughly match the minority group's percentage of the electorate. 523 F. Supp. 2d at 644-45; *Cottier*, 475 F. Supp. 2d at 938. Furthermore, the plan must comply with the Fourteenth Amendment's one-person-one-vote requirement. *Cottier*, 475 F. Supp. 2d at 939. *League of Women Voters v. City of Chicago*, 757 F.3d 722, 727 (7th Cir. 2014)(The one-person-one-vote principle seeks to prevent one district from becoming so overpopulated, or under populated, that it leads to significant disparities in voting strength amongst others.) That requires that a deviation from the largest district to the smallest be less than 10%. *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321 (1973); *Voinovich v. Quilter*, 507 U.S. 146, 113 5 Ct. 1146 (1993); *Marylanders For Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1030-33 (M.D. Md. 1994); *League of Women Voters,* 757 F.3d at 725 (A maximum population deviation greater than ten percent creates a prima facie case of discrimination and therefore must be justified by the state. But when a maximum deviation is less than ten percent, the deviation is considered minor and the plaintiffs cannot establish a violation of the Equal Protection Clause from population variations alone. [Citations Omitted]. Thus, a plan with a minor maximum population deviation will be presumed

to be constitutionally valid absent a showing of arbitrariness or discrimination.); see also, *Wright v. North Carolina*, 2015 U.S. App. LEXIS 8731 (4th Cir.) Finally, any SMD plan proposed by the defendant should reflect county lines, natural boundaries and precinct lines, to the extent possible and be compact and contiguous. See*, Alabama Legislative Black Caucus v. Alabama,* 988 F. Supp.2d 1285 (M.D. Ala. 2013*), judgment vacated and remanded*, 135 S. Ct. 1257 (2015).

B. A VOTE DENIAL CASE UNDER GINGLES

Prior to the decision by the United States Supreme Court in Shelby County in 2013 declaring the pre-clearance provision of Section 5 of the VRA to be unconstitutional, any attempted changes in voting rights would be subject to pre-clearance by the Justice Department. However, as a result of that decision, any attempts to change voting laws began to be litigated under Section 2. These cases generally involved early voting provisions and attempts to pass voter identification laws. These cases were referred to as "vote denial" cases as opposed to "vote dilution" claims which were the bulk of the Section 2 cases prior to Shelby.

The leading vote identification cases is *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 128 S. Ct. 1610 (2008) wherein the Court upheld a photo ID requirement passed by the state of Indiana. In that decision the Court noted that both the prevention of voter impersonation on election day and the preservation of public confidence in the integrity of elections justify a photo ID requirement even though persons who do not already have government issued photo ID's must spend time to acquire necessary documents (such as a birth certificate) and stand in line at a public agency to get one. The Court also noted that for most voters who need them, the inconvenience of making a trip to the department of motor vehicles, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote or even represent a significant increase over the usual burdens of voting. 553 U.S. at 198.

The Court in *Crawford* also and rejected the argument that the poor are less likely to have photo ID's than person of average income. *Id. at 199-203*. See also, *Frank V. Walker*, 2014 U.S. App. LEXIS 19108 (7th Cir.).

In addition to the photo ID cases, another line of cases were brought under Section 2 for the first time after the Shelby County case. See, *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 323 (M.D.N.C. 2014), rev'd in part, aff'd in part and remanded with instructions to enter a preliminary injunction, *League of Women Voters of N.C. v. N.C., 2014* U.S. App. LEXIS 18764 (4th Cir.).

The *McCrory* case was divided in August, 2014 and involved House Bill ("HB") 589 which dealt with: (1) changes in voter ID provisions by eliminating identifications issued by a state university or community college as valid forms of identification for voting purposes; (2) reduction of the period for early voting from 17 to 10 days; (3) the elimination of same-day registration ("SDR") which permitted voters to register and then vote ag the same time during the early-voting period; (4) the prohibition on the counting of provisional ballots cast outside of a voter's correct voting precinct on election day (out-of-precinct ballots); (5) the expansion of allowable poll observers and voter challenges; (6) the elimination of the discretion of county boards of election ("CBOE") to keep the polls open an additional hour on election day in "extraordinary circumstances", and (7) the elimination of pre-registration of 16 and 17 year olds who will not by 18 by the next general election. *Id.* at *336.*

For purposes of our discussion today we are only addressing the applicability of Section 2 of the VRA to these "vote denial" issues. In its analysis the court referenced the seven Senate Factors to determine if Section 2 is violated by the listed changes in the law. *Id.* at *345-346.* The court also noted that these "vote denial" actions brought under Section 2 is the direct result of the

Shelby case. *Id.* at *346-347.* The court also considered whether defendants' intentionally violated Section 2 by its conduct. However, because this case came before the court on a motion to dismiss and for a preliminary injunction there is no decision on the merits. *Id.* at *383-4.* See also, *Ohio State Conf. of the NAACP v. Husted,* 2014 U.S. App. LEXIS 18296 (6th Cir.).

Part II: Recent VRA & Redistricting Decisions

by Ben Griffith

1. ONE PERSON, ONE VOTE in light of *Evanwel v. Abbott*

The U.S. Supreme Court is poised to address the standard for population equality under the one person, one vote principle in *Evenwel v Abbott*, No. 14-940, prob. juris. noted, 135 S.Ct. 2349 (Mem), 192 L.Ed.2d 143, 83 USLW 3867 (May 26, 2015)[1]. This case rests at the intersection of immigration, redistricting and §2 jurisprudence.

Evenwel v. Abbott may provide the U.S. Supreme Court with an opportunity to address the proper measure of population that should be used to determine whether the population is equally distributed among voting districts. Over five decades ago when the U.S. Supreme Court entered the political thicket of redistricting in *Reynolds v. Sims* (1964), it held that voting districts must contain very close to the same number of people, but it did not say which people count. In fact, lower courts have criticized the Supreme Court for being somewhat evasive in regard to which population must be equalized.

Despite at least three opportunities to do so, the Court has never resolved the precise question of whether voting districts should have the same number of people or the same number of eligible voters in order to comply with the one person, one vote principle of the 14th Amendment.

As we will see, the establishment of the appropriate population standard to use for purposes of the one person, one vote principle of the 14th Amendment can have tremendous ramifications.

Facts of the case

Plaintiffs below are two Texas voters challenging the voting districts for the Texas Senate on the basis that the one person, one vote principle requires states and local governments to count only eligible voters rather than count all people. They live in senate districts significantly overpopulated with voters, the result of the Texas Legislature's 2013 enactment of a state senate map the created districts roughly equal in total population (all persons counted in the 2010 census), but which grossly malapportioned voters. Their claim is that their voting power has been diluted and that there are voters or potential voters in Texas whose senate votes are worth 1 ½ times that of the plaintiffs.

With respect to the question presented, whether the one person, one vote principle creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote, the three judge court from which this direct appeal was taken invoked the political question doctrine and dismissed the challenge as judicially unreviewable. To the surprise of many election law experts, litigators and scholars, on May 26, 2015, the U.S. Supreme Court noted probable jurisdiction. Oral argument and a decision await during the October 2015 term.

Core Argument

The core argument of the Evanwel plaintiffs below is that counting all people, including illegal immigrants, children, prisoners, and immigrants who are here legally but are not citizens, unconstitutionally amplifies the voting power of places with large numbers of residents who cannot vote legally. These places tend to be urban and tend to vote Democratic. If voting districts are based on equal numbers of eligible voters, political power would move away from urban centers with their many immigrants and children and toward older, more homogenous rural areas. The most significant impact of an eligible voters-only decision would be in the border states of California, Texas, Arizona and Nevada, all with the largest proportions of noncitizens.

The Court has declined to address three similar challenges, and this precise issue has remained unsettled. In one of those challenges from the Ninth Circuit (*Garza v. County of Los Angeles*), moreover, Judge Kozinski opined that such a claim as the one asserted by the plaintiffs in Evenwel was not only serious but should prevail. In the other two challenges that came from the Fourth Circuit (*Daly v. Hunt*) and Fifth Circuit (*Chen v. City of Houston*), those courts

invoked the political question rationale employed by the three judge court in *Evenwel*. Even then, the Fifth Circuit acknowledged in Chen that this is a close question and that Judge Kozinski had made "a powerful case that the general tenor of the Court's opinions mandates protection of the individual potential voter."

The U.S. Supreme Court by noting probable jurisdiction has decided that this constitutional issue presented by the plaintiffs' one person, one vote claim has enough substance to warrant full briefing on the merits and oral argument.

Practically speaking, most state and local governments draw their voting districts based on total population, but due to wide variations in demographic patterns, there can be a difference between counting all people or counting only eligible voters in a particular jurisdiction.

On the one hand, by counting all people, representational equality is ensured, with elected officials tending to the interests of the same number of people, whether or not they are voters. Elected officials represent persons, whether registered to vote or not registered. In a typical municipality, some aldermanic wards or commissioner districts may have mostly seniors who are voters, while other wards or districts may have high populations of children. Each person should count equally under the principle of one person (registered/unregistered), one vote.

On the other hand, if only eligible voters are counted, this vindicates the principle that voters "hold the ultimate political power in our democracy." If the Court were to adopt a new constitutional rule that requires equal numbers of citizens, it will necessitate a different kind of census as compared to the one currently conducted. Further, if the Court were to decide that states can determine for themselves which measure of population they want to use, state legislatures could conceivably be given license to locate more power or less power in areas that have large geographic concentrations of noncitizens, with areas having more power if the standard is based on equality of residents and less power if the standard is equality of eligible voters.

Stanford University Law School Professor Nathaniel Persily notes[2] that while the plaintiffs may have exposed a gap in one person, one vote jurisprudence, their constitutional argument "is dangerous and destabilizing for the redistricting process and the U.S. Census." He argues that creating a "constitutional rule of redistricting based on citizenship or eligible voters

presents insurmountable logistical difficulties." These difficulties are of constitutional significance because "no national database of citizenship exists at the level of granularity necessary to draw legislative districts that comply with one person, one vote."

The redistricting data released by the U.S. Census and used by virtually every jurisdiction in this nation "includes information regarding the total population and voting-age population, as broken down by race," and it is derived from a census form that asks nothing about citizenship, voter registration, or anything comparable.

Citizenship date comes from an annual survey of 2.5% of American households, the American Community Survey (ACS), which includes questions about citizenship, marital, employment, and veteran status. The ACS dataset is not appropriate for redistricting, since the annual surveys do not produce data at sufficient detail at the census block level, the building block for redistricting. A 2.5% national survey will likely not provide a sufficient basis for estimating citizenship rates. The three- and five-year ACS averages, while they may give better estimates of the citizenship rates at smaller levels of geography, are not released at the census block level, and are averages of earlier years that do not provide estimates of the citizenship population at the time of redistricting.

The *Evenwel* plaintiffs also suggest registered voters as another population base for redistricting. In *Burns v. Richardson*[3], the Supreme Court recognized the shortcomings of relying on Census figures to establish intrastate voting districts. It did not hold that reliance on Census figures was constitutionally required, nor did it mandate the use of registered voter data for redistricting purposes. While it sanctioned the use of registered voters as the population base, this was because only because in that context, "registered voters was chosen as a reasonable approximation of both citizen and voter population."

According to Professor Persily, to require a constitutional rule for redistricting on the basis of equal numbers of registered voters comes with its own set of serious problems, including the fact that the Constitution does not require voter registration, and the number of registered voters in a given jurisdiction can fluctuate considerably depending on whether one uses data before or after the election. In short, voter registrations lists are a moving target, and inaccuracy of voter registration rolls are a constant source of frustration for election admininstrators, with a degree of inaccuracy that varies state by state and cautions against using voter registration as a

population base for redistricting. Further, it has been estimated that about 8%, or 16 million voter registration records are invalid or significantly inaccurate. If redistricting were to be mandated on the basis of registered voters, this would not resolve the issue of the proper population base for redistricting, but would require further decisions on which voter registration list and at which time. According to Professor Persily, these technical and logistical issues should foreclose the constitutional debate, since current data on citizenship or on registered voters is too inaccurate or contested to be used in redistricting. The alternative is to leave the decision to states on drawing their districts using the most accurate data available.

*Evenwel'*s Impact on Section 2 litigation

In an interesting amicus brief [4]filed by the Cato Institute, the unique argument is advanced that *Evenwel* pits the VRA against the Fourteenth Amendment:

> The parties here are caught in the inevitable trap of (1) maintaining majority-minority districts under complex, overlapping standards and (2) administering electoral schemes that do little to advance racial equality while doing much to violate voter equality—the idea that each eligible voter's vote should count equally. In the background of this conflict lurks a cacophony of precedent and conflicting judicial standards that have arisen from Section 2 cases. Basic constitutional guarantees of equal protection inherent in the Fourteenth Amendment—such as "one person, one vote" (OPOV)—get lost in this thicket.
>
> Avoiding racial discrimination under these circumstances is particularly difficult in jurisdictions where total population and CVAP diverge due to varied concentration of noncitizens. As with the tensions amicus Cato has described before, jurisdictions navigating between the VRA's Scylla and the Constitution's Charybdis are bound to wreck individual rights—here, voter equality—on judicial shoals.
>
> Over the years, courts, including this Court, have repeatedly recognized the potential for devaluing individual votes by drawing majority-minority districts in a manner that accords greater weight to minority votes in protected districts and diminishes the relative weight of voters elsewhere. See, e.g., *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Even the Fifth Circuit recognized this danger while ultimately ruling the other way. *Chen,* 206 F.3d at 528 ("[T]he propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question."). Nevertheless, here the special district court panel adhered to that flawed lower-court precedent—tepidly refusing to acknowledge CVAP as integral to OPOV and thus a requisite element of constitutional - equal protection. At least one member of this Court has already recognized the urgency of the problem: "Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined." *Chen v. City*

of Houston, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from denial of certiorari).

