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The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation

Introduction

In *Shelby County, Alabama* v. *Holder*, the U.S. Supreme Court immobilized a core provision of the Voting Rights Act, Section 5, which had, for nearly 50 years, protected millions of voters of color from racial discrimination in voting. The Supreme Court rendered Section 5 inoperable by striking down as unconstitutional Section 4(b) of the Voting Rights Act, which identified the places in our country where Section 5 applied. Section 5 required those states and localities covered by Section 4(b)—for example, Alabama, Florida, Georgia, Louisiana, North Carolina, and Mississippi—to receive approval from the federal government *before* implementing a voting change. Section 5 protected Black, Latino, Asian, American Indian, and Alaskan Native voters from racial discrimination in voting in the parts of our country with the most entrenched and adaptive forms of discrimination. Striking Section 4(b) and, therefore, gutting Section 5, was like taking away your car keys (Section 4(b)), but letting you keep your car (Section 5).

Section 5 as Compared to Section 2

Both before and after the *Shelby County* decision, skeptics of Section 5's continued need based on current conditions in covered jurisdictions, pointed to Section 2 of the Voting Rights Act as a potential stand-in for Section 5's protection. Section 2, which applies nationwide, is the affirmative piece of the Voting Rights Act relied upon by voters of color to challenge racial discrimination in voting *after* a discriminatory voting practice or procedure is in place.

The differences between Sections 5 and 2 are critical. Whereas Section 5 served as a shield to protect voters of color *before* discriminatory voting practices are in place, Section 2 can be (and has been) used as a sword *after* a voting change has been implemented to uproot its harm. Section 5 blocked over 1,000 proposed discriminatory voting changes over a 25-year period from 1982 to 2006, placing the burden—of factual and legal proof, time, and expense—on the state or locality to demonstrate that a proposed voting change was not discriminatory *before* that change went into effect and could spread its harm. Section 2 places the burden of proof, time, and expense on voters of color to go to court and seek relief for the discrimination that they experience in voting.

Following the *Shelby County* decision, communities of color continue to rely upon Section 2, in spite of its high price in both time and dollars, to ensure that they can elect their preferred candidates and participate equally in the political process. Once communities of color acquire the resources needed to bring Section 2 litigation, the court proceedings can be slow, and several elections can occur with the discriminatory voting procedures in place. Taxpayers living in states and localities defending Section 2 claims also pay the high cost of Section 2 litigation when politicians who benefit from discriminatory voting practices are incentivized to use taxpayer dollars to prolong litigation to keep the illegal voting practice that got them

elected in place.

Below is a snapshot of the costs of Section 2 litigation.

Burden of Proof

Courts have recognized that Section 2 litigation is an extremely complex and intimidating area of the law.[1] Section 2 litigation also is resource-intensive. The burden that Section 2 litigation places on plaintiffs may prevent voters of color from bringing claims.[2] Moreover, there is a dearth of lawyers who have experience bringing Section 2 claims.[3] National organizations that focus on discrimination in voting practices are focused on impact litigation[4] and do not have the resources to bring claims against every discriminatory voting practice that a jurisdiction implements.[5] Eighty-five percent of the voting changes that Section 5 blocked occurred at the local level across various local jurisdictions.[6]

Section 2 litigation is also labor-intensive. In its defense of a Section 2 claim, the town of Yakima in Washington produced more than 340,000 pages of documents and more than 50 people were deposed.[7] The complexity of Section 2 cases generally necessitates expert witnesses for both the plaintiff and the defendant.[8]

Due to its complex and time-intensive nature, Section 2 litigation strains district court judges and judicial resources. Because judges rarely grant preliminary injunctions, Section 2 litigation

[1] *Johnson v. Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999) ("the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns") (emphasis added); *Williams v. Bd. of Comm'rs of McIntosh Cnty.*, 938 F. Supp. 852, 858 (S.D. Ga. 1996); *Project Vote v. Blackwell*, 1:06-CV- 1628, 2009 WL 917737, *10 (N.D. Ohio Mar. 31, 2009) (calling voting rights "an area of law that [is] anything but simple"); Br. of Joaquin Avila, et al. as *Amici Curiae* in Supp. of Resp'ts at 16, *Shelby Cnty., Ala. v. Holder*, No. 12-96 (U.S. Feb. 1, 2013) (explaining that "Section 2 actions have become increasingly complex and resource-intensive in recent years."); *id* at 17; *see also id*. at 18-19 (referencing the Federal Judicial Center's *2003-2004 District Court Case-Weighting Study*, Table 1 (2005) (finding that voting cases consume the sixth most judicial resources out of sixty-three types of cases analyzed)).

