



*Standing in the Breach: Using the Remaining Tools in the Voting Rights Act
to Combat Voting Discrimination
as of July 7, 2021*

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* or abridge the exercise of the right to vote,² Section 2 prohibits vote *dilution*—the use of any redistricting plan that either packs³ together or cracks⁴ apart communities of color, as well as electoral schemes, such as an at-large method, that “submerg[e]” minority voters in a district controlled by the white majority—to deny those minority voters of an opportunity to elect candidates of their choice.⁵

The types of voting practices and procedures that may violate Section 2 include, but are not limited to: (1) **annexing neighborhoods with large concentrations of white residents into districts where people of color are the majority**; (2) **moving from**

¹ 52 U.S.C. § 10301(a).

² Examples of vote denial cases include: *Brnovich v. DNC*, No. 19-1257, 2021 WL 2690267 (U.S. July 1, 2021); *Greater Birmingham Ministries v. Alabama*, 992 F.3d 1299 (11th Cir. 2021); *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366 (9th Cir. 2016) (en banc); *North Carolina State Conference NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Lee v. Virginia State Board of Elections*, 843 F.3d 592 (4th Cir. 2016); *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016); *Michigan State A. Philip Randolph Institute v. Johnson*, 833 F.3d 656 (6th Cir. 2016); *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014); *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014); *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 “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.

⁴ “Cracking” is the redistricting practice of spreading a cohesive group of voters of color across a large number of districts.

⁵ *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). Examples of vote dilution cases include: *Wright v. Sumter Cty. Bd. of Elections and Registration*, 979 F.3d 1282 (11th Cir. 2020); *Mo. State Conf. of the NAACP v. Ferguson-Florissant Schl. Dist.*, 894 F.3d 924 (8th Cir. 2018); *Luna v. Cty. of Kern*, 291 F.Supp.3d 1088 (E.D. Ca. 2018); *Hall v. Jones Cty. Bd. of Comm’rs*, No. 4:17-cv-00018 (E.D.N.C. filed Feb. 13, 2017); *Terrebonne Par. NAACP v. Jindal*, 274 F.Supp.3d 395 (M.D. La. 2017), *rev’d Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020); *Patino v. City of Pasadena*, 230 F.Supp.3d 667 (S.D. Tex. 2017); Order Granting Plaintiff’s Motion for Summary Judgment, *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm’rs*, 3:11-cv-00123-TCB (N.D. Ga. May 21, 2013), ECF No. 152, *rev’d* 775 F.3d 1336 (11th Cir. 2015).

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).

To learn more about redistricting, see LDF, MALDEF, and Asian Americans Advancing Justice – AAJC, *Power on the Line, Making Redistricting Work for Us*, <http://bitly.ws/fpB9>. This is a guide for community partners who intend to engage in the redistricting process at the local, state legislative and/or congressional level.

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electing candidates by districts to at-large voting; (3) replacing elected officials with appointed officials; (4) moving, closing, and/or consolidating polling locations that had been accessible to voters of color; (5) reducing early voting opportunities or changing voting hours or election days; (6) implementing restrictive photo identification requirements for in-person voting and voting by mail; (7) limiting voter registration opportunities; (8) limiting or failing to provide language assistance; (9) adopting onerous candidate qualifications; (10) **adopting dilutive redistricting plans;** (11) adopting and maintaining felony disenfranchisement statutes; and (12) counting incarcerated people as residents of the locations of their prison for purposes of redistricting rather than as residents of their pre-prison home communities.⁶

II. Establishing a Section 2 Vote Dilution 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.”⁷ In *Gingles*, the Court identified three “necessary preconditions” or “*Gingles* factors” for a claim that a districting plan constitutes vote dilution and, thus, 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.”⁸

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.”⁹ The Senate Report accompanying the 1982 amendments to the Voting Rights Act identified “typical factors” that are relevant to determining whether Section 2 has been violated.¹⁰

⁶ A list of NAACP LDF’s “List of Common Potentially Discriminatory Voting Changes” is available at: <https://tinyurl.com/rg3qvv8>.

⁷ 478 U.S. at 47.

⁸ *Id.* at 50–51.

⁹ See 42 U.S.C. § 10301(b); see also *Clark v. Calhoun Cty.*, 21 F.3d 92, 94, 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)).

¹⁰ 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.

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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.”¹¹ Rather, Section 2’s flexible “totality of circumstances” standard allows the Senate factors to be considered factor by factor, applying only those factors that are relevant to a particular case.¹² 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.”¹³ A district court is required to conduct “a searching practical evaluation of the past and present reality ... [to assess] whether the political process is equally open to minority voters.”¹⁴

No. 97-417 at 28-29 (1982), *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 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).

