

# 16

## LEGISLATIVE REDISTRICTING AND VOTING RIGHTS ACT PRECLEARANCE

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### 16-1 INTRODUCTION

This chapter addresses state and federal law regarding the process of legislative redistricting, along with the preclearance requirements for such districting plans and all other election changes. It focuses initially on traditional districting criteria, including mandatory state and federal requirements, plus other practical considerations that courts have recognized as valid reasons for drawing election district lines. It then discusses developments under Section 2 and Section 5 of the federal Voting Rights Act and racial gerrymander claims under the federal Equal Protection Clause.

In adopting redistricting plans following the 2010 U.S. Census, the General Assembly and Virginia localities were once again required to balance the requirements of the federal Voting Rights Act, which demands that race be taken into account to avoid “retrogression” and “vote dilution,” with those of the Equal Protection Clause, which prohibits using race as the predominant factor in drawing election districts.

Changes to the Section 5 preclearance process also impacted redistricting efforts. Originally scheduled to expire in 1970, the Voting Rights Act preclearance requirement has been repeatedly renewed and revised. In 2006, it was extended for another twenty-five years by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577. This Act made two important changes to the substantive standard by which preclearance requests are judged, by overriding two decisions of the U.S. Supreme Court.

With those amendments to Section 5, localities were again subject to the more stringent definition of “discriminatory purpose” as used by the Justice Department in the 1990s. In short, the Justice Department could deny preclearance even though an election change did not worsen the position of minority residents. Instead, in some circumstances, an impermissible discriminatory purpose could be based on a deliberate failure to adopt a voting change that would improve the voting strength of minority voters. In addition, the revised preclearance provisions rejected any changes to election districts that would merely permit minority voters to “influence” the election of candidates preferred by other groups, rather than to “elect” their own preferred candidates.

However, as a result of the U.S. Supreme Court decision in *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612 (2013), the preclearance requirement has

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<sup>1</sup> The authors would like to express their appreciation to the original author of this chapter, Carter Glass IV.

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effectively been suspended until Congress enacts a new formula to determine which states and localities should be covered by the preclearance provisions of the Act. The preclearance requirements may also regain relevance if the Justice Department succeeds in “bailing in” localities. See section 16-3.

In 2021, however, the General Assembly enacted the Virginia Voting Rights Act, requiring advance notice and comment on, or the Virginia Attorney General’s preclearance of, localities’ enactment or administration of certain “covered practices” relating to voting. 2021 Va. Acts chs. 528 and 533 (special session I) (adding Va. Code § 24.2-129). Among other things, such “covered practices” include “any change to the boundaries of election districts or wards in the locality, including changes made pursuant to a decennial redistricting measure.” See, e.g., Va. Code § 24.2-129(A)(3).

It is also worth noting at the outset the significant matter of *who* does the redistricting. In 2020, voters approved an amendment to the Virginia Constitution transferring redistricting authority from the General Assembly to a sixteen-member commission. Va. Const. art. II, § 6-A; 2020 Va. Acts ch. 1196; 2019 Va. Acts ch. 821. The Virginia Redistricting Commission consists of eight legislative members (four from each major party) and eight citizens (selected by a committee of five retired circuit court judges). Va. Const. art. II, § 6-A(b). The Commission is to draw Virginia’s districts for the U.S. House of Representatives and both houses of the General Assembly and submit its redistricting plans for consideration by the General Assembly. *Id.* art. II, § 6-A(d). The General Assembly may not amend the redistricting plans. *Id.* art. II, § 6-A(e). If the Commission’s plan is approved by the General Assembly, it becomes law without the Governor’s signature. If the Commission or the General Assembly fail to meet certain deadlines for their respective submission or adoption of redistricting plans, the districts will be drawn by the Supreme Court of Virginia. See *id.* art. II, § 6-A(f), (g). In 2021, the Commission did not approve redistricting plans for submission to the General Assembly, so the Supreme Court of Virginia assumed responsibility for establishing the new district lines. See *In re Decennial Redistricting*, 300 Va. 379 (2021).

No such changes have been made for local governing bodies elected by district,<sup>3</sup> and local redistricting continues to be the responsibility of the local governing bodies. Va. Const. art. VII, § 5; Va. Code § 24.2-304.1(B).

## 16-2 TRADITIONAL DISTRICTING CRITERIA

### 16-2.01 In General

Virginia recognizes two categories of traditional districting criteria: (1) requirements mandated by constitutional or statutory authority and (2) “good government” or practical policy considerations. These traditional districting criteria are relevant in virtually every facet of the redistricting process, from planning to drawing to defending congressional, state, and local districts.<sup>4</sup>

Many of the criteria, particularly those that are constitutionally or statutorily based, are considered in determining compliance with or liability under the Voting Rights Act or the Equal Protection Clause of the United States Constitution. For example, as discussed below, to make out a *prima facie* case of racial gerrymandering, the plaintiff must prove that the state subordinated its traditional districting criteria to racial considerations. *Shaw*

<sup>3</sup> In recent legislative sessions, measures have been proposed (but have not passed) regarding local redistricting commissions and related procedures. Va. H.B. 381 (2020); Va. H.J. Res. 615 (prefiled Jan. 1, 2019); Va. H.J. Res. 615 (comm. sub. Feb. 1, 2019).

<sup>4</sup> The U.S. Constitution’s Elections Clause does not immunize a state legislative body’s redistricting law from the state courts’ ordinary judicial review for compliance with the state’s constitution and laws. *Moore v. Harper*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 2065 (2023).

*v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993); *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

In the early 2020s, shifting political majorities in the legislative houses and various interests and concerns related to voting and elections have translated into numerous enactments by the General Assembly. In 2020 alone, the legislature enacted over fifty individual bills related to elections and voting.<sup>5</sup> Subjects of legislation included standards for the drawing of federal congressional and state legislative districts. To a large extent, these standards incorporate preexisting constitutional and statutory standards, including those under the Voting Rights Act. See, e.g., Va. Code § 24.2-304.04(2) (requiring districts to be drawn in accordance with the U.S. Constitution, the Constitution of Virginia, and federal and state law). Related standards are also reflected in legislation requiring compliance with “judicial decisions relating to racial and ethnic fairness”; mandating that districts be drawn “to give racial and language minorities an equal opportunity to participate in the political process” without dilution of their votes; and requiring districting to preserve “communities of interest,” defined as neighborhoods of people who share similar social, cultural, and economic interests. Va. Code § 24.2-304.04(3), (4), and (5). The 2020 provisions also established circumstances under which localities must provide voting and election materials in languages other than English, Va. Code § 24.2-128, mandate that each county and city precinct must be wholly contained within a single congressional, Senate, House, and local election district, Va. Code § 24.2-307, and provide that elections for local governing bodies may be conducted by ranked-choice voting. Va. Code § 24.2-673.1.

In 2021, the General Assembly enacted nineteen more bills related to elections and voting.<sup>6</sup> These bills expanded absentee voting availability, provided additional assistance for disabled voters, allowed for preregistration of Virginians sixteen and older and automatic registration for anyone receiving a Virginia driver’s license, and also addressed matters of early in-person voting, campaign finance, nomination methods, registrar qualifications, election day procedures, voter registration, and voting rights.

Of the 2021 enactments, the Virginia Voting Rights Act is particularly relevant to redistricting. See 2021 Va. Acts chs. 528 and 533 (special session I).<sup>7</sup> The Virginia Voting Rights Act requires localities, prior to the enactment or administration of any “covered practice,” to provide notice and allow at least thirty days for public comment, Va. Code § 24.2-129(B), (C), or, instead, submit the proposed “covered practice” to the Virginia Attorney General’s Office for a certification of no objection, Va. Code § 24.2-129(D). A “covered practice” is defined as:

1. Any change to the method of election of members of a governing body or an elected school board by adding seats elected at large or by

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<sup>5</sup> See Virginia Department of Elections, [2020 Changes to Virginia’s Election Laws](#), for a list and brief summary of each bill.

<sup>6</sup> See Virginia Department of Elections, [2021 Changes to Virginia’s Election Laws](#), for a list and brief summary of each bill.

<sup>7</sup> The Virginia Voting Rights Act also prohibits the state or any locality from imposing or applying any voting qualification, prerequisite to voting, or standard, practice, or procedure that results in the denial or abridgement of any citizen’s right to vote based on race, color, or membership in a language minority group. Va. Code § 24.2-126. And the Act contains numerous other voting reform measures, including the creation of a civil cause of action for the violation of certain election laws, Va. Code § 24.2-104.1, provisions for minority language accessibility, § 24.2-128, restrictions on at-large methods of election, § 24.2-130, and creation of a Voter Outreach and Education Fund, § 24.2-131.

- converting one or more seats elected from a single-member district to one or more at-large seats or seats from a multi-member district;
2. Any change, or series of changes within a twelve-month period, to the boundaries of the locality that reduces by more than five percentage points the proportion of the locality's voting age population that is composed of members of a single racial or language minority group, as determined by the most recent American Community Survey data;
  3. Any change to the boundaries of election districts or wards in the locality, including changes made pursuant to a decennial redistricting measure;
  4. Any change that restricts the ability of any person to provide interpreter services to voters in any language other than English or that limits or impairs the creation or distribution of voting or election materials in any language other than English; or
  5. Any change that reduces the number of or consolidates or relocates polling places in the locality, except where permitted by law in the event of an emergency.

Va. Code § 24.2-129(A). If the locality elects the procedure for notice and public comment, any person who will be subject to or affected by the covered practice can challenge it in circuit court during a thirty-day waiting period after the public comment period. Va. Code § 24.2-129(C). The court may award attorney's fees to a prevailing private plaintiff. *Id.* If the locality elects to preclear through the Virginia Attorney General's Office, the certification of no objection will be deemed to have been issued if the Attorney General does not object within sixty days of the submission, or the Attorney General may affirmatively certify on good cause shown to facilitate an expedited approval within that sixty-day period. Va. Code § 24.2-129(D). Under either procedure, the Attorney General's certification does not bar a later action to enjoin enforcement of the covered practice. *Id.*

Another 2021 enactment bearing on district lines addresses localities that impose district/ward-based residency requirements for members of the governing body or school board. 2021 Va. Acts ch. 225 (special session I), amending Va. Code § 15.2-1400. Notwithstanding any other provision of law, general or special, such members must be elected by the qualified voters of that district or ward and not by the locality at large. *Id.*

In 2022, the General Assembly enacted seventeen more bills related to elections and voting.<sup>8</sup> Subjects of these bills included absentee voting, campaigns and campaign finance, election officials, public meetings, voter lists, precincts and polling places, risk-limiting audits, and voter registration and, overall, had less bearing on redistricting than previous' years enactments. It remains to be seen whether, in future sessions, efforts are revived to consider potential changes to the Commonwealth's election governance structure. Although narrowly passing 21-19 in the Senate, the House of Delegates did not agree to a joint resolution that would have required the Joint Legislative Audit and Review Commission to study various matters related to the administration of state and local elections. Va. S.J. Res. 33 (comm. sub. Feb. 11, 2022).

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<sup>8</sup> See Virginia Department of Elections, [2022 Changes to Virginia's Election Laws](#), for a list and brief summary of each bill.

In 2023, the General Assembly enacted thirteen bills related to elections and voting.<sup>9</sup> Topics covered included absentee voting, campaigns and campaign finance, elected officials, general registrars, recounts, special elections, and voter registration.

### 16-2.02 Population Equality—One-Person, One-Vote

#### 16-2.02(a) Source of the One-Person, One-Vote Requirement

One of the most significant mandated districting criteria is the one-person, one-vote requirement. The principle of one-person, one-vote rests on the premise that each person's vote must count equally and no person's vote should be worth more than another's. The principle of one-person, one-vote ensures that all voters have an equal voice in electing their representatives. *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); see also *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964).

At the federal level, this principle is grounded in article I, § 2 of the United States Constitution, which provides that “[r]epresentatives . . . shall be apportioned among the several States . . . according to their respective numbers . . . .”

The one-person, one-vote requirement is applicable to state legislative districting through the Equal Protection Clause of the Fourteenth Amendment and the Constitution of Virginia. State and local districts are governed by article II, § 6 and article VII, § 5 of the Constitution of Virginia, respectively. Article II, § 6, as to state legislative districts, and article VII, § 5, as to local districts, require that districts be so constituted “as to give, as nearly as is practicable, representation in proportion to the population of the district.”

The U.S. Supreme Court has applied the one-person, one-vote requirement to congressional districts, *Wesberry*, 376 U.S. 1, 84 S. Ct. 526, state legislative districts, *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964), and local districts, *Avery v. Midland Cnty.*, 390 U.S. 474, 88 S. Ct. 1114 (1968). “By contrast, if a state or local government does not hold a popular election—that is, if a local officer is effectively appointed by a governmental entity rather than ‘the people’—then one-person, one-vote does not apply.” *Kim v. Bd. of Educ. of Howard Cnty.*, 641 F. Supp. 3d 223 (2022).

The one-person, one-vote requirement means that districts should contain roughly, if not exactly, the same number of persons. Article I, § 2 of the U.S. Constitution requires congressional districts to achieve “population equality as nearly as is practicable.” *Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925 (1997) (citing *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964)). While “precise mathematical equality” may not be possible and is not constitutionally required, deviations in voting district populations are closely scrutinized.

Greater population deviations are permitted in state and local districts than in congressional districts. “[M]inor deviations from mathematical equality . . . are insufficient to make out a prima facie case of invidious discrimination” in state and local districts. *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321 (1973). In this regard, the one-person, one-vote requirement usually is satisfied if the variation in population between the most populous district and the least populous is less than 10 percent. *Chen v. City of Houston*, 9 F. Supp. 2d 745 (S.D. Tex. 1998) (citing *Connor v. Finch*, 431 U.S. 407, 97 S. Ct. 1828 (1977)). However, the 10 percent threshold does not completely insulate a state's districting plan from attack. See discussion in section 16-2.02(c)(iv). Virginia law mandates a deviation of no more than 5 percent for state legislative districts. Va. Code § 24.2-304.04(1).

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<sup>9</sup> See Virginia Department of Elections, [2023 Changes to Virginia's Election Laws](#), for a list and brief summary of each bill.



Under the one-person, one-vote principle, legislative bodies should redraw their election districts at least once per decade. *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964) (“If reapportionment were accomplished with less [than decennial] frequency, it would assuredly be constitutionally suspect.”) In *Reynolds*, Chief Justice Warren observed that “reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States, often honored more in the breach than the observance, however.” The Chief Justice noted that, while acting only at the end of a decennial period leads to some imbalance in the population of districts, limitations on the frequency of these efforts are justified by the need for stability and continuity in the legislative system. *Id.* The Court did not make decennial redistricting “a constitutional requisite”; however, decennial redistricting “would clearly meet the minimal requirements,” and anything less frequent “would assuredly be constitutionally suspect.” *Id.* Several decisions have considered local redistricting under this branch of “one-person/one-vote” jurisprudence. See, e.g., *Fairley v. Forrest Cnty.*, 814 F. Supp. 1327 (S.D. Miss. 1993); *French v. Boner*, 786 F. Supp. 1328 (M.D. Tenn. 1992), *aff’d*, 963 F.2d 890 (6th Cir. 1992); *Ramos v. Illinois*, 781 F. Supp. 1353 (N.D. Ill. 1991), *aff’d sub. nom Political Action Conf. of Ill. v. Daley*, 976 F.2d 335 (7th Cir. 1992). “In the wake of *Reynolds*, courts generally have accepted that some lag-time between the release of census data and the reapportionment of a state’s legislative districts is both necessary and constitutionally acceptable, even when it results in elections based on malapportioned districts in the years that census data are released.” *Miss. State Conf. of NAACP v. Barbour*, No. 3:11cv159 (S.D. Miss. May 16, 2011) (collecting cases), *aff’d*, 569 U.S. 991, 133 S. Ct. 2389 (2013). Cases filed concerning Virginia’s failure to redistrict ahead of its 2021 House of Delegates elections (because the coronavirus pandemic delayed the U.S. Census Bureau’s release of census data) have been dismissed for lack of standing. *Goldman v. Brink*, 41 F.4th 366 (4th Cir. 2022); *Thomas v. Beals*, No. 3:22cv427 (E.D. Va. Aug. 1, 2022).

In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Supreme Court rejected the contention that a state legislature is prohibited from enacting a mid-decade redistricting plan for partisan reasons. There, the Texas legislature had failed to enact a congressional plan after the 2000 census, and therefore a 2001 court-drawn plan was used for the initial elections following the census. When Republicans won control of the legislature in 2002, they adopted a new congressional plan, which Democrats challenged on a number of grounds. The plaintiffs contended that such a “voluntary” mid-decade plan violated the one-person, one-vote requirement, because decennial census data was no longer accurate by that time. In rejecting that claim, the Court commented, among other things, that such a mid-decade plan was no different from “ordinary, 3-year-old districting plans” that also rely upon population data that is no longer accurate. Jurisdictions operate under a “legal fiction” that their plans are constitutionally apportioned throughout the decade to avoid constant redistricting as the population of areas changes year by year. *Id.*; see also *Holloway v. City of Va. Beach*, No. 2:18-CV-69 (E.D. Va. Aug. 17, 2020) (results of 2010 census still in effect and “presumptively valid as a matter of law” pending release of 2020 census results and may be used by plaintiffs in voting rights cases).<sup>10</sup>

### 16-2.02(b) Counting Heads

There are two ways of computing population differences between districts. The Supreme Court recognizes both. The first, “overall population deviation,” is defined as the difference in population between the two districts with the greatest disparity. The second measurement, “average population deviation,” is the average difference of all the districts in a state from perfect equality. *Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925 (1997); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996).

<sup>10</sup> For a full discussion of the *Holloway* litigation, see section 16-4.02(d)(i).

Ascertaining population deviations is dependent upon the base population used: total population, including non-citizens and children, or voter-population, either eligible voters or registered voters. The distinction can matter a great deal as those in districts with fewer eligible voters but larger populations can have significantly more electoral influence than voters in districts with a high percentage of eligible voters. As Justice Thomas has stated, the question is whether “the ultimate basis of representation is the right of citizens to cast an equal ballot or the right of all inhabitants to have equal representation.” *Evenwel v. Abbott*, 578 U.S. 54, 136 S. Ct. 1120 (2016).

Congressional districts are constitutionally required to be based on total population. U.S. Const. amend. XIV, § 2.<sup>11</sup> There is no such explicit requirement for states and local legislative districts. All states currently draw their legislative districts on the basis of total population.<sup>12</sup> In *Evenwel v. Abbott*, 578 U.S. 54, 136 S. Ct. 1120 (2016), voters who lived in districts with particularly large eligible and registered voter populations alleged that basing apportionment on total population diluted their votes in relation to voters in other districts, in violation of the one-person, one-vote principle of the Equal Protection Clause. The Supreme Court held that the use of total population as the basis for drawing state districts was not unconstitutional. Although the Court’s rationale, based on history, precedent, and practice, favored the principle of total population apportionment (“As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote”), *id.*, the Court stopped short of requiring it. Thus, whether states or localities can apportion their districts based on voter eligibility population, or can restrict what constitutes total population, remains unclear.

In 2001, the General Assembly authorized localities with inmate populations exceeding certain percentages of the locality’s total population to exclude such inmate populations for purposes of redistricting and reapportionment. While relatively minor changes were made to this provision in the interim, in 2020 the General Assembly revised the policy and made it uniform statewide. Va. Code §§ 24.2-414(A), 30-265, and 53.1-5.2; *see also* Va. Code § 24.2-304.04(9). As a result of 2020’s changes, the Division of Legislative Services will adjust the census data—to be used by the locality for purposes of redistricting and reapportionment—to account for prisoners in federal, state, or local correctional facilities. A prisoner who resided within the Commonwealth at the time of incarceration will be deemed to be a resident at that address. A prisoner who resided outside of the Commonwealth (or whose residence cannot be determined) as of the time of incarceration will be deemed to be a resident at the location of the correctional facility. In advance of the proposal or adoption of a redistricting plan in 2021, a state senator and several others petitioned the Supreme Court of Virginia to issue a writ of mandamus, a writ of prohibition, and a permanent injunction preventing the Virginia Redistricting Commission, the State Board of Elections, the Department of Elections, and the Commissioner of the Department of Elections from applying or enforcing statutory redistricting criteria—including the 2020 changes regarding prison populations—contending that they were in violation of the Virginia Constitution. The Supreme Court of

<sup>11</sup> As to the apportionment of congressional seats, the Supreme Court has not answered whether the population counts may exclude persons unlawfully present in the United States. *See Trump v. New York*, 592 U.S. \_\_\_, 141 S. Ct. 530 (2020) (per curiam) (dismissing as unripe challenge to Trump administration’s plan to exclude people unlawfully present in the U.S. from total population used to apportion Representatives); *Trump v. Usec*, 141 S. Ct. 123 (mem.) (2020) (same); *Trump v. City of San Jose*, 141 S. Ct. 1231 (2020) (mem.) (same). [Compare Executive Order on Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census](#) 86 Fed. Reg. 7015 (Jan. 20, 2021), with [Pres. Mem. to Sec’y of Commerce, Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census](#), 85 Fed. Reg. 44,679 (July 23, 2020).

<sup>12</sup> Some states allow adjustments such as the removal from the total population figures of nonresident military personnel, prisoners, or noncitizen immigrants.

Virginia denied the requested relief, holding that mandamus and prohibition were not appropriate remedies and that its limited original jurisdiction did not allow the issuance of the permanent injunction. *Adkins v. Va. Redistricting Comm’n*, No. 210770 (Va. Sup. Ct. Sept. 22, 2021).

### **16-2.02(c) Congressional Districts—Federal One-Person, One-Vote Standards**

#### **16-2.02(c)(i) The Karcher Test**

A two-step inquiry governs the permissibility of population deviations in congressional districts. First, the party challenging the district as being in violation of one-person, one-vote must prove that population differences could have “been reduced or eliminated altogether by a good-faith effort to draw districts of equal population.” If the plaintiff fails to show that the population deviation could have been avoided, the district will be upheld. Second, if the plaintiff carries his or her burden, the state must prove that “each significant variance between districts was necessary to achieve some legitimate goal.” *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983).

#### **16-2.02(c)(ii) Population Deviations**

Article I, § 2 of the United States Constitution permits only minor population differences between congressional districts and only those differences which are “unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown,” *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983). Only the slightest population deviations are tolerated. Obviously, the best way to avoid one-person, one-vote issues is to draw congressional districts with equal numbers of citizens.

While more sophisticated redistricting computer models permit states to draw districts with very little, if any, population deviations, the use of such technology increases judicial scrutiny. For example, a district court in the Fourth Circuit required Maryland to justify a deviation of ten people. *See Anne Arundel Cnty. Republican Cent. Comm. v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991) (three-judge court). Similarly, a deviation of less than 1 percent has been held unconstitutional. *See State ex rel. Stephan v. Graves*, 796 F. Supp. 468 (D. Kan. 1992) (0.94 percent).

Court-ordered districting plans are subject to even more rigorous population equality requirements. A congressional districting plan drawn by a federal court should “ordinarily achieve the goal of population equality with little more than de minimis variation.” *Chapman v. Meier*, 420 U.S. 1, 95 S. Ct. 751 (1975).