Section 2 and the Fourteenth Amendment have thus reached an impasse that has been highlighted by a conflict among lower courts' application of OPOV. See *Chen,* 206 F.3d 502; *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011); *Daly v. Hunt*, 93 F.3d 1212; *Garza*, 918 F.2d 763. This Court has clearly left pending a substantial question regarding the continued viability of OPOV and voter equality under the Fourteenth Amendment. Accordingly, this Court should resolve that conflict once and for all—by explaining the proper use of different population metrics and saving OPOV from the judicial morass the VRA has become.

Larios v. Cox

Larios v. Cox[5] was a federal district court decision holding unconstitutional a Georgia legislative redistricting plan with less than a 10% deviation, because it found that the plan was "not supported by legitimate [State] interests," but was "tainted by arbitrariness or discrimination," Larios was summarily affirmed by the Supreme Court without opinion, *Cox v. Larios*, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004), which affirms only the judgment and not the rationale. At its core, proof of a *Larios* claim requires a showing ofdeliberate and purposeful discriminatory intent in order to invalidate a redistricting map.

Larios involved redistricting tainted by two prohibited considerations: first, the redistricting sought "to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence" at the expense of Republican leaning areas; and second, the deviations "were created to protect incumbents in a wholly inconsistent and discriminatory way." *Larios,* 300 F.Supp.2d at 1342. If successfully invoked, it is one way to get around the presumption of constitutionality for population deviations under 10%. It required proof that voters' ability to elect their representatives was been diminished, evidence that voters with particular ideologies were being disfavored, or evidence that "Republican-leaning districts [were] vastly more overpopulated as a whole than Democratic-leaning districts."

LWV v. Chicago

League of Women Voters v City of Chicago 757 F. 3d 722 (7th Cir 2014) involved a one person, one vote challenge to the City's 2015 map. In rejecting the LWV's one person, one vote challenge, the 7th Circuit held that it failed to meet its burden to show a prima facie case of unconstitutionality. Under *Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214

(1983), a maximum population deviation below 10 percent was considered minor and insufficient to establish a prima facie case that required justification by the state. There was no allegation that the map targeted an objectively defined group and preserved the voting rights of minorities, and "disfavoring certain aldermen over others is an inherent part of the political process and an inevitable result of redistricting." The LWV failed to overcome the presumption that attends a plan with a minor maximum population deviation of less than 10%, and could not establish a violation of the Equal Protection Clause from population variations alone. The 7th Circuit also rejected the LWV's effort to sustain their claim of political discrimination under *Larios v. Cox*[6], finding that there was no showing that voters' ability to elect their representatives was significantly diminished, nor was there evidence that voters with particular ideologies were being disfavored, nor was there evidence, as there was in *Larios*, that "Republican-leaning districts [were] vastly more overpopulated as a whole than Democratic-leaning districts," Id. at 1331. On the contrary, the Constitution's guarantee of opportunity for equal participation by all voters in the election of their representatives was "not meant to insulate individual politicians from the threat of political reprisal once redistricting occurs. The fact remains that the equal-population requirement is meant to protect "an individual's right to vote." Reasoning that redistricting is an inherently political process and that "[p]olitics and political considerations are inseparable from districting and apportionment," the 7th Circuit acknowledged the reality that districting inevitably has and is intended to have substantial political consequences," and concluded that "as in any election or redistricting scheme, there are bound to be winners and losers. Simply alleging that two aldermen — who were of the same party as those seeking to "oust" them — were at the short end of the proverbial stick is not enough to overcome a presumptively constitutional map and establish a prima facie violation of voters' equal protection rights."

Favors v. Cuomo

Favors v Cuomo, 2014 WL 2154871 (ED NY 2014) upheld the New York legislature's redistricting plan for the state Senate in a one person, one vote challenge. While the plan did not reflect "perfect equality in population apportionment, its minor deviations comport with the discretion afforded to the states to legislate their own redistricting." The challengers failed to "produce any evidence suggesting that the redistricting process was infected by racial prejudice." With respect to the one person, one vote claim, the maximum relative deviation of 10% was the

most relevant statistical factor, and the plaintiffs had failed to substantiate their *Larios* claim in which the statistical characteristics were marginally worse than, but roughly comparable to, those of the New York Senate. The Larios court had identified two defects in the redistricting process that rendered it unconstitutional, and those factors were absent in this case: explicit regional favoritism that overpopulated Republican-leaning geographic areas to the benefit of the incumbent Democratic party and implementation of incumbent protection that strongly favored incumbent Democrats but not incumbent Republicans by forcing Republican incumbents into competition with one another.

The challengers failed to show such evidence of illicit partisanship, leading the court to conclude that the "facial presence of an irrationally prejudiced partisan agenda and the aggressively opportunistic splitting and reorganizing of incumbent districts differentiates the facts of *Larios* from those before us." The court rejected the Plaintiffs' claim that the New York Senate Plan was infected with the type of regional partisan bias favoring one party and condemned by the *Larios* court. After granting summary judgment on the equal population claim, the court concluded that any further discovery on the one-person, one-vote claims would be based on speculation and that "the case before us... reveals no issue of material fact that remains in dispute. Rather, the critical facts for resolving this motion consist of the agreed-upon characteristics of the Senate Plan, and those facts reveal no violation of the Equal Protection Clause on one-person, one-vote grounds."

Dismissal on summary judgment was proper since the intervenors failed to come forward with evidence of racially disparate impact, failed to demonstrate that the process by which the Senate Plan was passed revealed legislators' illicit racial animus in order to show that the Senate Plan was discriminatory, and failed to cite any procedural irregularities or suspect legislative conduct indicating that the Senate Plan was so contaminated, "nor do any other features of the Senate Plan or of the legislative history surrounding it support an inference of racial discrimination."

In an effort to avoid summary judgment, the Intervenors argued, over objections asserting legislative privilege, that they "should be permitted to continue to pursue discovery with the hope of excavating some evidence that will allow them to argue a disputed material fact exists regarding the presence of racial prejudice in the passage of the Senate Plan," but the court declined to allow them to pursue broad discovery of documents related to the creation of the Senate Plan.

Following *in camera* review of privileged materials, the court found no evidence that would support a finding that racial animus was a motivating factor in the creation of the Senate Plan. In view of the strong policies disfavoring disclosure of confidential records of legislative deliberation, the court saw no justification for ordering disclosure of privileged records that do nothing to advance the Intervenors' allegations, and any suggestion that the Senate Plan was tainted by racial animus was purely speculative.

2. VOTE DILUTION, VOTER ID and VOTE DENIAL CASES UNDER SECTION 2

Many courts have noted that the Senate Report factors were designed with redistricting and other vote-dilution cases in mind. See *Miss. State Chapter, Operation Push v. Allain*, 674 F.Supp. 1245, 1263 (N.D.Miss.1987), aff'd sub nom. *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir.1991); see also Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L.Rev. 689, 709 (2006) ("The legislative history of the 1982 amendments, however, provides little guidance on how Section 2 should apply to practices resulting in the disproportionate denial of minority votes."). Vote denial cases, on the other hand, are claims that challenge voting procedures that disproportionately affect minority voters, whereby a vote denial "occurs when a state employs a standard, practice, or procedure that results in the denial of the right to vote on account of race." *Johnson v. Governor of State of Fla*., 405 F.3d 1214, 1227 n. 26 (11th Cir.2005) (en banc).

Vote-denial claims under Section 2 have been rare, and there are but a handful of appellate decisions in which the courts of appeals have considered vote-denial claims under Section 2. In *Irby v. Va.State Bd. of Elections*, 889 F.2d 1352 (4th Cir.1989), the Fourth Circuit held that black voters could not establish the state's choice to appoint, rather than elect, school board members violated Section 2 because there was no evidence the admitted disparity between black and white school board members was caused by the appointive system. In *Ortiz v. City of Philadelphia*, 28 F.3d 306, 312-14 (3d Cir.1994), the Third Circuit held that a state statute removing voters who did not vote in the last two federal elections from the registration rolls did not violate Section 2 because its disparate impact on minorities was not caused by the statute, but rather "because [individual voters] do not vote, and do not take the opportunity of voting in the next election or requesting reinstatement"). In *Smith v. Salt River Project Agric. Improvement & Power Dist*., 109 F.3d 586, 595-96 (9th Cir. 1997), the Ninth Circuit held that a special utility district's

decision to limit the right to vote in the district to property owners did not violate Section 2, even though the requirement disproportionately affected minorities, since there was no causal connection between the decision and a discriminatory result. Smith indicated that "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 `results' inquiry." *Smith*, 109 F.3d at 595.

The Sixth Circuit and other courts have recognized that a Section 2 vote-denial claim consists of two elements: (1)"the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. *N.A.A.C.P. v. Husted*, 2014 WL 4377869 (S.D. Ohio 2014), aff'd, No. 14-3877, 2014 WL 4724703, at *24 (6th Cir. Sept. 24, 2014), stayed, No. 14A336, Order List 573 U.S., 2014 WL 4809069 (U.S. Sept. 29, 2014), and (2) that burden must in part be caused by or linked to `social and historical conditions' that have or currently produce discrimination against members of the protected class." Id., quoting *Gingles*, 478 U.S. at 47). As the Sixth Circuit noted in *Husted*, the courts in assessing both of these elements should consider the totality of circumstances. Id. at *24 (quoting 42 U.S.C. § 1973(b)), and as with the evaluation of Section 2 claims generally, will looked to certain "typical" factors pulled directly from the Voting Rights Act's legislative history, commonly known as the Senate Report factors.

Other cases have attempted to provide more definitive guidance, as in *Brown v. Detzner*, 895 F.Supp.2d 1236, 1244 (M.D.Fla.2012), where the court denied the plaintiffs' motion to preliminarily enjoin a state statute that reduced the number of days of early voting from between 12 and 14 days to eight days and gave each county discretion to offer between 48 and 96 hours of early voting, as compared to 96 hours which the prior version of the statute had required. 895 F.Supp.2d at 1239. The Brown court's formulation provides an accurate application of the Section 2 results inquiry and how it can inform proper analysis of a vote denial claim: whether the current electoral law interacts with historical discrimination and social conditions to cause black voters to have unequal access to the polls. The court considered evidence that the state's largest counties and its five covered counties under Section 5 would offer the maximum number of hours of early voting, leading it to conclude that the plaintiffs' claim was not likely to succeed

on the merits. According to the court, the inquiry under Section 2 is "whether, based on an objective analysis of the totality of the circumstances, the application of the [statute] will act to exclude African American voters from meaningful access to the polls, on account of race." Id. at 1249-50 While accepting the findings of experts that the changes would disproportionately impact black voters, id. at 1251, the court in *Brown* found that "[b]ecause [the new statute] allows early voting during non-working hours, as well as voting during the weekend, including one Sunday, voting times which are important to African American voters, as well as to [get-out-the-vote] efforts, the Court cannot find that [it] denies equal access to the polls." Id. at 1255. In doing so, it emphasized that it was not comparing the old law to the new one, because that retrogression standard applies only in a Section 5 proceeding.

In another Section 2 vote denial case, however, *Frank v. Walker*, 2014 WL 1775432 (E.D.Wis. Apr. 29, 2014), the district court permanently enjoined enforcement of Wisconsin's voter ID law. The court held that Section 2 plaintiffs "must show that the disproportionate impact results from the interaction of the voting practice with the effects of past or present discrimination and is not merely a product of chance." Id. at *31. Concluding that black voters disproportionately lacked IDs, the court found that the ID requirement violated Section 2 since it interacted with historical conditions of discrimination in housing, employment, and other areas to cause an additional barrier to be placed in the path of black voters. Id. at *32-33.

In *League of Women Voters v. North Carolina*, 769 F. 3d 224 (4th Cir. 2014), the Fourth Circuit invalidated North Carolina's sweeping voting reform measures, including imposition of strict Voter ID requirements, cutting a week off of early voting, prohibiting local election boards from keeping the polls open on the final Saturday afternoon before elections, eliminating same-day voter registration, opening up precincts to "challengers," eliminating pre-registration of sixteen- and seventeen-year-olds in high schools, and barring votes cast in the wrong precinct from being counted at all.

> Section 2's use to date has not been entirely dilution-focused. Rather, courts have entertained vote-denial claims regarding a wide range of practices, including restrictive voter identification laws (Frank, 2014 WL 1775432); unequal access to voter registration opportunities (*Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd sub nom, *Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991)); unequal access to polling places (*Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982)); and omnibus laws

combining registration and voting restrictions (*Husted*, 2014 WL 4377869, aff'd, 2014 WL 4724703).

Indeed, Section 2's plain language makes clear that vote denial is precisely the kind of issue Section 2 was intended to address. Section 2 of the Voting Rights Act forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). See also *Gingles,* 478 U.S. at 45 n.10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution.").

Further, the principles that make vote dilution objectionable under the Voting Rights Act logically extend to vote denial. Everyone in this case agrees that Section 2 has routinely been used to address vote dilution—which basically allows all voters to `sing' but forces certain groups to do so pianissimo. Vote denial is simply a more extreme form of the same pernicious violation—those groups are not simply made to sing quietly; instead their voices are silenced completely. *A fortiori*, then, Section 2 must support vote-denial claims.

Justice Scalia has provided a helpful illustration of what a Section 2 vote-denial claim might look like:

If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity "to participate in the political process" than whites, and [Section] 2 would therefore be violated. . . .

Chisom, 501 U.S. at 408 (Scalia, J., dissenting).

Veasey v. Abbott

In *Veasey v. Abbott,* 769 F. 3d 890, 2015 WL 4645642 (5th Cir. August 5, 2015), the 5th invalidated the Texas Voter ID legislation and remanded for further proceedings on the plaintiffs' claims of intentional discrimination under the 14th Amendment. In finding that the Texas' Voter ID statute, SB 14, violated Section 2 by disproportionately impacting Hispanic and African-American voters, the Court addressed the statistical evidence relied upon as the basis for disparate impact claims asserted by the plaintiffs and intervenors, noting:

Foremost, the State disputes the propriety of using statistical analyses to determine the racial composition of the No-Match List. Citing *Bartlett v. Strickland*, 556 U.S. 1, 17-18 (2009), the State argues that the Supreme Court foreclosed using statistical analysis to determine the racial composition of a group of voters. That is a mischaracterization. *Strickland* cautions against adopting standards that require judges to make complicated, race-based predictions in redistricting cases, a concern that is not implicated here. Id. It is well within the district court's purview to assess whether minorities are disproportionately affected by a change in the law, based on statistical analyses. See e.g., *Operation Push*,

932 F.2d at 410-11. Using accepted statistical methodologies to estimate the racial composition of Texas voters does not require the type of race-based predictions that the Court referenced in Strickland. Instead, this case is more akin to Operation Push, in which this court approved using surveys and "independent statistical tests" to project the impact on minorities of newly enacted voter registration procedures. Id.