[2] Avila Brief, *supra* n.l at 16.

[3] Avila Brief, *supra* n.l at 28.

[4] Avila Brief, *supra* n.1 at 30.

[5] Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (June 8, 2013) (more than 85% of Section 5's work was previously done at the local level).

[6] *Id*.

[7] Mike Faulk, *Big Costs, Heavy Hitters in ACLU Suit Against Yakima*, YAKIMA HERALD (Aug. 10, 2014), http://www.yakimaherald.com/special_projects/aclu/big-costs-heavy-hitters-in-aclu-suit-against-yakima/article_3cbcce20-ee9d-11e4-bfba-f3e05bd949ca.html

[8] *Id.*; *see also Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 713 (N.D. Tex. 2009) (finding that expert witnesses that are qualified due to education and experience can give their opinions regarding the *Gingles* factors).

rarely serves as a preemptive tool against discriminatory voting practices.[9] Section 2 litigation typically follows the implementation of discriminatory voting practices.

Money

A huge amount of resources is needed to bring a Section 2 complaint. Section 2 cases require voters of color and their lawyers to risk six- and seven-figure expenditures.[10]

Section 2 claims also are expensive to defend. Voting changes are highly likely to face court challenges, which end up using taxpayer resources. Section 2 litigation can run taxpayers in locales defending claims a considerable amount of money.

Lawmakers in Charleston County, South Carolina, spent $2 million unsuccessfully defending itself from a Section 2 claim.[11] On the contrary, under Section 5, it cost an average of $500 for states and localities to submit paperwork for preclearance of changes to voting practices.[12]

Several other states and localities have amassed substantial legal fees, which are paid with public funds, defending Section 2 claims:

In Fayette County, Georgia, the Board of Commissioners and the Board of Education spent over $1.11 million of taxpayers' dollars on legal fees defending a Section 2 claim challenging the County's at-large voting scheme, which discriminated against voters of color.[13]

In North Carolina, state lawmakers, between 2011 and 2016, spent at least $5 million of taxpayers' dollars defending its election law changes.[14] That figure does not include the costs and expenses borne by civil rights groups and the U.S. DOJ, challenging those changes. In *North Carolina State Conference of the NAACP v. McCrory*, the Fourth Circuit Court of Appeals, in July 2016, struck down those laws after finding that the state legislature enacted them with a

[9] Avila Brief, *supra.* n.l at 20-21.
[10] *Id*. at 24.
[11] Order granting attorney's fees, *Moultrie v. Charleston Cty.,* No. 2:01-cv-00562-PMD (D.S.C. Aug. 8, 2005).
[12] Avila Brief, *supra* n.1 at 27.
[13] Tammy Joyner, *Fayette's voting fight proves costly*, ATLANTA JOURNAL-CONSTITUTION (Oct. 20, 2015, 5:37 PM), http://www.myajc.com/news/news/local-govt-politics/fayettes-voting-fight-proves-costly/nn6j9/.
[14] Alice Ollstein, *North Carolina Spent Nearly $5 Million Defending Voter ID, and Lost*, ThinkProgress (Aug. 9, 2016), https://thinkprogress.org/north-carolina-legal-spending-voter-id-f0aa75082518#.2a9rll7u3; Emery P. Dalesio, *McCrory Legal bills mount in Voter ID case*, Associated Press (Sept. 30, 2014, 3:16 PM), http://www.citizen-times.com/story/news/local/2014/09/30/mccrory-legal-bills-mount-voter-case/16488927/; *North Carolina State Conference of the NAACP, et. al v. McCrory, et al.*, 16-1468, ECF No. 150 (4th Cir. July 29, 2016), *available at* http://electionlawblog.org/wp-content/uploads/nc-4th.pdf; Jim Morrill & Michael Gordon, *After passing laws, NC Republicans spent millions defending them*, News & Observer (Nov. 25, 2016, 6:00 AM), http://www.newsobserver.com/news/politics-government/state-politics/article116795423.html

discriminatory purpose.