The acceptable level of deviation in several cases illustrates, from a purely statistical standpoint, just what type of population differences courts will tolerate. Among five states with one-person, one-vote challenges to their congressional districting plans, the overall population deviations and the results of the litigation demonstrate the slight margin for error in district drawing:

- Kansas: 0.94 percent deviation – plan rejected
- Texas: 0.82 percent deviation – plan approved
- Arkansas: 0.73 percent deviation – plan approved
- California: 0.49 percent deviation – plan approved
- Georgia: 0.35 percent deviation – plan approved

#### **16-2.02(c)(iii) Justifications for Population Deviations in Congressional Districting**

If the plaintiff satisfies its burden of demonstrating that differences in population among congressional districts could have been minimized or eliminated altogether but were not, the state must then present evidence of legitimate districting goals justifying each significant variation. Several policies may justify a population deviation, assuming they are applied in a non-discriminatory manner, including: (1) compactness, (2) preserving



the cores of existing districts, (3) protecting incumbents from competing with one another, and (4) respecting municipal, county, and precinct boundaries. See *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983); *Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925 (1997). Where the population deviation is minor and the state advances one or more of these legitimate policies justifying the deviation, the Court will defer to the state's legislative policies. See *White v. Weiser*, 412 U.S. 783, 93 S. Ct. 2348 (1973); *W. Va. Civil Liberties Union v. Rockefeller*, 336 F. Supp. 395 (S.D. W.Va. 1972) (holding that the state's constitutional compactness provision justified a 0.78 percent maximum deviation in the state's congressional districting plan).

In meeting its burden of proof, the state must show "with some specificity" that the particular objective upon which it relies to justify a difference in population between districts actually required the deviation. Nevertheless, the evidentiary showing is a "flexible" one depending on the following factors: (1) the size of the deviation, (2) the importance of the state's interest justifying the deviation, (3) the consistency with which the state's districting plan as a whole reflects those interests, and (4) the availability of alternatives that might substantially vindicate the state's interests while more closely reaching population equality. *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983).

In an application of the *Karcher* standard, the Supreme Court reversed a trial court decision invalidating congressional districts in West Virginia that had a total population deviation of 0.79 percent. In *Tennant v. Jefferson County Commission*, 567 U.S. 758, 133 S. Ct. 3 (2012), the Supreme Court concluded that the lower court had given insufficient deference to the political judgments of the state legislature in drawing district lines. It held that the minor variation in population was justified by three legitimate state objectives: (1) avoiding contests between incumbents, (2) avoiding the splitting of localities, and (3) minimizing population shifts between districts.

#### **16-2.02(c)(iv) One-Person, One-Vote Standards for State and Local Districts**

Virginia's state and local election districts are also subject to one-person, one-vote requirements pursuant to the Equal Protection Clause of the U.S. Constitution and article II, § 6 and article VII, § 5 of the Constitution of Virginia. Unlike article I, § 2 of the U.S. Constitution, which controls congressional districts and requires population equality as nearly as is practicable, the Fourteenth Amendment's Equal Protection Clause requires only that states make "an honest and good faith effort" to draw state and local districts with equal populations. *Brown v. Thomson*, 462 U.S. 835, 103 S. Ct. 2690 (1983); *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964).

Due to the greater flexibility that states are afforded to draw state and local districts, minor population deviations among districts are insufficient to make out a prima facie case of discrimination. As a general rule, population differences of less than 10 percent are prima facie constitutional and require no justification by the state. See *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 136 S. Ct. 1301 (2016); *Voinovich v. Quilter*, 507 U.S. 146, 113 S. Ct. 1149 (1993); *Brown v. Thomson*, 462 U.S. 835, 103 S. Ct. 2690 (1983); *Gause v. Brunswick Cnty., N.C.*, No. 95-3028 (4th Cir. Aug. 13, 1996) (unpubl.).

However, the 10 percent threshold does not completely insulate a state's districting plan from attack. When a plan is under that threshold, a challenge must show that it is "more probable than not that a deviation of less than 10 percent reflects the predominance of illegitimate reapportionment factors rather than . . . 'legitimate considerations.'" *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 136 S. Ct. 1301 (2016) (also noting that "attacks on deviations under 10 percent will succeed only rarely, in unusual cases").

Prior to *Harris*, in *Cox v. Larios*, 542 U.S. 947, 124 S. Ct. 2806 (2004), the Supreme Court summarily affirmed a district court decision that found a one-person, one-vote violation where a 9.98 percent population deviation in Georgia legislative districts was not supported by “any legitimate, consistently-applied state interests.” The district court had concluded that the size of the population deviation was the result of partisan gerrymandering aimed at allowing Democrats to maintain or increase their representation in the state districts. However, it ruled that it need not decide if “partisan advantage alone” could justify such a population deviation, because the plans had two arbitrary and discriminatory goals. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff’d*, 542 U.S. 947, 124 S. Ct. 2806 (2004). First, they were drawn to favor the interests of certain regions over others by “allow[ing] [Democratic-leaning] rural southern Georgia and inner-city Atlanta to maintain their legislative influence even as their rate of population growth lags behind that of the rest of the state.” Second, rather than applying in a neutral fashion a policy of protecting incumbents, the plans were drawn systematically to protect Democratic incumbents and to “eliminate as many Republicans [incumbents] as possible.” The redistricting plans implemented these goals by selectively “under-populating” certain districts and “over-populating” others. *Id.*

Construing *Harris* and *Larios*, the Fourth Circuit held that in one-person, one-vote cases with population deviations below 10 percent, plaintiffs must show by a preponderance of the evidence that improper considerations predominate in explaining the deviations. *Raleigh Wake Citizens Ass’n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) (rejecting district court’s rational basis analysis). The court found that state’s mid-decade, partisan redistricting plans constituted the rare, unusual case where the plaintiffs met that burden. In dicta, it stated that regional favoritism (rural over urban) was also an illegitimate reapportionment factor.

In *Harris*, the Supreme Court rejected an argument that the “under” and “over” populating of districts was intended to favor the Democratic Party, instead finding that it was for the permissible reason of compliance with the Voting Right Act’s non-retrogression preclearance requirements. *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 136 S. Ct. 1301 (2016). The Court distinguished its summary affirmance of *Larios*, stating that no legitimate purposes explained the deviations in *Larios*. Despite *Larios*, however, the Court has not explicitly held that political partisanship is an illegitimate redistricting factor. The Fourth Circuit, while recognizing this, construes *Larios* as effectively declaring it to be so. *Raleigh Wake Citizens Ass’n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016).

#### **16-2.02(c)(v) Justifying Population Deviations in State Districting**

Overall population deviations exceeding 10 percent in state and local districting may be justified if they are based on “legitimate considerations . . . of a rational state policy.” *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964). Virginia’s historic districting policy of avoiding locality splits justified a population deviation of 16.4 percent in *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979 (1973). Although no precise outer boundary of population deviations in state legislative districts has been firmly established, the *Mahan* Court noted that 16.4 percent “approach[ed] tolerable limits.” *Id.*

The Virginia General Assembly reached that “tolerable limit” in 1981 when it created districts with population deviations of 23 percent. Those districts were *prima facie* unconstitutional and were ultimately struck down because the General Assembly did not accomplish the state interests of avoiding locality splits, maintaining communities of interest, and creating single-member districts. *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981).

In addition to historic state policies such as Virginia’s policy of maintaining the integrity of political subdivisions, compliance with state constitutional requirements and accomplishing the objectives identified in *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983) also represent legitimate reasons justifying population deviations in state and local districts greater than 10 percent. See *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994).

As noted above, federal, state, and local representation must be in proportion to the population. To determine population figures, Virginia uses the decennial census data prepared by the Department of Commerce’s Bureau of the Census. The Constitution of the United States requires an “actual enumeration” every ten years. U.S. Const. art. I, § 2. The exact meaning of “actual enumeration” as it pertains to state and local districting has generated, and will continue to generate, controversy throughout the redistricting process.

Prior to the 2000 Census, the Census Bureau stated its intention to use two forms of statistical sampling to address what it perceived to be a serious problem of undercounting certain identifiable groups, particularly minorities. The sampling methods the Census Bureau planned to use would have generated additional numbers to supplement the “actual enumeration” to theoretically provide a more accurate head count of the nation. The supplemented enumeration is commonly referred to as the “adjusted number.” Before the Census Bureau could use the adjusted numbers for congressional apportionment, however, the Supreme Court held that the Census Act, 13 U.S.C. § 1 et seq., “prohibits the proposed use of statistical sampling in calculating the population for purposes of apportionment.” *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 119 S. Ct. 765 (1999).

The Supreme Court’s decision related only to apportionment for congressional districts, not state and local districts. The Court, however, based its decision, in part, on the fact that the government had previously argued that the Census Act prohibited the use of statistical sampling in determining “state-by-state population totals.” *Id.*

The 2000 General Assembly attempted to resolve any doubt as to which figures—the actual enumeration versus the adjusted number—would be used in Virginia’s redistricting process. Virginia Code § 30-265 provides that “the General Assembly shall use the population data provided by the United States Bureau of the Census identical to those from the actual enumeration conducted by the Bureau for the apportionment of the Representatives of the United States House of Representatives . . . .” Ultimately, the Census Bureau decided not to use population numbers adjusted by statistical sampling, notwithstanding its earlier pronouncements.

As noted above, in 2020, the General Assembly amended Va. Code § 30-265 to qualify that the population data used would be “adjusted by the Division of Legislative Services pursuant to § 24.2-314,” incorporating the adjustments for prison populations provided therein.

### 16-2.03 Compactness and Contiguity

The Constitution of Virginia requires that state and local districts be both compact and contiguous. See Va. Const. art. II, § 6 and art. VII, § 5 (districts “shall be composed of contiguous and compact territory”); Va. Code §§ 24.2-304.1(B) and 24.2-304.04(7). Under Virginia law, compactness refers only to territorial compactness. The notion of compactness does not include non-geographical considerations such as “communities of interest.” See *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992).

The judicial standard of review for challenges to compactness or contiguity is whether the factual determination by the legislature is “clearly erroneous, arbitrary, or

wholly unwarranted.” The plan must be upheld if the legislative determination is “fairly debatable,” that is, if the evidence “would lead objective and reasonable persons to reach different conclusions.” *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002).

In determining whether a district is compact, due regard must be had for the “geographic difference of this Commonwealth.” *Allen v. Greensville Cnty. Bd. of Sup’rs*, 24 Va. Cir. 398 (Greensville Cnty. 1991). In light of the Commonwealth’s “vast and different topography, . . . a strict or rigid construction of contiguous and compact” would make drawing district lines difficult if not impossible.” *Id.* Therefore, compactness is not defeated by irregular district lines that are necessitated by mountains or rivers or maintaining political subdivisions or precinct boundaries.

In *Vesilind v. Virginia Board of Elections*, 295 Va. 427, 813 S.E.2d 739 (2018), the challengers’ expert testified that his statistical analysis proved that discretionary factors predominated over compactness considerations. The Virginia Supreme Court held that there was no constitutional requirement that discretionary factors cannot predominate over compactness. The proper inquiry is limited to consideration of the district from a spatial perspective—whether it is in fact compact. It is not required to be as compact as possible. The Court stated:

Our Constitution speaks to the result of the redistricting process, and mandates that districts be compact in the end. It does not attempt to curtail the legislative process that creates the end result. Nor does it require that compactness be given priority over other considerations, much less establish a standard to determine whether the legislature gave proper priority to compactness. Thus, there is evidence to support the ruling that the determination of the General Assembly regarding compactness of the Challenged Districts is fairly debatable, and not clearly erroneous, arbitrary, or wholly unwarranted . . . .

Turning to contiguity, short of an intervening land mass totally severing two sections of an electoral district, there is no per se test for the constitutional requirement of contiguity. *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002). Districts whose portions are separated by water, with or without bridge access, are valid unless physical access between those portions (whether across a bridge or by traveling through another district, in the absence of a bridge) is unreasonable, unduly burdensome, or adversely impacts the ability of residents to secure meaningful representation or effective communication with their elected representative, a finding the court indicated would be unlikely in today’s technological world. *Id.*; see also *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997) (“the presence in a district of a body of water, even without a connecting bridge” does not defeat contiguity); 1989 Op. Va. Att’y Gen. 92; 1984-85 Op. Va. Att’y Gen. 128.

Contiguity is lacking, however, where territory within a district is only “technically” contiguous, with only “dubious connectors” such as unpopulated strips of territory, “barren stretches of river,” or “highway exits” in order to connect “fingers” within the core of a district. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court); Va. Code § 24.2-304.04(6) (no district is contiguous “only by connections by water running downstream or upriver”).

#### 16-2.04 Clearly Observable Boundaries

Each election district and voting precinct must have “clearly defined and clearly observable boundaries.” Va. Code § 24.2-305. A clearly observable boundary can include: (1) any named road or street, (2) any road or highway which is part of the federal, state primary or state secondary road system, (3) any river, stream or drainage feature shown as a

polygon boundary on the TIGER/line files of the U.S. Census Bureau, or (4) any other natural or constructed or erected permanent physical feature which is shown on an official map issued by the Virginia Department of Transportation or shown as a polygon boundary on the TIGER/line files of the Census Bureau. A property line or subdivision boundary may not be used as a precinct boundary unless it is marked by a permanent physical feature that is shown on an official map issued by the Virginia Department of Transportation, on a United States Geological Survey topographical map, or as a polygon boundary on the TIGER/line files of the Census Bureau.

### 16-2.05 Political Fairness and Incumbency Protection

Incumbency protection is a legitimate districting criterion upon which a state can rely to defend the drawing of district lines. See *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996) (plurality opinion); *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999). The Supreme Court has recognized two types of incumbency protection: (1) creating districts to protect the seat of an incumbent against a new challenger and (2) drawing districts to avoid pitting one incumbent against another. See *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983); *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996).

Where a redistricting plan gives unfair advantage to one political party over another party, claims of “partisan gerrymandering” have been asserted under the Fourteenth Amendment’s Equal Protection Clause as well as other provisions of the Constitution. After decades of addressing but not squarely resolving the question, the Supreme Court definitively held in *Rucho v. Common Cause*, 588 U.S. \_\_\_, 139 S. Ct. 2484 (2019), that partisan gerrymandering claims present political questions that are nonjusticiable, stating that “federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.” Thus, the Court denied the plaintiffs’ claims under the Equal Protection Clause, First Amendment, Article I, § 2, and the Elections Clause. Citing examples of historical enactments of Congress, recent bills in Congress, and other measures in the States, the Court observed that avenues for reform remained open insofar as such reform is desired. *Id.*

In an attempt to eliminate partisan gerrymandering, the voters of Arizona by ballot initiative amended that state’s constitution to provide that an independent commission would draw state and congressional districts. The Arizona legislature challenged the commission’s districting authority, asserting that the commission was barred by the Elections Clause of the U.S. Constitution from drawing congressional districts. The Elections Clause states that the “time, place, and manner” of holding congressional elections shall be “prescribed in each State by the Legislature thereof . . . .” Approving of a “capacious[]” definition of “legislature,” the Supreme Court held that voters adopting initiatives are legislating just as representative bodies do when they pass laws. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 135 S. Ct. 2652 (2015).<sup>13</sup>

As mentioned above, in 2020 Virginia voters approved a constitutional amendment providing for redistricting by a commission rather than the General Assembly. Va. Const. art. II, § 6-A. A 2020 statute also provided that “[a] map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party.” Va. Code § 24.2-304.04(8).

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<sup>13</sup> When the independent redistricting commission’s plan was challenged on the merits, the Court upheld the plan even though it found that “partisanship played some role.” *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 136 S. Ct. 1301 (2016).

### 16-2.06 Communities of Interest

Protecting communities of interest is a legitimate “good government” districting criterion. Communities of interest exist when residents of a legislative district share actual, similar interests in social, commercial, economic, agricultural, education, planning and other activities. “A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests.” *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995). Race, however, cannot be used as a proxy for assuming that members of the same racial group automatically share the same interests. Virginia requires districts to be drawn to preserve communities of interest, defined as neighborhoods or other geographically defined groups of people who share similar social, cultural, and economic interests. Va. Code § 24.2-304.04(5).

### 16-2.07 Maintaining Political Subdivisions

District plans should be drawn to avoid splitting counties, cities and towns to the extent possible. See Va. Code § 24.2-304.04(6) (“political boundaries may be considered”). A significant number of split counties and cities demonstrates a disregard for traditional districting criteria and provides evidence of a racially gerrymandered district. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court). Virginia’s Third Congressional District was struck down in *Moon* because, in part, eleven counties and cities were split in that district alone. *Id.*

### 16-2.08 Standing

In *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. \_\_\_, 139 S. Ct. 1945 (2019), the Supreme Court held that the Virginia House of Delegates did not have standing to challenge a three-judge court’s finding that voting districts were unconstitutionally drawn when the Attorney General refused to appeal. The Court reasoned that Va. Code § 2.2-507(A) assigns to the Attorney General the authority and responsibility of representing the Commonwealth’s interests in civil litigation; the House had purported to represent its own interests in intervening in the litigation; and the House had no standing on its own behalf because as an institution it lacked a cognizable interest in the identity of its members. *Cf. Az. State Legislature v. Az. Indep. Redistricting Comm’n*, 576 U.S. 787, 135 S. Ct. 2652 (2015) (Arizona House and Senate, acting together, had standing to challenge a referendum that gave redistricting authority exclusively to an independent commission); *Berger v. N.C. State Conference of the NAACP*, 597 U.S. \_\_\_, 142 S. Ct. 2191 (2022) (North Carolina’s House Speaker and Senate President Pro Tempore had a right to intervene on behalf of the state’s legislature when state law authorized their participation in litigation challenging the constitutionality of a voter-ID law and the existing defendant State Board of Elections did not adequately represent their interests).

The Virginia Supreme Court has followed federal law standing criteria (see section 16-5.01) to hold that proof of residency in an alleged racially gerrymandered district is sufficient to establish standing to challenge that district as racially gerrymandered without further proof of personalized injury. Standing can also be shown by a non-resident of the district who produces specific evidence of a particularized injury arising from the alleged racial gerrymandering. The Court also held that the same criteria apply to establish standing for compactness and contiguity challenges. *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002).

## 16-3 SECTION 5 OF THE VOTING RIGHTS ACT

**Note:** Although the following material is not currently applicable in light of *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612 (2013), which rendered Section 5 inoperable by finding Section 4’s coverage formula invalid (see discussion of *Shelby County* below), the discussion of Section 5 jurisprudence is retained in this chapter on the chance that Congress makes material



**amendments to the Voting Rights Act or Department of Justice “bail-in” litigation succeeds.**

Section 5 of the Voting Rights Act prohibits a covered jurisdiction from implementing any change in a “standard, practice, or procedure with respect to voting” until it has obtained preclearance from either the U.S. District Court for the District of Columbia or the U.S. Attorney General. 52 U.S.C. § 10304. Such approval will be granted only if the locality can demonstrate that an election change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a language minority group. *Id.*

Unlike Section 2 of the Voting Rights Act, which applies to all states and localities, Section 5 applied only to certain parts of the country, primarily Southern states, including Virginia and most of its counties, cities, and towns. However, as discussed below, the U.S. Supreme Court has essentially suspended the Section 5 requirements until Congress enacts a new formula—based on “current conditions” rather than “decades-old data”—to determine which states and localities should be covered by the preclearance provisions of the Act.

Section 5 is an extraordinary statute because it places the burden on covered localities to prove that a new election law or regulation is lawful, rather than requiring a challenger to prove that the measure is unlawful. Hence, it rejects the usual presumption of the validity of legislative action. Section 5 was enacted as a “response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.” *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357 (1976). Congress found that case-by-case litigation was inadequate to combat discrimination in voting and decided to “shift the advantage of time and inertia from the perpetrators of the evil to its victim,” by freezing election procedures until localities proved that the proposed changes were nondiscriminatory. *Id.*

Originally scheduled to expire in 1970, the Section 5 preclearance requirement has been repeatedly renewed and revised. In 2006, it was extended for another twenty-five years by the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (hereafter “2006 Reauthorization Act”), Pub. L. No. 109-246, § 7, 120 Stat. 577. In addition to extending the life of Section 5, the 2006 Reauthorization Act also made two important changes to the substantive standards by which preclearance requests are judged. As discussed in sections [16-3.05\(b\)\(ii\)](#) and [16-3.06\(a\)](#), Congress overturned two decisions of the U.S. Supreme Court that made it easier for jurisdictions to prove that election changes were not discriminatory.

In *Northwest Austin Municipal Utility District No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (three-judge court), *rev’d*, 557 U.S. 193, 129 S. Ct. 2504 (2009), the federal district court for the District of Columbia upheld the 2006 Reauthorization Act against a claim that the reenactment of Section 5 was an “unconstitutional overextension of Congress’s enforcement power” to remedy violations of the Fifteenth Amendment’s prohibition on racial discrimination in voting. The utility district argued that the applicable legal standard required a determination that Section 5’s preclearance requirement was “congruent and proportional” to the constitutional harm it sought to prevent. It complained that Congress had extended Section 5 “without any meaningful evaluation of whether circumstances originally used to justify the law continue to exist.” The district court rejected those arguments, initially finding that Section 5 was subject only to a traditional “rationality review.” It also held that, even if the stricter standard applied, the congressional findings had established that discrimination continued to exist with regard

to voting and that Section 5 was congruent and proportional to the harms it sought to remedy. *Id.*

On appeal, however, the Supreme Court did not reach the issue of the constitutionality of Section 5. *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504 (2009). While commenting that the preclearance requirements “raise serious constitutional questions,” the Court concluded that the case could be resolved on statutory grounds. The plaintiff, a small utility district with an elected board, had filed a so-called “bailout suit,” by which it sought to be released from the preclearance requirements. In the alternative, the water district argued that, if the Voting Rights Act was interpreted to make it ineligible to seek such a bailout, then Section 5 was unconstitutional. The district court had decided that a political subdivision like the water district could not file a bailout action because it did not register its own voters. On appeal, the Supreme Court disagreed, ruling that all political subdivisions subject to Section 5 preclearance requirements are eligible to seek a bailout remedy. Therefore, it reversed the district court judgment, but avoided the constitutional issue.

The Court again avoided the constitutionality of Section 5 in *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612 (2013). However, the Court effectively negated the preclearance requirements, at least until (and if) Congress takes corrective action, by holding that Section 4(b) of the Voting Rights Act is unconstitutional as currently structured. Section 4(b) establishes the coverage formula that determines which states and localities must abide by the Section 5 requirements. The Section 4 formula was last adjusted in 1975 and provides that covered jurisdictions are those that had a voting test (such as literacy and knowledge tests or good moral character requirements) and less than 50 percent voter registration or turnout as of 1972. The Act was reauthorized in 1982 and 2006 for twenty-five years each time, but the coverage formula was never changed.