The State also relies on *Strickland* to argue that the canon of constitutional avoidance militates against requiring the State to ensure that voters of various races possess voter ID in equal measure. See 556 U.S. at 18. The district court's discriminatory effect finding, if affirmed, would do no such thing; nor does Section 2 mandate the sort of remedy to which the State objects. Section 2 merely prohibits the State from imposing burdens on minority voters that would disproportionately diminish their ability to participate in the political process.[7]

Next, the State argues that the analyses relied upon by the district court are unreliable because one source of data — the State's voter registration database — does not list the race or ethnicity of voters. The State contends that Plaintiffs' expert should have relied instead on data provided by the Department of Public Safety ("DPS"). The district court rightly rejected this argument. The DPS database did not allow registrants to identify themselves as "Hispanic" until May 2010. As the Texas Director of Elections conceded, the number of Hispanic registered voters is "exponentially higher" than the DPS records would suggest. We cannot fault the district court for refusing to rely on inaccurate data, particularly in light of the State's failure to maintain accurate data.

Finally, the State suggests that conveying the disparity in ID possession in comparative percentages is misleading. See *Frank*, 768 F.3d at 755 n.3 (stating that purveying data as a comparative percentage is a "misuse" that "produces a number of little relevance to the problem"). Instead, the State believes a less deceptive method is to state that 2% of Anglo, 5.9% of Hispanic, and 8.1% of African-American registered voters lack SB 14 ID. Even assuming the State is correct, conveying the disparities in the way the State suggests does not change the analysis. The district court did not err in concluding that SB 14 disproportionately impacts Hispanic and African-American voters.

Alabama Legislative Black Caucus v. State of Alabama: Racial Predominance

In *Alabama Legislative Black Caucus v. State of Alabama,* 135 S. Ct. 1257 (2015), against a complex legal landscape and factual background, a majority of the Supreme Court held that the state legislative redistricting plan drawn by the Alabama Legislature following the 2010 census constituted a racial gerrymander in violation of the 14th Amendment since the challengers below had adequately shown that race was the "predominant factor" in the redistricting and that traditional redistricting principles had been subordinated. The majority rejected Alabama's argument that it had complied with traditional districting principles and that, in any event, its intention was purely partisan and not racial.

In Alabama's Republican-controlled legislature, the redistricting plan before the Court contained the same number of majority-minority Senate districts and one additional majority-minority House district compared to the 1990s court-drawn plan and the plan drawn by a Democratic legislature based on the 2000 census. Population shifts and declines, coupled with the composition of the original 2001 districts, revealed that the most underpopulated of all the districts were the African-American districts, rendering it necessary to move many voters into those districts in order to comply with the "one person, one vote" requirement.

When state legislators in charge of redistricting set as a goal a population deviation of not over 2% across districts, they their redistricting consultant to maintain the same number of majority-minority districts in the two state houses and also maintain the same percentage of African Americans within each district. Their stated reason for keeping the same percentage of African-American voters in each majority-minority district was to comply with VRA Section 5's non-retrogression principle

As a consequence of these twin directives, more African Americans were moved into these majority-minority districts, packing more African Americans, Alabama's most reliable Democratic voters, into fewer districts, and increasing Republican voting strength in districts throughout the rest of the Alabama. Following challenges to the legislative redistricting plan brought by various legislators, voters and groups, including a Section 2 vote dilution claim, and claims of partisan gerrymandering and racial gerrymandering, the three-judge district court dismissed the claims of racial gerrymandering for lack of standing, alternatively granted judgment in favor of the state on the racial gerrymandering claims, dismissed the vote dilution claim as nonjusticiable, and alternatively granted judgment in favor of the state on the vote dilution claim. Before the Supreme Court was the three-judge district court's 2-1 denial of the racial gerrymandering claim.

Vacating and remanding, the Supreme Court noted that equal population objectives "may often prove `predominant' in the ordinary sense of that word," the question of whether race predominated over traditional race neutral redistricting principles is a "special" inquiry: "It is not about whether a legislature believes that the need for equal population takes ultimate priority," but rather, whether the legislature placed race above nonracial considerations in determining which voters to allocate to certain districts in order achieve an equal population goal. Id. at 1270-71. The Court also found that if the district court had properly treated the equal population goal

as "a background rule against which redistricting takes place," its predominance conclusions may have been different — particularly given evidence that the legislature's goal of maintaining existing racial percentages in majority-minority districts significantly impacted the boundaries of one of the challenged districts. Id. at 1271. The Court in *Alabama* held that the district court's finding that the challenged districts would survive strict scrutiny rested upon a misperception of the requirements of Section 5, explaining that Section 5 "does not require a covered jurisdiction to maintain a particular numerical minority percentage," but instead "requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice." Id.

The Court concluded that, in "rel[ying] heavily upon a mechanically numerical view as to what counts as forbidden retrogression," the district court failed to ask the question critical to the narrow tailoring analysis: To what extent was the legislature required to "preserve existing minority percentages in order to maintain the minority's present ability to elect the candidate of its choice?" Id. at 1273-74.

Fairley v. Hattiesburg

Of course, the above summary shows us that vote dilution challenges to state and local government redistricting plans are still in vogue, but the trial courts are ready and willing to wade into the details of expert methodology and make their own assessment of credibility and probative value of the evidence, even when it comes from an American University professor.

A recent decision from the Southern District of Mississippi also provides an excellent example of a principled judicial reluctance to rubber-stamp expert opinions in vote dilution litigation, especially where those opinions are abstract and disconnected from a local appraisal of the facts. It also demonstrates a readiness on the part of an Article III judge to scrutinize the methodology used by those experts, particularly in the context of rough proportionality and unsupported demands for maximization of minority voting strength that would reduce a Section 2 analysis to a crude quota system.

In *Fairley v. Hattiesburg*, ____F. Supp. 3d_____, 2015 WL 4744315 (S.D. Miss. Aug. 11, 2015), District Judge Keith Starrett took note of the fact that the city's African American plaintiffs' expert, Dr. Allan Lichtman, had concluded that socioeconomic disparities between the city's African American citizens and its white citizens in the areas of income, employment rate, educational attainment, home ownership and vehicle availability, id. at *11, and that socioeconomic circumstances diminish the opportunity for minorities to participate equally in the

political process." Id. at *12. In addition to African Americans traditionally enjoying a substantially higher turnout than whites, moreover, probative evidence of African Americans' robust participation in the city's democratic process demonstrated that although the city's African Americans "have lower incomes, educational levels, and standards of living that its white citizens, they participate in the political process at the same or higher levels." Id. at *12.

Rejecting this type of "armchair speculation" as not grounded in an intensely local appraisal of the city's social and political climate, the Court found that "Dr. Lichtman's analysis of the socioeconomic disparities issue is wholly disconnected from the local facts," that it could not establish that the city's African Americans do not participate equally in the political processes, and that while Dr. Lichtman dismissed African American higher turnout, ascribing it to other factors, "he failed to identify or analyze those factors." Id. at *12. The Court also noted Dr. Lichtman's expert testimony on racial polarization, his assertion that the city's racial polarization was the highest he had seen, and his criticism of methodology of the city's expert, Chris Watson, on the ground that the expert did not use standard methods in social science. Addressing this mini-battle between the experts, the Court observed:

> But in the course of examining the evidence, it has become clear to the Court that any methodology is only as good as the underlying data. A sound methodology can be corrupted if a party chooses the data set with an eye toward a particular result or if a party fails to acknowledge the influence of unquantifiable factors. Watson only analyzed two statewide elections involving African-American incumbents. Lichtman relied more heavily on the 2013 mayoral elections than past City Council elections, and he was wholly unwilling to acknowledge the probative value of any methodology but his own. The Court does not imply that either Lichtman or Watson were dishonest, but voting rights litigation does not lend itself to detached, objective social science. Hired experts are constrained by the data provided to them by the parties, and any expert who admitted the inherent uncertainty in the process or acknowledged that the opposing expert has a point would not get any repeat business. As Mark Twain famously wrote: "Figures often beguile me, particularly when I have the arranging of them myself . . . . There are three kinds of lies: lies, damned lies and statistics." Mark Twain, Chapters from My Autobiography, 180 (Amazon Digital Services, Inc. 2011) (originally published 1906). Id. at *15.

The Court in ***Fairley v. Hattiesburg*** rejected the plaintiffs' chief argument that the challenged redistricting plan did not accurately reflect the city's population and that three of the city's five city council wards "must have a majority African American population because African Americans are a majority" of the city's population. Noting the city's response that the

plan was roughly proportional to the city's racial composition, the Court concluded that the plan provided African Americans with electoral opportunity that is roughly proportional to their share of the city's population, following the reasoning of *Johnson v. DeGrandy*, 512 U.S. 997, 1013-14 (1994), that the relevant question is "whether minority groups enjoy electoral opportunity in rough proportion to their share of the population, rather than whether they enjoy electoral success in proportion to their share of the population." Id. at *22.

The Court rejected the plaintiffs' demand to maximize African American electoral opportunity and to maximize minority voting power through creation of a third majority-black aldermanic district:

> In any case, Plaintiffs do not seek "roughly proportional" electoral opportunity. Rather, they want to maximize African-American electoral opportunity. According to the City Council's minutes, Councilwoman Delgado stated at the June 21, 2012, redistricting summit that she was "interested in ways of maximizing minority voting power because of the history of voting in this community and in Mississippi." At trial, she admitted that her primary goal was to create a third majority-black district. Likewise, representatives of the CPAC group — at least one of whom is a Plaintiff in this case — made it clear in the public hearings that their only concern was creating a third majority-black district. In other words, Plaintiffs believe that "anything short of the maximum number of majority-minority districts consistent with the *Gingles* conditions would violate § 2 . . . ." *De Grandy*, 512 U.S. at 1016. But "reading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." Id. at 1016-17. Id at *22.

Finally, the Court rejected the plaintiffs' demands for a crude quota system "in which majority districts are rigidly apportioned on the basis of racial proportions in the population," id. at *24. Based on a searching, thorough analysis of the evidence, the Court held that the city's current plan did not dilute the voting or political power of African American citizens in violation of Section 2 of the Voting Rights Act, that it did not practically hinder African Americans' opportunity to participate in the electoral process and elect representatives of their choice, and that African Americans in this city "enjoyed political power in rough proportion to their share of the voting age population, and that they actively exercise such power through the political process." Id. at *24.

3. SECTION 3 (c) BAIL-IN

Shortly after *Shelby County v. Holder* was decided, a little noticed provision of the Voting Rights Act began to draw attention. Section 3(c)[8] of the VRA, known as the "bail-in" provision or "pocket trigger," provides that as part of a federal court's remedial power once there is a determination of purposeful or intentional discrimination in voting that violates the Fourteenth Amendment, the court can order the jurisdiction to be subject to preclearance for a specified period of time, with notice and reporting requirements similar to Section 5 preclearance procedure that ground to a halt with *Shelby County*. The lower courts are just gearing up to deal with the viability of Section 3 bail-in in light *of Shelby County v. Holder*'s immobilization of Section 5. To understand the potential reach of a bail-in remedy under Section 3(c), it is helpful to review the history of this provision of the Voting Rights Act.

History of Section 3(c) Bail-In

Up until the Supreme Court's June 25, 2013 decision in *Shelby County v. Holder*, the Section 3(c) bail-in remedy remained practically unused since the passage of the Voting Rights Act of 1965 until it was imposed by stipulation of the parties or by consent decree in a number of cases, including the first one in 1979, *United States v. Thurston County, Nebraska*., C.A. No. 78-0-380 (D. Neb. May 9, 1979), *McMillan v. Escambia County*, 559 F.Supp. 720 (N.D.Fla.1983), *Sanchez v. Anaya*, Civ. No. 82-0067M (D. N.M. Dec. 17, 1984), *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. May 16, 1990), and the most recent one - pre-*Shelby County*- in 2006, *United States v. Village of Port Chester*, N.Y., C.A. No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006).

Up until the time of the Supreme Court's decision in *Shelby County v. Holder* on June 25, 2013, approximately twenty jurisdictions have been bailed-in, including the above Section 3(c) proceedings in *Thurston County*, *Escambia County*, *Sanchez* and *Jeffers*. The rest of the bail-ins were individual counties or cities predicated on consent decrees, with one recent exception involving the City of Evergreen, Alabama, discussed below. Brief for Federal Respondents at Appx. A, *Shelby Cnty. v. Holder*, 2013 WL 315242 (Jan. 15, 2013).

Jeffers v. Clinton

In *Jeffers v. Clinton*, 740 F. Supp. 585, 699-602 (E.D. Ark. 1990), the plaintiffs requested bail-in of the entire state of Arkansas. The three-judge district court acknowledged that it knew

of no reported case discussing the standards for imposing preclearance under Section 3(c), nor any case in which a court has subjected an entire State to preclearance, except for the New Mexico bail-in proceedings in *Sanchez v. Anaya*, Civ. No. 82-0067M (D.N.M. Dec. 17, 1984). Chief Judge Eisele in his dissenting opinion in *Jeffers v. Clinton*, 740 F. Supp. 585, 605 (E.D. Ark. 1990), pointed out that the Section 3(c) bail-in procedure applied specifically to "pockets" of discrimination that exist outside those jurisdictions that were automatically covered by Section 5. He noted that under Section 3(c), constitutional violations are not presumed, but must be proved. Further, up until the *Jeffers v. Clinton* decision in 1990, no court had articulated standards for its imposition, nor had an entire state, or even most of a state, been subject to its strictures.