¹¹ *Gingles*, 478 U.S. at 45.

¹² *See, e.g., Veasey*, 830 F.3d at 216 (affirming a district court’s finding that Texas enacted a photo ID law with discriminatory effects based on court’s analysis of the relevant Senate factors of past electoral discrimination, racially polarized voting, racial discrimination in employment and education, and use of racial appeals in elections); Order Granting Plaintiff’s Motion for Summary Judgment at 52-54, 59, 69, 74, & 78, *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm’rs*, 3:11-cv-00123-TCB (N.D. Ga. May 21, 2013), ECF No. 152 (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 on other grounds*, 775 F.3d at 1336; *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), *aff’d*, 932 F.2d 400 (5th Cir. 1991); *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 vote dilution claim).

¹³ *Gingles*, 478 U.S. at 30, 47.

¹⁴ *Id.* at 79 (internal citation and quotation marks omitted).

A typical remedy for the dilutive redistricting plans is the creation of single-member electoral districts. *White v. State of Ala.*, 74 F.3d 1058 (11th Cir. 1996) (“[T]he typical remedy for racial vote dilution yielded by at-large voting in a multi-member district is to divide the district into single-member districts if the plaintiff minority is sufficiently cohesive and compact to comprise a majority in one or more single-member districts) (citing *Gingles*, 478 U.S. at 50)).

However, cumulative voting is used in dozens of localities in the United States, mostly in southern states like Alabama and Texas. To learn more about cumulative voting, *see, e.g., Mo. State Conference of the NAACP*, 894 F. 3d. at 924; *see also* Anna Beahm, *Pleasant Grove voting method changed to cumulative voting, according to approved settlement*, Alabama Media Group (Oct. 13, 2019), <https://tinyurl.com/y55nxwr8>; Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Pub. L. Rev. 97 (2010); Richard L. Engstrom, Delbert A. Taebel & Richard L. Cole, *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogorado, New Mexico*, 5 J.L. & Pol. 469 (1989).

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III. Establishing a Section 2 Vote Denial Claim

Recently, the U.S. Supreme Court considered the merits of a Section 2 vote denial claim in *Brnovich v. DNC*. While the Court did not announce a “test” applicable to all such cases, as it has done with the aforementioned *Gingles* framework for vote dilution claims, the Court did identify a non-exhaustive set of “guideposts” for considering the “totality of circumstances” in vote denial cases.¹⁵ Those “guideposts” include: (1) the size of the burden imposed by the challenged voting rule; (2) the degree to which the voting rule departs from standard practices at the time Section 2 was amended in 1982; (3) the size of any disparate impact on minority groups; (4) the opportunities provided by a state’s entire system of voting; and (5) the strength of the state interests served by the challenged voting rule such as the “prevention of fraud” and “intimidation or undue influence” in voting.¹⁶

And, prior to the July 2021 *Brnovich* decision, in addition to conducting a totality of circumstances analysis, scholars had written about how circuit and district courts across the country had begun to coalesce on a two-part test/framework for adjudicating vote denial claims. Those courts had required plaintiffs to demonstrate that: (1) the challenged practice “impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class ‘have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice’”; and (2) “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.’”¹⁷

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

Following the Supreme Court’s devastating ruling eight years ago in *Shelby County, Alabama v. Holder*,¹⁸ Section 3(c),¹⁹ which had rarely been the subject of litigation,²⁰

¹⁵ No. 19-1257, 2021 WL 2690267, *10-14 (U.S. July 1, 2021).

¹⁶ *Id.* at 13-14.

¹⁷ See Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, Yale L.J. Forum (Feb. 2018), available at: <https://tinyurl.com/vxln2je>; see also Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763 (2016), available at: <https://tinyurl.com/qo72gkf>; Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579 (2013), available at: <https://tinyurl.com/y35xlde>.

¹⁸ 133 S. Ct. 2612 (2013).

¹⁹ 52 U.S.C. § 10302(c).

²⁰ 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 practice most jurisdictions have been bailed-in to Section 3(c) as a result of a consent decree. See, e.g., *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-1-87-388 (E.D. Tenn. Jan. 18, 1990); *Cuthair v. Montezuma-Cortez Sch. Dist. No. RE-1*, No. 1:89-cv-0964 (D. Col. Apr. 9, 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. 1:93-1134-LH/LFG (D.N.M. Apr. 21, 1994), ECF No. 72; *United States v. Socorro Cnty.*, No. 1:93-1244-JP (D.N.M. Apr. 13, 1994), ECF No. 46; *United States v. Alameda Cty.*, No. 3:95-cv-1266 (SAW) (N.D. Cal. Jan. 27, 1996) ECF No. 13; *United States v. Bernalillo Cty.*, No. 1:98-0156-BB/LCS (D.N.M. Apr. 27, 1998), ECF No. 6; *Kirkie v.*