Relying on the principles of federalism and equal sovereignty among the states, the Court stated the Act’s “current burdens” must be justified by “current needs,” thereby requiring a showing that the statute’s disparate geographic coverage is sufficiently related to the problem it targets. *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612 (2013). While the coverage formula met that test in 1975, the Court found that it failed to do so today. Although the Court acknowledged that improvements in minority voting participation were in large part because of the Voting Rights Act and that voting discrimination still exists, the Court found that the lack of disparities in voter registration and turnout between covered and uncovered jurisdictions rendered the coverage formula unconstitutional. The Court’s decision in *Shelby County* did not alter the substantive standards governing the granting of preclearance by the Justice Department or the U.S. District Court for the District of Columbia. Hence, the statutory requirements and case law applying Section 5 will remain applicable if Congress corrects the coverage formula.

The bail-in provision of Section 3 of the Act permits a court, after finding a specific constitutional violation of voting rights, to direct that the locality may not implement voting changes until the court approves the new requirements or practices. 52 U.S.C. § 10302(c). The Section 3 remedy provides flexibility as a court can order a jurisdiction to preclear voting changes for a limited period of time, rather than indefinitely, and can target the preclearance obligation to specific types of voting changes. However, the authority to order a “bail-in” depends on a finding of a violation of the Fourteenth or Fifteenth Amendments to the U.S. Constitution, which requires proof of intentional discrimination. That requirement imposes a much more difficult burden than proof that a voting change will have the effect of denying or abridging the right to vote on account of race or color.

### 16-3.01 Scope of Section 5

The threshold determination in any potential preclearance matter is whether the proposed change is subject to preclearance at all. The scope of Section 5 is “expansive within its sphere of operation,” and all “standard[s], practice[s], or procedure[s] with respect to voting” must be precleared. *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 112 S. Ct. 820 (1992). Interpreting this standard, the Supreme Court has held that “Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.” *Allen v. State Bd. of Elections*, 393 U.S. 544, 89 S. Ct. 817 (1969). Accordingly, Section 5 is given its broadest possible scope.

In cases considering the reach of Section 5, the Supreme Court has identified four broad categories of changes that must be precleared. They are: (1) changes to the manner of holding elections, (2) changes to the composition of the electorate, (3) changes in candidacy requirements and qualifications, and (4) changes to elected offices. See *Presley*, 502 U.S. at 502-03 (“Our cases . . . reveal a consistent requirement that changes subject to § 5 pertain only to voting. Without implying that the four typologies exhaust the statute’s coverage, we can say . . . cases fall within one of . . . four factual contexts.”). In its Section 5 regulations, the Justice Department lists numerous examples of changes affecting voting that are subject to preclearance requirements. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. § 51.13. Preclearance letters from the Justice Department provide additional examples of election changes that are subject to Section 5 requirements. An allegation that involves an act or omission taken pursuant to pre-established laws is not a “change” that is covered by Section 5. *White-Battle v. Democratic Party of Va.*, 323 F. Supp. 2d 696 (E.D. Va. 2004), *aff’d*, 134 F. App’x 641 (4th Cir. 2005); *Moseley v. Price*, 300 F. Supp. 2d 389 (E.D. Va. 2004), *aff’d*, 106 F. App’x 873 (4th Cir. 2004).

#### 16-3.01(a) Changes in the Manner of Holding Elections

Changes to the “manner of election” come within the purview of Section 5. For example, according to the Supreme Court, the relative accessibility, prominence, facilities, and location of polling places affect citizens’ ability to vote. Thus, these changes must be precleared, and preclearance will be denied where the new polling place is too far away from voters protected by the Voting Rights Act, or is in a location to which minority voters may be reluctant to go. See, e.g., *Perkins v. Matthews*, 400 U.S. 379, 91 S. Ct. 431 (1971); see also Letter from Bill Lann Lee, Acting Assistant Attorney General, to Benjamin W. Emerson (Oct. 27, 1999) (change in location of polling place from a hunt club with predominantly black membership located in area where majority of black residents lived to a church with predominantly white membership located at opposite end of precinct about twelve miles away was not precleared because the new polling place would have imposed a significantly greater hardship on black voters than white voters).

Additionally, in *Allen v. State Board of Elections*, 393 U.S. 544, 89 S. Ct. 817 (1969), the Court held that changes to write-in voting procedures were changes with respect to voting that must be submitted for Section 5 preclearance. The Attorney General also has required the submission of proposed changes in absentee voting procedures. See Letter from Bill Lann Lee, Acting Assistant Attorney General, to Robert A. Butterworth, Attorney General of Florida (Aug. 14, 1998). In addition, changes to the date of an election must be precleared. See *Lucas v. Townsend*, 486 U.S. 1301, 108 S. Ct. 1763 (1988); see also Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to J. Lane Greenlee, Esq. (Dec. 11, 2001) (town’s attempt to cancel general election must be submitted under Section 5).

#### 16-3.01(b) Changes to the Composition of the Electorate

The changes perhaps most commonly associated with Section 5 preclearance are redistricting plans, as they potentially change the racial composition of the group of citizens

who may vote for a given office. *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 101 S. Ct. 2224 (1981) (county commission redistricting plan); *Connor v. Waller*, 421 U.S. 656, 95 S. Ct. 2003 (1975) (Mississippi state legislative redistricting). Even redistricting plans ordered into effect by a state court are subject to the preclearance requirement. *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429 (2003) (congressional redistricting plan fashioned by state court subject to Section 5).

Boundary changes such as annexations and de-annexations also require preclearance because they determine who votes in municipal elections, thus potentially diluting the voting strength of voters who enjoyed the franchise before expansion or contraction of the territory. *Perkins v. Matthews*, 400 U.S. 379, 91 S. Ct. 431 (1971); *see also City of Pleasant Grove v. United States*, 479 U.S. 462, 107 S. Ct. 794 (1987) (holding that even annexation of uninhabited land must be submitted for Section 5 preclearance).

#### **16-3.01(c) Changes in Candidacy Requirements and Qualifications**

Changes in filing deadlines must be submitted under Section 5, *see NAACP v. Hampton Cnty. Election Comm'n*, 470 U.S. 166, 105 S. Ct. 1128 (1985) (statement of candidacy) and *Hadnott v. Amos*, 394 U.S. 358, 89 S. Ct. 1101 (1969) (designation of campaign committee), as must changes to a state or locality's voter registration system. *Compare Young v. Fordice*, 520 U.S. 273, 117 S. Ct. 1228 (1997) (preclearance not required to implement the compulsory elements of the National Voter Registration Act system) *with* Letter from Isabelle Kantz Pinzler, Acting Assistant Attorney General, to Sandra M. Shelson, Special Assistant Attorney General for the State of Mississippi (Oct. 22, 1997) (preclearance is required to implement discretionary elements of the National Voter Registration Act).

Additionally, changes to, or the implementation of, rules restricting government employees' ability to campaign for or hold elected political office must be precleared. *See Dougherty Cnty. Bd. of Educ. v. White*, 439 U.S. 32, 99 S. Ct. 368 (1978).

#### **16-3.01(d) Changes to Elected Offices**

Some local government rules and regulations regarding elected offices and those who already hold them are subject to preclearance. For instance, the imposition of or changes to a term limits provision must be submitted, as it potentially restricts the field of candidates from which voters choose their representatives. *See* Letter from Bill Lann Lee, Acting Assistant Attorney General, to Ann Littrell, Douglass, Arizona City Attorney (June 23, 1998).

Clearly, changes to the system of representation or the method of determining the election of candidates are changes with respect to voting that must be precleared. These include:

- Changes to at-large elections. *Allen v. State Bd. of Elections*, 393 U.S. 544, 89 S. Ct. 817 (1969); *Cnty. Council of Sumter Cnty. v. United States*, 555 F. Supp. 694 (D.D.C. 1983).
- Changes to a council-administrator system. *Horry Cnty. v. United States*, 449 F. Supp. 990 (D.D.C. 1978).
- Changes to a majority vote requirement. *City of Monroe v. United States*, 522 U.S. 34, 118 S. Ct. 400 (1997) (mayoral elections); *City of Rome v. United States*, 446 U.S. 156, 100 S. Ct. 1548 (1980) (council elections).
- Changes to a numbered post system. *City of Lockhart v. United States*, 460 U.S. 125, 103 S. Ct. 998 (1983).

- Changes in whether officials are elected or appointed. *McCain v. Lybrand*, 465 U.S. 236, 104 S. Ct. 1037 (1984) (change from appointed county commissioners to elected city council); *see also Horry Cnty. v. United States*, 449 F. Supp. 990 (D.D.C. 1978) (denying any distinction between “state enactments which change a present method of electing public officials and enactments which result in electing public officials who were formerly appointed,” and holding both types of changes subject to federal scrutiny under Section 5).

While the Supreme Court and the Justice Department have taken a very expansive view of the scope of Section 5, some changes with respect to elected offices and officeholders do not have to be precleared. In *Presley v. Etowah County Commission*, 502 U.S. 491, 112 S. Ct. 820 (1992), the Supreme Court considered a new plan proposed by a county commission permitting just four of its six members to make all decisions regarding road maintenance and improvements. In addition, while current practice permitted each of the six members to control the use of road monies for his or her district, the new plan placed all road monies in a common fund controlled entirely by the four commission members. The Supreme Court held that these changes had no connection to voting, as they merely altered the powers of elected officials and the distribution of authority among them. Likewise, changes to the internal rules of procedure of a governing body are not subject to preclearance. *See DeJulio v. Georgia*, 290 F.3d 1291 (11th Cir. 2002) (Georgia General Assembly’s new requirement that local legislation be reported out of committee only after “local delegation” of legislators recommended passage was not subject to preclearance).

A “change” is not subject to Section 5 preclearance in limited situations where there was a “temporary misapplication of [a new] state law” that is subsequently treated as if the election change was never in force or effect at all. *Riley v. Kennedy*, 553 U.S. 406, 128 S. Ct. 1970 (2008). In *Riley*, the Court held that Section 5 preclearance was not required where Alabama Supreme Court reinstated the practice of gubernatorial appointments to fill vacancies on county commission, after it invalidated a state law providing for special elections to fill such vacancies. Although the new state law had been precleared and a special election had been held during the pendency of the state court challenge to the law’s validity, the state law was treated as a nullity and therefore the return to gubernatorial appointments was not treated as a “change” but rather a continuation of the preexisting method of filling such vacancies.

### 16-3.02 General Standards for Approval

To grant preclearance, the District Court for the District of Columbia must find that an election change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or membership in a language minority group. 52 U.S.C. § 10304. The Attorney General applies the same legal standard. 28 C.F.R. §§ 51.1 and 51.52.

In practice, political jurisdictions almost always seek preclearance by the Justice Department because the court route is much slower and more expensive. From 1965 to 2007, jurisdictions submitted over 440,000 voting changes to the Justice Department for its review, while they filed only sixty-eight suits for preclearance. Report of the Citizens’ Commission on Civil Rights 34 (2007).

The burden of proof is on the locality to show the absence of both racially discriminatory purpose and effect. 28 C.F.R. § 51.52(a). The Supreme Court has noted that proving the absence of discriminatory purpose and effect is a “difficult burden” because “it is never easy to prove a negative.” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 117 S. Ct. 149 (1997) (“*Bossier I*”). Given that the locality bears the burden of proof,

the Justice Department may deny preclearance where the evidence is “conflicting” and the Attorney General is “unable to determine that the change is free of discriminatory purpose and effect.” 28 C.F.R. § 51.52.

Preclearance under Section 5 does not bar a subsequent court action by the Attorney General or other parties under Section 2 of the Voting Rights Act, which prohibits “vote dilution.” 28 C.F.R. § 51.55(b).

The 2006 Reauthorization Act made significant changes to the legal standard applicable to the preclearance determination by overriding two decisions of the U.S. Supreme Court that had restricted the Justice Department’s interpretation of the purpose and effect prongs of Section 5. The Justice Department has issued a guidance, Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470-7473 (Feb. 9, 2011), describing, among other things, the changes in the standard for Section 5 review.

### **16-3.03 Procedures for Submission to the Attorney General**

The Attorney General has adopted detailed regulations regarding the mechanics of submitting a request for preclearance. See Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. § 51.1 et seq.

If a submission is filed prematurely, the Attorney General will not consider it on the merits. 28 C.F.R. § 51.22. A redistricting plan or other election changes cannot be submitted prior to final enactment by a locality. *Id.* The Attorney General has sixty calendar days to interpose an objection to a redistricting plan, and that period ordinarily begins to run the day following receipt of the submission by the Justice Department. 28 C.F.R. § 51.9. If the submission is not complete, however, it does not start the sixty-day clock, and the Attorney General may request, within that period, any omitted information. Such a request postpones the running of the sixty days, which will then commence upon receipt of the locality’s response providing the requested information or stating that it is unavailable. 28 C.F.R. § 51.37. The Supreme Court has suggested that the Justice Department’s request for additional information must not be frivolous or unwarranted. See *Branch v. Smith*, 538 U.S. 254, 123 S. Ct. 1429 (2003) (upholding federal court injunction of state court plan because plan was not precleared prior to the state law deadline for qualification of candidates; delay in preclearance resulted from Justice Department request for more information that was not frivolous or unwarranted). While the Attorney General can again request further information, that request does not suspend the running of the sixty days. 28 C.F.R. § 51.37.

A locality may request “expedited consideration” of a preclearance request when it is necessary to implement a voting change within the sixty-day review period, 28 C.F.R. § 51.34, but it is generally very difficult to obtain such an expedited decision from the Justice Department. If the Attorney General interposes an objection, a locality may request reconsideration of that decision. 28 C.F.R. § 51.45.

If a locality fails to obtain preclearance from the Attorney General, it cannot implement the change unless it then obtains approval from the United States District Court for the District of Columbia. The consequences of failing to obtain preclearance of a redistricting plan can be particularly severe when a change of boundaries triggers the need to redistrict. In that situation, the voters within the annexed area are barred from participating in the municipal election. See *Halifax Voting Decision Confirmed*, *Gazette-Virginian*, Apr. 24, 2000 (county residents annexed during 1999 boundary adjustment barred from voting in May 2000 town election where Attorney General had not precleared new redistricting plan prior to election).



### 16-3.04 Elections Pending Preclearance

Where a locality fails to secure timely preclearance of a redistricting plan in advance of an upcoming election, it faces the question of what districts to use until a new plan has been approved. The Supreme Court provided guidance on that issue in *Perry v. Perez*, 565 U.S. 388, 132 S. Ct. 934 (2012). Texas, which had experienced an enormous increase in population, was required to redraw its electoral districts for the United States Congress and its state legislature to comply with the Constitution's one-person, one-vote rule. It promptly filed for preclearance of its new redistricting plans with the District of Columbia District Court but did not receive approval in time for upcoming elections. In a per curiam decision, the Supreme Court noted that in such a situation the existing plan usually remains in effect for an election until the new plan receives preclearance. However, if that plan is unconstitutional, as it was in Texas because of noncompliance with the one-person, one-vote requirement, then a federal district court is required to create an interim plan. If shifts in population are relatively small, the court should need to make only minor or obvious adjustments to the existing plan. However, if sweeping population changes require fundamental changes to the districts in the existing plan, the federal district court should look to the plan submitted for preclearance as the starting point for the interim plan, although it should be careful not to incorporate into the interim plan any legal defects in the new plan. Where a state's proposed plan faces challenges under the Constitution or Section 2 of the Voting Rights Act, a district court should still be guided by that plan, except to the extent those legal challenges are shown to have a likelihood of success on the merits.

The Court in *Perry* also stressed that the jurisdiction of the local federal district court to fashion an interim plan was limited by the exclusive jurisdiction of the District Court of the District of Columbia over the Section 5 preclearance process. It explained that the local district court should

[T]ak[e] guidance from a State's policy judgments unless they reflect aspects of the state plan that stand a reasonable probability of failing to gain § 5 preclearance. And by "reasonable probability" this Court means in this context that the § 5 challenge is not insubstantial. That standard ensures that a district court is not deprived of important guidance provided by a state plan due to § 5 challenges that have no reasonable probability of success but still respects the jurisdiction and prerogative of those responsible for the preclearance determination. And the reasonable probability standard adequately balances the unique preclearance scheme with the State's sovereignty and a district court's need for policy guidance in constructing an interim map.

*Id.* In applying these principles, the Court ruled, for example, that the district court erred in redrawing districts in the state's legislative plan in certain areas, where the court had made no determination that allegations of constitutional violations were even plausible. Also, it erred by drawing an interim plan that had only de minimis population variations, even though there was no claim that larger variations in the state's plan were unlawful.

### 16-3.05 Discriminatory Effect

A jurisdiction seeking preclearance bears the burden of demonstrating that the redistricting plan or other election change will not have the effect of denying or abridging the right to vote on account of race or color. The "effect" prong of Section 5 bars any redistricting plan or other election change that would lead to "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357 (1976). Stated differently, the effect prong of Section 5 "prevents nothing but backsliding," *Reno v. Bossier Parish School Board*, 528 U.S. 320, 120 S. Ct. 866 (2000) (*Bossier II*), and thus a locality is entitled to preclearance as long as a redistricting plan or other election change does "not increase the degree of discrimination against

blacks.” *City of Lockhart v. United States*, 460 U.S. 125, 103 S. Ct. 998 (1983). A plan that merely preserves “current minority voting strength” meets the requirements of Section 5. *Id.*

The practical test under *Beer* is whether the redistricting plan or other election change would “make members of such a group worse off than they had been before the change.” 28 C.F.R. § 51.54 (citing *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357 (1976)). As applied to redistricting plans, the *Beer* analysis generally focused on whether there would be a diminution in the number of majority-minority districts (those with at least a majority of black voters, for example) in which minority voters likely could elect candidates of their choice.

In *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498 (2003), the Supreme Court analyzed in detail the meaning of a minority group’s “effective exercise of the electoral franchise,” and it adopted a revised “totality of the circumstances” test. The Court stated that a redistricting plan must be examined as a whole, because the diminution of a minority group’s voting strength in one district may be offset by gains in voting strength in other districts. The relevant circumstances that must be considered include (i) the ability of minority voters to *elect* their candidates of choice, (ii) the extent of the minority group’s opportunity to *participate* in the political process, and (iii) the feasibility of creating a non-retrogressive plan.

Addressing the first factor, the Court explained that the “comparative ability of a minority group to elect a candidate of its choice” remains an important consideration, but it is not the dispositive or exclusive inquiry. *Id.* It held that a reduction in the number of “safe” districts—where it is highly likely that minority voters can elect their preferred candidates because the minority group has more than 50 percent of the voters—does not necessarily violate Section 5. Instead, a legislature may create a *greater* number of districts having a percentage of minority voters under 50 percent, but where it is likely—though not as likely as in districts with a supermajority—that minority voters will be able to elect candidates of their choice when forming a reliable coalition with voters from other racial groups.

With respect to the second factor, the Court held that the trial court should consider whether the plan adds or subtracts “influence districts” where minority voters may not be able to *elect* candidates of choice but can play a substantial role in the election. The *Georgia v. Ashcroft* decision provoked controversy because it sanctioned the granting of preclearance, in some circumstances, where a redistricting plan clearly reduced the ability of a minority group to elect its preferred candidates. In the 2006 Reauthorization Act, Congress expressly rejected the new totality of circumstances test in *Georgia v. Ashcroft* to the extent it relied upon “influence districts” as a justification for granting preclearance. A new subsection states that the purpose of Section 5 is to “protect the ability of . . . [minority] citizens to elect their preferred candidates of choice.” 52 U.S.C. § 10304(d). The House Report commented that retaining the *Georgia v. Ashcroft* standard “would encourage States to spread minority voters under the guise of ‘influence’ and would effectively shut minority voters out of the political process.” H.R. No. 478, 109<sup>th</sup> Cong. (2006). The purpose of the amendment was to restore the analysis set forth in *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357 (1976), and precedent that followed. Hence, voting changes that leave a minority group “less able to elect” a preferred candidate of choice “cannot be precleared under Section 5.” *Id.*

However, in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 135 S. Ct. 1257 (2015), the Supreme Court made clear that retrogression does not occur simply because the percentage of a minority’s majority is decreased. The Court held that Section 5 does not require a covered jurisdiction to maintain a particular numerical

minority percentage. Rather, Section 5 is satisfied if minority voters retain the ability to elect their preferred candidates, which can happen even if the majority percentage is reduced. Recognizing that a legislature faces difficulty in selecting a minority percentage that may place too many minority voters in a district, so that it has racially gerrymandered, or too few, so that it has caused retrogression, the Court stated that the legislature's plan should be upheld if there is a "strong basis in evidence" for the choice that is made. In *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. 253, 136 S. Ct. 1301 (2016), the Supreme Court avoided deciding whether preclearance concerns are still a compelling interest post-*Shelby County*, as *Shelby County* had not been decided when the redistricting commission acted. The Court did state that it was "proper" for the commission to consider compliance with § 5 to be a "legitimate state consideration."

### **16-3.05(a) "Benchmark" for Measuring Retrogression**

In making the retrogression determination, the Attorney General will compare the new redistricting plan or other submitted change to the voting practice or procedure in effect at the time of submission. 28 C.F.R. § 51.54(b). "Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Bossier I*, 520 U.S. 471, 117 S. Ct. 1491 (1997).

By regulation, 28 C.F.R. § 51.54, the Justice Department's retrogression analysis had historically compared the existing and new plans using only the most recent census figures, i.e., the benchmark for redistricting in 2001 was a locality's existing plan using its 2000 demographic characteristics, rather than population figures drawn from the 1990 Census upon which the existing plan was originally based. However, the Supreme Court in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498 (2003), held that in addition to the current census figures, it is also appropriate to evaluate how the new plan differs from the benchmark plan as originally enacted by the legislature. That is, in addition to comparing minority population percentages in the new districts versus existing districts using the most recent census figures, the population percentages should also be compared using the census figures applicable to the existing districts at the time the existing plan was drawn. The 2006 Reauthorization Act apparently did not override this ruling in *Georgia v. Ashcroft*. The manner in which the benchmark plan is identified was not specifically discussed in the House Report in connection with the amended wording. Notwithstanding *Georgia v. Ashcroft*, the Justice Department continued to take the position that the retrogression analysis should be based on a comparison of the benchmark plan and the proposed redistricting plan using only the "most current population data." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011).

If a covered jurisdiction has failed to obtain preclearance of a redistricting plan, it cannot serve as the benchmark under Section 5. *Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925 (1997). Likewise, if a court has determined that the existing plan is unconstitutional, it cannot serve as the benchmark for the new redistricting plan. *Id.* ("§ 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional"). In *Abrams*, the Supreme Court rejected the Justice Department's position that the unconstitutional plan could still serve as the benchmark for retrogression purposes, as long as it was "shorn of its constitutional defects." *Id.*

### **16-3.05(b) Examples of the Retrogression Analysis**

#### **16-3.05(b)(i) *Beer v. United States***

In *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357 (1976), the U.S. Supreme Court formulated the basic retrogression analysis. There, the 1961 city council plan contained five districts, of which one had a black majority of total population and a bare majority (50.2 percent) of black registered voters. The 1971 city council plan contained two districts with

a black majority of total population, with one of those containing a slightly higher (52.6 percent) majority of black registered voters. The district court concluded that the 1971 plan would have a discriminatory impact because it would likely under-represent black residents in proportion to their 34.5 percent share of the registered voters. The Supreme Court reversed, holding that a plan that “enhances the position” of black residents cannot be said to have the “effect” of abridging the right to vote.