Sanchez v. Anaya

New Mexico was bailed in after its 1980 redistricting plan was found unconstitutional in *Sanchez v. Anaya*. The state was subject to the preclearance requirement for the next decade, and then removed from the preclearance roster.[9] In *Sanchez*, the three-judge court's final decree imposing the bail-in remedy was entered by stipulation, which was a circumstance reducing its weight as a precedent. The final decree was based on a finding that the State of New Mexico's legislative apportionment violated the Voting Rights Act. The final decree required preclearance of any new redistricting plan for a period of ten years, but preclearance was not required as to any other voting laws or practices.

This tailored action by the New Mexico court in *Sanchez* indicated to the Arkansas three-judge court in *Jeffers v. Clinton* that preclearance, if imposed at all, did not need to be an all-or-nothing proposition. On the other hand, the final judgment in *Sanchez* was entered by stipulation, a circumstance which reduces its weight as a precedent.

Standards for Imposing Bail-in Remedy

The three-judge district court in *Jeffers v. Clinton* identified the following standards for imposing the bail-in remedy and subjecting an entire state or any part of it to preclearance:

1. The governing words of 42 U.S.C. § 1973a(c) are that if "the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during

such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting" may be changed without preclearance.

2. “Preclearance" in this context means either a finding by the court that the voting qualification, standard, practice or procedure does not have the purpose and will not have the effect of denying the right to vote on account of race or color, in contravention of the Voting Rights Act, or a failure by the Attorney General of the United States to object within 60 days.
3. Both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments must be taken into account. Section 3(c) does not say that the State or its officials must be guilty of the violations, but the violations must "have occurred *within the territory*" of the State.
4. More than one violation must be shown, since 3(c) uses the plural in referring to "violations", and “it would be strange if a single infringement could subject a State to such strong medicine.”
5. It is a permissible construction of Section 3(c) of the Voting Rights Act, if not a required one, that whatever relief is granted, including preclearance, must be measured against traditional equitable remedial principles, so that the court in the exercise of its equitable discretion are afforded a full opportunity to treat 3(c) enforcement proceedings in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.
6. The criteria that should guide the court in the exercise of its discretion should include the following: (a) Have the violations been persistent and repeated? Are they recent or distant in time? (b) Are they the kinds of violations that would likely be prevented, in the future, by preclearance? (c) Have they already been remedied by judicial decree or otherwise? How likely are they to recur? (d) Do political developments, independent of this litigation, make recurrence more or less likely? (e) Throughout the weighing process, the court has in mind the strong interests on both sides: the interest of the plaintiffs in vindication of their constitutional right to vote, and the interest of the defendants in maintaining the sovereignty of the State, which is itself an important part of the constitutional balance against the exercise of arbitrary power by any portion of government, national or state. (f) undue deference to state sovereignty cannot be permitted to thwart the purpose of the 14th and 15th Amendments and of the Voting Rights Act, which is to override state action.
7. In concluding that a limited preclearance remedy was required, the court also took into account that certain of the constitutional violations found had already been remedied by judicial action in the form of consent decrees of which there had been no violations.
8. We therefore hold that any further statutes, ordinances, regulations, practices, or standards imposing or relating to a majority-vote requirement in general elections in this State must be subjected to the preclearance process. In all other respects, plaintiffs' request for statutory preclearance under Section 3(c) will be denied.
9. While the court may have the discretion to impose statutory preclearance on a broader basis, its choice for the time being was based in part on the quickening pace of political change in the State of Arkansas and an increasing trend of conversion of at-large election systems to single-member systems in evident in litigation affecting school-board elections and municipal elections, and now statutorily required in elections for quorum courts, the legislative bodies of counties.

10. While retention of jurisdiction is not required by Section 3(c), as a matter of the court's inherent equitable power, no plan of apportionment adopted for the House and Senate districts following the next (1990) census may go into effect until 60 days have elapsed from the date of its final adoption, and the court will retain jurisdiction during that time period to entertain any challenge by the plaintiffs in this case to such plan. In the absence of such challenge, the plan may go into effect, subject to the right of any aggrieved citizen to challenge it in an appropriate action at a later time.

Beyond the above, according to the *Jeffers* court, "authority is scant."

Following *Shelby County*, then-Attorney General Eric Holder made clear that his office would continue to aggressively enforce the provisions of the VRA unaffected by the Supreme Court's decision. Todd Ruger, DOJ Denounces Voting Rights Act Decision, THE NATIONAL LAW JOURNAL, Jul. 1, 2013, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202608968847&slreturn=20130530100405. One can expect this enforcement effort will include an increased utilization of § 3. Additionally, private actors are likely to pursue more suits involving § 3(c) as a remedy, with the hopes of placing violating jurisdictions under supervision.

On the day after the *Shelby County v. Holder* decision was handed down, the State of Texas announced its intention to immediately implement the Texas Voter ID law, S.B.14, in response to which Plaintiffs challenged S.B. 14 as violative of the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the U.S. Constitution, as well as Section 2 of the Voting Rights Act in that it denied and abridged the right to vote on account of race and language minority status. The Plaintiffs included in their prayer for relief a request that the court "[r]etain jurisdiction and require Texas to obtain preclearance pursuant to Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c) with respect to its voting practices and procedures." See http://www.campaignlegalcenter.org/images/tx_photo_id_first_amended_complaint_8-23-13.pdf.

Perez v. Perry, 26 F. Supp. 3d 612 (W.D. Texas 2014) is an example of how Section 2 Plaintiffs have increasingly sought equitable relief under § 3(c) of the VRA. Minority Plaintiffs in *Perez v. Perry* invoked the Section 3(c) bail-in remedy less than one month after *Shelby County v. Holder* rendered Section 5 preclearance unavailable. See Texas Latino Redistricting Task Force Plaintiffs' Brief on Section 3(c) of the Voting Rights Act, filed 7-22-13, accessible at http://moritzlaw.osu.edu/electionlaw/litigation/documents/823.pdf ("The section 3(c) remedy is

available "in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment[.]" 42 U.S.C. § 1973a(c). Cases such as this one, in which Plaintiffs filed suit under the Voting Rights Act and the U.S. Constitution to challenge discriminatory redistricting plans, are appropriate cases in which to grant relief under section 3(c). See *Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990). In addition to any other equitable relief that it may grant, a court that finds violations of the Fourteenth or Fifteenth Amendments shall retain jurisdiction for an appropriate period during which the jurisdiction must preclear its voting changes with that court or the U.S. Department of Justice. 42 U.S.C. § 1973a(c); see, e.g., *Jeffers*, 740 F. Supp. at 599-01 (granting section 3(c) bail-in following findings of intentional discrimination in election procedures). The violations of the Fourteenth or Fifteenth Amendments can include past or present discriminatory acts by the defendant; the violations also need not have been the subject of the litigation in which the section 3(c) remedy is sought. See *Jeffers*, 740 F. Supp. at 591-92.)

No Cause of Action Provided by Section 3(c)

The "bail-in" relief provided by Section 3(c) of the VRA does not provide for a cause of action, but parties may seek relief under 3(c). The distinction was critical to the district court's ruling in In *Hall v. State of Louisiana*, 12 F.Supp. 3d 878, 2014 WL 1465880 (M.D. La. 2014), a Section 2 suit against Louisiana and various state officials in which plaintiff challenged a judicial districting plan as dilutive of minority voting strength. Plaintiff's Section 2 complaint included a request that the court "bail in" the state only after finding that the defendants violated the 14th and 15th Amendments. In denying the defendants' motion to dismiss the Section 3(c) request for relief, the court reasoned that the plaintiff "does not allege a claim under Section 3(c) of the Voting Rights Act" but "seeks relief under Section 3(c) only." According to the court,

> Section 3(c) does not provide for a cause of action. Rather, parties may seek relief under Section 3(c) only. 42 U.S.C. § 1973a(c). Accordingly, Hall's Fourth Amending and Supplemental Complaint requests the Court "bail-in" the State of Louisiana, pursuant to Section 3(c), only after a finding that Defendants violated the Fourteenth and Fifteenth Amendments. (Doc. 180, Prayer for Relief.) In sum, the Court concludes that Hall has not alleged claims under Section 3(c). Rather, he seeks relief under Section 3(c) only. Accordingly, Defendants' request that the Court dismiss Hall's claims under Section 3(c) of the Voting Rights Act is DENIED.

In *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013), vacated and remanded, 135 S. Ct. 1257 (2015), the lower court noted that it was not clear to what extent the Section 3 bail-in provision would be used to fill in the void left after *Shelby County v. Holder*:

> A jurisdiction may still be required to obtain preclearance of redistricting plans, even after *Shelby County*, under the "bail-in" provision of § 3 of the VRA. See 42 U.S.C. § 1973a(c); *Shelby Cnty., Ala. v. Holder*, 679 F.3d 848, 855 (D.C.Cir. 2012), rev'd on other grounds — U.S. —, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). That provision "authorizes courts to impose preclearance in response to violations of the Fourteenth and Fifteenth Amendments." Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 2006 (2010). The state of the VRA is in flux at the moment, and it is unclear to what extent this provision will be utilized to fill the void left after *Shelby County*. See http://www.justice.gov/iso/opa/ag/ speeches/2013/ag-speech-130725.html (Attorney General noting that he will seek a court order subjecting Texas to preclearance after *Shelby County*).

Section 3 Bail-In Following *Shelby County*: *Allen v. City of Evergreen*

The first reported district court decision invoking Section 3 bail-in and reimposing preclearance requirements following the Supreme Court's *Shelby County* decision was *Allen v City of Evergreen*, 2014 WL 8276573 (S.D. Ala. Jan. 13, 2014). A small Alabama town with 62% black population was the subject of this Section 3 bail-in decision handed down January 13, 2014. The decision may be accessed at https://www.documentcloud.org/documents/1005529-82-order-section-3c-1.html.

The U. S. District Court for the Southern District of Alabama relied on Section 3 to require the City of Evergreen to obtain approval from the DOJ if it makes changes to the voting rolls and also if it makes redistricting changes in its city council elections. The City had been placed under Section 5 in 2012, but following the Supreme Court's *Shelby County* decision on June 25, 2013, enforcement of Section 5 was effectively removed.

The City of Evergreen in recent years had been found to have improperly excluded minority voters from its rolls and redrawn its district lines to concentrate black voters, who were in the majority, into just two of the five districts, limiting black voting power.

Following a robust summary judgment[10] proceeding in which the plaintiffs sought relief under Section 3(c) because of intentional voting discrimination and racially discriminatory

purpose in the adoption of its redistricting plan and method of identifying eligible voters, coupled with overwhelming evidence of race-based harassment and intimidation of black voters at the polls and other constitutional violations, Attorneys for the City of Evergreen dropped their resistance to the Section 3 bail-in restrictions and entered into negotiations that ultimately led to the district court's order.

Under changes that the City agreed to, it will have to submit changes for Section 3 review by the district judge or by DOJ if they entail any change in the City Council districts or if they change the standards for determining which voters are eligible to vote in municipal elections, and federal observers will be assigned to monitor municipal elections. See *Citing race record, federal judge extends heightened scrutiny of Evergreen elections until 2020*, http://blog.al.com/live/2014/01/citing_race_record_federal_jud.html; Voting Rights Preclearance Lives, http://pulse.ncpolicywatch.org/2014/01/15/voting-rights-preclearance-lives/.

4. SUMMARY JUDGMENT PRACTICE IN SECTION 2 LITIGATION

In determining whether summary judgment is appropriate in Section 2 cases, the trial court must resolve all ambiguities and draw all reasonable inferences against the moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, summary judgment is appropriate "when the nonmovant fails to demonstrate that there is sufficient summary judgment evidence to allow a reasonable fact finder to find in its favor on all essential issues as to which it would bear the burden of proof at trial." *Chen v. City of Houston*, 206 F.3d 502, 505 (5th Cir.2000) (summary judgment standards in context of racial gerrymandering claim); see also *Marylanders for Fair Representation, Inc. v. Schaefer,* 849 F.Supp. 1022, 1030 (D.Md.1994) (three-judge court) (explaining that to survive summary judgment dismissal plaintiff must show "there is sufficient evidence from which a reasonable factfinder could find in its favor"). Facts that are material are identified on the basis of the substantive law governing the case, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In voting rights cases, the trial court's summary judgment analysis should take into account "the sensitive nature of redistricting and the presumption of good faith" owed to state legislatures.[11]

A number of lower court decisions have applied these basic summary judgment principles in the context of voting discrimination and vote dilution claims. *Lee v. City of Los Angeles* (C.D. Cal. 2015), *Gonzales v. Harris County* (5th Cir. 2015), *Bethune-Hill v. Virginia State Board of Elections* (E.D. Va. 2015) and *Page v. Virginia State Board of Elections* (E.D. Va. 2015), and *Pope v. County of Albany* (N.D. N.Y. 2014), are very instructive for summary judgment practice in § 2 litigation involving a *Shaw* claim based on scant evidence of racial predominance (*Lee*) , a geographically compact majority-minority district (*Gonzales*), legislative privilege (*Bethune-Hill*), the predominance of race over political partisanship in racial gerrymandering claims (*Page*) or expert testimony on minority political cohesion and legally significant white racial bloc voting (*Pope*) are at issue.

A. *Lee v City of Los Angeles,* 2015 WL 773915 (C.D. Cal. 2015)

In holding that the City of Los Angeles was entitled to summary judgment on the plaintiffs' *Shaw* claim based on their argument that evidence of racial motivation alone was sufficient to prove a *Shaw* violation, the court noted that in *Cromartie II*, the plaintiffs had produced two pieces of "direct" evidence of discriminatory intent to prove that North Carolina's redistricting process was predominantly motivated by race and thus a *Shaw* violation. The court noted, however, that S*haw* principles had never been applied by the Supreme Court to invalidate a district in which the allegedly favored minority population did not represent a controlling electoral majority. The plaintiffs in this case asked the district court "to do something that has never been done by the Supreme Court." Under *Shaw* jurisprudence, municipalities are prohibited from intentionally and artificially creating districts defined by a race (such as "Black districts" or "White districts") because such districts are unfair racial classifications of the citizens within them.

