Standing in the Breach: Using the Remaining Tools in the Voting Rights Act to Combat Voting Discrimination

A Primer on Sections 2 & 3(c) of the Voting Rights Act

I. Section 2 of the Voting Rights Act

Section 2 prohibits a state or a political subdivision of a state from using 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."[1]

In addition to prohibiting practices that directly *deny* the exercise of the right to vote,[2] Section 2 prohibits vote *dilution*—the use of any electoral scheme, such as an at-large method, to "submerg[e]" minority voters in a district controlled by the white majority, thus denying those minority voters an opportunity to elect candidates of their choice.[3]

The types of voting practices and procedures that may violate Section 2 include, but are not limited to: (1) annexing largely white neighborhoods into districts where people of color are the majority; (2) moving from electing candidates by districts to at-large voting; (3) replacing elected officials with appointed officials; (4) moving conveniently-located polling locations to inconvenient locations; (5) closing or consolidating conveniently-located polling places; (6) reducing early voting opportunities or changing voting hours; (7) implementing restrictive photo identification laws for in-person voting; (8) limiting registration opportunities; (9) limiting multi-lingual voting assistance; (10) adopting onerous candidate qualifications; (11) adopting

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1 52 U.S.C. § 10301(a).

2 Examples of vote denial cases include: *Veasey v. Perry*, 135 S.Ct. 9 (2014); *North Carolina v. League of Women Voters*, 135 S.Ct. 6 (2014); *Husted v. Ohio State Conference of the NAACP*, 135 S.Ct. 42 (2014); *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc); *Brown v. Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012); *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); *Smith v. Salt River Project*, 109 F.3d 586 (9th Cir. 1997); *Ortiz v. City of Philadelphia*, 28 F.3d 306 (3d Cir. 1994).

3 *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder* ("*NAMUDNO*"), 557 U.S. 193 (2009); *Terrebonne Par. NAACP v. Jindal*, No. 14-69, 2014 WL 3586549 (M.D. La. Feb. 3, 2014) (minority plaintiffs challenging the at-large electoral method for the 32nd Judicial District, a parish court, under Section 2 and the Fourteenth and Fifteenth Amendments); *Ga. State Conference of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 3:11-cv-00123-TCB (N.D. Ga. May 21, 2013), Dkt. No. 152 (Order granting SJ to Plaintiffs challenging Fayette County Georgia's at-large electoral method to Board of Commissioners and Board of Education in violation of Section 2), *rev'd* 775 F.3d 1336 (11th Cir. 2015); *Mo. State Conference of the NAACP v. Ferguson-Florissant Schl. Dist.*, 4:140cv002077-RWS, Dkt. No. 1 (E.D. Mo. Dec. 18, 2014) (challenging the at-large electoral method for the Ferguson-Florissant School District).

The vast majority of the hundreds of Section 2 cases have been in the context of vote dilution, *i.e.*, the abridgment of minority voting power. *See* Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative*, 39 U. Mich. J.L. Reform 643\ (2006).

discriminatory redistricting plans that either pack[4] together or crack[5] apart communities of color; and (12) counting incarcerated people as residents of their prison communities for purposes of redistricting rather than as residents of their pre-prison home communities.

II. Establishing a Section 2 Claim

In *Thornburg v. Gingles*, the United States Supreme Court held that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[6] In *Gingles*, the Court identified three "necessary preconditions" or "*Gingles* factors" for a claim that a districting plan violates Section 2: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[7]

After considering *Gingles*' preconditions, a court's analysis turns to whether plaintiffs have established that, "based on the totality of circumstances," voters of color "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[8] The Senate Report accompanying the 1982 amendments identified "typical factors" that are relevant to determining whether Section 2 has been violated.[9]

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[4] "Packing" is the redistricting practice of compressing communities of color into a small number of districts, resulting in unnecessarily high minority populations in those districts and purposely low minority populations in other districts.

[5] "Cracking" is the redistricting practice of spreading a cohesive group of voters of color across a large number of districts.

[6] 478 U.S. at 47.

[7] *Id*. at 50–51.

[8] *See* 42 U.S.C. § 10301(b); *see also Clark v. Calhoun Cty*., 21 F.3d 92, 97 (5th Cir. 1994) ("'[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances.'" (quoting *Jenkins v. Red Clay Consol. Sch. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993)).