**16-3.05(b)(ii) *Georgia v. Ashcroft***

While Congress rejected the “totality of the circumstances” test set forth in *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498 (2003), the decision by the lower court (the District Court for the District of Columbia) illustrates the retrogression analysis apparently endorsed by the 2006 Reauthorization Act. See *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D. D.C. 2002). In that case, the state senate plan was designed to “unpack” the most heavily concentrated majority-minority districts in the existing benchmark plan and to create a number of new coalitional and influence districts. According to the 2000 census, the new plan reduced by five the number of districts with a black voting-age population in excess of 60 percent, compared to the benchmark plan. Yet, at the same time, it increased the overall number of majority-black voting-age population districts by one, and it increased by four the number of districts with a black voting-age population of between 25 percent and 50 percent.

The district court held, however, that the new Georgia plan was retrogressive as to three senate districts because a lesser opportunity existed for minority voters to elect their candidates of choice, finding that black voting-age population in the three districts would be reduced from 60.58 to 50.31 percent, from 55.43 to 50.66 percent, and from 62.45 to 50.80 percent. Moreover, in all three of the districts, the percentage of black registered voters dropped to just under 50 percent. The total number of districts with black voting-age population over 55 percent decreased by four. *Id.* The district court further concluded that the retrogression in those three districts was not offset by gains in other districts. *Id.*

Therefore, the state plan technically increased the number of majority-minority districts by one. However, three of those districts retained a majority of black voting-age population by the narrowest of margins—less than 51 percent. Hence, the reductions in the percentages of black voting-age population had the practical effect of reducing the ability of minority voters to elect their preferred candidates. While the district court said that the mere fact of a decrease in black voting-age population was not dispositive of the preclearance question, it accepted the evidence presented by the Justice Department that the narrow percentages of black voting-age population were insufficient for black voters to elect their preferred candidates. *Id.*

**16-3.05(b)(iii) *City of St. Martinsville, La.***

An example of the Justice Department’s application of the retrogression analysis is an October 6, 1997 objection by the Attorney General to a redistricting plan for the five single-member districts used to elect council members for the City of St. Martinsville, Louisiana. According to the 1990 Census, black residents constituted 59 percent of the total population and 56 percent of the voting-age population. Under the existing election plan, three of the five districts had black population majorities of 70 percent or more. While the proposed plan included two districts with 97 percent and 86 percent black population, respectively, the Attorney General interposed an objection, because the third district contained only 59 percent black population, or a reduction in the black population percentage of thirteen percentage points which lessened “significantly the opportunity of black voters to elect candidates of choice in the district.” Letter from Justice Department to George W. McHugh (Oct. 6, 1997).

**16-3.05(b)(iv) Dinwiddie County Polling Place**

Another example of a finding of retrogressive impact by the Attorney General is a 1999 objection to the proposed location of a polling place in Dinwiddie County, Virginia. There, the board of supervisors approved a relocation of a polling place from the western portion of a rural voting precinct to its extreme eastern end. The precinct extended approximately twelve miles from one end to the other. The existing polling place was at a predominantly black hunt club while the new polling place was at a church with a predominantly white congregation. Noting that the black population was heavily concentrated in the western part of the precinct, the Attorney General concluded that the change would apparently “impose a significantly greater hardship on minority voters than white voters,” and that the County had provided no information showing that the polling place move “will not have this disparate impact.” Letter from Bill Lann Lee, Acting Assistant Attorney General, to Benjamin W. Emerson. (Oct. 27, 1999).

**16-3.05(b)(v) Other Voting Changes**

Several examples of objections to submissions involving voting changes other than redistricting plans or new polling places can be found on the Justice Department’s [website](#).

**16-3.05(c) Limitations of the Retrogression Standard**

In some circumstances, a redistricting plan will not violate Section 5 even though it results in retrogression in the usual sense in which that standard is applied.

**16-3.05(c)(i) Annexation**

The Supreme Court has adopted an exception to the normal retrogressive effect principles in the context of annexations or other changes of boundaries. Where a municipality annexes areas with a lower proportion of minority voters than in the existing city or town, the result is a percentage reduction in the black population. To avoid the invalidation of all annexations under the “effect” prong, the Court held that Section 5 would not be violated as long as the new election plan affords representation that fairly reflects minority voting strength as it exists in the post-annexation jurisdiction. *City of Richmond v. United States*, 422 U.S. 358, 95 S. Ct. 2296 (1975); see also 28 C.F.R. § 51.61(c). Hence, the new redistricting plan is not constrained by the plan used in the pre-annexation boundaries, but rather is measured against the post-annexation minority voting strength.

**16-3.05(c)(ii) Population Changes**

Some flexibility exists in the application of the retrogression standard when the demographic characteristics of a locality have changed for reasons other than an adjustment of boundaries. For example, the new census may show that the minority population has substantially decreased throughout all or portions of a locality, which may require a reduction in minority population in election districts, because of the limitations imposed by the constitutional one-person, one-vote requirement. The Department of Justice has recognized that such reductions in minority voting strength are “unavoidable” and would not violate Section 5. See Revision of the Procedures for the Administration of Section 5, Supplementary Information, 52 Fed. Reg. 486, 488 (Jan. 6, 1987).

In *Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925 (1997), the Supreme Court addressed a situation where Georgia went from ten to eleven authorized congressional seats because of its population increase as shown by the 1990 Census. A 1995 court-ordered plan was attacked on the basis that it had a retrogressive effect. The last valid redistricting plan was enacted in 1982 and contained one majority black district, or 10 percent of the ten districts. Under the court’s 1995 plan, however, only one of the eleven districts (9 percent) was majority black. Rejecting a claim that the plan was retrogressive, the Supreme Court commented that “[u]nder that logic each time a State with a majority minority district was allowed to add one new district because of population growth, it

would have to be majority minority. This the Voting Rights Act does not require.” *Id.* The ramifications of this holding are unclear. The Court found that the black population was not sufficiently compact to create a second majority black district, and thus, at least under those circumstances, a small percentage reduction in the number of majority black districts did not have an impermissible effect under Section 5.

#### **16-3.05(c)(iii) Constitutional Limitations**

As discussed in section 16-5, a redistricting plan, under some circumstances, can violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution if race was the predominant factor in drawing district lines, resulting in the subordination of traditional districting principles. *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993). Where an existing plan has been invalidated on the basis of such “racial gerrymandering,” the Department of Justice has stated that a replacement plan “might well require some reduction in minority voting strength [compared to the benchmark] in order to . . . address the . . . court’s constitutional concerns.” Letter from Department of Justice to John C. Henry (May 20, 1998).

This situation is illustrated by a request for preclearance involving a redistricting plan for Horry County, South Carolina. There, based on a *Shaw* claim, a federal district court invalidated a redistricting plan adopted after the 1990 Census. The locality adopted a new plan and submitted it for preclearance. The benchmark 1982 plan—the last legally enforceable plan—had one district with 50 percent black voting-age population. The new plan had one district with 44 percent black voting-age population and another with 43 percent, but none with black voting-age population as high as 50 percent. As a result, the Attorney General concluded that the new plan would have a retrogressive impact, because it would “greatly diminish” the ability of black voters to elect candidates of their choice.

The Justice Department recognized, however, that a reduction in minority voting strength “that is required by the United States Constitution does not violate Section 5.” It added that, in Horry County, some reduction in minority voting strength might be required, but the question was whether the new plan went “farther than is necessary to address . . . [the court’s constitutional] concerns.” While recognizing the need for some decrease in minority voting strength, it denied preclearance because it appeared that an alternate plan existed, containing a “reasonably compact” district (with 48 percent black voting-age population), which would reduce black voting strength to a lesser extent than the proposed plan.

The Justice Department employed a similar analysis in reviewing a new redistricting plan for the South Carolina Senate following the invalidation of the existing plan on the basis of a *Shaw* violation. See Letter from Department of Justice to Hon. John W. Drummond (Apr. 1, 1997).

Closely related to the preceding situation is one in which an election plan has never been challenged on *Shaw* grounds, but could have been. As a result of pressure from the Justice Department and the threat of suits under Section 2 of the Voting Rights Act, Virginia localities in the early 1990s frequently adopted redistricting plans with the greatest possible number of black majority districts, but without regard for traditional notions of compactness. Does the normal retrogression analysis apply where an existing plan has unconstitutional characteristics, but was never challenged on that ground?

In *Chen v. City of Houston*, 9 F. Supp. 2d 745 (S.D. Tex. 1998), *aff’d*, 206 F.3d 502 (5th Cir. 2000), the plaintiffs challenged the 1997 Houston redistricting plan as a racial gerrymander under *Shaw*. The City defended one district on the ground, among others, that alternative plans would have had a retrogressive effect on certain black majority districts. The plaintiffs argued that the prior 1995 plan was constitutionally



defective for the same reason and hence could not serve as the “benchmark” for Section 5 purposes. The district court disagreed, ruling that the 1995 plan was the benchmark, as a matter of law, because it had not been held unconstitutional and there was “no legal basis . . . to permit the review of plans that have become final and have been reviewed to the extent necessary by law.” *Id.* The court upheld the validity of the redistricting plan.

On appeal, the Fifth Circuit, while not specifically discussing the correct benchmark for retrogression purposes, ruled that the trial court erred in refusing to consider evidence that the earlier redistricting plan had been designed so that “race predominated over traditional districting concerns.” Nevertheless, the Court of Appeals concluded that the trial court’s error was harmless, and it affirmed the judgment, holding that the plaintiffs’ evidence failed to prove that race predominated over other factors when the earlier 1995 plan was adopted and when the new 1997 plan was approved. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000).

While the Supreme Court has not specifically addressed this issue, it seems highly unlikely that Section 5’s retrogression principle would be interpreted to require a locality to adopt a plan with geographically bizarre districts that disregard traditional districting principles solely to maintain the same number of majority black districts in the existing plan, which would have been invalidated if a *Shaw* claim had been brought. See *Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925 (1997) (indicating in dictum that the Section 5 retrogression principle does not require the drawing of a majority black district that is not reasonably compact and that disregards traditional districting principles, because such a district would be unconstitutional); see also Guinn, Chapman & Knechtel, *Redistricting in 2001 and Beyond: Navigating the Narrow Channel Between the Equal Protection Clause and the Voting Rights Act*, 51 BAYLOR L. REV. 225, 253 (1999) (“Surely, the Federal District Court in the District of Columbia would not insist that a political subdivision employ a benchmark that is constitutionally suspect”).

#### **16-3.05(c)(iv) No Incorporation of Section 2 into Section 5**

In 1987, the Department of Justice adopted a regulation allowing the Attorney General to object to a redistricting plan if it constituted a clear violation of Section 2. 28 C.F.R. § 51.55(b)(2). As discussed in section 16-4, Section 2 bars redistricting plans that are impermissibly “dilutive.” Generally speaking, vote dilution can occur in a locality where racial minority and majority groups tend to vote for different candidates, and the majority, by virtue of its size, is usually able to defeat the candidates preferred by the minority group. In that situation, if it is possible to draw a reasonably compact district in which the minority constitutes a majority, i.e., a “majority minority” district, a locality’s failure to include such a district may have the effect of minimizing or canceling out minority voting strength in violation of Section 2.

Thus, even if a new redistricting plan would not make minorities “worse off,” the Justice Department frequently took the position that it would deny preclearance if the locality rejected an alternative redistricting plan that would have created additional majority minority districts. Consequently, during the 1990 Census redistricting cycle, Virginia localities commonly adopted plans containing the maximum number of majority black districts.

In *Reno v. Bossier Parish School Board*, 520 U.S. 471, 117 S. Ct. 1491 (1997) (*Bossier I*), the Supreme Court rejected the Justice Department’s regulation, holding that a violation of Section 2 was not an independent reason to deny preclearance under Section 5. In *Bossier I*, the local school board had twelve members elected from single-member districts. None of the districts had a majority of black residents, and no black had ever won election to the board, even though black residents constituted 17.6 percent of the

voting-age population. Following the 1990 Census, the board adopted a new plan with 12 districts, which likewise contained no districts with a majority of black residents.

Since the minority group was no *worse off* under the new plan, there was no retrogression. The Attorney General objected, however, because the proposed plan “unnecessarily limited the opportunity for minority voters to elect their candidates of choice,” where an alternative plan existed that would have included two compact districts having a majority of black residents. The Supreme Court disagreed, concluding that vote dilution standards under Section 2 could not be incorporated into a Section 5 preclearance decision. To do so, the Court explained, would effectively “replace the standards for Section 5 with those for Section 2.” It stressed, though, that the Attorney General or a private plaintiff was free to initiate a Section 2 proceeding against the locality. In *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498 (2003), the Supreme Court held that the converse was also true—just because a plan would be considered valid under Section 2 did not mean that it was valid under Section 5.

*Bossier I* limited the scope of the Attorney General’s preclearance authority under the “effect” prong of Section 5. Its practical impact on Virginia localities, however, may not be that significant. Due to potential liability under Section 2, a locality must consider not only whether a redistricting plan will worsen the position of racial minorities, but also whether a failure to improve the position of such residents will impermissibly dilute their votes. In addition, evidence of vote dilution can be considered by the Attorney General when evaluating a locality’s compliance with the “purpose” prong of Section 5, as discussed below. The 2006 Reauthorization Act did not override this ruling in *Bossier I*.

### 16-3.06 Discriminatory Purpose

A “covered jurisdiction” also bears the burden of demonstrating that the redistricting plan does not have the “purpose” of denying or abridging the right to vote on account of race or color. In determining whether a locality has proven the absence of discriminatory purpose in adopting a redistricting plan, the Attorney General may look at a variety of factors originally enunciated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977), including:

- The impact of the plan, including whether it has a retrogressive effect or a dilutive impact;
- The historical background of the jurisdiction’s decision;
- The specific sequence of events leading up to the challenged decision;
- Departures from the normal procedural sequence; and
- The legislative or administrative history, especially any contemporary statements by members of the decision-making body.

*Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 117 S. Ct. 1491 (1997) (*Bossier I*). In its regulations, the Department of Justice has set forth in more detail the relevant considerations. See 28 C.F.R. §§ 51.57 to 51.59.

#### 16-3.06(a) What Is a Discriminatory Purpose?

A locality must demonstrate that its decision was not motivated by “any discriminatory purpose.” 52 U.S.C. § 10304(c) (emphasis added). The 2006 Reauthorization Act modified the language of Section 5 to nullify the Supreme Court’s restrictive interpretation of what constitutes a “discriminatory purpose” in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 120 S. Ct. 866 (2000) (*Bossier II*). In that case, the Supreme Court ruled that a discriminatory purpose, for purposes of Section 5, was limited to an “intent to regress,” that is, an intent to “worsen the position of minority voters.” Thus, preclearance could not be denied if a locality deliberately adopted a plan that would cause unlawful vote dilution under Section 2, as long as it was no worse than the existing redistricting scheme.

Until the decision in *Bossier II*, the Department of Justice took the view that the “purpose prong” of Section 5 went beyond an intent to retrogress and also prohibited the intentional *diluting* of the votes of racial minorities, which “may not be retrogressive but is unquestionably discriminatory and unconstitutional.” *Reno v. Bossier Parish School Board*, Rec. No. 98-405, Br. of Department of Justice. A simple example of these different views is shown by the facts in *Bossier II*. There, the *existing* plan for local school board elections did not contain any districts with a majority of black residents, and the *new* plan likewise contained no majority-black districts. Given that black residents were *no worse off*, there was no retrogression, and the school had no intent to worsen the position of black residents. Yet, with 17.6 percent black voting-age population in the locality, it was possible to draw a plan with two compact districts having a majority of black residents. The Attorney General objected to the new plan, concluding that the school board had a discriminatory purpose by deliberately rejecting the alternate plan that would have contained two black majority districts. In other words, when *Bossier* maintained the status quo, by sticking with zero majority black districts, the Attorney General inferred from all the circumstances a discriminatory purpose, because it had been possible to adopt a plan with two majority-black districts.

In a 1991 speech, the Assistant Attorney General for Civil Rights further explained the Justice Department’s position. “A discriminatory purpose means a design or desire to *restrict* a minority group’s voting strength, that is, the ability of that group to elect candidates of its choice, below the level that minority [group] might otherwise have enjoyed.” John R. Dunne, Assistant Att’y Gen. for Civil Rights, Remarks at National Conference of State Legislators (Aug. 13, 1991) (emphasis added).

The 2006 Reauthorization Act added a subsection that defines “purpose” in Section 5 to include “any discriminatory purpose.” 52 U.S.C. § 10304(c). The House Judiciary Committee made it clear that the reason for the new language was to reject the holding in *Bossier II* that the purpose prong of Section 5 was limited to an “intent to retrogress.” H.R. Res. 478, 109th Cong. (2006). Instead, *any* discriminatory purpose will bar preclearance. Such a finding can be based, in part, on a jurisdiction’s refusal to make a change that would have increased the number of majority black districts. See [Justice Department Section 5 Guidance, 76 Fed. Reg. 7470, 7471 \(Feb. 9, 2011\)](#) (“The single fact that a jurisdiction’s proposed redistricting plan does not contain the maximum possible number of districts in which minority group members are a majority of the population or have the ability to elect candidates of choice to office, does not mandate that the Attorney General interpose an objection based on a failure to demonstrate the absence of a discriminatory purpose. Rather, the Attorney General will base the determination on a review of the plan in its entirety.”)

#### **16-3.06(b) Practical Impact of 2006 Reauthorization Act**

The revival of the Department of Justice’s interpretation of a discriminatory purpose in the 2006 Reauthorization Act increased the burden on Virginia localities in seeking preclearance. During the 1990’s, the Justice Department interposed 151 objections solely on the basis of discriminatory purpose. Those objections represented 43 percent of all objections interposed. H.R. Res. No. 478, 109th Cong. (2006). By contrast, after the *Bossier II* decision in 2000, less than 1 percent of the Justice Department’s objections were based on the purpose prong alone. *Id.*

The return to a broadened definition of discriminatory purpose means that localities no longer have a “safe harbor” by adopting a non-retrogressive election plan. Instead, they must also demonstrate that an election plan has no discriminatory purpose, and a redistricting plan that underrepresents minority voters is one circumstance from which the Justice Department can infer a racially discriminatory intent.

### 16-3.07 Exemption from Section 5—"Bailout" Suits

In 1965, Congress provided for a limited method by which covered jurisdictions could exempt themselves from the preclearance requirements of Section 5. To obtain a so-called "bailout," a state had to file a declaratory judgment proceeding in the United States District Court for the District of Columbia and show that, during the preceding five years, it had not used a "test or device" for the purpose or, with the effect of, denying or abridging the right to vote on account of race or color.

As originally enacted, this method could not be used by any locality within a state that was entirely covered under Section 5; only the state itself could seek a bailout. Moreover, the state could not obtain an exemption if a racially discriminatory voting test or device had been used *anywhere in the state*. Virginia unsuccessfully sought a bailout in a declaratory judgment proceeding during the 1970s.

In 1982, Congress substantially revised the Voting Rights Act by permitting a "political subdivision" of a state to seek a bailout. In *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 129 S. Ct. 2504 (2009), the Supreme Court held that *all* political subdivisions subject to Section 5 preclearance requirements are eligible to file a bailout suit. It reversed a trial court decision that had limited the availability of bailout suits to those political subdivisions that conducted "registration for voting."

Under the amended Act, 52 U.S.C. § 10303(a), a locality must demonstrate that, during the *ten years* preceding the filing of the suit and during the pendency of the action:

- No test or device has been used to discriminate on account of race or color or membership in a language minority group;
- No final judgment has been entered determining that denials or abridgements of the right of vote have occurred anywhere with the locality;
- Federal examiners have not been assigned to the locality;
- The locality has submitted all voting changes for preclearance as required by Section 5;
- The Attorney General has not interposed an objection to a preclearance request and the United States District Court for the District of Columbia has not denied a request for approval of a voting change;
- The locality has eliminated procedures that inhibit or dilute equal access to the electoral process;
- The locality has made constructive efforts to eliminate intimidation and harassment of voters; and
- The locality has made other constructive efforts to further voting rights, such as expanding convenient registration opportunities and appointing minority persons as election officials.

As of April 2023, thirty-three counties and cities in Virginia had successfully bailed out from coverage under Section 5: the Counties of Amherst, Augusta, Bedford, Botetourt, Carroll, Craig, Culpeper, Essex, Frederick, Grayson, Greene, Hanover, James City, King George, Middlesex, Page, Prince William, Pulaski, Roanoke, Rappahannock, Rockingham, Shenandoah, Warren, Washington, and Wythe; and the Cities of Fairfax, Falls Church, Harrisonburg, Manassas Park, Salem, Williamsburg, Winchester, and the former City of Bedford. The Department of Justice consented to a declaratory judgment in each of those cases. See U.S. Department of Justice, Civil Right Division, [Section 4 of the Voting Rights Act, Jurisdictions Currently Bailed Out](#). A successful "bail-out" by one locality does not exempt a boundary change from the Section 5 preclearance process. For instance, an agreed upon change in the corporate limits of a city that has obtained a bail-out judgment

exempts that city from the preclearance requirement, but not the county whose electoral base is also modified by such a boundary change, unless the county has obtained its own bail-out judgment.

## 16-4 SECTION 2 OF THE VOTING RIGHTS ACT

Section 2 of the Voting Rights Act of 1965 was enacted to prohibit the “denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” Unlike Section 5, it applies nationwide. While historically Section 2 has applied to the “vote dilution” claims discussed extensively in section 16-4.02, the invalidation of Section 5 preclearance has resulted in claims being brought under Section 2 against generally applicable time, place, or manner voting rules. See *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. \_\_\_, 141 S. Ct. 2321 (2021).

As amended in 1982, Section 2 does not require proof that a challenged electoral scheme was intentionally adopted or maintained for a discriminatory purpose; instead, it is sufficient if the election practice has a discriminatory result. *Allen v. Milligan*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 1487 (2023) (Kavanaugh, J., concurring in all but Part III-B-1) (“[A]s this Court has long recognized—and as all Members of this Court today agree—the text of § 2 establishes an effects test, not an intent test.”). Plaintiffs will still seek to prove purposeful discrimination even though it is tougher to prove as it implicates broader remedies than a discriminatory impact violation. “While remedies short of invalidation may be appropriate if a provision violates the Voting Rights Act *only* because of its *discriminatory effect*, laws passed with *discriminatory intent* inflict a broader injury and cannot stand.” *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (emphasis in original). Unlike with Section 5 preclearance standards, it is the plaintiff’s burden to show that a state voting rights law was enacted with a discriminatory intent or purpose and there is a presumption of legislative good faith. The allocation of the burden of proof and the presumption are not changed by a finding of past discrimination. *Abbott v. Perez*, 585 U.S. \_\_\_, 138 S. Ct. 2305 (2018).