Defending a Section 2 claim cost the city of Yakima, Washington, nearly $3 million—$1.1 million to defend and $1.8 million to pay to the ACLU who brought the Section 2 lawsuit in August 2012.[15] The complexity of Section 2 litigation affects the cost of litigation. In Yakima, the city paid three expert witnesses a total of $278,623 to rebut the testimony of the ACLU's four expert witnesses.

Pasadena, Texas paid more than $260,000, well in advance of trial, to defend a challenge to the City's at-large electoral method for diluting Latino voting strength.[16] These expenses did not include those being borne by the Mexican American Legal Defense Fund (MALDEF) on behalf of plaintiffs, who are Latino voters in the lawsuit. In 2017, Pasadena agreed to a settle the case for $1 million dollars.[17]

Moreover, the state of Texas has spent more than $4 million dollars and counting over more than five years to defend against challenges, brought under Sections 2 and 5 of the Voting Rights Act and the U.S. Constitution, to its draconian photo ID law.[18] That exorbitant figure will continue to rise as one of those challenges, *Veasey v. Perry*, which LDF is litigating alongside other civil rights groups and the U.S. DOJ, makes its way through the appellate courts. That figure does not include the costs and expenses borne by these civil rights groups and the U.S. DOJ.

And, Virginia, has spent at least $600,000, defending its photo ID law.[19]

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[15] Faulk, *supra* n.7.

[16] Kristi Nix, *Pasadena's legal fees top $260K with no trial date in sight for lawsuit*, THE PASADENA CITIZEN (Dec. 17, 2015, 7:00 a.m.), http://www.yourhoustonnews.com/pasadena/news/pasadena-s-legal-fees-top-k-with-no-trial-date/article_17b99c09-d160-511b-b29a-cae92cc8aa4e.html

[17] Gabrielle Banks and Mike Snyder, *Pasadena Mayor Pitches $1 Million Settlement to End Voting Rights Suit*, Houston Chronicle (Sept. 29, 2017, 10:19 PM), http://www.houstonchronicle.com/news/houston-texas/houston/article/Pasadena-mayor-pitches-1M-settlement-to-end-12242251.php

[18] Justin Levitt, *The Other Costs of Voter ID*, Election Law Blog (Oct. 6, 8:16 PM), http://electionlawblog.org/?p=95298; Jim Malewitz and Lindsay Carbonell, *State's Tab Defending Voter ID $3.5 Million So Far*, THE TEXAS TRIBUNE (June 17, 2016), http://www.gilmermirror.com/view/full_story/27211479/article-State-s-Tab-Defending-Voter-ID-$3-5-Million-So-Far?instance=home_news_bullets; Peggy Fikac, *Supreme Court has been messing with Texas a lot lately: Recent rulings are setbacks to state's conservative initiatives*, HOUSTON CHRONICLE (July 2, 2016, 8:33 PM updated), http://www.houstonchronicle.com/news/politics/texas/article/Supreme-Court-has-been-messing-with-Texas-a-lot-8338698.php; *see also Groundhog Day for Texas Republicans – reliving the same political disaster over and over: After yet another judicial defeat, Texas should stop wasting tax dollars on app*eal, Houston Chronicle (Aug. 26, 2017), http://www.houstonchronicle.com/opinion/editorials/article/Groundhog-Day-for-Texas-Republicans-reliving-11969435.php (indicating that, as of 2015, Texas had spent at least $8 million dollars defending redistricting plans and a photo ID law that federal judges have found to be intentionally discriminatory).

