# Voting Rights and Redistricting A Presentation for the Redistricting Commission of the City of San Diego by

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# Voting Rights Protection

- 14th Amendment to the United States Constitution
- Section 2 of the federal Voting Rights Act
- Section 5 of the federal Voting Rights Act – Not Applicable to San Diego County
- The California Voting Rights Act – Not Applicable to the City of San Diego
- City of San Diego Charter, Art. II, 5 & 5.1

# 14th Amendment

Prohibits purposeful discrimination.

Requires proof of intent to discriminate, and discriminatory effects.

Little voting rights case law under the 14th Amendment since the 1982 amendments to the federal Voting Rights Act, which eliminated the need to prove purposeful discrimination.

# Charter, Art. II, § 5.1

Each redistricting plan shall provide fair and effective representation for all citizens of the City, including racial, ethnic, and language minorities, and be in conformance with the requirements of the United States Constitution and Federal statutes.

No case law interpretation of this provision, but extensive judicial interpretation of the incorporated federal law.

# SECTION 2 of the VOTING RIGHTS ACT (42 U.S.C. § 1973)

# Background of Section 2:
## Nationwide Application

Section 2 applies nation-wide. It forbids any "qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group.

Does not require intent to discriminate.

Applies to redistricting.

# Background of Section 2:
## Language of Section 2

- Section 2 provides:
  - "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
  - "(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

# Background of Section 2: *Thornburg v. Gingles*, 478 U.S. 30 (1986)

Construed Section 2 in the context of a lawsuit concerning dilution in a multi-member (*i.e.*, "at-large") legislative district. Although courts ultimately apply a totality of the circumstances test to determine whether a practice results in a denial or abridgement of the right to vote, 42 U.S.C. § 1973(b), i.e. vote dilution, a plaintiff bringing a claim under Section 2 must <u>first</u> establish the three *Gingles* threshold preconditions:

- "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . .
- Second, the minority group must be able to show that it is politically cohesive. . . .
- Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."

*Id.* at 50-51 (internal citations and footnote omitted).

# Background of Section 2
## Other Limitations

Race cannot be the predominant redistricting consideration with other traditional redistricting criteria subordinated.

Evidence that race predominates:

1. Shape of the district
2. Testimony
3. Other circumstantial evidence

# Background of Section 2: Application of *Gingles* to Redistricting

The Supreme Court has subsequently applied *Gingles* to single-member districts. "[A] claim of vote dilution in a single-member district requires proof meeting the same three threshold conditions for a dilution challenge to a multimember district." *Johnson v. De Grandy*, 512 U.S. 997, 1006 (citing *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

# Background of Section 2: Application of *Gingles* to Redistricting

No packing or cracking:

"[M]anipulation of district lines can dilute the voting strength of politically cohesive minority group members, whether by fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them, or by packing them into one or a small number of districts to minimize their influence in the districts next door. ... Section 2 prohibits either sort of line-drawing where its result, interacting with social and historical conditions, impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters."

*Johnson v. DeGrandy*, 512 U.S. 997, 1006 (1994), numerous citations omitted.

# Background of Section 2: Application of *Gingles* to Redistricting

"But some dividing by district lines and combining within them is virtually inevitable and befalls any population group of substantial size. Attaching the labels 'packing' and 'fragmenting' to these phenomena, without more, does not make the result vote dilution when the minority group enjoys substantial proportionality. … [R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast."

*Id*., at 1115 – 1118.

# 1st *Gingles* Precondition
## Deconstruction after *Thornburg v. Gingles*

1. "Majority-minority" districts, *i.e.*, one "in which a majority of the population is a member of a specific minority group." *Voinovich v. Quilter*, 507 U.S. 146, 149 (1993).
2. "Coalition" districts, *i.e.*, one in which a minority group joins with voters from at least one other minority group to elect a candidate. *De Grandy*, 512 U.S. at 1020.
3. "Crossover" districts, *i.e.*, one in which a minority group has "support from a limited but reliable white crossover vote." *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 376 (S.D.N.Y.) (per curiam) (three-judge court), *aff'd mem.*, 543 U.S. 997 (2004).
4. "Influence" districts, *i.e.*, one in which a minority group is merely large enough to influence the election of candidates but too small to determine the outcome. *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003) (defining an influence district as one in which a minority group "would be able to exert a significant—if not decisive—force in the election process").

# 1st *Gingles* Precondition
## Influence Districts

- Prior to 2009, most federal courts had not sanctioned such districts.

  *See Metts v. Almond*, 217 F. Supp. 2d 252, 258 (D.R.I. 2002), *vac'd & rem'd sub nom.*, *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc) (per curiam); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 379 (S.D.N.Y. 2004) (influence claims have "no standards and would be judicially unmanageable. 'Influence' cannot be clearly defined or statistically proved."); *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), *cert. denied*, 2005 U.S. LEXIS 2973 (2005); *Thompson v. Glades County Bd. of County Comm'rs*, 493 F.3d 1253 (11th Cir. 2007), *vac'd by*, *reh'g en banc granted by*, *Thompson v. Glades County Bd. of County Comm'rs*, 2007 U.S. App. LEXIS 27348 (11th Cir. Fla. Nov. 27, 2007); *Aldasoro v. Kennerson*, 922 F. Supp. 339, 376 (S.D. Cal. 1995); *DeBaca v. County of San Diego*, 794 F. Supp. 990, 996-97 (S.D. Cal. 1992); *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1391-92 (S.D. Cal. 1989); *Romero v. City of Pomona*, 665 F. Supp. 853, 864 (C.D. Cal. 1987), *aff'd*, 883 F.2d 1418, 1424 (9th Cir. 1989).