The first piece of evidence included a statement by a state senator and leader of the redistricting effort, testifying publicly before a legislative committee, in which he stated that the redistricting plan "satisfies a need for racial and partisan balance," but this reference to "racial balance" was not an admission that the legislature had drawn the districts using race as the

controlling factor, but, as the Supreme Court found, "even as so read, the phrase shows that the legislature considered race, along with other partisan and geographic considerations; and as so read it says little or nothing about whether race played a predominant role comparatively speaking." Id. at 253-54 (citing *Bush v. Vera*, 517 U.S. at 952, 958 (O'Connor, J., principal opinion)). The second piece of evidence was an email sent from a legislative staff member to two state senators discussing moving portions of the African-American community into and out of certain districts, which the district court erroneously found had proved racial intent, Id. at 254, but the Supreme Court found as a matter of law that the plaintiffs' "evidence taken together . . . does not show that racial considerations predominated in the drawing of District 12's boundaries." Id. at 257.

Similarly, the evidence offered by the plaintiff in the instant case demonstrated only that some individuals involved in the redistricting process may have been motivated by racial considerations, but such evidence does not permit a fact finder to draw an inference "that racial considerations predominated in the City's drawing of [d]istrict ... boundaries." Id. at 257. Nor did the plaintiffs provide evidence of a motivation to create a "Black district" in CD 10 or a "Latino district" in CD 9. "The evidence conversely demonstrates that Commissioners did not agree on the drawing of the district lines. Furthermore, there is no evidence that the City Council, the legislative body that passed the 2012 Redistricting Ordinance, was motivated by race in drawing the boundaries of CD 9 and CD 10. Plaintiffs' evidence that one Commissioner expressed racial concerns and one Councilmember praised the Redistrict Ordinance after it was passed cannot be imputed to prove the City's motivation."

Rejecting the plaintiffs' evidence as sufficient to withstand summary judgment, the court noted that "evidence that race was "a motivation for the drawing of a majority-minority district" is not evidence that supports a Shaw claim," citing *Bush v. Vera*, 517 U.S. at 959, and that "even if Plaintiffs were able to provide evidence of the City's racial motivation, which the Court finds they fail to do, such evidence would be insufficient to prove an equal protection violation. A *Shaw* claim has not been proven as a matter of law even where a legislative body uses "facially race driven" criteria in creating an electoral district; there must be evidence that race is the predominant or only motivating factor. See Cromartie I, 526 U.S. at 545, 552. Considering all of Plaintiffs' "direct evidence" in the light most favorable to Plaintiffs does not create a material dispute that the City was predominately motivated by race in redistricting CD 9 or CD 10."

The court also noted that race consciousness "does not give rise to a claim of racial gerrymandering when race is considered along with traditional redistricting principles, such as compactness, contiguity, and political boundaries." *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413 (E.D. Cal. 1995); see also Cano, 211 F. Supp. 2d at 1220; and found that there was "no evidence that the City was predominantly motivated by race." The court then found that the plaintiffs had failed to prove the other element of their Shaw claim, neglecting or subordinating traditional districting criteria, Bush, 517 U.S. at 962, and that the City in its motions for summary judgment had provided "undisputed evidence that every change to CD 10 and CD 9 worked in favor of fulfilling a traditional non-racial redistricting purpose."

While the plaintiffs failed to provide any evidence that the City subordinated traditional redistricting criteria to racial considerations in drawing the district lines for CD 9 or CD 10, the City provided "evidence that every change to the Benchmark Map of CD 10 satisfied a traditional, non-racial, redistricting purpose." Since there was no dispute that the City of Los Angeles did not subordinate or neglect traditional redistricting criteria in passing the 2012 Redistricting Ordinance, the court concluded that summary judgment must be granted in favor of the City, citing *Cromartie I*, 526 U.S. at 541 ("To carry their burden, [plaintiffs] were obliged to show—fusing direct or circumstantial evidence, or a combination of both... that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.").

B. Gonzales v Harris County, Texas, 601 Fed.Appx. 255, 2015 WL 525464 *(*5th Cir 2015*)*

In a vote dilution claim that arose following the 2010 census, plaintiffs presented a geographically compact hypothetical district with a greater-than-50-percent Latino voting age "minority" population, but could not satisfy the compactness precondition because their plans did not respect traditional districting principles. The district court found that the plaintiffs' maps failed to respect those principles because they adversely impacted the commissioners' ability to deliver services to their constituents, shifted approximately 40 percent of the county's population to a new precinct, thereby disrupting incumbent-constituency relationships, split two cities (Baytown and Pasadena) between two precincts, and threatened the existing African-American voting opportunity precinct in the county.

Affirming, the Fifth Circuit upheld the district court's conclusion that plaintiffs failed to propose a hypothetical district in which the Latino voting-age population was sufficiently compact, a *Gingles* precondition to their § 2 claim, based on the proposed district's not sufficiently comporting with traditional districting principles. The Fifth Circuit accordingly affirmed on the basis of the district court's thorough consideration of traditional districting principles and its appropriate balancing of those principles against its finding that the proposed plans included a geographically compact voting-age "minority" district, and accordingly, the district court did not err in concluding plaintiffs' proposed plans were not "compact" under *Gingles*' first precondition.

C. *Bethune-Hill v VA State Bd of Elections,* 2015 WL 3404869 (E.D. Va. 2015)

In a challenge levelled against twelve Virginia House of Delegates districts as unlawful racial gerrymanders in violation of the Equal Protection Clause of the U.S. Constitution, Plaintiffs served requests for production on defendants and intervenors, seeking all communications and documents related to the 2011 redistricting process between or among the state House of Delegates, including to members representing the challenged districts, any political organizations, lobbyists, political operatives, consultants, constituents, voters, and government officials, statewide or national Republican groups, the Republican National Committee, National Republican Congressional Committee, Republican State Leadership Committee, Republican Legislative Campaign Committee, their staff members, agents, employees, consultants, advisors, experts, and personnel, and all emails, letters, notes, press releases, and other documents. The House of Delegates was in possession of these legislators' communications because it maintained an email system that the delegates were encouraged to use for communications between legislators, staff, state agencies, constituents, and others concerned with state business, including the transfer of documents and usage of email.

The district court addressed the defendants' objections based on federal and state legislative immunity and privilege, noting that it would "not lightly intrude upon the state legislative privilege" which is a qualified privilege that must "yield in the face of an evidentiary need that lies at the core of the inquiry required by the Supreme Court in redistricting cases."

The court undertook a qualified privilege analysis in which it applied a five-factor balancing test for the proper analytical framework for decision on the legislative privilege issues presented, and examined the relevance of the evidence sought to be protected, the availability of

other evidence, the `seriousness' of the litigation and the issues involved, the role of government in the litigation, and the purposes of the privilege. Based on this analysis, the court found that the totality of circumstances warranted the selective disclosure of the assertedly privileged documents in the House's possession, and that where Plaintiffs alleged racial gerrymandering and sought an injunctive remedy from the legislature itself, where the intent of the legislature was the dispositive issue in the case, "the balance of interests calls for the legislative privilege to yield." The court then set out detailed disclosure requirements and procedures, directing the House to (1) produce any documents or communications created after the redistricting legislation's date of enactment and limiting the privilege to protecting only "integral steps" in the legislative process and not extending it to commentary or analysis following the legislation's enactment, (2) produce any documents or communications shared with, or received from, any individual or organization outside the employ of the legislature, noting that the legislative privilege is strongest as applied to communications among legislators and between legislators and their immediate aides, but that "a conversation between legislators and knowledgeable outsiders, such as lobbyists, to mark up legislation is a session for which no one could seriously claim privilege", and (3) with respect to documents or communications internal to the House that were generated before the legislation's date of enactment, all documents or communications reflecting strictly factual information — regardless of source — were to be produced, including all materials and information available to lawmakers at the time a decision was made, and all documents or communications produced by committee, technical, or professional staff for the House (excluding the personal staff of legislators) that reflect opinions, recommendations, or advice were to be produced, subject to redaction of comments, requests, or opinions expressed by legislators or their aides in communication with such staff.

Finally, the district court required counsel for the Intervenors to work with the legislators to demonstrate the existence of the privilege for each document, if possible, and to aid in expediting that process, all documents or communications produced by legislators or their immediate aides before the redistricting legislation was enacted could be withheld, except to the extent any such document pertains to, or "reveals an awareness" of: racial considerations employed in the districting process, sorting of voters according to race, or the impact of redistricting upon the ability of minority voters to elect a candidate of choice."

In such a situation, "the public interest in vindicating vital constitutional rights overcomes the presumption of common-law privilege and warrants production," the court reasoning that "considerations of race and ethnicity are, in fact, necessary to ensure compliance with the [Voting Rights Act]," and consequently it would not require the disclosure of documents or communications produced by legislators or aides that merely reference or contain demographic data, although such data itself should be produced as "factual information" consistent with the requirement above unless it is inextricably intertwined with non-factual content."

D. *Page v VA State Bd of Elections,* 2015 WL 3604029 (E.D. Va. 2015)

At issue was whether the Virginia Congressional Redistricting legislation, which had been enacted largely on the basis on nonretrogression under Section 5 of the Voting Rights Act, passed constitutional muster in the wake of Shelby County v. Holder, which effectively immobilized Section 5, and in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Following *Shelby County v. Holder's* invalidation of the coverage formula under Section 4, Virginia was no longer obligated to comply with the preclearance requirements of Section 5. See id. at 2631.

After Virginia submitted its 2012 Plan to the Justice Department for Section 5 preclearance, the DOJ precleared the plan, finding that it did not effect any retrogression in the ability of minorities to elect their candidates of choice. Three months later, on June 25, 2013, the Supreme Court handed down *Shelby County v. Holder*, the result of which was that Section 5's requirements of review and preclearance for covered areas no longer applied to Virginia with respect to future changes to its voting and election laws. See *Shelby Cnty*., 133 S. Ct. at 2631.

Plaintiffs challenged the Virginia plan on the ground that Virginia used the Section 5 preclearance requirements as a pretext to pack African-American voters into Virginia's Third Congressional District and reduce these voters' influence in other districts, and sought a declaratory judgment that Virginia's Third Congressional District, as drawn in the 2012 Plan, was a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment. On March 25, 2015, the Supreme Court decided *Alabama Legislative Black Caucus v. State of Alabama,* holding the district court improperly concluded that race did not predominate in the challenged redistricting effort because "it placed in the balance, among other [traditional] nonracial factors, legislative efforts to create districts of approximately equal population." *Alabama*, 135 S.Ct. at 1270.

Following the Supreme Court's directive for it to reconsider its earlier decision in light of *Alabama,* the court in *Page* noted that "to successfully challenge the constitutionality of the Third Congressional District under the Equal Protection Clause, Plaintiffs first bear the burden of proving that the legislature's predominant consideration in drawing its electoral boundaries was race. If they make this showing, the assignment of voters according to race triggers the court's "strictest scrutiny." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Then, the burden of production shifts to Defendants to demonstrate that the redistricting plan was narrowly tailored to advance a compelling state interest. See *Shaw II*, 517 U.S. at 908.

On remand, the court in *Page* found that the Plaintiffs had shown race predominated and that the Third Congressional District could not survive review under the strict scrutiny standard. The court reasoned that while compliance with Section 5 was a compelling interest when the legislature acted, the redistricting plan was not narrowly tailored to further that interest. As as consequence, the court was compelled to hold that the challenged Third Congressional District violated the Equal Protection Clause of the Fourteenth Amendment.

In reaching this conclusion, the court in *Page* relied upon several specific evidentiary factors that showed racial line drawing: (1) statements by legislators indicating that race was a predominant factor in redistricting, (2) evidence that race or percentage of race within a district was the single redistricting criterion that could not be compromised, (3) creation of non-compact and oddly shaped districts beyond what is strictly necessary to avoid retrogression, (4) use of land bridges in a deliberate attempt to bring African-American population into a district, and (5) creation of districts that exhibit disregard for city limits, local election precincts, and voting tabulation districts ("VTDs").

Not only were all of these factors present, but the court also considered direct evidence of legislative intent, including statements by the legislation's sole sponsor, in conjunction with the circumstantial evidence supporting whether the 2012 Plan complies with traditional redistricting principles. In addition to this evidence of legislative intent, the court also considered the extent to which the district boundaries manifest that legislative will, noting that "evidence of a "highly irregular" reapportionment plan "in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions," indicates that racial considerations predominated during the 2011-12 redistricting cycle. *Shaw* I, 509 U.S. at 646-47.

Race or partisan politics

While the defendants cited various parts of the legislative record to show that incumbency protection and partisan politics also motivated the 2011-12 redistricting efforts, the court found that in a "mixed motive suit" — in which a state's conceded goal of "produc[ing] majority-minority districts" is accompanied by "other goals, particularly incumbency protection" — race can be a predominant factor in the drawing of a district without the districting revisions being "purely race-based," *Bush*, 517 U.S. at 959 (emphasis omitted), and that even the Supreme Court had observed that "partisan politicking" may often play a role in a state's redistricting process, but the fact "[t]hat the legislature addressed these interests [need] not in any way refute the fact that race was the legislature's predominant consideration." *Shaw II*, 517 U.S. at 907."

While there was overwhelming evidence in *Cromartie II* in the form of a record "articulat[ing] a legitimate political explanation for [the State's] districting decision," 532 U.S. at 242, including unequivocal trial testimony by state legislators, see *Cromartie I*, 526 U.S. at 549, here there were only "post hoc political justifications" for the 2012 plan. As the court noted, "the nature of the population swaps and shifts used to create the Third Congressional District suggests that less was done to further the goal of incumbency protection than to increase the proportion of minorities within the district."

The above evidence led the district court in *Page* to conclude on remand that the subject plan was an unconstitutional racial gerrymander, drawn predominantly on the basis of race, and that "we see no reason why it should make a difference whether Defendants' "explicit and repeated admissions" of the predominance of race were made in the course of hearings on the House of Delegates floor, as here, or in the State's Section 5 preclearance submission, as in *Shaw* II. These specific and repeated references, when taken together with the circumstantial evidence of record, compel our conclusion that race was the legislature's paramount concern."