[9] These Senate factors are: (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;" (2) "the extent to which voting in the elections of the state or political subdivision is racially polarized;" (3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;" (4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process;" (5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;" (6) "whether political campaigns have been characterized by overt or subtle racial appeals;" and (7) "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 36-37, (quoting S. Rep. No. 97-417 at 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07); *see also Zimmer v. McKeithen*, 485 F.2d 1297, 1305-06 (5th Cir. 1973) (en banc) (noting factors probative of Section 2), *aff'd sub*

Congress did not intend for these Senate factors to be comprehensive or exclusive, nor did it intend that "any particular number of factors be proved, or that a majority of them point one way or the other."[10] Rather, Section 2's flexible "totality of circumstances" test allows the Senate factors to be considered factor by factor, applying only those factors that are relevant to a particular case.[11] Thus, whether a particular practice results in vote dilution under Section 2 depends on whether the challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black [or other voters of color] and white voters to elect their preferred representatives."[12] A district court is required to conduct "a searching practical evaluation of the past and present reality, … whether the political process is equally open to minority voters."[13]

III. Section 3(c) of the Voting Rights Act

Following the Supreme Court's devastating ruling in *Shelby County v. Holder*,[14] Section 3(c), which has rarely been litigated,[15] provides an avenue to "bail in" jurisdictions and require

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nom. E. Carroll Par. Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam). And: (1) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" and (2) "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Gingles*, 478 U.S. at 37, (quoting S. Rep. No. 97-417 at 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-07).

The Supreme Court announced another factor in *Johnson v. De Grandy*, proportionality, defined as the relationship between "the number of majority-minority voting districts [and] minority members' share of the relevant population." 512 U.S. 997, 1013-14 & n.11 (1994).

[10] *Gingles*, 478 U.S. at 45.

[11] *See, e.g., Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. Oct. 9, 2014) (holding that Texas enacted photo ID law had discriminatory effects and was enacted with a discriminatory purpose after analyzing the relevant Senate factors of past electoral discrimination, racially polarized voting, racial discrimination in employment and education, and use of racial appeals in elections); *Ga. State Conference of the NAACP*, 3:11-cv-00123-TCB (N.D. Ga. May 21, 2013), Dkt. No. 152 at 52-54, 59, 69, 74, & 78 (holding that Fayette County's at-large electoral method to Board of Commissioners and Board of Education constituted vote dilution in violation of Section 2 after analyzing all Senate factors and finding that plaintiffs' evidence satisfied six of them), *rev'd* 775 F.3d 1336 (11th Cir. 2015); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1268 (N.D. Miss. 1987) (holding that Mississippi's dual registration requirement constituted vote denial in violation of Section 2 after discarding as irrelevant five Senate factors and finding that plaintiffs' evidence satisfied the four remaining Senate factors relevant to the case); *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 426 (2006) (The Supreme Court using the Senate Factors to frame its analysis of a Section 2 claim).

[12] *Gingles*, 478 U.S. at 29-30, 47.

[13] *Id.* at 79 (internal citation and quotation marks omitted).

[14] 133 S. Ct. 2612 (2013).

[15] *See* Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L.J. 1992, 1997-98 (2010).

In fact, most jurisdictions have been bailed in to Section 3(c) as a result of a consent decree. *See United States v. Thurston Cty.*, No. 78-0-380 (D. Neb. May 9, 1979); *McMillan v. Escambia Cty.*, No.77-0432 (N.D. Fla. Dec. 3, 1979); *Woodring v. Clarke*, C.A. No. 80-4569 (S.D. Ill. Oct. 31, 1983); *Sanchez v. Anaya*, No. 82-0067M (D. N.M. Dec. 17, 1984); *United States v. McKinley Cty.*, No. 86-0029-C (D. N.M. Jan. 13, 1986); *United States v. Sandoval Cty.*, No.88-1457-SC (D. N.M. May 17, 1990); *Brown v. Bd. of Comm'rs of Chattanooga*, No. CIV-1-87-

them to preclear voting changes[16] through Section 3(c)[17] of the Voting Rights Act as *a remedy* to a finding of *intentional* discrimination in violation of the U.S. Constitution.[18]

To establish racially discriminatory intent, a plaintiff may rely upon either direct or circumstantial evidence.[19]. In *Arlington Heights*, the Supreme Court identified several non-exhaustive factors that guide the circumstantial evidence inquiry: (1) a discriminatory impact; (2) a historical background of discrimination; (3) the sequence of events leading up to the challenged law or practice; (4) procedural or substantive deviations from the normal decision-making process; and (5) contemporaneous viewpoints expressed by the decision-makers.[20]