### 16-4.01 Section 2 Challenges to Time, Place, or Manner Voting Rules

In 2021, the Supreme Court decided its “first § 2 time, place, or manner case” in *Brnovich v. Democratic National Committee*, 594 U.S. \_\_\_, 141 S. Ct. 2321 (2021). In a 6-3 decision, the Court upheld two Arizona laws against the plaintiffs’ challenge under Section 2 of the VRA. The Arizona laws at issue (1) provided that in-person votes cast in the wrong precinct would not be counted and (2) prohibited persons other than a postal worker, elections official, caregiver, family member, or household member from collecting a voter’s early ballot. Data from the 2016 election showed that a little over 1 percent of Hispanic voters, 1 percent of black voters, and 1 percent of Indian voters cast votes outside of their precincts, while around 0.5 percent of nonminority voters cast votes outside of their precincts. There was no statistical data regarding the effects of the ballot-collection limitation; however, there was trial testimony that the limitation made voting harder for Indians on remote reservations. Under the totality of the circumstances, the Court concluded that these laws did not violate Section 2. They did not impose more than the usual burdens of voting, the State had valid interests in their enforcement, and the Court observed that the State’s voting laws “generally make it quite easy for residents to vote.” The Court also rejected a disparate-impact test (such as that used in cases under Title VII of the Civil Rights Act and under the Fair Housing Act) and a least-restrictive-means test as to the State’s interests in the legislation at issue.

This was the Supreme Court’s “first foray” into the area of Section 2 challenges to generally applicable time, place, or manner voting rules, and the Court declined to announce a “test” to govern all such claims. *Id.* A variety of different tests were proposed by the parties, amici curiae, and the lower courts. *Id.* (“All told, no fewer than 10 tests

have been proposed.”) However, the Court did “identify certain guideposts,” *id.*, and recognized several (nonexhaustive) circumstances to be considered in the totality:

1. the size of the burden imposed by a challenged voting rule;
2. the degree to which a voting rule departs from what was standard practice when Section 2 of the VRA was amended in 1982, and the degree to which a challenged rule has a long pedigree or is in widespread use in the United States;
3. the size of any disparities in a rule’s impact on members of different racial or ethnic groups;
4. the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision; and
5. the strength of the State interests served by a challenged voting rule.

*Id.* As the *Gingles* factors “grew out of and were designed for use in vote-dilution cases,” the Court considered some of them “plainly inapplicable in a case involving a challenge to a facially neutral time, place, or manner voting rule.” *Id.*<sup>14</sup> The Court acknowledged that all *Gingles* factors are among the totality of circumstances to be considered in a Section 2 case; however, the relevance of some may be “much less direct” outside of the vote-dilution context. *Id.*

It remains to be seen whether or how *Brnovich* informs lower courts’ decisions on Section 2 challenges to generally applicable time, place, or manner voting rules, broadly; however, several pre-*Brnovich* cases are surveyed below.

The Fourth Circuit invalidated as purposefully discriminatory North Carolina’s facially neutral voting restrictions regarding photo IDs, early voting, same-day registration, out-of-precinct voting, and preregistration. Relying heavily on the *Arlington Heights* factors for determining legislative purpose, see section 16-3.06, the Fourth Circuit held in *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) that a discriminatory purpose motivated the enactment of the challenged voting provisions based on (1) the state’s historical background of racial discrimination, (2) the “rush through the legislative process” to enact the restrictions immediately after the *Shelby County* decision, (3) the legislative history that revealed that members of the General Assembly sought racial data that showed that blacks disproportionately lacked acceptable IDs and disproportionately used the other voting services, and (4) the impact of the restrictions on minority voters. The court found that the state failed to demonstrate that it would have enacted the restrictions absent the discriminatory purpose, holding that the state’s reasons must survive more than a rational

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<sup>14</sup> The Court elaborated: “Factors three and four concern districting and election procedures like ‘majority vote requirements,’ ‘anti-single shot provisions,’ and a ‘candidate slating process.’ Factors two, six, and seven (which concern racially polarized voting, racially tinged campaign appeals, and the election of minority-group candidates) have a bearing on whether a districting plan affects the opportunity of minority voters to elect their candidates of choice. But in cases involving neutral time, place, and manner rules, the only relevance of these and the remaining factors is to show that minority group members suffered discrimination in the past (factor one) and that effects of that discrimination persist (factor five).” *Id.* (footnotes and citations omitted).



basis test when there has been a showing of discriminatory purpose. The court held that complete invalidation of the restrictions was the only remedy.<sup>15</sup>

Similarly, a Texas suit filed by the Justice Department in 2013, consolidated with three other actions, challenged a new requirement that voters display one of a limited number of qualified photo identifications to vote. In *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), the trial court ruled that the Texas voter ID requirements violated Section 2 because they interacted with social and historical conditions in Texas to cause an inequality in the electoral opportunities enjoyed by African Americans and Hispanic voters as compared to white voters. The court also found the law created an unconstitutional burden on the right to vote, was enacted with an unconstitutional discriminatory purpose, and constituted an unconstitutional poll tax. The Supreme Court denied the application to vacate the Fifth Circuit’s stay of the district court’s order. *Veasey v. Perry*, 574 U.S. 951, 135 S. Ct. 9 (2014) (mem.). On appeal en banc, the Fifth Circuit also applied the *Arlington Heights* factors in addressing the purposeful discrimination claim. While it held that the district court had erred in its reliance on historical discrimination, finding little evidence of “relatively recent” discrimination, the court suggested many factors that the district court could use on remand to find a discriminatory purpose. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

Prior to its decision on the merits in *McCrory*, the Fourth Circuit preliminarily enjoined North Carolina’s law that eliminated same-day registration and prohibited counting out-of-precinct ballots as violating Section 2. *League of Women Voters v. North Carolina*, 769 F.3d 224 (4th Cir. 2014). Unlike its decision on the merits which focused on discriminatory purpose, the court’s injunction decision was based on whether the plaintiffs were likely to prove discriminatory effect. The Fourth Circuit stated that a Section 2 vote denial claim consists of two elements. First, 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. Second, 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. In assessing both elements, courts should consider the totality of the circumstances. The Fourth Circuit held that the “totality of the circumstances” includes an examination of whether the changes will worsen the position of minority voters in comparison to the preexisting voting practice—in essence, a Section 5 retrogression analysis. The appellate court dismissed the district court’s finding that the prohibition on counting out-of-precinct ballots would have a “minimal” effect on minority voters, holding that “what matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that ‘any’ minority voter is being denied equal electoral opportunities.” The court found that both electoral mechanisms were originally intended to increase voter participation, that both practices were disproportionately used by African Americans, and that the disproportionate impact of the prohibition of such electoral

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<sup>15</sup> Although it addressed a preliminary injunction premised only on constitutional claims, note that North Carolina’s 2018 voter-identification law came before the Fourth Circuit in *North Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). The Fourth Circuit reversed the preliminary injunction against the law’s enforcement, holding that the district court erred in imputing to the 2018 voter-ID law the legislature’s discriminatory intent in enacting the 2013 voting legislation invalidated in *McCrory*: *McCrory* “did not ‘freeze North Carolina election law in place.’” *Id.* (quoting *McCrory*). The district court had “considered the North Carolina General Assembly’s past conduct to bear so heavily on its later acts that it was virtually impossible for it to pass a voter-ID law that meets constitutional muster” and, in so doing, “improperly reversed the burden of proof and disregarded the presumption of legislative good faith.” *Id.* Because the evidence in the record failed to meet the challengers’ burden, the Fourth Circuit reversed the grant of a preliminary injunction.

mechanisms on African Americans meant that plaintiffs were likely to succeed on the merits of a Section 2 claim.

Adopting the two-part elements of the Fourth Circuit’s *McCrory* injunction holding, the en banc Fifth Circuit also held that Texas’s voting restrictions had had a discriminatory effect on minority voting rights. *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2106) (en banc).

Prior to the Fourth Circuit’s *McCrory* decision but after *League of Women Voters* was decided, a federal district court in Virginia upheld the state’s voter ID law, finding that it did not have a discriminatory impact on minority voters. Using the two elements outlined in *League of Women Voters*, and factoring in the *Gingles* factors (see section 16-4.02(a)), the court found that while the ID requirement added a “layer of inconvenience” to the voting process, it appeared to burden all voters equally. It also found that while Virginia had a history of past discriminatory voting practices, in recent years Virginia had taken “aggressive steps” to eliminate voting barriers. *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577 (E.D. Va. 2016). Although addressed in the context of violations of the Fourteenth and Fifteenth Amendments and not as a Section 2 purposeful discrimination claim, the district court also held that there was insufficient evidence of an intent to discriminate against minority voters in adopting the voter ID law. *Id.* The Fourth Circuit unanimously affirmed the decision of the district court in *Lee v. Virginia State Board of Elections*, 843 F.3d 592 (4th Cir. 2016). The Fourth Circuit reached the same conclusions as the district court and found that requiring voter ID engendered faith in the electoral process and helped prevent voter fraud. Furthermore, Virginia took a number of steps to mitigate any burdens or inconveniences the law may place on voters, including allowing a broad spectrum of IDs and expired IDs, providing ID cards for free, and allowing three days for voters to cure the lack of an ID through a provisional ballot system. The Fourth Circuit found that Virginia’s law does not pose an undue burden on minority voting, and there was no evidence of such intent. Thus, the law was constitutional.

### 16-4.02 Section 2 Vote Dilution Challenges

Section 2 is the basis for so-called “vote dilution” claims, which refers to the impermissible discriminatory effect that a multi-member or other districting plan has, in certain circumstances, when it operates to “cancel out or minimize the voting strength of racial groups.” A districting scheme can have that result where minority and majority voters consistently prefer different candidates, and the majority, by virtue of its numerical superiority, regularly defeats the candidates preferred by minority voters. Vote dilution can occur either when an election system submerges black voter concentrations within an at-large or multi-member district or when it “fractures” the black voter concentrations into several single-member districts.

A redistricting plan can violate Section 2 where the “totality of the circumstances” reveals that

the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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.

52 U.S.C. § 10301(b). The extent of minority electoral success is one circumstance that can be considered, but “nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.” *Id.*

As applied in a practical sense to election district lines, Section 2 addresses the basic issue of when a locality is required to enhance the voting strength of a minority

group. That is, when must the locality create an election district in which a minority group has a majority of the voters?

#### **16-4.02(a) Necessary Preconditions—*Thornburg v. Gingles***

In 1986, the Supreme Court first interpreted the amended Section 2 in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), which involved a challenge to the 1982 legislative redistricting plan for the North Carolina Senate and House of Representatives. In this case the Supreme Court established that a plaintiff bringing a claim under Section 2 of the VRA must establish the existence of the following three “necessary preconditions” for a plaintiff to state a plausible case of vote dilution in multi-member districts:

1. That the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”;
2. That the minority group is “politically cohesive”; and
3. That the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances—usually to defeat the minority’s preferred candidate.

*Id.* These preconditions are evidentiary matters, separate from the question of whether the plaintiffs have standing. *Holloway v. City of Va. Beach*, No. 2:18-CV-69 (E.D. Aug. 17, Va. 2020) (holding African American plaintiffs have standing and may put on evidence of a minority coalition of Blacks, Hispanics, and Asians to meet *Gingles* preconditions).<sup>16</sup>

The U.S. Supreme Court has also held that state-defendants that claim they justifiably used race to draw redistricting lines to avoid violating the VRA must establish the same prerequisites. *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455 (2017). State-defendants can only use race as a predominant factor in drawing redistricting lines if they meet strict scrutiny, which requires a compelling interest as discussed in section 16-5.01(b). The Supreme Court has recognized that states may demonstrate such a compelling interest where they have “a strong basis in evidence” or “good reasons” to believe that the VRA requires them to take action to avoid violating the Act. See, e.g., *Legislative Black Caucus v. Alabama*, 575 U.S. 254, 135 S. Ct. 1257 (2015).

However, in *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455 (2017), the Court held that for a state-defendant to meet that “strong basis in evidence” or “good reason” standard when claiming consideration of race was necessary to avoid violating the VRA, the state, like a plaintiff, must establish the three *Gingles* preconditions. Only if a defendant can establish these prerequisites can it make the requisite threshold showing that “the minority [group] has the potential to elect a representative of its own choice” and that “racially polarized voting prevents it from doing so in the district as actually drawn because it is ‘submerg[ed] in a larger white voting population’” (alteration in original). In *Cooper*, African Americans had made up less than 50 percent of the voting population for years but still unwaveringly elected their preferred candidates. Thus, the Court found that North Carolina had not established the third *Gingles* precondition: “white-bloc voting.” Without doing so, the Court held that the state’s defense that it used race to avoid Section 2 liability necessarily failed.

The same three requirements also must be met when challenging single-member districting schemes. See *Grove v. Emison*, 507 U.S. 25, 113 S. Ct. 1075 (1993). The Supreme Court has rejected arguments that “the text of § 2 does not apply to single-member redistricting” and that “§ 2 as applied to redistricting is unconstitutional under

<sup>16</sup> For a full discussion of the *Holloway* litigation, see section 16-4.02(d)(i).

the Fifteenth Amendment.” *Allen v. Milligan*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 1487 (2023) (affirming three-judge court’s holding that Alabama’s 2021 redistricting plan for its seven U.S. House of Representatives seats violated Section 2 by failing to create a second majority-minority congressional district). When applied to a claim that single-member districts dilute minority voting strength, *Gingles* requires proof that it is possible to create “more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.” *Johnson v. De Grandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994). In drawing a new election plan of single-member districts, a jurisdiction may eliminate an existing minority “opportunity district” by creating an offsetting opportunity district in a different area. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006). The offsetting district, however, must itself meet the requirements to establish a Section 2 vote dilution claim. For instance, if the alternative district is not “geographically compact,” as required by the first *Gingles* precondition, then no Section 2 violation has been established, and such a district does not compensate for dismantling another district. *Id.*; cf. *Abbott v. Perez*, 585 U.S. \_\_\_, 138 S. Ct. 2305 (2018) (three-judge court erred in finding three of four challenged districts unlawful, including where court incorrectly held that Texas created an opportunity district for those lacking a Section 2 right—but not those having a Section 2 right—even though non-Latino voters tended to support the same candidates as the majority of Latinos in the district).

If the plaintiffs cannot meet these requirements, they cannot “pass the summary judgment threshold” for a vote dilution claim. At the same time, proof of the *Gingles* preconditions is not sufficient, by itself, to establish Section 2 liability. A court must also examine the “totality of the circumstances” to determine whether the minority group has less opportunity to elect representatives of its choice. Other factors that a court should consider include:

1. The extent of any history of official discrimination that touched on the right to register, to vote, or participate in the election process;
2. The extent to which voting is racially polarized;
3. The extent to which the locality had devices (such as unusually large election districts or majority voting requirements) that may enhance the opportunity for discrimination;
4. Whether minorities have been denied access to a candidate slating process;
5. The extent to which minorities bear the effects of discrimination in education, employment, and health; and
6. Whether political campaigns have been characterized by overt or subtle racial appeals.

The totality-of-the-circumstances analysis should not narrow into an overly-mechanical assessment of whether “the State’s enacted plan contains fewer majority-minority districts than [a hypothetical] race-neutral benchmark.” *Allen v. Milligan*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 1487 (2023). “Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality.” *Id.*

Although the *Gingles* factors do not require proportionality, 52 U.S.C. § 10301(b), proportionality may correlate with a districting plan that is lawful under Section 2. If the minority group constitutes an effective voting majority in a number of districts

substantially proportional to their share in the population, then the minority group may have an equal opportunity to elect representatives of their choice, and the districting scheme may not cause vote dilution. See section 16-4.02(d).

While *Gingles* provided the basic framework for analyzing a vote dilution claim, the Supreme Court is still clarifying the three-prong test. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Court answered some questions left unresolved in *Gingles* and modified one of the three prongs. See sections 16-4.02(b)(i), 16-4.02(b)(ii), and 16-4.02(b)(iv). In *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009), the Supreme Court decided an important issue as to the first prong of *Gingles*—whether a Section 2 claim can be stated if a minority group constitutes less than a numerical *majority* in a single-member district. See section 16-4.02(b)(ii). Finally, in *Abbott v. Perez*, 585 U.S. \_\_\_, 138 S. Ct. 2305 (2018), the Court clarified, somewhat, the issues regarding viable opportunity districts.

### **16-4.02(b) Necessary Preconditions—First Prong**

#### **16-4.02(b)(i) What Constitutes a Majority?**

Under the first *Gingles* precondition, a minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a “majority in a single-member district.” The reason for this requirement is that, unless minority voters possess the “potential to elect representatives in the absence of the challenged structure or practice,” they cannot claim to have been injured by that structure or practice.” *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986). This requirement in *Gingles* places a constraint on vote dilution claims if a minority group is spread evenly throughout a geographical area or the minority group is simply too small. Since any districting system must satisfy the one-person, one-vote constitutional mandate of population equality among districts, a minority group cannot seek to satisfy this precondition by showing that it would constitute a majority in a district with a substantially smaller population than other districts.

Although requiring that a minority group must demonstrate that it can constitute a “majority,” in *Gingles* the Supreme Court declined to consider whether a Section 2 claim could be stated where a minority group is not sufficiently large to constitute a majority and therefore cannot “alter election results,” but where it nevertheless would have the ability to “influence” election results. However, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006) and *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009), the Supreme Court decided that a Section 2 violation cannot exist unless the minority group represents at least a numerical majority of the voting age population in a single-member district, even if it could elect its preferred candidate with the assistance of crossover votes from members of the majority group. See section 16-4.02(b)(ii).

In *Gingles*, the Supreme Court did not decide what population base—total population, voting-age population, or registered voters—should be used in examining the majority requirement. However, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Court ruled that citizen voting-age population was the preferred means of determining if a minority group represented a majority in a district. There, a new Texas congressional plan modified the boundaries of an existing majority-Latino district. While the proposed district retained a narrow Latino majority of voting-age population (just over 50 percent), the Latino share of citizen voting-age population was only 46 percent. The Supreme Court ruled that such a bare majority of *voting-age population* was insufficient to establish an “opportunity district” in the proposed plan under the first *Gingles* precondition. It explained that the relevant numbers had to consider citizenship, because “only eligible voters affect a group’s opportunity to elect candidates.” There was a significant difference between the Latino percentage of all voting-age population and the Latino citizen voting-age population. As a result, the Latino percentage



of those eligible to register and vote was less than 50 percent in the new district. In the absence of citizenship data, *Perry* suggests that voting-age population is the most relevant population base.<sup>17</sup> In a more recent decision, *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009), the Supreme Court ruled that a Section 2 violation cannot be stated if the minority group makes up less than 50 percent of the *voting age population* in a potential election district. The Court did not discuss whether the minority group must also represent at least 50 percent of the citizens of voting age within the district, but the distinction between citizens and non-citizens was not at issue in that case. Hence, it appears that the preference given to citizen voting age population in *League of United Latin American Citizens v. Perry* remains in place.

A related issue is whether a bare majority of minority residents automatically meets the first *Gingles* criterion or whether a higher percentage can be required based upon examining other factors, such as historical rates of voter registration and voter turnout that affect whether a district will provide minority voters with an “effective opportunity” to elect their preferred candidates.

In older Section 2 cases, many courts ruled that a minority group often must have “something more than a mere majority even of voting-age population in order to have a reasonable opportunity to elect a representative of their choice.” *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984). A “guideline” of 65 percent of total population or 60 percent of voting-age population was sometimes referred to in redistricting cases as the size of the minority population necessary to create a non-diluted district. That guideline was based on recognition by some courts that minorities typically have a higher proportion of their total population below voting age than whites and that historically, blacks have had lower voter registration and lower voter turnout. The 65 percent figure has been derived by “augmenting a simple majority with an additional 5 percent for young population, and 5 percent for low voter registration and 5 percent for low voter turnout.” This guideline was apparently intended to produce a district within which minority voters would typically constitute one-half of the actual voters who turn out on a given election day. For those courts that applied the “65 percent rule,” the evidence in a particular locality was evaluated to determine the “practical need for a super-majority.” It is doubtful that the 65 percent rule has much relevance at present, because of the recognition that racial bloc voting has lessened in most jurisdictions.

In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Supreme Court suggested that this *Gingles* criterion requires a minority group to have not only a mathematical majority within a proposed district, but at least the potential to have an *effective* voting majority. It is possible, however, that this requirement for proof of an *effective* voting majority is not part of this *Gingles* criterion, but rather is part of the ultimate “totality of the circumstances” determination that focuses on whether the minority group has less opportunity to elect its candidates than does the majority group. In *Perry*, Texas redrew a congressional district (District 23) where Latinos previously comprised 57.5 percent of the citizen voting-age population. The plaintiffs challenged the new district (with only 46 percent Latino citizen voting-age population), arguing that the elimination of District 23, as it previously existed, violated Section 2. The district court stated that the existing District 23 had not been an effective opportunity district, because Latinos had been unsuccessful in preceding congressional elections, and thus the changes to District 23 did not violate Section 2. The Supreme Court disagreed. It acknowledged that Section 2 required a showing that a minority group would constitute

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<sup>17</sup> In a splintered decision regarding whether a citizenship question could be included in the 2020 census, the Supreme Court found that the Secretary of Commerce’s rationale for the inclusion, that improved citizenship data would improve enforcement of the Voting Rights Act, was pretextual. *Department of Commerce v. New York*, 588 U.S. \_\_\_, 139 S. Ct. 2551 (2019).

an “effective voting majority” that provided a “real electoral opportunity.” While it “may be possible for a citizen voting-age majority to lack real electoral opportunity,” it concluded that the Latino majority in old District 23 did possess “electoral opportunity protected by § 2.”

In concluding that the district in question met the Section 2 requirements, the Court did not rely solely on the fact that Latinos had more than 57.5 percent of the population eligible to register and vote in the prior version of District 23. Instead, it undertook a fact-intensive appraisal to determine the likelihood that Latinos would be able to elect their preferred candidate if the district had not been modified. The Supreme Court pointed to increases in Latino voter registration and overall population, the near-victory of the Latino-preferred candidate in the last election, and the success of many Latino-preferred candidates for statewide offices in winning a majority of the votes in District 23. It also emphasized that the fact that Latinos had lost in prior elections did not resolve the vote dilution issue, because Section 2 provides “equality of opportunity, not a guarantee of electoral success.” The Supreme Court then concluded that the redrawing of District 23 had prevented the “immediate success of the emergent Latino majority” and that the Latino majority did possess “electoral opportunity protected by § 2.” In sum, it appears that *Perry* requires that a plaintiff demonstrate more than a mere mathematical majority of potential voters, by relying on other circumstances to prove that a proposed district is likely to furnish an “effective opportunity” for a minority group to elect the candidates of its choice.

#### **16-4.02(b)(ii) Coalition and Influence Districts**

In *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), the Supreme Court did not resolve the important issue of whether the majority requirement can be met by a minority group forming a “coalition” with another group sufficiently large either to *elect* minority-preferred candidates or to *influence* the election of a candidate who is not preferred by the minority group. In two recent cases, the Supreme Court rejected Section 2 claims based upon either type of coalition district.