Applying the strict scrutiny standard, the court found that compliance with the VRA is a compelling state interest, and that the redistricting plan would not fail under the Equal Protection analysis if it had been narrowly tailored to that interest — that is, if "the legislature ha[d] a strong basis in evidence in support of" its use of race, *Alabama*, 135 S. Ct. at 1274, but that in this case, "while the legislature drew the Third Congressional District in pursuit of the compelling state interest of compliance with Section 5, Defendants have failed to show that the 2012 Plan was narrowly tailored to further that interest." Significant evidence in this regard was the fact that

even though the Third Congressional District has been a safe majority-minority district for 20 years, the 2012 Plan increased the total number of its African-American voting age residents by 44, 711 people.

The court in *Page* concluded on remand that the Virginia legislature's use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns, suggested that voting patterns in the Third Congressional District were not "considered individually," and that the 2012 Plan was not narrowly tailored to achieve compliance with Section 5, and therefore failed strict scrutiny. It reasoned as follows:

> In this respect, the legislature's decision to increase the BVAP of the Third Congressional District is similar to the redistricting plan invalidated by the Supreme Court in *Bush*. See 517 U.S. at 983. In *Bush*, a plurality of the Supreme Court held that increasing the BVAP from 35.1% to 50.9% was not narrowly tailored because the state's interest in avoiding retrogression in a district where African-American voters had successfully elected their representatives of choice for two decades did not justify "substantial augmentation" of the BVAP. Id. Such an augmentation could not be narrowly tailored to the goal of complying with Section 5 because there was "no basis for concluding that the increase to a 50.9% African-American population . . . was necessary to ensure nonretrogression." Id. "Nonretrogression is not a license for the State to do whatever it deems necessary to ensure continued electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." Id. While the BVAP increase here is smaller than that in Bush, the principle is the same. Defendants show no basis for concluding that an augmentation of the Third Congressional District's BVAP to 56.3% was narrowly tailored when the district had been a safe majority-minority district for two decades.

E. *Pope v County of Albany,* 2015 WL 1311064 (N.D. N.Y. 2014)

The defendants in a Section 2 claim challenging a legislative redistricting plan sought summary judgment on the basis that black and Hispanic voters could not form a coalition for the purposes of Section 2, Plaintiffs had not proved political cohesion among the black and Hispanic voting populations taken as a whole, and Plaintiffs could not prove that white bloc voting was usually sufficient to defeat the minority-preferred candidate.

Rejecting these arguments, the court held the broad wording of Section 2 did not suggest that only a single group may allege a violation of its voting rights; even without empirical data, anecdotal evidence alone could support the conclusion that Hispanic voters are politically cohesive with black voters, and that the anecdotal evidence in this case was sufficient to raise a genuine issue of material fact, rejecting the defendants' contention that a failure to show cohesion between black and Hispanic voters through statistical evidence was fatal to a Section 2 claim.

Finding that the plaintiffs had compiled a record of anecdotal political cohesion to show that the black and Hispanic communities satisfy Section 2's cohesion requirements, the court further concluded that the plaintiffs had satisfied that third *Gingles* precondition that voting be polarized along racial lines, and that majority bloc voting "usually" suffice to defeat the minority-preferred candidate.

The court rejected the defendants' argument that the plaintiffs had not properly identified minority-preferred candidates and that plaintiffs had not properly proved racial polarization, and that minority electoral success was sufficient to warrant judgment as a matter of law.

On the contrary, the court noted that the defendants had not provided a coherent standard to judge that the combination of minority success rate, additional anecdotal evidence, and the existence of special circumstances in the instant case could not reasonably support a finding that there is sufficient white bloc voting to "usually" defeat the minority-preferred candidate, while the plaintiffs had showed that minority-preferred candidates are successfully less than half of the time, and that even among successful minority candidates, several were incumbents, others won races within MMDs, and still others won immediately after prior successful litigation "might have worked a one time advantage for black candidates."

Based on this evidence, the court concluded that there were genuine issues of material fact as to whether or not minority-preferred candidates have usually been defeated due to white bloc voting, and that summary judgment was not appropriate.

5. REMEDIAL PLANS IN VRA LITIGATION

The lower courts have taken more creative approaches to devising remedies in vote dilution litigation, with a renewed emphasis on cumulative voting and other alternative electoral systems. First, a few fundamentals should be noted.

Once a violation of § 2 of the Voting Rights Act has been established, a district court is required to give the defendant legislative body the first opportunity to devise a remedial plan. *McGhee v. Granville County, N.C.*, 860 F.2d 110, 115 (4th Cir.1988). The district court's review and its remedial powers are largely dictated by the action taken by the legislative body. Id. If and when that legislative body responds with a proposed remedy, the "court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable." Id. If the proposed remedial plan is legally acceptable, the district court must "accord great deference to legislative

judgments about the exact nature and scope of the proposed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process that rightly pertain to the legislative prerogative of the state and its subdivisions." Id. On the other hand, "[i]f the legislative body fails to respond or responds with a legally unacceptable remedy, the responsibility falls on the District Court to exercise its discretion in fashioning a near optimal plan." Id.

See *Benavidez v. Irving Independent School District* (N.D. Texas 2014) (Upon finding that the defendant board's 5-2 system of electing its board of trustees violated § 2, the district court directed the board to submit within 60 days a plan to remedy the violation, noting that (1) the proposed remedy need not include the creation of one of plaintiffs' proposed illustrative districts, (2) the court is not suggesting that defendants must abandon the 5-2 system, since "at-large election schemes ... are not per se violative of minority voters' rights;" single member districts and no at-large positions may be necessary to ensure compliance with § 2, (3) although defendants are not legally required to create a single-member district that has a share of Hispanic CVAP that is greater than 50%, if they do not, they must be able to demonstrate on the basis of sufficiently reliable data that there is sufficient crossover voting from non-Hispanic voters or some other set of circumstances that will ensure effective Hispanic representation under the proposed plan, and (4) in light of the court's finding that District 6 is inadequate as presently configured, the court will not approve a proposed remedy that only adjusts immaterially the boundaries of District 6.)

Cumulative Voting as Remedial Alternative Under Section 2

In *Cane v. Worcester County, Md.*, 35 F. 3d 921 (4th Cir. 1994), following a judicial determination that the county's at-large residency district electoral system violated Section 2, the district court rejected the county's proposed plan, Bill 93-6, as a legally unacceptable remedial plan. That proposed plan altered the former electoral scheme by eliminating the commissioner-at-large position and by creating a fifth residency district, with each of the five commissioners of the board elected at large. After the district court rejected this plan, it imposed a remedy consisting of a cumulative voting scheme proposed by the plaintiffs. Under the cumulative voting plan, candidates would run in a countywide at-large election, each voter would be allowed to cast five votes and to allocate all of them to one candidate or divide them among several candidates, and the five candidates receiving the most votes among all of those offering

for election would win a seat on the Board. The district court's two justifications for its selection of the cumulative voting plan were that (1) permitting all of the citizens to vote for all of the candidates would promote the county's desire to have commissioners serve the collective interest of the county by requiring the candidates to appeal to all of the voters in the county, and (2) the plan would avoid the creation of districts that split or combined municipalities.

> With respect to the cumulative voting remedy imposed by the district court in Cane, the county argued that cumulative voting is a radical departure from traditional elections systems and may not be judicially imposed to remedy a § 2 violation. The Fourth Circuit held that the district court abused its discretion in adopting the cumulative voting system proposed by the plaintiffs, noting that it was "not called upon to outline whether facts and circumstances might justify the imposition of a cumulative voting plan on a political subdivision," and that its "review is limited by the specific facts and circumstances presented here.

The Fourth Circuit then addressed the degree of deference a district court must accord legislative judgments in exercising its discretion to fashion a remedy when the legislative body's proposed remedy is legally unacceptable, and concluded that even when the legislative body fails to offer a remedy or its proposed remedy is legally unacceptable, the court, in exercising its discretion to fashion a remedy that complies with § 2, must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme or the legally unacceptable remedy offered by the legislative body.[12]

Although the district court had recognized its obligation "to give great deference to legislative judgments about the nature and scope of the proposed remedy and to reconcile the requirements of the statute with the goals of county political policy," *Cane,* 847 F.Supp. at 372-73, the Fourth Circuit found that it failed to give due deference to another legislative judgment, and that was the county's clear expression of a preference for residency requirements that would ensure that the board members were knowledgeable of and responsive to the diverse interests of the various regions of the county.

In *Cane*, the legislative findings accompanying Bill 93-6 articulated a detailed narrative of the historical and political basis for its expressed legislative preference, but the district court, in adopted the cumulative voting plan, had failed to defer to that legislative preference when it abolished the residency districts, imposed a plan under which all five seats on the board would be filled by individuals living in the same general area of the county. The Fourth Circuit concluded that the district court had "failed to adequately defer to the "variety of political

judgments about the dynamics of [the] overall electoral process that rightly pertain to the legislative prerogative of" the County." *McGhee*, 860 F.2d at 115. In light of this error, the Fourth Circuit remanded to the district court with instructions to afford the county an opportunity to submit a proposed plan of its choosing that remedied the § 2 violation.

In *United States v. Euclid*, 632 F. Supp.2d 740, 753-745, 770-771 (N.D. Ohio 2009), the school district's electoral system was stipulated to be violative of Section 2, after the defendant school board proffered a single-member district remedy which the district court rejected. The district court then ordered use of a limited voting electoral system to replace an election system which had been stipulated to violate Section 2. In the first federal decision to order a non-district remedy in a Section 2 case over the objection of one of the parties, the court provided a detailed discussion of how to apply the threshold of exclusion‖ formula for predicting minority voters' electoral success. Id. at 762-670.

In *United States v. Village of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010), the district court found that the Village's existing electoral system diluted the voting strength of Hispanic voters in violation of Section 2 and ordered a cumulative voting remedy into effect over objections from plaintiffs. This was the first federal decision in which a court ordered a cumulative voting remedy outside the context of a settlement and discussed in detail the availability of such alternative remedies under Section 2.[13]

Georgia State Conference of NAACP v. Fayette County Board, 996 F. Supp. 2d 1353 (N.D. Ga. 2014) provides a helpful overview of the standards for court-drawn remedial plans in Voting Rights litigation:

> Judicial redistricting is not ideal. So where legislative action can remedy an unconstitutional or unlawful election plan, redistricting should be left to elected officials. Perry v. Perez, 132 S.Ct. 934, 941, 181 L.Ed.2d 900 (2012). Yet this rule is not without exception, such as when the timing of an upcoming election makes legislative action impractical. Wise v. Lipscomb, 437 U.S. 535, 540, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) (plurality opinion). That is the case here. Under a recently enacted Georgia law, qualification for the 2014 state and local elections will take place from March 3-7, with partisan 1358*1358 primaries to select candidates for the general election to follow on May 20. Consequently, the "unwelcome obligation" of creating a redistricting plan for the election of Fayette County Board of Commissioners and Board of Education members falls to the Court. Perez, 132 S.Ct. at 940.

I. Standards for Court-Drawn Remedial Plans

Ordinarily, redistricting involves "criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." Id. at 941. This is because "experience has shown the difficulty of defining neutral legal principles in this area." Id. As a result, a federal court charged with drawing new district lines "should be guided by the legislative policies underlying" a prior plan — including an unenforceable one — "to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."[14]

In creating a remedial plan to cure a violation of § 2 of the Voting Rights Act, the Court has several obligations.

First and foremost, it must "exercise its traditional equitable powers to fashion the relief so that it completely remedies" the § 2 violation and "fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."[15] This means that the Court-created plan must create a majority-minority district. See Bartlett, 556 U.S. at 19, 24, 129 S.Ct. 1231.

Second, the Court-created plan should be narrowly tailored to avoid running afoul of the constitutional right of one person, one vote guaranteed by the Equal Protection Clause of the Fourteenth Amendment. See *DeJulio v. Georgia*, 290 F.3d 1291, 1295 (11th Cir.2002) (explaining when the one person, one vote requirement applies). To do this the plan should strive for a small population deviation — less than 10 percent, the deviation permitted for state or local legislature redistricting purposes.[16]

Third, the Court-created plan cannot violate § 2 or 5 of the Voting Rights Act.[17]

Fourth, the plan should avoid "intrud[ing] on state policy any more than is necessary" to uphold the requirements of the U.S. Constitution.[18] This means that the Court-created plan should follow the traditional redistricting principles, though these principles have less precedence than "the requirements of the Constitution and Voting Rights Act." *Larios v. Cox*, 314 F.Supp.2d 1357, 1360 (N.D.Ga.2004) (three-judge court).

Legislative Plan vs. Court-Ordered Plan as Proposed Remedial Plan

When a Section 2 vote dilution challenge is successfully brought against an at large electoral system, and that system is invalidated, “it usually leads courts to create majority-minority districts that give minority voters a greater chance of electing their preferred candidates."[19]

In the context of a federal court’s proper role in serving as a catalyst for redistricting in such litigation, however, the Supreme Court has routinely admonished the lower courts that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."[20] As an integral part

of this need for judicial restraint, a rule of deference had emerged by which the courts will accord great deference to the legislative judgments and policy choices of the defendant governing body, with respect to the exact nature and scope of the remedial plan when it is proposed by that body:

> When a federal court declares an existing apportionment scheme unconstitutional, it is ... appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise*, 437 U.S. at 540, 98 S.Ct. 2493; *United States v. Brown*, 561 F.3d 420, 435 (5th Cir.2009) ("[A]t least in redistricting cases, district courts must offer governing bodies the first pass at devising a remedy.").
>
> If a new legislative plan is forthcoming, then that remedial plan "will ... be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise,* 437 U.S. at 540, 98 S.Ct. 2493; see also *McGhee v. Granville Cnty., N.C.*, 860 F.2d 110, 115 (4th Cir.1988) ("[A] reviewing court must ... accord great deference to legislative judgments about the exact nature and scope of the proposed remedy....").
>
> If a defendant government body's proposed remedial plan is a legislative plan, it is owed substantial deference. See *Wise*, 437 U.S. at 540, 98 S.Ct. 2493; see also *Tallahassee Branch of NAACP v. Leon Cnty., Fla.,* 827 F.2d 1436, 1438 (11th Cir.1987) ("[F]ederal courts must defer to the judgment of a state legislative body in the area of reapportionment. Principles of federalism and common sense mandate deference to a plan which has been legislatively enacted.").
>
> If, however, the remedial plan that the district court puts into effect is deemed a court-ordered plan, "[a] more stringent standard is applied ... because a federal court, lacking the political authoritativeness that the legislature can bring to the task, must act circumspectly, and in a manner free from any taint of arbitrariness or discrimination."[21]
>
> In such circumstances, the Supreme Court has instructed that, "[a]mong other requirements, a court-drawn plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary." *Wise*, 437 U.S. at 540, 98 S.Ct. 2493; see also *Chapman*, 420 U.S. at 26-27, 95 S.Ct. 751 ("We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan ... must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation.").