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remains an avenue to “bail in” jurisdictions and require them to preclear voting changes²¹ as a remedy to a finding of *intentional* discrimination in violation of the U.S. Constitution.²²

To establish racially discriminatory intent, a plaintiff may rely upon either direct or circumstantial evidence.²³ In *Arlington Heights*, the Supreme Court identified several non-exhaustive factors that guide the discriminatory intent 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.²⁴

The period of time²⁵ and the contours of a bail-in²⁶ depend largely on the facts and evidence adduced in a particular case. Following *Shelby*, three jurisdictions have been ordered or voluntarily bailed-in through Section 3(c),²⁷ while courts have declined to bail-in or bail-in has otherwise not been achieved with respect to other jurisdictions.²⁸

Buffalo Cty., No. 3:03-cv-3011 (D.S.D. Feb. 12, 2004), ECF No. 23; *Blackmoon v. Charles Mix Cty.*, No. 4:05-cv-4017 (D.S.D. Dec. 4, 2007), ECF No. 144; and *United States v. Vill. of Port Chester*, No. 1:06-cv-15173 (S.D.N.Y. Dec. 22, 2009), ECF No. 119.

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).

²¹ Either a federal court or the Attorney General reviews the voting changes during the bail-in period.

²² Crum, *supra* n.20 at 2006; *id.* at 2009 (suggesting that discriminatory results, and thus many Section 2 findings, are irrelevant to a Section 3 analysis).

²³ *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).

²⁴ *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-68 (1977).

²⁵ Bail-in can occur for a limited period of time or indefinitely. *See, e.g.*, *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-0182, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019) (ordering bail-in of Jefferson County Board of Education until 2031); Final Judgment and Order of Injunction, *Patino v. Pasadena*, No. 4:14-cv-03241 (S.D. Tex. Jan. 16, 2017), ECF No. 162 (ordering bail-in of the City of Pasadena until 2023); *Allen v. City of Evergreen*, No. 13-0107, 2014 WL 12607819, at *3 (S.D. Ala. Jan. 13, 2014) (the bail-in of the City of Evergreen to last for approximately seven years); Consent Decree, *Blackmoon*, No. 4:05-cv-4017 (D.S.D. Dec. 4, 2007), ECF 144 (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); *Kirkie v. Buffalo County*, CA No. 03-cv-3011, 2004 U.S. Dist. LEXIS 30960 (D.S.D. Feb. 12, 2004) (a consent decree agreeing to bail-in for approximately one decade).

²⁶ A Section 3(c) preclearance requirement could apply to specific or all types of voting practices and procedures adopted by a jurisdiction. Final Judgment and Order of Injunction, *Patino*, No. 4:14-cv-03241 (S.D. Tex. Jan. 16, 2017), ECF No. 162 (bailing in Pasadena for all voting changes related to the City Council); *Jeffers*, 740 F. Supp. 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.

²⁷ Proposed Order, *Patino*, No. 4:14-cv-03241 (S.D. Tex. Nov. 13, 2014), ECF No. 160 (ordering bail-in of the City of Pasadena as a remedy to the City’s adoption of a dilutive redistricting map); *Evergreen*, 2014 WL 12607819, at *2 (bailing in the City of Evergreen, Alabama); *Jefferson Cnty. Bd. of Educ.*, No. 2:19-0182, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019) (imposing a remedial map for Jefferson County Board of Education and ordering bail-in related to any changes to that map or voter eligibility as a remedy to a discriminatory at-large multimember district).

²⁸ *See, e.g.*, Order on Request for §3(c) Relief, *Perez v. Abbott*, No. 11-CV-360-OLG-JES-XR (W.D. Tex. July 24, 2019), ECF No. 1632 (denying bail-in of Texas after three-judge courts found that the State drew intentionally discriminatory state house and congressional maps in 2011 and the Supreme Court affirmed a finding that Texas unconstitutionally racial gerrymandered in 2013); *Veasey*, 888 F.3d 792, 804 (5th Cir. 2018) (denying private plaintiffs Section 3(c) relief despite a trial court’s findings of discriminatory purpose under Section 2 and the Fourteenth and



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For questions about the information contained herein or to share information about voting changes in your community, please contact please contact LDF Deputy Director of Litigation, Leah Aden, at 212.965.2200 or vote@naacpldf.org.

Fifteenth Amendments); *North Carolina State Conference NAACP*, 831 F.3d at 241 (denying plaintiffs Section 3(c) relief despite affirming findings of discriminatory purpose under Section 2 and the Fourteenth and Fifteenth Amendments).