In applying the *Gingles* requirements, the Supreme Court has described three different types of districts. A “majority-minority district” is one where a minority group composes a “numerical, working majority of the voting-age population.” *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009). At the opposite end of the spectrum is an “influence district,” where a minority group does not constitute a majority of the voting-age population and is not large enough to influence the election of its *preferred candidate*. However, such a district contains a minority group sufficiently large to help elect a candidate other than its *preferred candidate*. Finally, there is an intermediate type of district referred to as a “crossover district,” where minority voters also have less than a majority of the voting age population; however, in a crossover district, the minority population is large enough to elect its preferred candidate with help from voters of the majority group who cross over to support the minority’s preferred candidate. *Id.*

In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Supreme Court rejected the argument that a Section 2 violation can be based on a failure to draw an “influence district.” There, Texas broke apart a congressional district that had contained African Americans equal to 25.7 percent of the citizen voting-age population. Anglos represented 49.8 percent of the citizen voting-age population, while Latinos represented 20.8 percent. The plaintiffs contended that African Americans had “effective control” of the district and were sufficiently large to elect the candidate of their choice with the assistance of cross-over votes. Specifically, they pointed to the fact that African Americans represented 64 percent of the voters in the Democratic primary and that the Democratic nominee had won the general election for the preceding twenty-five years.



The Supreme Court ruled that there was no clear error in the trial court finding that African Americans could not elect their candidate of choice in the district, noting among other things that there had never been any opposition to an Anglo Democrat in the primaries during that period and that other expert testimony indicated that African Americans could not elect their preferred candidate. While the Court agreed that African Americans had “influence” in the original district, the Court in an opinion by Justice Kennedy ruled that mere influence was not sufficient to state a Section 2 claim. It explained that the opportunity “to elect representatives of their choice” in Section 2 requires “more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice.” *Id.*

In *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009), the Court held that a Section 2 claim cannot be based on a jurisdiction’s failure to use a “crossover district” in a redistricting plan. Specifically, it held that a racial minority group that constitutes less than 50 percent of the voting-age population in a potential election district cannot state a vote dilution claim under Section 2, even if it would have been able to *elect* its preferred candidate with the help of some voters of the majority group. Therefore, in view of *Bartlett*, the party asserting Section 2 liability must show by a preponderance of the evidence that the minority population is greater than 50 percent of the voting-age population.

In *Bartlett*, the North Carolina General Assembly created District 18 in the state house of representatives by including portions of two counties. While the division of the counties violated a “whole county” requirement of the North Carolina Constitution, the legislature concluded that Section 2 of the Voting Rights Act required the creation of District 18, because it would allow black voters, with 39.4 percent of the voting-age population, to elect a candidate of their choice with limited crossover voting by whites. The North Carolina Supreme Court disagreed, holding that Section 2 did not require the creation of such a district. Instead, the Court adopted a “bright-line rule” and explained that a minority group must constitute a “numerical majority” of the citizens of voting age within a proposed election district. The U.S. Supreme Court affirmed, noting that no federal court of appeals had held that Section 2 requires the creation of crossover districts. Among other things, the Court noted that there was a need for “workable standards” in applying Section 2 and that the 50 percent majority-minority requirement provided an “objective, numerical test” that would provide “straightforward guidance” to legislatures and courts. Further, it stated that a standard that mandated crossover districts would place courts in the “untenable position” of “predicting many political variables and tying them to race-based assumptions.” The Supreme Court placed two limitations on its decision in *Bartlett*. First, it observed that a “crossover district” should not be confused with a different type of coalition district. There can be situations where *two* minority groups form a coalition to elect the candidate of the coalition’s choice.<sup>18</sup> The Court said that it was not deciding the *Gingles* requirements applicable to Section 2 claims based on that type of district. Second, the Court noted that *Bartlett* did not involve any allegations of intentional discrimination by the North Carolina legislature, and it did not address whether allegations of deliberate discrimination would affect the *Gingles* requirements.

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<sup>18</sup> Neither the U.S. Supreme Court nor the Fourth Circuit has ruled on the question of whether a coalition of protected minority groups may bring an aggregated § 2 claim. However, in a decision later determined to be moot, a federal district court in Virginia held that “racial coalitions, claiming voter dilution based on race, can bring a § 2 claim because it is consistent with the language and purpose of the VRA as well as Supreme Court precedent.” *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015 (E.D. Va. 2021), *vacated as moot*, 42 F.4th 266 (4th Cir. 2022). The U.S. Courts of Appeal for the Second, Fifth, Ninth, and Eleventh Circuits have either accepted or assumed that such claims may be brought, the Sixth Circuit has denied such claims, and the First, Third, and Seventh Circuits have not expressly ruled on the question. *Id.*

**16-4.02(b)(iii) Size of the Governing Body**

In applying the first prong of *Gingles*, a critical issue is whether this test must be satisfied on the basis of the size of the existing governing body or whether the plaintiffs could demonstrate a majority in an election district based on an increase in the number of members of the governing body. *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986). For example, a minority group that represents 10 percent of the total population of a locality would not be able to demonstrate that it could constitute a majority in a single-member district where the governing body consisted of only three members. Due to the constraints of the one-person, one-vote principle, it would be mathematically impossible for such a 10 percent minority group to constitute a majority in one of three single-member districts that would contain roughly one-third of the locality's total population. On the other hand, if the minority group was sufficiently compact, it could constitute a majority in a single-member district, if the size of the governing body was expanded to ten members. It would then be very feasible to draw a single-member district in which one of the ten districts contained a majority of the minority group.

In *Holder v. Hall*, 512 U.S. 874, 114 S. Ct. 2581 (1994), a Georgia locality had a one-member governing body that performed all executive and legislative functions. The trial court ruled that if the "county commission" were increased from one to six members, then a "black majority safe district" could be created that would satisfy the first *Gingles* precondition. The Supreme Court reversed, holding that the size of a governing body is not subject to a Section 2 challenge.

Relying upon *Holder*, lower courts have held that the first prong of *Gingles* cannot be established by the plaintiffs proposing a single-member district plan that would require an increase in the existing size of the locality's governing body. *Lincoln v. City of Va. Beach*, No. 2:97CV756 (E.D. Va. Dec. 29, 1997) (unpubl.); *Concerned Citizens for Equality v. McDonald*, 63 F.3d 413 (5th Cir. 1995) ("[W]hen the existing size of the governmental body precludes a plaintiff from satisfying the first prong of *Gingles*, that plaintiff may not invoke hypothetical mutations and transfigurations of the existing political structure to circumvent that *Gingles* prerequisite."); *Hines v. Mayor of Ahuskie*, 998 F.2d 1266 (4th Cir. 1993) ("[A]ctionable vote dilution must be measured against the number of positions in the existing governmental body rather than some hypothetical model . . . .")

Similarly, if a plaintiff has demonstrated a Section 2 violation and the defendant then fails to propose a legally acceptable remedy, the court may fashion its own remedy, but in doing so, it "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." *Cane v. Worcester Cnty.*, 35 F.3d 921 (4th Cir. 1994). In *Cane*, the Fourth Circuit held that the district court erred in requiring a Maryland county to use an at-large "cumulative voting" plan, by which each voter could cast up to five votes for county commissioners, including the right to cast one or more of those votes for a single candidate. Since the county had expressed a clear preference for residency districts, the district court abused its remedial discretion by imposing a plan that would permit all five seats on the board to be filled by individuals living in the same general area of the county. *Id.*

**16-4.02(b)(iv) Compactness**

The first precondition of the *Gingles* test requires not only that a minority group be sufficiently large to constitute a majority in a single-member district but also, that it be "geographically compact." *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986). Without adding such a geographical limitation to the test, the determination of the existence of a voting majority would simply be a mathematical exercise. By imposing a compactness requirement in addition to a numerical requirement, the Supreme Court implicitly recognized the value of compactness and perhaps other neutral redistricting criteria that

are traditionally used in developing districting plans. For example, it has been noted that qualities of compactness and contiguity facilitate “political organization, electoral campaigning, and constituent representation.” *Karcher v. Daggett*, 462 U.S. 725, 103 S. Ct. 2653 (1983) (Stevens, J., concurring).

In *Gingles*, the Supreme Court offered little guidance as to how to measure whether a district was sufficiently compact. However, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Court clarified that this precondition refers to “the compactness of the minority population, not to the compactness of the contested district.” The analysis should take into account traditional districting principles such as “maintaining communities of interest and traditional boundaries.” Hence, a district that “reaches out to grab small and apparently isolated minority communities” is not reasonably compact.” *Id.*

In *League of United Latin American Citizens*, the Supreme Court ruled that District 25 in the Texas congressional plan was not compact for purposes of Section 2—even though the district lines were relatively smooth—because there was an “enormous geographical distance” separating two Latino communities within the district. In addition, the two communities had “divergent needs and interests” because of differences in socio-economic status, education, employment, health, and other characteristics. The Supreme Court rejected the argument that the compactness requirement was met simply because the combined voting strength of both Latino groups would allow a Latino-preferred candidate to win. Instead, for Section 2 purposes, it said that the minority population must be geographically compact, and it must have similar needs and interests.

Until the early 1990s, lower courts only rarely found that this criterion of *Gingles* had not been met, and it was readily apparent that traditional notions of compactness, in terms of symmetry or attractiveness, had largely been discarded. In 1993, as discussed in section 16-5, the Supreme Court imposed an additional compactness requirement in a series of cases dealing with “racial gerrymanders.”

In *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993) (*Shaw I*), the Supreme Court made it clear that, in general, a redistricting plan cannot ignore “traditional districting principles” and thereby create districts that “are so geographically bizarre that they are explainable only as an act of racial segregation.” This principle was based on the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, and it focuses on the compactness of the contested district rather than the minority population. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006).

In *Shaw I*, the Court invalidated North Carolina’s 12th Congressional District which it described as having the following features: it was 160 miles long and for much of its length no wider than the Interstate 85 corridor; it wound “like a snake”; of ten counties through which it passed, five were cut into three different districts; towns were divided; and at one point, it remained contiguous only because it intersected at a single point. *Id.*

#### **16-4.02(b)(v) Reasonable configuration**

Under the first precondition of the *Gingles* test, the size and geographic compactness of the relevant minority group are considered in reference to “a reasonably configured district.” *Allen v. Milligan*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 1487 (2023) (quoting *Wis. Legis. v. Wis. Elections Comm’n*, 595 U.S. \_\_\_, 142 S. Ct. 1245 (2022) (per curiam)). “A district will be reasonably configured . . . if it comports with traditional districting criteria, such as being contiguous and reasonably compact.” *Id.*

In *Allen v. Milligan*, for example, the plaintiffs presented alternative redistricting maps showing that Alabama’s 2021 U.S. House of Representatives redistricting plan

violated Section 2 by failing to create a second majority-minority congressional district. *Id.* These maps showed that Alabama could enact redistricting plans “contain[ing] two majority-black districts that comported with traditional districting criteria.” *Id.* The congressional districts in the plaintiffs’ maps were at least as compact as those in the State’s plan, none contained “tentacles, appendages, bizarre shapes, or any other obvious irregularities,” and they satisfied other traditional districting criteria such as population equality, contiguity, and respect for the boundaries of existing political subdivisions. *Id.* The Supreme Court rejected the State’s argument that the plaintiffs’ maps transgressed such traditional criteria by splitting a purported “Gulf Coast” community of interest, and the Court observed that the plaintiffs’ maps were reasonably configured in joining a community of interest consisting of black voters who shared a rural geography, historical background, and social and economic characteristics. *Id.* The Court also rejected the State’s argument that its plan should be preferred for its “core retention”—a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another.” *Id.* The Court “has never held that a State’s adherence to a previously used districting plan can defeat a § 2 claim,” and “§ 2 does not permit a State to provide some voters ‘less opportunity . . . to participate in the political process’ just because the State has done it before.” *Id.* (quoting 52 U.S.C. § 10301(b)).

The inquiry into reasonable configuration is necessarily comparative, but it should also be practical. A court “d[oes] not have to conduct a ‘beauty contest[]’ between plaintiffs’ maps and the State’s.” *Id.* (alteration in original).

#### **16-4.02(c) Necessary Preconditions—Second and Third Prongs**

*Gingles* recognized that racial bloc voting—or “racially polarized voting”—is a key element of a vote dilution claim. First, it is a means of ascertaining whether minority groups constitute a politically cohesive unit. Second, the existence of racially polarized voting must be considered in determining whether whites vote sufficiently as a bloc usually to defeat the minority’s preferred candidates. In a general sense, “racial polarization” exists whenever black voters and white voters vote for candidates of their own races.

While the evidence required to prove the existence of the second and third prongs of *Gingles* often overlaps, these criteria are nonetheless distinct. To determine whether a minority group is politically cohesive, a court must determine whether “a significant number of minority group members usually vote for the same candidates.” *Id.* The existence of racially polarized voting can sometimes establish political cohesiveness. However, political cohesion means that a “group generally unites behind a single political platform of common goals and common means by which to achieve them.” *Levy v. Lexington Cnty.*, 589 F.3d 708 (4th Cir. 2009). Therefore, minority voters can “be racially polarized but still lack political cohesiveness if their votes are split among several different minority candidates for the same office.” *Id.* In *Levy*, the Fourth Circuit decided that the district court erred in its political cohesiveness analysis because it failed to consider minority support for candidates in all elections; instead, it disregarded those elections where no candidate received more than 50 percent of the minority vote, which “guaranteed a finding of cohesiveness.” *Id.*

In ascertaining whether bloc voting exists, it is necessary to begin with an identification of the minority members’ “preferred candidates” or “representatives of their choice.” If white and black residents do generally prefer different candidates, then such racially polarized voting becomes legally significant if the white majority normally will defeat the combined strength of minority votes plus white “crossover” votes for the minority’s preferred candidates. *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986).

**16-4.02(c)(i) Who Are Minority-Preferred Candidates?**

Although the Supreme Court has not clearly addressed how a court should determine which candidates are preferred by a minority group, the Fourth Circuit dealt extensively with this question in *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996).

An initial issue is whether a “minority-preferred candidate” must be of the same race as the minority group. In *Alamance County*, the trial court examined only those elections in which a black candidate was on the ballot in evaluating whether black-preferred candidates were usually defeated. The Fourth Circuit disagreed, holding that a minority-preferred candidate “may be either a minority or a non-minority,” because “it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate” which is relevant in determining whether the *Gingles* requirements have been met. Thus, a court must consider a “representative cross-section of elections, and not merely those in which a minority candidate appeared on the ballot.”

Another issue is presented in multi-seat elections where voters may cast more than one vote—for example, in a city with at-large elections where a voter may vote for five different candidates to fill the five council seats. In that situation, may candidates who finished second or third among minority voters be considered minority-preferred candidates? In *Alamance County*, the Fourth Circuit concluded that at least any candidate who receives a *majority* of the minority vote and who finishes behind a *successful* candidate who was the first choice among minority voters is automatically deemed a minority-preferred candidate just like the successful first candidate. For example, candidate X received the support of 90 percent of minority voters and was elected to the board or council. If candidate Y received 60 percent of the votes of minority voters, then that individual is also treated as a minority-preferred candidate.

Where the minority group’s first choice of candidates is *unsuccessful*, the rule is somewhat different. In that case, other successful candidates, who received at least a majority of the minority vote, should be viewed as “minority-preferred” where the unsuccessful candidate who was the first choice of minority voters did not receive a “significantly higher percentage” of the minority votes. For example, in *Alamance County*, black candidate Morris received 98 percent of the black vote in a Democratic primary election, while white candidate Long received 84 percent of the black vote. The Fourth Circuit held that the fourteen-percentage-point difference between those two figures was not significant and thus the trial court should have automatically treated Long as a black-preferred candidate. On the other hand, if the level of support received by the unsuccessful first choice of black voters is significantly more than the next-place finishers, an “individualized determination” must be undertaken to ensure that the successful second- or third-place finishers are in fact minority preferred candidates based on all the circumstances, where such second- or third-place finishers have received more than 50 percent of the black vote.

In *Levy v. Lexington County*, 589 F.3d 708 (4th Cir. 2009), the Fourth Circuit made it clear that a determination of a “significantly higher percentage” was to be based on all electoral circumstances, not simply on a certain benchmark percentage. Even if a candidate received less support from minority voters than an unsuccessful first choice candidate, the candidate may still be deemed a minority-preferred candidate of choice in a multi-seat election. The district court should first consider the number of candidates on the ballot and the number of seats to be filled. Only then should the court make a determination of whether the unsuccessful top minority vote-getter received a significantly higher percentage of the minority community’s support than did other candidates. Moreover, in elections in which no candidate receives a majority of the minority vote, a candidate may still be labeled a minority-preferred candidate of choice if that candidate would have been elected had the election been held only among minority voters, so long

as an individualized assessment of that candidate supports that conclusion. Apart from the “bare statistics,” the court may consider, for example, testimony from political observers as to whether those candidates may accurately be classified as minority-preferred candidates of choice. *Id.*

#### **16-4.02(c)(ii) Which Elections Count?**

In considering whether racially polarized voting exists, questions may arise as to which elections, and how many, should be examined. Some courts have refused to consider so-called “exogenous” elections, which are those involving offices different than those at issue in the Section 2 suit. The Fourth Circuit has found, at least by implication, that such election results are relevant to this inquiry. See *Cane v. Worcester Cnty.*, 35 F.3d 921 (4th Cir. 1994) (affirmed finding of legally significant white bloc voting, based in part on evidence of results in exogenous elections); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (three-judge court) (exogenous elections considered).

Another issue in determining whether minority-preferred candidates are “usually” defeated within a jurisdiction is how many elections must be taken into account. The Fourth Circuit has noted that Section 2 requires the consideration of “multiple electoral contests,” *Hines v. Mayor of Ahsokie*, 998 F.2d 1266 (4th Cir. 1993), but has declined to decide precisely how many elections should be considered. *Lewis v. Alamance Cnty.*, 99 F.3d 600 (4th Cir. 1996). In *Levy v. Lexington County*, 589 F.3d 708 (4th Cir. 2009), the court held that under the circumstances, the district court’s failure to consider the two election cycles subsequent to the bench trial constituted legal error. Among the circumstances was the district court’s delay of almost three years in issuing its decision and the success in one of the subsequent elections of a minority candidate.

#### **16-4.02(c)(iii) Why Does Racially Polarized Voting Exist?**

Since *Gingles*, there has been some disagreement as to the relevance of the reasons for the existence of racial bloc voting. However, the Fourth Circuit has held that, in satisfying the second and third *Gingles* preconditions, the reason for the defeat of a minority-preferred candidate is irrelevant. *United States v. Charleston Cnty.*, 365 F.3d 341 (4th Cir. 2004). The legal standard for the existence of racial bloc voting “looks only to the difference between how majority votes and minority votes were cast; it does not ask why those votes were cast the way they were.” *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir. 1987).

Thus, for this purpose, racially polarized voting exists in a given locality where whites generally support different candidates than blacks, not because of racial prejudice, but because whites tend to support political party X while blacks tend to support political party Y. At the same time, the Fourth Circuit has ruled that, once the *Gingles* requirements have been met, the reasons for the defeat of minority-preferred candidates (such as party affiliation) may be considered in determining if a Section 2 violation exists, based on the totality of the circumstances. *United States v. Charleston Cnty.*, 365 F.3d 341 (4th Cir. 2004); *Lewis v. Alamance Cnty.*, 99 F.3d 600 (4th Cir. 1996).

#### **16-4.02(c)(iv) How Often Must the Minority-Preferred Candidate Lose?**

One final issue occasionally addressed by courts has been how often a minority-preferred candidate must be defeated to meet the *Gingles* requirement that racial polarized votes be legally significant; that is, under what circumstances can a court conclude that a majority group “usually” defeats the minority’s preferred candidate? In *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996), the Fourth Circuit indicated that plaintiffs do not meet their burden by merely showing that white bloc voting defeats the minority-preferred candidate “more often than not.” While declining to decide exactly what “usually” means, it added that plaintiffs must show losses that are “something more than just 51 percent.” *Id.*

In *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455 (2017), the Supreme Court considered North Carolina’s defense to a VRA claim under Section 2 that it used race considerations to draw a redistricting line by increasing the number of African American voters so that the percentage of such voters would surpass the 50 percent threshold. The Court found the state’s reasoning faulty because for “most of the twenty years prior to the new plan’s adoption,” African American voters only made up between 46 percent and 48 percent of the electorate; yet, the district was a reliably “safe” African American district where candidates preferred by African Americans uniformly received between 59 percent and 70 percent of the district’s votes. The Court construed this evidence as demonstrative of the fact that white voters did not vote as a “bloc” and that the third *Gingles* precondition accordingly was not present. Accordingly, North Carolina’s defense failed.

In *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996), the court held that the evidence fully supported the trial court ruling that plaintiffs had failed to prove that black-preferred candidates were usually defeated. It noted that the plaintiffs’ own expert witness admitted that twenty of the thirty-one candidates “generally preferred” by black voters won election or nomination, and eight of the eleven candidates most strongly preferred by blacks were elected to seats on the county board. *Id.* Similarly, a federal district court ruled that the plaintiffs had failed to prove the third *Gingles* precondition, where 50 percent to 65 percent of the minority-preferred candidates were elected depending on the applicable time span. *Simpson v. City of Hampton*, 919 F. Supp. 212 (E.D. Va. 1996).

In *Page v. Bartels*, 144 F. Supp. 2d 346 (D. N.J. 2001), the plaintiffs raised a Section 2 claim challenging the 2001 redistricting plan for New Jersey’s Senate and General Assembly that eliminated certain majority-minority districts, including one where the black voting-age population was reduced from 53 percent to 27 percent compared to the existing plan. The district court dismissed the claim under the Voting Rights Act, observing that there was no credible evidence that the white majority in the challenged districts voted sufficiently as a bloc to enable it normally to defeat the combined strength of minority voters plus white crossover votes. Among other findings, the court noted that eight of fifteen black members in the New Jersey General Assembly were elected in districts having less than 30 percent black voting-age population. And, in three general elections between a black and a white candidate, the black candidate received an average of 55 percent of the white vote.

#### 16-4.02(d) Proportionality

Even if the *Gingles* preconditions have been satisfied, a court must consider whether all the circumstances demonstrate that the minority group has less opportunity than the majority group to elect representatives of its choice. Although Section 2 disclaims that “nothing in [it] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population,” 52 U.S.C. § 10301(b), a lawful redistricting plan may be shown where the minority group has achieved, or has the potential to achieve, representation in proportion to its voting strength in the locality. *Cf. Allen v. Milligan*, \_\_\_ U.S. \_\_\_, 143 S. Ct. 1487 (2023) (Alito, J., dissenting) (criticizing the three-judge court’s decision for “giv[ing] substantial weight to the disparity between the percentage of majority-black House districts in the legislature’s plan (14%) and the percentage of black voting-age Alabamians (27%), while the percentage in the plaintiffs’ plan (29%) came closer to that 27% mark”).