Large v. Fremont County

In *Large v. Fremont County, Wyo*., 670 F. 3d 1133 (10th Cir. 2012), the Tenth Circuit considered the level of deference that should be given to a local governmental entity's proffered plan to remedy an adjudicated violation of Section 2 then the proposed remedy unnecessarily conflict with state law. Following Supreme Court precedent strongly favoring single-member districts in court ordered remedial plans, the Court held that when a local government defendant's proposed remedial plan does not adhere "as closely as possible to the contours of state governing law," it is not eligible for the deference that is customarily afforded legislative plans, and in such a case, the district court properly may reject the defendant's proposed remedial plan. The Tenth Circuit agreed, holding that federal courts owe no deference to Section 2 remedial plans offered by political subdivisions of a State, when those plans unnecessarily conflict with state law.

Following a trial and judicial finding that Fremont County's at-large electoral system violated Section 2, the county proffered a proposed remedial plan consisting of one single-seat majority Native American district and one four-seat majority white district encompassing the rest of the county, under which county commissioners would be elected for four-year staggered terms, candidates from the majority Native American district would be required to reside in that district and could only be voted on by members of that district, while the four remaining seats in the majority white district would be elected by the remaining county population using an at-large scheme with two board members elected every other year.

This hybrid election scheme was not authorized under Wyoming law, which provided for only two methods of electing county commissioners, at-large voting for all the commissioner seats or creation of five single-member districts in which each commission must reside in and represent the district from which he or she is elected by the registered voters of that district.

The lower court, while recognizing that redistricting is primarily a legislative task, found that adopting the hybrid-district election scheme was inappropriate since it violated state law and failed to cure the harm identified in the original at-large voting scheme. The county was free to exercise its legislative judgment in proposing a remedial plan to

replace the one invalidated by the district court, but in doing so it was no free to disregard state law, and its proposal must remedy the Section 2 violation. According to the court,

> When a political subdivision of a State substantively contravenes the laws of that State—at least insofar as that contravention is not sanctioned by higher federal law—it no longer acts as an agent of that sovereign, and therefore is due no federal-court deference. A natural corollary of this is that any remedial plan proposed by a political subdivision of a State cannot be deemed a legislative plan—i.e., a plan that is a valid expression of legislative process and policy judgment—unless it is bounded by state laws to the maximum extent possible. … However, where that political subdivision's remedial plan contravenes state laws that have not been remedially abrogated by the Supremacy Clause, the plan could not be considered a valid exercise in legislative judgment because it would not respect the "policy choices" of the dominant sovereign from which the local governmental entity's authority flows.
>
> Therefore, we hold that where a local governmental body's proposed remedial plan for an adjudged Section 2 violation unnecessarily conflicts with state law, it is not a legislative plan entitled to deference by the federal courts. As this was the case here, we also conclude that the district court did not err in refusing to defer to the Board's plan. We further conclude that the district court did not abuse its discretion in implementing its single-member-district plan. Indeed, as previously noted, the County makes no serious argument to the contrary.
>
> In the absence of a valid legislative plan, any redistricting plan adopted by the court would properly be deemed a court-ordered plan. As the district court properly noted, the Supreme Court has mandated the use of single-member districts in court-ordered plans—as opposed to legislative plans— when "there is no compelling reason for doing otherwise." …*Chapman*, 420 U.S. at 16, 95 S. Ct. 751.

The Tenth Circuit in *Fremont County* also rejected the county's attempted reliance on *United States v. Village of Port Chester*, 704 F.Supp.2d 411 (S.D.N.Y. 2010), and *United States v. Euclid City School Board*, 632 F.Supp.2d 740 (N.D.Ohio 2009), holding that in both of these cases, a legislative plan was challenged on the basis that it conflicted with state law because it employed cumulative voting, a procedure not explicitly endorsed by the laws of the States at issue. In *Village of Port Chester*, the district court "did not find this problematic because cumulative voting was not expressly prohibited by state law either, and also was not in tension with any other state election laws." See 704 F.Supp.2d at 449. According to the Tenth Circuit, "[s]uch reasoning, however, actually may be read as working against the county's position because the court

did not reject the plaintiffs' challenge on the basis that compliance with state law is irrelevant—which seemingly would have been the natural response of a judicial adherent of Justice Powell's position in *Wise*. See *Wise*, 437 U.S. at 548, 98 S.Ct. 2493 (Powell, J., concurring in part and concurring in the judgment) (noting that "[t]he essential point is that the Dallas City Council exercised a legislative judgment")."

The Tenth Circuit also noted that in *Euclid City School Board*, "although the district court spoke in emphatic tones about the need to give deference to the apportionment judgment of political governmental entities, because of deficiencies in the government's presentation, the court was not compelled to squarely address the issue presented here." See 632 F.Supp.2d at 750 n. 9 (noting that the government "offered without citation or explanation" the assertion that the deference that is "usually appropriate" when courts review remedial apportionment plans was not appropriate in that case because of a conflict with state law)."

Finally, the Tenth Circuit in Fremont County rejected the district court's analysis in Euclid City School Board as skeletal at best and unpersuasive, predicated on "state-law silence" in both cases, whereas in the instant case, "Wyoming law clearly contemplated that there would be one of only two potential election schemes for county commissioners; neither scheme is reflected in the remedial plans submitted by the Board."

6. ATTORNEYS FEES in VRA LITIGATION

In the United States, parties are ordinarily required to bear their own attorney's fees. The prevailing party is not entitled to collect from the loser. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 247 (1975). This is the American Rule, under which the courts follow "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Key Tronic Corp. v. United States*, 511 U. S. 809, 819 (1994). Congress has nonetheless authorized the award of attorney's fees to the "prevailing party" in numerous statutes, including the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U. S. C. § 1973l (e), and the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988, and the Civil Rights Act of 1964, 78 Stat. 259, 42 U. S. C. § 2000e— 5(k). See generally *Marek v. Chesny*, 473 U. S. 1, 43-51 (1985).

Texas v. U.S., 49 F.Supp.3d 27 (D. D.C. 2014), in the words of the D.C. District Court, "presents a case study in how not to respond to a motion for attorney fees and costs." Intervenors prevailed in VRA Section 5 preclearance litigation before a three-judge court and were held entitled to recover attorney fees and costs even though the Supreme Court vacated that opinion in light of its subsequent decision *Shelby County v. Holder* which declared the Section 4 coverage provision unconstitutional, effectively immobilizing the Section 5 preclearance provision. In awarding the requested fees and cost, the court concluded:

> A quick search of the Federal Reporter reveals the complexity of this narrow question. Yet, rather than engage the fee applicants, Plaintiff Texas basically ignores the arguments supporting an award of fees and costs. In a three-page filing entitled "Advisory," Texas trumpets the Supreme Court's decision, expresses indignation at having to respond at all, and presumes that the motion for attorney fees is so frivolous that Texas need not provide further briefing in opposition unless requested. Such an opposition is insufficient in this jurisdiction. Circuit precedent and the Local Rules of this Court provide that the failure to respond to an opposing party's arguments results in waiver as to the unaddressed contentions, and the Court finds that Texas's "Advisory" presents no opposition on the applicable law. Accordingly, the Court will award the requested fees and costs.

Prevailing Party status

"Prevailing party" is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes.[22] "[B]y the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs . . . ." *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 387 (1884).

"Costs have usually been allowed to the prevailing party, as incident to the judgment, since the statute 6 Edw. I, c. 1, § 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was organized. . . . "Weighed in the light of these several provisions in the Judiciary Act [of 1789], the conclusion appears to be clear that Congress intended to allow costs to the prevailing party, as incident to the judgment . . . ." *The Baltimore*, 8 Wall. 377, 388, 390 (1869).

In *Davis v. Abbott*, 781 F. 3rd 207, 214 (5th Cir. 2015), the Fifth Circuit addressed the definition of a "prevailing party" in light of the VRA's shifting legal landscape and impact on a Section 2 Plaintiffs' entitlement to attorneys' fees. The court noted that "[i]n determining whether a party is the prevailing party, courts use a tripartite test, traceable to the Supreme Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't Of Health & Human Res.*, 532 U.S. 598 (2001). First, a "plaintiff must achieve judicially-sanctioned relief"; second, "the

relief must materially alter the legal relationship between the parties"; and, third, "the relief must modify the defendant's behavior in a way that directly benefits the plaintiff at the time the relief is entered." Davis, 781 F.3d at 214.

Baca v. Berry

At issue in *Baca v. Berry* (D. N.M. 2014), was the propriety of the district court's award of sanctions under 28 U.S.C. § 1927, which provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." The plaintiffs filed a complaint in state court on January 17, 2013 for injunctive and declaratory relief under Section 2 of the VRA and various provisions of state law against the Mayor of Albuquerque in his official capacity, to achieve a constitutionally acceptable and otherwise lawful redistricting of the Albuquerque City Council.

Following federal question removal by the defendant, plaintiffs' counsel became aware of a change in the City charter that raised the percentage of the votes required to avoid a run-off from 40% to 50%, an event that plaintiffs admitted had an ameliorating effect on their concerns. Plaintiffs' counsel was then provided with the defendant's expert report on June 25, 2013, indicating clearly that the plaintiffs could not establish the three *Gingles* preconditions. According to the court, "[u]pon reading that report, it would have been clear to a reasonable attorney that this case no longer had merit." Plaintiffs' counsel continued to pursue the case, and this conduct on the part of plaintiffs' counsel was found by the court to be objectively unreasonable. Notably, Mr. Sanderoff's report came after Plaintiffs were aware of a change in the City charter that raised the percentage of the votes required to avoid a run-off from 40% to 50%; an event that Plaintiffs admit had an ameliorating effect on their concerns.

The plaintiffs sought voluntary dismissal without prejudice under Rule 41(a) of the Federal Rules of Civil Procedure on July 5, 2013, based on their position that their lawsuit may have been prematurely filed. Two weeks after plaintiffs filed their motion, defendant filed a motion to dismiss with prejudice, its position being that the plaintiffs filed the complaint solely to draw media attention to alleged ethnic discrimination in the election process in the upcoming November 2013 elections in the City of Albuquerque. On September 30, 2013, the district court entered a stay in this case and deferred ruling on both motions until after the conclusion of the mayoral race, at which point the parties would advise the Court whether, based on the results of

the mayoral election, they still wished to pursue litigation on the allegations raised in the complaint. The Court ultimately dismissed the case with prejudice, and after entry of final judgment, defendant as the prevailing party moved for an award of attorneys' fees and costs, and plaintiffs opposed the imposition of sanctions in the form of attorneys' fees.

Although defendant originally moved for sanctions under 42 U.S.C. § 1988, 42 U.S.C. § 19731, 28 U.S.C. § 1927, Fed. R. Civ. P. 16(f), and Fed. R. Civ. P. 37(d), the court only awarded sanctions under 28 U.S.C § 1927, even though maintenance of the suit likely met the standards for awarding sanctions under the other statutes and rules, because awarding sanctions under those other rules and statutes would involve sanctioning the parties themselves, a result the court did not find appropriate since (1) the individual plaintiffs were relying on the advice of counsel in continuing this litigation, (2) the parties themselves were of modest means, and (3) defendant conceded this lawsuit was not filed in bad faith.

At the sanctions hearing, it was shown that at the time that plaintiffs' expert submitted his report, months into this litigation, (1) plaintiffs' counsel either had an expert opinion to back the claims or they did not, and none was timely provided; (2) plaintiffs' counsel failed to move this matter forward in a timely manner and failed to fulfill their obligations to the Court; (3) plaintiffs' counsel never provided an alternative map for city council districts; (4) plaintiffs apparently failed to respond to discovery requests and did not provide defendant with a copy of one of their expert's reports; (5) even though the thrust of the lawsuit was that the new redistricting plan disadvantages minority voters, the plan adopted in 2012 actually added a new majority minority district and kept the previous three (3) majority Hispanic districts and one majority minority district, resulting in a total of five majority minority districts out of nine districts overall, whereby a majority of the city council districts in the plan adopted were majority minority districts, favorable to minority voters.

The question before the court was whether and at what point during the course of the litigation plaintiffs' counsels' conduct in maintaining this case began to multiply the proceedings in an unreasonable and vexatious manner.

The sanctions statute, 28 U.S.C. §1927, focuses on whether an attorney's conduct "imposes unreasonable and unwarranted burdens on the court and opposing parties," *Braley v. Campbell*, 832 F.2d 1504, 1510 (10th Cir.1987) (en banc), and sanctions under § 1927 are appropriate “when an attorney acts recklessly or with indifference to the law.” Sanctions may

also be awarded under 1927 when an attorney is “cavalier or bent on misleading the court; intentionally acts without a plausible basis; [or] when the entire course of the proceedings was unwarranted."[23]

In evaluating the propriety of sanctions in the form of an award of attorneys fees to the prevailing defendant in this case, the district court reasoned that an attorney is expected to exercise judgment, and the court will not "excuse objectively unreasonable conduct."[24] The court further noted that an attorney must regularly re-evaluate the merits of claims and avoid prolonging meritless claims.