A number of cases pending in federal court currently seek bail-ins for a variety of jurisdictions.[21] The period of time[22] and the contours of a bail-in[23] depend largely on the facts and evidence adduced in a particular case. Following *Shelby*, at least one local jurisdiction has been bailed in and required to preclear certain voting changes before implementation, beginning in 2014 and until the end of 2020.[24]

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388 (E.D. Tenn. Jan. 18, 1990); *Cuthair v. Montezuma-Cortez Sch. Dist. No. RE-1*, No. 89-C-964 (D.Col. Apr. 8, 1990); *United States v. Los Angeles Cty.*, Nos. CV 88-5143 KN (Ex) and CV 88-5435 KN (Ex) (C.D. Cal. Apr. 26, 1991); *United States v. Cibola Cty.*, No. 93-1134-LH/LFG (D. N.M. Apr. 21, 1994); *United States v. Socorro Cnty.*, No. 93-1244-JP (D.N.M. Apr. 11, 1994); *United States v. Alameda Cty.*, No. C 95-1266 (SAW) (N.D. Cal. Jan. 22, 1996); *United States v. Bernalillo Cty.*, No. 93-156-BB/LCS (D. N.M. Apr. 22, 1998); *Kirke v. Buffalo Cty.*, No. 03-CV-3011 (D.S.D. Dec. 4, 2007); *Blackmoon v. Charles Mix Cty.*, No.05-CV-4017 (D.S.D. Dec. 4, 2007); and *United States v. Vill. of Port Chester*, No. 06-CV-15173 (S.D.N.Y. Dec. 22, 2006).

A case considering Section 3(c) with a meaningful discussion of that provision is *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990), *appeal dismissed*, 498 U.S. 1129 (1991); *see also infra* n.24 (referencing *Allen v. City of Evergreen*, No. 1:13-cv-107-CG-M, ECF No. 82 (S.D. Ala. Jan. 13, 2014).

[16] Either a court or the Attorney General reviews the voting changes during the bail-in period.

[17] 52 U.S.C. § 10302(c).

[18] Crum, 119 Yale L.J. at 2006; *id.* at 2009 (suggesting that discriminatory results, and thus many Section 2 findings, are irrelevant to a Section 3 analysis).

[19] *Lodge v. Buxton*, 639 F.2d 1358, 1373 (5th Cir. Unit B 1981), *aff'd sub nom.*, *Rogers v. Lodge*, 458 U.S. 613, 618 (1982).

[20] *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-68 (1977).

[21] *See, e.g.*, *U.S. v. Texas*, 2:13-cv-00263, ECF No. 13-2 (S.D. Tex. Aug. 26, 2013), consolidated with *Veasey v. Perry*, No. 2:13-cv-00193, ECF No. 15-2 (S.D. Tex. Aug. 26, 2013); *League of Women Voters*, No. 1:13-cv-00660-TDS-JEP, ECF No. 1 (M.D.N.C. Aug. 12, 2013); *Terrebonne Par. NAACP*, No. 3:14-cv-00069-JJB-SCR, ECF No. 1 (M.D. La. Feb. 3, 2014).

[22] Bail-in can occur for a limited period of time or indefinitely. *See, e.g.*, *Blackmoon*, No. 05-CV-4017 (D.S.D. Dec. 4, 2007) (bailing in the jurisdiction for seven years); *Jeffers*, 740 F. Supp. at 585 (bailing in Arkansas for an indefinite period to end at the court's discretion).

[23] A Section 3(c) preclearance requirement could apply to specific *or* all types of voting practices and procedures adopted by a jurisdiction. *Id*. at 601 (bailing in Arkansas only with respect to laws establishing majority-vote requirements); *Sanchez*, No. 82-0067M, slip op. at ¶ 8 (D.N.M. Dec. 17, 1984) (requiring New Mexico to submit only its redistricting plans for preclearance). Thus, if the only voting problem involves redistricting, a court can require the state to preclear subsequent redistricting plans rather than other voting changes that are not a problem.

[24] *Allen*, No. 1:13-cv-00107-CG-M, ECF No. 82 (S.D. Ala. Jan. 13, 2014), https://www.documentcloud.org/documents/1005529-82-order-section-3c-1.html.