- Only three federal courts had ever held that the federal VRA requires, rather than merely permits, the creation of influence districts in the absence of a showing of intentional discrimination.

  *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991); *East Jefferson Coalition for Leadership & Dev. v. Parish of Jefferson*, 691 F. Supp. 991 (E.D. La. 1988); *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc) (per curiam).

# 1st *Gingles* Precondition

## *Wilson v. Eu* on Influence and Coalitional Districts

Noting the lack of clear guidance on the issue of coalitional and influence districts, the Special Masters of the California Supreme Court in *Wilson v. Eu* took a cautious approach and "(1) endeavored to protect the combined voting strength of two or more minority groups in areas containing substantial numbers of such groups ..., and (2) recognized the propriety of forming minority influence districts to maximize the voting potential of geographically compact minority groups of appreciable size ..., even though the individual minority groups involved in categories (1) or (2) were an insufficient size to constitute a majority in their voting districts."

*Wilson v. Eu*, I Cal.4th 707, 715 (1992).

# *Bartlett v. Strickland:*
## Proceedings In The Trial Court

- The North Carolina Constitution prohibits dividing counties to form state House and Senate districts (the "whole county" provisions), except to comply with the Voting Rights Act and one-man, one-vote requirements, and then county lines can be crossed only to the minimum degree necessary for compliance. N.C. Const., art. II, § 3(3) & §5(3).
- The case concerned North Carolina House District 18 that includes parts of New Hanover and Pender counties. It has an African-American voting age population of 39%. Since 1992, voters in House District 18 and its predecessor district have elected an African-American to the North Carolina General Assembly.
- In May 2004, Pender County brought an action challenging House District 18 as a violation of the "whole county" provision of the North Carolina Constitution. The state respondents asserted that it was necessary to cross county lines in order to comply with Section 2.
- A three-judge panel of the North Carolina Superior Court granted partial summary judgment to the State on the grounds, among others, that the first *Gingles* precondition does not require a minority group to meet a bright line 50% numerical majority of eligible voters in a district, but rather, the proper analysis is whether the political realities of a district render the minority group a *de facto* majority in that it is able to elect candidates of its choice.

# *Bartlett v. Strickland*:

## The Holding: No § 2 Protection for Influence or Cross-over Districts

"It remains the rule, however, that a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent. ...Our holding does not apply to cases in which there is intentional discrimination against a racial minority."

129 S.Ct. 1231, 1246.

# *Bartlett v. Strickland*:
## The Measure of Ability to Create a Majority-Minority District

This was decided earlier in a case called:

*League of United Latin American Citizens v. Perry*, 548 U.,S. 399 (2006)

"[T]he relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates."

*Id*., at 429.

# *Bartlett v. Strickland:*

## The Holding: No § 2 Protection for Influence or Cross-over Districts

"*Section 2* does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters. In setting out the first requirement for § 2 claims, the *Gingles* Court explained that '[u]nless 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.' *478 U.S., at 50, n. 17, 106 S. Ct. 2752, 92 L. Ed. 2d 25*. The *Growe* Court stated that the first *Gingles* requirement is 'needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.' *507 U.S., at 40, 113 S. Ct. 1075, 112 L. E.2d 388* . Without such a showing, 'there neither has been a wrong nor can be a remedy.' *Id., at 41, 113 S. Ct. 1075, 112 L. E.2d 388*. There is a difference between a racial minority group's 'own choice' and the choice made by a coalition."

129 S. Ct. 1231, 1243.

# *Bartlett v. Strickland*: What About Coalitional Districts?

"We do not address that type of coalition district here."

129 S.Ct., at 1242.

# *Bartlett v. Strickland*: What About Coalitional Districts?

On the other hand, the vast majority of lower courts to consider a coalition claim, including in this Circuit, has assumed it to be valid and allowed it to proceed under the first *Gingles* precondition and has adjudicated the claim under the second and third preconditions, minority political cohesion and majority bloc voting.

# *Bartlett v. Strickland*: What About Coalitional Districts?

Tea-leaf Reading:

The Court defined a coalition district claim as one in which "two minority groups form a coalition to elect the candidate of the coalition's choice." *Id*., citing *Nixon v. Kent County*, 76 F.3d 13811393 (1996), which denied a coalition claim by African Americans and Hispanics under the first *Gingles* precondition.

# *Bartlett v. Strickland*: What About Coalitional Districts?

The Court went on to say:

"African-Americans ... have the opportunity to join other voters – including other racial minorities, or whites, or both – to reach a majority and elect their preferred candidate. They cannot, however, elect that candidate based on their own voter and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance.' [Citations omitted.] Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Bartlett v. Strickland*, 129 S.Ct., at 1243.

# *Bartlett v. Strickland:*
## And the 2011 Redistricting

- To be entitled to § 2 protection, the minority group must be able to form the majority of eligible voters (i.e. citizens of voting age) in a reasonably compact single-member district.
- No "packing" or "fragmenting" if the result is vote dilution judged by the totality of the circumstances.
- No obligation to "maximize" voting strength of minorities.
- Creation of influence and cross-over districts not required.
- Creation of influence and cross-over districts not prohibited, unless race is the predominant consideration.
- Unclear whether the creation of coalition districts is required.
- Creation of coalition districts is not prohibited, unless race is the predominant criterion.
- Certainly any coalition district must also meet all three of the *Gingles* preconditions.

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