“Forcing proportional representation is unlawful and inconsistent with th[e] Supreme] Court’s approach to implementing § 2.” *Id.* (majority op.). In rejecting arguments to abandon the *Gingles* framework, the Supreme Court has denied that its “existing § 2 jurisprudence inevitably demands racial proportionality in districting.” *Id.* The Court responded that proper application of “the *Gingles* framework itself imposes meaningful constraints on proportionality.” *Id.* It also observed that such racial



proportionality is generally not attained and may become “more difficult” to attain, consistent with traditional districting criteria, as residential segregation decreases. *Id.* (citation omitted). Concurring, Justice Kavanaugh added that, “[t]o ensure that *Gingles* does not morph into a proportionality mandate, courts must rigorously apply the ‘geographically compact’ and ‘reasonably configured’ requirements.” *Id.* (Kavanaugh, J., concurring in all but Part III-B-1).

#### **16-4.02(d)(i) At-Large Election Plan**

In a challenge to an at-large election plan, proof that some minority candidates have been elected to office does not defeat a Section 2 claim, *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986), but the consistent achievement of “proportional or nearly proportional” representation can bar such a suit.

In *Gingles*, the Supreme Court reversed a finding of vote dilution by the trial court as to one multi-member district where blacks, in each of six previous elections, had elected one of the three representatives in a district in which they constituted 36.2 percent of the total population and 28.6 percent of the registered voters. Such “persistent proportional representation,” the Court said, was presumptively inconsistent with the plaintiffs’ allegation that the ability of black voters in that district was “not equal to that enjoyed by the white majority.” *Id.*

In 2018, two minority voters in Virginia Beach (one of whom had been an unsuccessful candidate for the City Council) sued the city to challenge its at-large system for electing city councilmembers, claiming that it diluted minority voting strength in violation of Section 2 of the Voting Rights Act. The plaintiffs argued that white Virginia Beach voters formed a majority bloc that consistently opposed candidates by preferred black, Latino, and Asian communities. Thus, although these minorities constituted more than 30 percent of the city’s population and they consistently voted as a cohesive coalition, only six minority candidates had won elections for City Council since 1966. The district court agreed with the plaintiffs, finding the at-large election system violated Section 2, enjoining its continued use, and granting the plaintiff’s request for attorney’s fees and costs. *Holloway v. City of Va. Beach*, 531 F. Supp. 3d 1015 (E.D. Va. 2021). During the trial litigation, the Virginia General Assembly amended Va. Code § 15.2-1400 to provide that, “in a locality that imposes district-based or ward-based residency requirements for members of the governing body, the member elected from each district or ward shall be elected by the qualified voters of that district or ward and not by the locality at large.” 2021 Va. Acts. chs. 103 and 225 (special session I) (adding Va. Code § 15.2-1400(F)). Although the district court held that this enactment did not moot the Section 2 claim, the Fourth Circuit disagreed on appeal. It held that the new law rendered the plaintiffs’ claims moot, but it allowed the district court to consider, on remand, whether to allow the plaintiffs to pursue claims against Virginia Beach’s election system under the new law, which permits three at-large seats without residency requirements. *Holloway v. City of Va. Beach*, 42 F.4th 266 (4th Cir. 2022). The trial litigation was stayed until the City Council determined the city’s new election method, *Holloway v. City of Va. Beach*, No. 2:18cv69 (E.D. Va. Nov. 15, 2022), which was communicated to the court in a notice filed by the city defendants on September 6, 2023. As of October 2023, no further action in the case is apparent from the court’s docket.

#### **16-4.02(d)(ii) Single-Member Districting Plan**

In a challenge to a single-member districting plan, it is unlikely that plaintiffs can prove a Section 2 violation where minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters’ respective share of the voting-age population. *Johnson v. De Grandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994).

In *De Grandy*, the Florida legislature drew a plan for its house of representatives with nine of the eighteen districts in the Dade County area having Hispanic voting majorities. In Dade County, Hispanics constituted 50 percent of the voting-age population. The district court ruled that the plan violated Section 2 because it was possible to draw two additional districts with Hispanic voting majorities. The Supreme Court reversed. Initially, it rejected the district court's "rule of thumb" that anything short of the maximum number of majority-minority districts would violate Section 2. It noted a hypothetical situation where a minority group with 40 percent of the voting population could control, with "careful manipulation," 70 percent of the election districts. It would be "absurd," it said, to suggest that the failure to put such a scheme in place indicates a denial of equal participation in the political process. The Court further held that there was no basis for a finding of vote dilution, because the Florida plan provided Hispanics with voting majorities in 50 percent of the districts in Dade County, which was substantially proportional to the 50 percent voting-age population of Hispanics in the same area.

At the same time, the Supreme Court rejected the state's argument that, as a matter of law, no dilution could occur under any circumstances where the number of majority-minority districts mirrors the minority group's percentage of the population, i.e., a "safe harbor." It explained that if such a rule were adopted, the most "blatant racial gerrymandering" in one-half of a county's area would be irrelevant if it was offset by overall proportionality. That situation would be based on the "highly suspect" assumption that the "rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class." *Id.*

#### **16-4.02(d)(iii) Population Base for Determining Proportionality**

In *Johnson v. De Grandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994), the Supreme Court left open the issue of what population base is used for determining proportionality. Although referring to the minority group's percentage of the voting-age population, it did not decide whether the relevant figure is population or some subset of population, such as those eligible to vote taking into account age, citizenship, and registration in another locality. *Id.* Subsequently, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Supreme Court ruled that the correct population base for measuring proportionality is a minority group's percentage of the "citizen voting-age population." There, a congressional plan creating five Latino "opportunity districts" represented 16 percent of the total districts, while Latinos made up 22 percent of the state's "citizen voting-age population." While Latinos were two districts short of proportional representation, the Court determined that it was unnecessary to decide whether the plan afforded an acceptable "rough proportionality," or whether the two-district deficit contributed to a finding of a Section 2 violation.

#### **16-4.02(d)(iv) Geographic Area for Determining Proportionality**

Another issue arising under the proportionality defense is whether proportionality is measured throughout the political subdivision as a whole or merely some portion of it. In *De Grandy*, the Supreme Court analyzed the proportion of Hispanics in only the Dade County area, and not in the state as a whole. However, the parties had focused in the trial court entirely on that geographic area, and thus, the Court declined to decide "which frame of reference" should have been used under other circumstances. *Johnson v. De Grandy*, 512 U.S. 997, 114 S. Ct. 2647 (1994). In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S. Ct. 2594 (2006), the Supreme Court found that this issue had been properly raised in the appeal and held that proportionality should be examined "statewide" or throughout the entire political subdivision in question. It concluded that any other sub-area would be "arbitrary."

## 16-5 RACIAL GERRYMANDERING

### 16-5.01 *Shaw v. Reno* and the Test for Racial Gerrymandering

The Supreme Court of the United States has recognized a cause of action for racial gerrymandering under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993) ("*Shaw I*") (5-4 decision). The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A plaintiff states a claim for racial gerrymandering:

by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.

*Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816 (1993).

To have standing to assert a *Shaw* claim, a plaintiff must live in the district that is the primary focus of the racial gerrymandering claim, or otherwise demonstrate personal racial classification. *United States v. Hays*, 515 U.S. 737, 115 S. Ct. 2431 (1995); *Sinkfield v. Kelley*, 531 U.S. 28, 121 S. Ct. 446 (2000) (per curiam). For standing to challenge redistricting under state law, see section [16-2.08](#).

#### 16-5.01(a) Background to *Shaw*

In *Shaw I*, plaintiffs challenged two North Carolina congressional districts. Both were irregularly drawn in an effort to create majority-minority districts. The shape of the first of the two districts, District 1, was compared to a "Rorschach ink-blot test" and a "bug splattered on a windshield." The second district, District 12, was described as "wind[ing] in snakelike fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." Using Interstate 85 as one of its boundaries, a state legislator commented of District 12 that "if you drove down the interstate with both car doors open, you'd kill most of the people in the district."

Against this backdrop of such bizarrely shaped districts, the Supreme Court held that the Constitution prohibits race-based districting absent a compelling justification. A district is unconstitutionally based on race if it is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." *Id.*

#### 16-5.01(b) The Two-Part Test for Racial Gerrymandering

A two-part test has evolved for claims of racial gerrymandering. First, the plaintiff has the burden of showing, through either circumstantial evidence of a district's shape or demographics, or direct evidence of legislative purpose, that race was the predominant factor in the decision to place a significant number of voters within or without a particular district. "To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including, but not limited to, compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995) (5-4 decision). Second, upon making that showing, the burden shifts to the state to justify its use of race under the strict scrutiny standard. To satisfy strict scrutiny, the state must demonstrate that the district was narrowly tailored to meet a compelling state interest.

The threshold for invoking strict scrutiny, however, is not always clear from the Supreme Court's fractured decisions. See *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996) (plurality opinion) (recognizing at least three different formulations of the showing

necessary for strict scrutiny to apply). Strict scrutiny does not apply just because a state creates a district “with consciousness of race.” Moreover, strict scrutiny does not automatically apply to all cases of intentionally created majority-minority districts. Rather, strict scrutiny applies in cases of alleged racial gerrymandering only when race was the “predominant factor motivating the legislature’s decision.” To show that race predominated, a plaintiff must prove that other “legitimate districting principles were subordinated to race.”

The plaintiff’s burden in proving a claim of racial gerrymandering, like any claim under the 14th Amendment, is to prove a “racial purpose or object” on the part of the legislature, or that the legislature’s decision is “unexplainable on grounds other than race.” *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545 (1999). In this regard, “the legislature’s motive is a factual question.” *Id.* When the legislature’s motive is disputed, as it frequently will be, summary judgment is not appropriate.

The Supreme Court’s holding in *Shaw I*, like all redistricting issues, is exceedingly complex. Among the issues left open by *Shaw I* and addressed, in part, by subsequent decisions are (a) what a plaintiff must prove to succeed on a claim of racial gerrymandering; (b) what state interests, if any, are compelling enough to justify a districting decision based predominantly on race; and (c) under what circumstances can a state prove that its compelling state interest was narrowly tailored.

#### **16-5.01(c) Racial Gerrymandering Cases Following *Shaw***

While racial gerrymander claims were initially used primarily by Republicans to stop Democrats’ districting plans, more recently Democrats have more frequently used such claims to stop Republican plans.

For example, *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 135 S. Ct. 1257 (2015), involved a challenge to Republican districting plans. In that case, the Republican-dominated Alabama legislature’s articulated goals in redistricting were to strictly limit population deviations to ensure compliance with the “one man, one vote” constitutional principle and to keep the same percentage of African American voters in each majority-minority district in order to comply with the non-retrogression principle of Section 5 of the Voting Rights Act. Because of population shifts which caused the minority districts to be underpopulated, these criteria resulted in new district lines that increased the number of black voters in majority-minority districts, minimizing minority influence in other districts. The three-judge court upheld the plan holding that the predominant purpose of the legislature was to limit population deviation and that complying with Section 5’s non-retrogression was a compelling state interest justifying any division of voters based on race.

The Supreme Court vacated and remanded to the lower court, first holding that racial gerrymandering claims must be evaluated on a district-by-district basis, not on the redistricting plan as a whole. Thus, the fact that racial considerations did not predominate generally in the redistricting plan was irrelevant; the issue was whether they predominated with regard to a specific district. After addressing the preservation of issues for appeal and standing concerns, the Court stated that Alabama had failed to show that race was not the predominant factor because the “one man, one vote” principle was a “part of the redistricting background, taken as a given when determining whether race, or other factors, predominate in a legislator’s determination as to *how* equal population objectives will be met.” *Id.* Thus, the equal population objective is not part of the permissible traditional race-neutral districting principles to be weighed against the use of race.

While it remanded the case to the lower court, the Supreme Court intimated that several of the districts in Alabama had been racially gerrymandered, although it expressly stated that its decision did not address the question of whether the intentional use of race in redistricting, even in the absence of proof that districting principles were subordinated to race, triggers strict scrutiny. It did, however, hold that Section 5 does not require a covered jurisdiction to maintain a particular numerical minority percentage. Rather, Section 5 is satisfied if minority voters retain the ability to elect their preferred candidates, which can happen even if the majority percentage is reduced. Recognizing that a legislature faces difficulty in selecting a minority percentage that may place too many minority voters in a district so that it has racially gerrymandered or too few so that it has caused retrogression, the Court stated that the legislature's plan should be upheld if there is a "strong basis in evidence" for the choice that is made. *Id.* The Court also expressly refused to decide whether compliance with Section 5 remains a compelling state interest in light of *Shelby County*, see section 16-3. The Court in *Harris v. Arizona Independent Redistricting Commission*, 578 U.S. 253, 136 S. Ct. 1301 (2016), avoided holding whether preclearance concerns are still a compelling interest post-*Shelby County*, as *Shelby County* had not been decided when the redistricting commission acted. Accordingly, the Court found that it was "proper" for the commission to consider compliance with Section 5 to be a "legitimate state consideration."

Prior to the Supreme Court's decision in *Alabama Legislative Black Caucus*, a three-judge court in *Page v. Virginia State Board of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014), determined that Virginia's Third Congressional District had been racially gerrymandered. Following the General Assembly's adoption of a congressional districting plan in 2012, several voters filed suit claiming that traditionally Democratic voters were packed into the Third District to avoid their votes having influence in surrounding districts. The three-judge court, with one dissent, ruled that the establishment of the district's boundaries constituted a racial gerrymander in violation of the Equal Protection Clause. *Id.*

The majority concluded that race was the "predominant purpose" in drawing the boundaries of that district, which had been a majority African American district since 1991. Among other factors, it relied heavily on statements in the legislative record that compliance with the non-retrogression requirement of Section 5 of the Voting Rights Act was the "only nonnegotiable criterion" followed by the General Assembly. The majority also pointed to the irregularity of shape and lack of compactness of the district; the use of water contiguity to connect predominantly African American populations; and the splits of political subdivisions. The dissent disagreed and argued that the districting plan was driven by a desire to protect incumbents and by the application of traditional redistricting criteria, even though race had to be considered to comply with the Voting Rights Act. *Id.*

The majority explained that its finding that race predominated in the drawing of the congressional district did not automatically result in a constitutional violation if the General Assembly had narrowly tailored the district to serve a compelling governmental interest. It decided that compliance with Section 5 of the Voting Rights Act was a compelling interest. However, it noted that the 2012 changes in the boundaries of the district increased the black voting age population from 53.1 percent to 56.3 percent. Because the court found that there was no evidence that the "increase of more than three percentage points was needed to ensure nonretrogression," the General Assembly had gone beyond what was reasonably necessary to avoid retrogression and therefore failed to narrowly tailor the district. *Id.*

The U.S. Supreme Court vacated the decision and remanded the case for reconsideration in light of its *Alabama Legislative Black Caucus* decision. *Cantor v. Personhuballah*, 575 U.S. 931, 135 S. Ct. 1699 (2015). On remand, the three-judge court

essentially reaffirmed its prior holding, ordering the General Assembly to devise a remedial plan. *Page v. Va. State Bd. of Elections*, No. 3:13cv678 (E.D. Va. June 5, 2015). When the General Assembly failed to act, the three-judge court ordered the implementation of the remedial plan drawn by a special master. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016). When the state decided not to appeal the decision, three Republican congressional representatives affected by the redistricting intervened and appealed to the Supreme Court. The questions presented for appeal included: (1) whether the court below erred in failing to make the required finding that race rather than politics predominated in the district in question, where there is no dispute that politics explains the enacted plan; (2) whether the court erred in relieving plaintiffs of their burden to show an alternative plan that achieves the General Assembly’s political goals, is comparably consistent with traditional districting principles, and brings about greater racial balance than the enacted plan; (3) whether, regardless of any other error, the finding of a *Shaw* violation by the court below was based on clearly erroneous fact-finding; (4) whether the majority erred in holding that the enacted plan fails strict scrutiny because it increased the Third District’s black voting-age population percentage above the benchmark percentage. Although the Supreme Court granted the appeal on the merits, it ultimately held that the intervenor appellants lacked standing to pursue the appeal. The representative most affected by the remedial plan informed the Court that he would no longer seek to run in the district that was drawn as a more heavily Democratic district. Thus, the Court found he no longer had a redressable injury. The Court found that the other two congressmen had failed to identify record evidence establishing that the remedial plan would reduce their chances of reelection. *Wittman v. Personhuballah*, 578 U.S. 539, 136 S. Ct. 1732 (2016).

In contrast to the *Page/Personhuballah* decision, a three-judge panel had held in *Bethune-Hill v. Virginia State Board of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), that twelve Virginia state and local election districts were permissibly drawn. In eleven of the twelve districts, the Court held that race was not shown to have been the predominant factor in their creation over traditional redistricting criteria. And in the twelfth district, the court found that race was considered permissibly pursuant to the Equal Protection Clause of the Fourteenth Amendment: (1) for a compelling state interest (compliance with federal antidiscrimination law), and (2) achieved in a narrowly-tailored fashion.

The Supreme Court reversed the district court with regard to the eleven districts, remanding for consideration under the correct legal standard. *Bethune-Hill v. Va. State Bd. of Election*, 580 U.S. 178, 137 S. Ct. 788 (2017). Acknowledging that its earlier redistricting decisions supported the conclusion that a challenger who alleges racial gerrymandering must show an actual conflict with traditional principles, the Court clarified that race may predominate as a factor even when traditional redistricting principles are honored, if race was the essential basis, or overriding factor, for the lines drawn. The Court concluded:

[A] court faced with a racial gerrymandering claim therefore must consider all of the lines of the district at issue; any explanation for a particular portion of the lines, moreover, must take account of the districtwide context. Concentrating on particular portions in isolation may obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target. A holistic analysis is necessary to give that kind of evidence its proper weight.

*Id.* The Court did not find error in the district court’s conclusion that the state had a compelling interest in compliance with the then-applicable retrogression prohibition of Section 5.

At the second bench trial, the three-judge district court held that eleven of the districts were unconstitutionally drawn because race predominated over traditional districting factors in their construction, enjoined Virginia from conducting elections for those districts before adoption of a new plan, and gave the General Assembly several months to adopt that plan. *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018). The court subsequently adopted a plan proposed by a special master. 368 F. Supp. 3d 872 (E.D. Va. 2019). After the Virginia Attorney General refused to appeal the case, the House of Delegates appealed as intervenors, but the U.S. Supreme Court held they did not have standing. See the discussion in section [16-2.08](#).

Following *Bethune-Hill*, the Supreme Court decided *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455 (2017), which considered the constitutionality of two congressional districts in North Carolina. *Cooper* is in part noteworthy for its contribution to the jurisprudence of racial gerrymandering insofar as it advances the question of what a plaintiff must prove to show racial predominance. North Carolina argued that a party challenging a district must proffer an alternative map that would have achieved the legislature's political objectives while improving racial balance. While acknowledging that such a proffer "can serve as key evidence in a race-versus-politics dispute[,]," the Court held that "[s]uch would-have, could-have, and . . . should-have arguments" are not "the only means" of proving that racial motivations predominated over other permissible ones. Rather, the court explained that "[a] plaintiff's task . . . is simply to persuade the trial court—without any special evidentiary prerequisites—that race (not politics) was the predominant consideration in deciding to place a significant number of voters within or without a particular district." Thus, direct proof or other potent circumstantial evidence of intent, as the *Cooper* plaintiffs had presented, can suffice to establish a prima facie case, even in the absence of presenting alternative map evidence.

In a 7-2 decision in 2022, the Supreme Court summarily reversed a decision of the Wisconsin Supreme Court adopting the governor's redistricting plan for the state's legislative districts. *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. \_\_\_, 142 S. Ct. 1245 (2022) (per curiam), *rev'g*, 971 N.W.2d 402 (Wis. 2022). The case had been filed in the Wisconsin Supreme Court after the Democratic governor vetoed the Republican legislature's proposed redistricting and the governor and legislature reached an impasse. The governor's plan proposed adding another majority-black district to reach a total of seven. In assessing the governor's plan under the Equal Protection Clause, the Wisconsin Supreme Court could not "say for certain on this record that seven majority-Black assembly districts [were] required by the" Voting Rights Act, but there were "good reasons to conclude a seventh majority-Black assembly district may be required." The Supreme Court, on review, held that the Wisconsin Supreme Court either erred in assessing whether the governor's plan satisfied strict scrutiny or failed to satisfy that standard itself in adopting the governor's plan. The governor's plan reflected "the sort of uncritical majority-minority district maximization that" the Supreme Court has "expressly rejected," and strict scrutiny "does not allow a State to adopt a racial gerrymander that the State does not, at the time of imposition, 'judg[e] necessary under a proper interpretation of the VRA.'" *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. \_\_\_, 142 S. Ct. 1245 (2022) (per curiam) (alteration in original) (quoting *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455 (2017)). Further, the Wisconsin Supreme Court "improperly relied on generalizations to reach the conclusion that the [*Gingles*] preconditions were satisfied" and "improperly reduced *Gingles*' totality-of-circumstances analysis to a single factor" of "proportionality." *Id.* On remand, the Wisconsin Supreme Court adopted the legislature's proposed redistricting plan that was found to be "race neutral." *Wis. Legis. v. Wis. Elections Comm'n*, 972 N.W.2d 559 (Wis. 2022).



### 16-5.02 The Meaning of Equal Protection and the Evils of Racial Gerrymandering

The “central purpose” of the Equal Protection Clause “is to prevent the States from purposefully discriminating between individuals on the basis of race.” *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993). While the particulars of the equal protection analysis are complicated, the Constitution’s proscription against classifying citizens on the basis of their race is “a simple one”:

At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.

*Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

Instances of racial gerrymandering violate the “central purpose” of the Equal Protection Clause by relying on and perpetuating “impermissible racial stereotypes,” such as “that members of the same racial group—regardless of their age, education, economic status or the community in which they live—think alike, share the same political interests and will prefer the same candidates at the polls.” *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993). In short, the Equal Protection Clause prohibits the “use of race as a proxy.” *Miller*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

In addition to perpetuating racial stereotypes, race-based districting sends an impermissible message to the candidates elected to represent constituents in a racially gerrymandered district. Elected officials who represent a race-based district are led to believe that their primary obligation is to protect the interests of but a single group of constituents rather than the district as a whole. This “pernicious” message “is altogether antithetical to our system of representative democracy.” *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993).

Unlike many government decisions, redistricting is unique in that citizens’ characteristics such as age, economic status, education, religious and political persuasion and race are frequently, if not by necessity, taken into consideration. What the *Shaw I* racial gerrymandering doctrine prohibits is making race the predominant consideration—districting by race for race’s sake. In this regard, a state can defeat a claim of racial gerrymandering by relying on traditional districting principles such as compactness, contiguity, and respect for political subdivisions as its primary motivation in drawing district lines. *Id.*

### 16-5.03 Evidence of Racial Gerrymandering

#### 16-5.03(a) The Presumption of Good Faith and Legislative Deference

Redistricting and reapportionment are “primarily the duty and responsibility of the State.” *Chapman v. Meier*, 420 U.S. 1, 95 S. Ct. 751 (1975). In exercising redistricting responsibilities, the states are given wide “discretion to exercise the political judgment necessary to balance competing interests.” *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995). Moreover, states presumptively exercise “good faith” in the exercise of that discretion. *Id.*

The Supreme Court recognizes the unique considerations at play in any districting decision. For example, legislatures will usually, if not always, be aware of the economic, educational, political and racial characteristics of the citizens they place in one district or another. That a state is aware of racial demographics when it determines the contours of a district does not automatically mean that “race predominates in the redistricting process.” *Miller*, 515 U.S. 900, 115 S. Ct. 2475 (1995). The special factors inherent in any districting decision call for judicial caution in cases of racial gerrymandering:

The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactment, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race.