While plaintiffs had a good faith basis for filing the complaint, there came a point in the litigation when the case was no longer viable. The court found that the “magic date” that this case was no longer viable and plaintiffs’ counsel unreasonably continued this matter was June 25, 2013, the date defendant’s expert report was provided to plaintiffs' counsel. o longer viable. The Court will not award attorneys' fees incurred prior to June 25, 2013. The court further reasoned that it would have been inclined to grant leniency towards plaintiffs' counsel if they had simply acquiesced to defendant's request to dismiss this case with prejudice. “They did not, however, and instead continued the charade of proceeding forward with this matter, causing the tax payers of Albuquerque to expend additional resources for attorneys' fees in spite of the fact that Plaintiffs' counsel knew or should have known that this case was over.”

Aside from what the court characterized as plaintiffs' counsels' “clear disregard for the glaringly obvious fact that this case was without merit,” plaintiffs’ counsel also argued that the court “should not award sanctions because voting rights are so important that awarding sanctions might discourage other potential plaintiffs from filing lawsuits to enforce their voting rights.” The court agreed with plaintiffs' counsel that voting rights are paramount and

> far too important for governmental entities to be forced to waste time and resources litigating cases devoid of any merit. Counsel must have the appropriate amount of respect for litigation involving such a fundamental right. What the Court is most struck by is that after nearly a year of litigation, discovery, motions practice, Plaintiffs' counsel still does not have a valid explanation for why they continued pursuing this case after the Sanderoff report and the change to the City charter clearly demonstrated that minority voters were not being harmed by the new redistricting plan.

The court awarded the defendant $48,217.95 in attorneys' fees as a sanction against plaintiffs' counsel for unreasonably continuing the litigation after it became apparent that the

case had no merit. The court's order awarding attorneys' fees imposed sanctions solely against the attorneys for the plaintiffs.

On appeal to the Tenth Circuit Court of Appeals, the plaintiffs' counsel, represented by Campaign Legal Center, framed the issues as whether the district court erred in sanctioning Plaintiffs' attorneys for multiplying the proceedings when plaintiffs had moved to dismiss the proceedings without prejudice and the court, after concluding that the record did not support dismissal with prejudice, stayed the proceedings, at neither party's request, solely in consideration of judicial economy; whether the district court erred in concluding that Plaintiffs' attorneys could be sanctioned for failing to dismiss their clients' case the day they received Defendant's expert report, in the absence of an opportunity to analyze the report, rebut the report, or depose the expert, and where errors of law in the report caused the district court to conclude erroneously that plaintiffs' case was without merit; whether the district court erred in applying a subjective, rather than objective, standard in sanctioning plaintiffs' attorneys for deciding to seek dismissal without prejudice after previously concluding, on an objective basis, that the same factual record did not support dismissal with prejudice; and whether the district court abused its discretion in failing to conduct an individualized analysis in its sanctions order.[25]

The City also cross-appealed, arguing that the voters who brought the voting rights case should also be on the hook for fees and insisting that the total fees should be far higher than $48,000. Oral argument before the Tenth Circuit was held on May 6, 2015.

On June 5, 2015, the plaintiffs in *Baca v. Berry* filed a motion for sanctions against the city and its attorneys for pursuing a frivolous cross-appeal in bad faith in which it has sought to force the voters to pay the city's attorneys' fees. The Motion for Sanctions is accessible online at http://www.campaignlegalcenter.org/sites/default/files/Motion%20for%20Sanctions.pdf
In their motion, the plaintiffs seek sanctions pursuant to FRAP Rule 38 and 28 U.S.C. §1927 in the amount of $66,980.651 against both the City of Albuquerque and its attorneys, alleging that "the city and its attorneys filed and pursued a frivolous cross-appeal in bad faith, forcing plaintiffs to endure months of financial uncertainty and angst, plaintiffs' pro bono counsel to expend significant unnecessary time and money, and this court to waste valuable judicial resources."

The factual summary provided by the plaintiffs and their account of the litigation leading up to the district court's imposition of sanctions appears online at

http://www.campaignlegalcenter.org/news/press-releases/albuquerque-citizens-seek-sanctions-against-city-its-attorneys-attempting-punish in a press release posted on the Campaign Legal Center website entitled *Albuquerque Citizens Seek Sanctions Against City & its Attorneys for Attempting to Punish Them for Bringing Voting Rights Case.* The press release characterizes the City of Albuquerque's cross-appeal as likely a "bad faith attempt to intimidate civil rights plaintiffs" and "coerce their former attorneys into dropping their appeal," and charges that the City is "bullying their own constituents" and "scaring them away from their recourse to the courts," stating:

> The voters originally brought the case to challenge the City of Albuquerque's redistricting plan for city council districts. After the case was brought, Albuquerque voters passed a referendum that altered the way the city council is elected. In light of this change in the law, the case was dismissed. The city then sought to recover its attorneys' fees from the voters and their attorneys. The district court granted the city's motion to sanction the voters' attorneys for prolonging the case, ordering them to pay $48,000, but refused to award fees against the individual voters. After the attorneys appealed this sanctions order to the Tenth Circuit, where they are represented by the law firm Jenner and Block, the city filed a cross-appeal seeking fees against the individual voters. But the city presented essentially no legal argument in support of this cross-appeal and dropped the cross appeal at oral argument before the Tenth Circuit on May 6, 2015. Rather than a good faith effort to recover its attorneys' fees, the city's cross-appeal was likely a bad faith attempt to intimidate civil rights plaintiffs and coerce their former attorneys into dropping their appeal.
>
> The City of Albuquerque and its Mayor acted shamelessly to intimidate and punish minority voters with gratuitous sanctions for attempting to safeguard their voting rights as residents of the city," said Joshua Bone, the Legal Center attorney who argued before the Tenth Circuit. "The city's conduct was so reprehensible that the Albuquerque City Council passed a resolution condemning the city's pursuit of attorneys' fees against its own citizens. We hope the court will see fit to rule in a manner that will dissuade other elected officials from abusing their office by bullying their own constituents and scaring them away from their recourse to the courts."

This case does illustrate the validity of concerns that are at times expressed over satellite litigation spawned by imposition of sanctions on abusive litigants, sanctions that in turn provoke new litigation while prolonging old litigation. The cynic may conclude that those concerns unfortunately have a tendency to surface too late in the process to do anyone a bit of good.

Conclusion

Much has changed since the Voting Rights Act of 1965 became the law of the land. Our nation has made great progress in rooting out the entrenched racial discrimination in voting that

justified the strong medicine embodied in this remarkable legislation. The first generation and second generation civil actions brought under Section 2 and Section 5 have yielded impressive results. Fifty years after LBJ signed into law the Voting Rights Act, voter turnout and registration rates now approach parity in those jurisdictions that were covered under Section 5 preclearance requirements. It is because of the VRA that dramatic changes have taken place in the political and legal landscape of the United States of America. These changes have ushered in unprecedented levels of minority electoral success in many state and local jurisdictions from Louisiana, Mississippi and Georgia to South Carolina, Florida, Arkansas and Texas, as well as in jurisdictions never covered under the strictures of Section 5 preclearance. Ballot access is no longer impeded by tests and devices that have been forbidden nationwide for five decades.

Still much remains to be done. Vote dilution claims and vote denial lawsuits continue to be filed, and the need continues for a strong federal commitment to fight racially discriminatory practices affecting the fundamental right to vote. Municipalities, counties, school districts and other political subdivisions, along with states in which minority citizens seek to have a meaningful place at the decision-making table, must remain vigilant and proactive in their efforts to promote minority inclusion, minority electoral access, robust political participation and governmental transparency. Our 240+ year experiment in democracy does not run by itself.

It is our sincere hope that this presentation to our IMLA colleagues has provided municipal attorneys with helpful information about the litigation risks, new strategies and feasible alternatives to Section 2 vote dilution and vote denial in its many forms. Our goal has been to take some of the mystery out of this area of litigation and acquaint you with best practices that may reduce liability exposure.

We have shared with you our most accurate synopsis of current cases and legal developments that have a bearing on every aspect of the local government electoral process. We have also tried to bring coherency to the nuanced and at times confusing distinctions that apply to population equality and how best to achieve the goals of the 14th Amendment's guarantee of one person, one vote.

In the final analysis, we trust that you will come away from this discussion with a practical understanding of how to navigate most efficiently and effectively through Voting Rights litigation in the event your jurisdiction is made a party defendant to such proceedings, and

that you will also appreciate the need to be proactive and deliberate in reducing the risk of such litigation.

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[1] See *Evenwel v. Perry*, 2014 WL 5780507 (W.D. Texas Nov. 5, 2014) ("the Supreme Court has generally used total population as the metric of comparison … However, the Court has never held that a certain metric (including total population) must be employed as the appropriate metric…. Plaintiffs' proposed theory for proving an Equal Protection Clause violation is contrary to the reasoning in Burns [v. Richardson, 384 U.S. 73, 91–92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966)] and has never gained acceptance in the law.")

[2] Symposium: *Evenwel v. Abbott* and the Constitution's big data problem (Aug. 3, 2015), accessible at http://www.scotusblog.com/2015/08/symposium-evenwel-v-abbott-and-the-constitutions-big-data-problem/

[3] 384 U.S. 73, 91, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966).

[4] Accessible at http://www.scotusblog.com/wp-content/uploads/2015/08/evenwel-filed-merits-brief.pdf.

[5] 300 F.Supp.2d 1320 (N.D.Ga.) (per curiam), summarily aff'd, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004).

[6] 300 F.Supp.2d 1320 (N.D.Ga.) (per curiam), summarily aff'd, 542 U.S. 947, 124 S.Ct. 2806, 159 L.Ed.2d 831 (2004).

[7] Cf. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc*. ("*Inclusive Communities*"), 135 S. Ct. 2507, 2524 (2015) ("Remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice. . . . If additional measures are adopted, courts should strive to design them to eliminate racial disparities through race-neutral means. Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions." (citation omitted)).

[8] Section 3(c) states: "If in any proceeding instituted by ... an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period [may impose preclearance requirements]." 42 U.S.C. § 1973a (c).

[9] Richard Pildes, *One Easy, But Powerful, Way to Amend the VRA*, ELECTION LAW BLOG (Jun. 28, 2013, 6:53 AM), http://electionlawblog.org/?p=52349.

[10] *Allen v. City of Evergreen*, 2013 WL 4857932 (S.D. Ala. Sept. 10, 2013)(Reply to Defendants' Response to Motion for Summary Judgment and Motion for Relief under Section 3 of the Voting Rights Act and Response to Motion to Dismiss).

[11] See *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); see also id. at 916-17, 115 S.Ct. 2475 (in context of racial gerrymandering claim, courts in a Rule 56 summary judgment proceeding should "recognize these principles, and the intrusive potential of judicial intervention into the legislative realm, when assessing under the Federal Rules of Civil Procedure the adequacy of a plaintiff's showing at the various stages of litigation. " *Celotex*, 477 U.S. at 327, 106 S.Ct. 2548)); *Chen*, 206 F.3d at 505.

[12] See *White v. Weiser*, 412 U.S. 783, 793-96, 93 S.Ct. 2348, 2353-55, 37 L.Ed.2d 335 (1973) (holding that the district court, after properly rejecting the reapportionment plan adopted by the legislature, erred in ignoring legislative districting policy and failing to implement a reapportionment plan "which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements"); see also *Whitcomb v. Chavis*, 403 U.S. 124, 160-61, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363 (1971) (holding that the district court erred in fashioning a plan that rejected state policy choices more than was necessary to remedy the specific constitutional violations involved).

[13] See Steven J. Mulroy, *Alternative, Nondistrict Vote Dilution Remedies Under the Voting Rights Act,* America Votes! A Guide to Modern Election Law and Voting Rights (ABA 2012, B. Griffith, ed.), accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923777## (Limited voting, cumulative voting, and choice voting alternative electoral systems may be considered as remedies for minority vote dilution claims under Section 2 of the Voting Rights Act. In light of *Euclid* and *Village of Port Chester*, two recent federal district court decisions which imposed such remedies over the objection of plaintiffs outside the context of a settlement. The author argues that such alternative systems are lawfully available Section 2 remedies, particularly where state law does not forbid their use and where there is not an equally viable single-member-district remedy preferred by the defendant. Such remedial alternatives lead to results more representative of the popular will, empower not only racial and ethnic minorities but other minorities as well, and avoid or minimize issues of gerrymandering.)

[14] Id. (quoting *Abrams v. Johnson*, 521 U.S. 74, 79, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997)) (internal quotation marks omitted). By doing so the court avoids being drawn into making "otherwise standardless decisions." Id.
[15] *United States v. Dall. Cnty. Comm'n, Dall. Cnty., Ala.*, 850 F.2d 1433, 1437-38 (11th Cir.1988) (quoting S.REP. No. 97-417, at 31 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 208)
[16] See *Voinovich v. Quilter*, 507 U.S. 146, 161, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993); *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).
[17] See *Dall. Cnty. Comm'n*, 850 F.2d at 1435.
[18] *Upham v. Seamon*, 456 U.S. 37, 41-42, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) (quoting *White v. Weiser*, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973)).
[19] Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 Harv. L.Rev. 1385, 1391 (2010)
[20] *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) (plurality) (White, J.); *Connor v. Finch*, 431 U.S. 407, 414-15, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977); *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); *White v. Weiser*, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973).
[21] *Wise*, 437 U.S. at 541, 98 S.Ct. 2493… *Abrams v. Johnson*, 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997) ("Court-ordered districts are held to higher standards of population equality than legislative ones."); see also *Tallahassee Branch of NAACP*, 827 F.2d at 1438 ("When a reapportionment plan is prepared by the district court, `equitable considerations demand a close scrutiny and mandate the fashioning of a near-optimal apportionment plan.'" (quoting *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir.1985))).
[22] *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 US 598 (2001).
[23] *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1278 (10th Cir.2005).
[24] *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1202 (10th Cir.2008); see also *Danielson-Holland v. Standley & Associates, LLC*, 512 F. App'x 850, 853 (10th Cir. 2013) ("If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious."
[25] Appellants' Opening Brief, accessible at http://www.campaignlegalcenter.org/sites/default/files/Baca_v_Berry_Motion__Brief_12-8-14.pdf