[19] Travis Fain, *4th Circuit Judges weigh Virginia voter ID law with N.C. case in mind*, DAILY PRESS (Sept. 22, 2016, 4:19 PM), http://www.dailypress.com/news/politics/

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Time

Another reality of Section 2 litigation is its time-consuming nature. Section 2 litigation does not keep up with the urgency of the political process. By the time that Section 2 litigation is resolved, several illegal elections can occur.[20] On average, Section 2 litigations can last between two to five years.[21]

In Fayette County, Georgia, Section 2 litigation related to its use of discriminatory at-large elections lasted approximately five years, beginning in August 2011.[22] County defendants appealed the district court's summary judgment ruling that the at-large voting scheme violated the Voting Rights Act because it prevented Black voters from electing their preferred candidates to the school board and county commission. In January 2015, the 11th Circuit Court of Appeals remanded the case to the district court to conduct a trial; a settlement in the case was reached in 2016.[23]

The Section 2 litigation in Yakima, Washington persisted over four years between 2012 and 2016 when the City Council voted to end its appeal of the lawsuit.[24] In 2014, the district court in Washington ruled that Yakima's at-large city council elections violated Section 2 of the Voting Rights Act and the district court implemented a remedial redistricting plan in February of 2015.[25]

In Charleston County, the U.S. Department of Justice and minority voters brought a Section 2

A separate challenge to Virginia's state legislative redistricting under the U.S. Constitution for packing Black voters into 11 districts and thereby diluting their voting strength has cost taxpayers (because of money the state has spent to defend the manipulative redistricting) more than $4 million dollars. Dave Ress, *Big bills for Virginia's redistricting battle*, Daily Press, (July 13, 2018), http://www.dailypress.com/news/politics/dp-nws-shad-plank-0714-story.html#

[20] Avila Brief, *supra* n.1 at 19.

[21] *Id*. at 22.

[22] Cal Beverly, *NAACP sues Fayette to halt at-large voting districts*, THE CITIZEN (Aug. 10, 2011, 4:35 AM), http://www.thecitizen.com/articles/08-10-2011/naacp-sues-fayette-halt-large-voting-districts.

[23] NAACP LDF, *Press Release: Black Voters in Fayette County, Georgia Win Historic Opportunity to Elect Candidates of Choice and Settle Voting Rights Act Case* (Jan. 20, 2016), http://www.naacpldf.org/press-release/black-voters-fayette-county-georgia-win-historic-opportunity-elect-candidates-choice

[24] Austin Jenkins, *ACLU Lawsuit: Yakima At-Large City Council Elections Dilute Latino Vote*, NPR (Aug. 22, 2012, 5:56 PM), http://www.npr.org/templates/story/story.php?storyId=159859795; Mike Faulk, *Yakima City Council abandons appeal of ACLU voting rights suit*, YAKIMA HERALD (Apr. 5, 2016), http://www.yakimaherald.com/news/elections/yakima-city-council-abandons-appeal-of-aclu-voting-rights-suit/article_5d1aba80-fbb0-11e5-b985-c3ce457c2bf1.html?utm_medium=social&utm_source=email&utm_campaign=user-share

[25] Michael Li, *Four Local Redistricting Fights to Watch*, BRENNAN CENTER FOR JUSTICE (Jan. 12, 2015), https://www.brennancenter.org/blog/three-local-redistricting-fights-watch; *Montes v. City of Yakima*, 2:12-cv-03108-TOR, ECF No. 143, (E.D. Was. February 17, 2015).

claim against Charleston County, South Carolina, over its use of the at-large electoral method for electing county commissioners. The federal district court found that the practice violated Section 2 in 2001, but the litigation proceeded until the U.S. Supreme Court denied the County's appeal in 2004.[26]

The challenge to Texas's photo ID law has lasted over six years, including litigation under Section 5 of the Voting Rights Act in 2012, and the Section 2 challenge filed in 2013 that remains ongoing.[27]

If you have questions or need further information, please contact LDF Deputy Director of Litigation, Leah Aden, at 212.965.2200.

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The NAACP Legal Defense Fund is the country's first and foremost civil and human rights law firm. Founded in 1940 under the leadership of Thurgood Marshall, LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society. LDF's victories established the foundations for the civil rights that all Americans enjoy today. In its first two decades, LDF undertook a coordinated legal assault against officially enforced public school segregation. This campaign culminated in Brown v. Board of Education, the landmark Supreme Court decision in 1954, a unanimous decision overturned the "separate but equal" doctrine of legally sanctioned discrimination, widely known as Jim Crow.

[26] *Cases Raising Claims Under Section 2 of the Voting Rights Act*, DEP'T OF JUSTICE, https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0.

[27] NAACP Legal Defense Fund case page, *United States v. Texas/Veasey v. Perry*, http://www.naacpldf.org/case-issue/united-states-v-texas-et-al