*Id.*

### 16-5.03(b) Shape

The first type of proof upon which a plaintiff can rely to establish a claim of racial gerrymandering is the shape of the district. Simply put, “reapportionment is one area in which appearances do matter.” *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993). The shape of a district is particularly significant because it is often, if not always, the starting point in the racial gerrymander inquiry: “redistricting legislation that is so *bizarre on its face* that it is unexplainable on grounds other than race,” is constitutionally permissible only if narrowly tailored to meet a compelling state interest. *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995) (emphasis added).

The relevance of a district’s shape was evident in *Shaw I*, where the Court harkened back to other instances of racially drawn districts such as Mississippi’s post-Reconstruction districting plan and Alabama’s attempts to disenfranchise black voters. In the case of Mississippi, the state “concentrated the bulk of the black population in a shoestring Congressional district running the length of the Mississippi River, leaving five others with white majorities.” *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993). In Alabama, the state redrew the boundaries of the city of Tuskegee “from a square to an uncouth twenty-eight-sided figure.” *Id.*

The bizarre shape of Georgia’s Eleventh Congressional District played a large part in the Supreme Court’s decision that race predominated in *Miller*. Georgia’s “max-black” redistricting plan “split 26 counties.” Moreover, the Eleventh District included black neighborhoods that were “260 miles apart in distance and worlds apart in culture.” Referring to the district as a geographical “monstrosity,” the Supreme Court held that the district’s shape, together with its racial demographics, made it “exceedingly obvious” that the legislature engaged in a “deliberate attempt to bring black populations into the district.” *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

A plaintiff may prove that a district’s shape is unconstitutionally bizarre by relying on nationwide studies of compactness. See *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996) (plurality opinion). For example, North Carolina’s “serpentine” District 12 was the “least geographically compact district in the nation.” *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894 (1996) (“*Shaw II*”). In *Bush*, the Supreme Court relied heavily on what it called the “leading statistical study of relative district compactness and regularity” to conclude that the three challenged congressional districts were unexplainable on grounds other than race. The Court cited Pildes and Niemi, *Expressive Harms, “Bizarre Districts” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993), which study ranked the three challenged districts in *Bush* the “least regular congressional districts nationwide.”

Evidence of a bizarre shape also played an important part in finding that race predominated in the drawing of Virginia’s Third Congressional District. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997). Referring to the district as a “grasping claw” and a “squashed salamander,” the district court held that there was “little doubt” that the General Assembly created a geographically bizarre district to ensure a “safe black” seat.

Shape, however, is not the sine qua non of a racial gerrymandering claim. In *Miller*, the Court rejected the notion that regardless of the legislature's purpose, a plaintiff must prove that a district's shape is so bizarre that it cannot be explained other than on the basis of race. In this regard, a "bizarre" shape is not required as a "threshold" to maintain a racial gerrymandering claim. *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995). Instead,

[s]hape is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines.

*Id.* Any competent evidence, including shape or other evidence of the legislature's intent, both direct and circumstantial, can be used to support a claim of racial gerrymandering. See also *N.C. v. Covington*, 585 U.S. \_\_\_, 138 S. Ct. 2548 (2018) (that the legislature did not look at racial data in drawing remedial districts did little to undermine the district court's conclusion that, based on evidence concerning the shape and demographics of those districts, that the districts unconstitutionally sorted voters on the basis of race).

Not every claim of a bizarrely drawn district has met with success. See *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999). In *Lawyer v. Department of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997), the Court rejected a racial gerrymander claim to Florida's Twenty-First State Senatorial District because the district's shape and composition were "demonstrably benign and satisfactorily tidy." Comparing the challenged district to others in the state, the Court found significant the fact that District 21 was no longer end-to-end than other districts and its "shape does not stand out as different from numerous other Florida House and Senate districts." *Id.*

### **16-5.03(c) Legislative Intent**

#### **16-5.03(c)(i) Department of Justice Preclearance Evidence**

One of the more common ways in which plaintiffs prove the "legislative intent" behind a districting decision is communications by and with the Department of Justice. When the jurisdiction at issue is "covered" under Section 5 of the Voting Rights Act, a reapportioned district must be precleared by the Department of Justice (DOJ) or approved by the District Court of the District of Columbia. In many of the racial gerrymandering cases, the plaintiffs and the court rely heavily on either the state's preclearance submission or DOJ's preclearance decision to prove that race was the predominant factor in the state's districting decision.

In *Shaw I*, for example, the North Carolina legislature submitted a districting plan to DOJ with only one majority-minority district. The DOJ objected to the original plan because, it believed the General Assembly could have created a second majority-minority district "to give effect to black and Native American voting strength" in this area. *Shaw I*, 517 U.S. 899, 116 S. Ct. 1894 (1996). State legislatures, such as North Carolina's, are then put between the rock and hard place of satisfying DOJ's mandates and steering clear of districts that are drawn predominantly based on racial characteristics. See *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). The Department of Justice provided similar evidence of race-based districting in *Miller*. After the 1990 decennial census, Georgia was allotted an additional congressional district, bringing its total to eleven. Under its previous apportionment scheme, Georgia had one black majority district. The Georgia legislature then created a second majority-minority district and submitted the plan to DOJ for preclearance. The DOJ, following a so-called "max-black" approach, formally objected to the Georgia plan on two separate occasions because the legislature did not create three majority-minority districts. Both the district court and the Supreme Court in *Miller* relied

on DOJ's preclearance objections to conclude that the Department "would accept nothing less than abject surrender to its maximization agenda." *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995). The state's compliance with DOJ's repeated insistence on three majority-minority led to the perhaps inevitable result of race predominating in the challenged district.

Similarly, in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court), the district court relied on Virginia's preclearance submission to DOJ. Virginia's preclearance documents noted that race was the reason for certain shifts of black voters from one district into to the newly created "safe black" district. The *Moon* court concluded that Virginia's preclearance submission demonstrated that the population shifts were a "deliberate and integral part of Virginia's predominant attention to the principal goal of creating a safe black district." *Id.*

#### **16-5.03(c)(ii) Legislative History**

Statements made by state legislators may also be used as evidence that a district was racially gerrymandered. For example, in *Miller*, the state conceded that "to the extent that precincts . . . are split, a substantial reason for their being split was the objective of increasing the black population of that district." *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995). The post hoc personal opinions of a legislator that race was the predominant factor used in drawing a plan, however, are not the type of legislative history that will suffice to carry the plaintiff's burden of proof. See *Chen v. City of Houston*, 9 F. Supp. 2d 745 (S.D. Tex. 1998). Instead, the intent of the legislative body is gleaned from its deliberations at legislative and other public hearings. *Id.*

The legislature's intent can also be gleaned from its use of sophisticated computer programs which permit it to "manipulate district lines" on the basis of race. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). Where the racial data available to legislatures is far more sophisticated and detailed than other demographic data, the inference is that the legislature relied predominantly on race in drawing district lines. In *Bush*, for example, Texas's REDAPPL districting computer program contained racial data at the "block-by-block level," whereas other demographic information, such as registration and voting statistics, were only available at the level of voter tabulation districts. The state's ability to—and practice of—manipulating districts to "exploit unprecedentedly detailed racial data," together with other evidence of race-based districting may result in the application of strict scrutiny.

The legislature's redistricting guidelines may also provide evidence of a racially gerrymandered district. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997). In *Moon*, Virginia's guidelines prohibited any changes which would reduce the black percentage of total or voting-age population in the majority black district.

#### **16-5.03(d) Subordination of Traditional Districting Principles**

The subordination of traditional districting principles, such as compactness, contiguity, and respect for political subdivisions, is further evidence of a racial gerrymander. In *Miller*, for example, the plaintiffs presented direct evidence that the legislature drew the challenged Eleventh District without regard to and inconsistently with traditional districting principles. Further, Georgia's Attorney General objected to DOJ's insistence on a "max-black" redistricting proposal by arguing that to do so the state would have to "violate all reasonable standards of compactness and contiguity." *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

Similarly, the sheer geographic scope of a district—such as Georgia's Eleventh, spanning some 260 miles end-to-end—is evidence that the legislature subordinated the legitimate goal of preserving communities of interest to racial considerations. *Id.*

Incumbency protection is a legitimate state goal that can defeat a claim of racial gerrymandering. See *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999). Where the state's decision to include certain persons within or without a district is based primarily upon protecting incumbents rather than distinguishing between citizens of the basis of their race, strict scrutiny will not apply. See *id.*; *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996).

Moreover, political gerrymandering is not subject to strict scrutiny. See *Davis v. Bandemer*, 478 U.S. 109, 106 S. Ct. 2797 (1986) (plurality opinion). "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race," strict scrutiny does not apply. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996); *Hunt v. Cromartie*, 526 U.S. 541, 119 S. Ct. 1545 (1999) (1999). What a state cannot do, however, is invoke incumbency protection as an excuse for using "race . . . as a proxy for political characteristics." *Bush, supra*. Notwithstanding, the burden is on the plaintiff to prove race is used as a proxy. Where majority-minority districts are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries can meet its burden through direct evidence of purpose or circumstantial evidence that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455 (2017). In *Raleigh Wake Citizens Ass'n v. Wake County Board of Elections*, 827 F.3d 333 (4th Cir. 2016), the Fourth Circuit held that, in the racial gerrymandering context, partisan advantage may be considered a traditional redistricting criterion, and evidence that politics was the primary motivation for the drawing of a district can defeat an allegation that race predominated.

Where, however, traditional districting principles have not been subordinated to race, a claim of racial gerrymandering fails. See *Lawyer v. Department of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997). In *Lawyer*, the Court held that traditional districting principles such as maintaining communities of interest in a single district were not subordinated in drawing the challenged district. The residents of the district, white and black alike, predominantly had low incomes and shared similar interests. Moreover, the district was not suspect as noncontiguous simply because it crossed a body of water. *Id.*; see also *In re Constitutionality of SJR 2G*, 597 So. 2d 276 (Fla. 1992) (holding that the presence of a body of water in a legislative district does not offend the constitutional requirement of contiguity).

In a state court challenge to the 2001 redistricting plans for the Virginia Senate and House of Delegates, plaintiffs asserted a *Shaw* claim based on the prohibition against race discrimination in article 1, § 2 of the Virginia Constitution. They alleged that the General Assembly drafted the plans predominantly on the basis of race by maximizing the number of black residents within certain districts and by subordinating traditional districting principles. The plaintiffs contended that by "packing" black voters in certain areas, the General Assembly reduced the influence of black voters in adjacent districts. Determining that the state's constitutional protection was congruent with that of the federal equal protection clause, the Virginia Supreme Court held the challengers failed to prove that the traditional redistricting principles of retaining core areas of existing districts, population equality, compactness and contiguity, "enhancement of communities of political interest," and protection of incumbents were subordinated to racial goals. In addition, the Court ruled that, even if race had been *the* predominant factor used in the redistricting process, the challengers failed to prove that alternative plans were available that were consistent with traditional redistricting principles and that "would have brought about significantly greater racial balance." *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002).

### 16-5.04 Narrowly Tailored Compelling State Interests

To establish a compelling state interest, the state must present evidence of its “actual purpose.” *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996). Racial gerrymandering cannot be supported by speculative reasons that “may have motivated” the legislature or post hoc justifications. Moreover, the state must have a “strong basis in evidence” to support a race-based district. *Id.*; see also *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). If the state’s justification is the avoidance of litigation, as it frequently is, the state must establish that it had a “strong basis in evidence” or “good reason” for believing that a substantial threat of litigation would ensue. *Cooper v. Harris*, 581 U.S. 285, 137 S. Ct. 1455 (2017). A state has no compelling interest in avoiding meritless lawsuits. *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996).

#### 16-5.04(a) Adherence to Traditional Districting Principles

The flip side of proving a racial gerrymander with evidence that traditional districting principles were subordinated to racial considerations, is justifying a district with concrete evidence of adherence to those traditional districting principles. For example, a state “is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests.” *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995); see also *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993).

A state must do more, however, than merely recite adherence to traditional districting principles. In *Miller*, the Supreme Court flatly rejected the state’s contention that because the unwieldy Eleventh Congressional District strove to include as many black citizens as possible, it also strove to protect communities of interest. The Court will not “accept as a defense to racial discrimination the very stereotype the law condemns.” *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

Nevertheless, the state’s burden of establishing a narrowly tailored compelling interest is not an impossible one. In *Lawyer v. Department of Justice*, 521 U.S. 567, 117 S. Ct. 2186 (1997), the Court intimated that the attempt to satisfy one-person, one-vote requirements, among other things, led to the conclusion that the state did not subordinate traditional districting principles to race. See also *Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999).

#### 16-5.04(b) Complying with the Voting Rights Act

##### 16-5.04(b)(i) Section 5 of the Voting Rights Act

Compliance with Section 5 of the Voting Rights Act can, presumably, constitute a compelling state interest justifying a racial gerrymander. The Supreme Court, however, has never so ruled with respect to any particular district. Instead, the Court has assumed without deciding that compliance with the Voting Rights Act, as a general proposition, may constitute a compelling state interest. See *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253, 136 S. Ct. 1301 (2016);<sup>19</sup> *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996); *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

To constitute a compelling state interest, the state’s effort to comply with the Voting Rights Act, and Section 5 in particular, must be based on a constitutional reading of the Act:

As we suggested in *Shaw*, compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not

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<sup>19</sup> In *Harris*, a unanimous decision, the Court stopped short of saying that compliance with Section 5 was a legitimate state interest, only noting that it was “proper” for the redistricting commission to consider it so as members of the Court has expressed that it was in other opinions. See section 16-2.02(c)(iv) for a full discussion of *Harris*.

reasonably necessary under a constitutional reading and application of those laws.

*Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995).

Moreover, compliance with a preclearance mandate from DOJ does not justify an otherwise suspect districting plan. In *Miller, supra*, the Court rejected the argument that Georgia's compliance with DOJ's "black-maximization" policy constituted a compelling state interest: "we do not accept the proposition that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.*

Notwithstanding a state's attempt to comply with DOJ "mandates," the judiciary retains the authority to conduct an independent review of a district's compliance with the Equal Protection Clause. Additionally, the Court has made it clear that DOJ is not entitled to any deference in its interpretation of Section 5 with respect to claims of racial gerrymandering. *Id.* Agency interpretations that raise serious constitutional questions are not entitled to deference, and when DOJ requires race-based districting under the guise of compliance with Section 5, "it by definition raises a serious constitutional question." *Id.*

Section 5 of the Voting Rights Act "has a limited substantive goal: 'to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996) (citing *Beer v. United States*, 425 U.S. 130, 96 S. Ct. 1357 (1976)). In the racial gerrymandering context, a state cannot justify as a compelling interest compliance with Section 5 when the districting plan goes beyond what is necessary to avoid retrogression. "A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993).

The facts of *Miller* best exemplify the limited role that Section 5 plays in justifying a racial gerrymander. Before the 1990 Census, Georgia had one majority-minority congressional district. After the 1990 Census, Georgia submitted a districting plan with two such districts. The Justice Department rejected the plan because Georgia did not create three majority-minority districts. After complying with DOJ's maximization policy, Georgia sought to justify its final plan on its interest in complying with Section 5's non-retrogression policy. The Supreme Court held that Georgia's original plan—increasing the number of majority-minority districts from one to two—was "ameliorative" and could not have violated Section 5. Since the original plan did not violate Section 5, the final plan—creating three safe black districts instead of two—could not be justified on the basis of complying with Section 5:

The Government's position is insupportable. Ameliorative changes, even if they fall short of what might be accomplished in terms of increasing minority representation, cannot be found to violate section 5 unless they so discriminate on the basis of race or color as to violate the Constitution.

*Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995); *see also Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996) (rejecting the state's purported compelling interest in complying with Section 5 because the state sought "not maintenance, but substantial augmentation" of the black population in one of the challenged districts).

Despite the lack of success at the Supreme Court, at least one federal Circuit Court of Appeals has held that avoiding a Section 5 retrogression violation defeated allegations of racial gerrymandering. *See Theriot v. Parish of Jefferson*, 185 F.3d 477 (5th Cir. 1999). In *Theriot*, the court held that the district did not go further than necessary, even though



the black voting-age population in the district exceeded the DOJ's benchmark for that population because "political incumbency and other political concerns were the driving force." *Id.*

Lastly, a state may be able to justify a race-based district as being in compliance with the purpose prong of Section 5. To do so, however, the state must show that reliance on traditional districting criteria instead of creating as many majority-minority districts as possible would "so discriminate[] on the basis of race or color as to violate the Constitution." *Id.*

#### **16-5.04(b)(ii) Section 2 of the Voting Rights Act**

The Supreme Court has only "assumed, without deciding" that compliance with Section 2 of the Voting Rights Act constitutes a compelling state interest sufficient to justify a racially gerrymandered district. See *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996); *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). The Court has never held that such a claimed interest satisfied strict scrutiny.

To justify a race-based district on compliance with Section 2 or avoidance of Section 2 liability, the state must have a "strong basis in evidence" that the elements of Section 2 liability exist in a particular district. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). As noted above, those elements include: (1) the minority group is sufficiently large and compact to constitute a majority in the district, (2) the minority group is politically cohesive, and (3) the white majority votes in a bloc so as to defeat the minorities' choice of candidate. See *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752 (1986).

In *Abbott v. Perez*, 585 U.S. \_\_\_, 138 S. Ct. 2305 (2018), the Supreme Court examined several districts, including one state house district where the legislature tried to balance the competing interests of Latino and African American communities in the county. In two successive primaries, a candidate from each race defeated the other by thin margins. Race was admittedly the predominant factor, but the state argued that it had "good reasons to believe" that the adjustments to increase Latino voting power were necessary to satisfy Section 2. The Court found that the state had not made a sufficient "pre-enactment analysis" to justify its conclusions.

There must be a "credible" threat of a Section 2 lawsuit in order to justify race-based districting on the avoidance of such potential liability. *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997); see also *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996). Cf. *Abbott v. Perez*, 585 U.S. \_\_\_, 138 S. Ct. 2305 (2018) (the demand by one group that race-based criteria be used is an insufficient reason to believe that Section 2 demands compliance with that demand). Moreover, where the Department of Justice has not applied its "maximization" policy to a particular state, the threat of a Section 2 liability will be difficult to establish. *Moon, supra*. Where the plaintiff proves that the legislature drew district lines predominantly based on race and subordinated traditional districting principles, the state will be hard pressed to justify its decision on Section 2 grounds. A "bizarrely shaped" district which is "far from compact," defeats any claim that the district is also "narrowly tailored to serve the State's interest in avoiding liability under § 2, because § 2 does not require a State to create, on predominantly racial lines, a district that is not reasonably compact." *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996).

The state's attempt to comply with Section 2 by using racial classifications in districting must actually accomplish the goal of avoiding Section 2 liability. "The legislative action must, at a minimum, remedy the anticipated violation or achieve compliance" to carry the government's burden of narrowly tailoring its compelling interest. *Shaw II*, 517

U.S. 899, 116 S. Ct. 1894 (1996). Simply put, “if a real § 2 liability exists, then the State must cure it in the affected areas.” *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997).

Similarly, a state can rely on compliance with Section 2’s prohibition against vote dilution as a basis for race-based districting only if the district at issue addresses the victims of the vote dilution. The Court in *Shaw II* rejected as “singularly unpersuasive” North Carolina’s claim that because there was evidence of a Section 2 violation elsewhere in the state, the racially gerrymandered District 12 satisfied strict scrutiny. A district based on race is not narrowly tailored to the state’s purported interest of complying with Section 2 unless the remedy affects the persons who suffer from the wrong. *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996).

Compliance with Section 2 is not, however, impossible to show. In litigation over North Carolina’s congressional districts, a three-judge court in the Eastern District of North Carolina held that the state sufficiently established that its desire to comply with Section 2 of the Voting Rights Act satisfied strict scrutiny. See *Cromartie v. Hunt*, 133 F. Supp. 2d 407 (E.D.N.C. 2000); *rev’d on other grounds*, 532 U.S. 234, 121 S. Ct. 1452 (2001).

#### **16-5.04(c) Eradicating the Effects of Past Discrimination**

“There is a significant state interest in eradicating the effects of past racial discrimination.” *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995) (quoting *Shaw I*, 509 U.S. 630, 113 S. Ct. 2816 (1993)). To prove that such an interest is compelling, the state must satisfy two criteria: (1) the discrimination sought to be remedied must be “specific” and “identified” and (2) the state must have a strong basis in evidence to “conclude that remedial action was necessary” before drawing a race-based district. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996). See also *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996).

Claims of compelling interests in eradicating past discrimination have failed thus far. In *Miller*, the Supreme Court held that there was no evidence of an intent to remedy past discrimination. Instead, as the state’s DOJ preclearance submission made clear, the reason for the challenged districts was to maximize safe black districts. Similarly, in *Bush*, Texas’s interest in remedying past discrimination failed because the discrimination sought to be remedied was racial bloc voting resulting in vote dilution. As it did in rejecting Texas’s Section 2 defense, the Court held that the state cannot eradicate past discrimination through the use of racially gerrymandered districts which ignore “sound districting principles” such as compactness. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941 (1996).

Lastly, the state must prove that its history of past discrimination “actually precipitate[d]” the use of race in drawing district lines. *Shaw II*, 517 U.S. 899, 116 S. Ct. 1894 (1996). Where there is no evidence that a majority of legislators knew of the past discrimination and were motivated by the desire to eradicate it at the time the district was created, the state cannot meet its evidentiary burden. *Id.*

#### **16-5.04(d) Remedy**

Relief in redistricting cases is in equity. *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964). A district court therefore must undertake an “equitable weighing process” to select a fitting remedy for the legal violations it has identified, *NAACP v. Hampton Cnty. Election Comm’n*, 470 U.S. 166, 105 S. Ct. 1128 (1985), taking account of “what is necessary, what is fair, and what is workable,” *New York v. Cathedral Acad.*, 434 U.S. 125, 98 S. Ct. 340 (1977). Without conceding that a special election is a property remedy for a racial gerrymander, the Court in a per curiam decision vacating a district court’s order that required a special election and truncated terms, stated that “obvious” considerations that must be weighed include “the severity and nature of the particular constitutional violation, the extent of the likely disruption to the ordinary processes of governance if early elections are imposed, and the need to act with proper judicial restraint when intruding on state

sovereignty.” *N.C. v. Covington*, 581 U.S. 486, 137 S. Ct. 1624 (2017). The Court subsequently found in the same case that the district court had exceeded its remedial authority when it ordered the redrawing of districts that were not involved in the racial gerrymandering. *N.C. v. Covington*, 585 U.S. \_\_\_, 138 S. Ct. 2548 (2018).