HOT TOPICS IN ELECTION LAW
American Bar Association Midyear Meeting
Friday, February 5, 2010
Suite 7102, 7th Floor, West Wing
Walt Disney World Dolphin

Current Trends in Voting Rights Litigation & the Census

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This presentation will address current trends in litigation under §2 and §5 of the Voting Rights Act, recent Supreme Court and lower court decisions addressing §5 bailout, minority group coverage under the Voting Rights Act, and the responsibilities of cities and counties, particularly in covered states, under the VRARA.

We will also consider current trends and developments involving partners affecting the 2010 Census, when a portrait of our extremely diverse American population will be taken by the U.S. Census Bureau. The results of the 2010 Census will not only provide a detailed picture of our nation, but its results will be used to determine how $400 billion in federal tax money is spent in states and communities and will play a pivotal role in redistricting and reapportionment litigation.

The Crown Jewel of the Civil Rights Movement

Since 1965, our national commitment to protect minority voting rights has rested on the twin pillars of equal access to the electoral process and effective participation in the political process. The chief vehicle for protecting the fundamental right of minority citizens to cast an effective vote has been the Voting Rights Act of 1965, the Crown Jewel of the Civil Rights Movement.

The VRA was passed by Congress at a watershed moment in our nation's turbulent history of racial injustice and discrimination in voting. It imposed substantial federalism costs, authorizing "federal intrusion into sensitive areas of state and local policymaking," but the historic accomplishments of the Act are undeniable.

At the time he signed it into law, President Lyndon Johnson described the Act as a just and necessary means of providing an effective remedy for combating massive resistance by southern states to federal attempts to enforce the 15th Amendment to the United States Constitution.

The heart of the VRA was a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. One VRA's key provisions was §5, passed originally for five years. §5 prohibits covered jurisdictions from changing any voting or election law, policy, practice or procedure without first obtaining federal preclearance. §5 was seen by many at the time of its initial enactment as a temporary remedy to an emergency situation. §5 prescribed a remedy by which the suspension of new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination.

Any change in election practices, procedures or administration, primarily in southern states and certain counties, would be subject to prior administrative or judicial approval, or preclearance. §5 preclearance could be obtained by filing a submission with and seeking a favorable "no objection" determination by the United States Department of Justice in Washington, D.C. or by filing an action for a favorable declaratory judgment and obtaining a favorable determination by the U.S. District Court for the District of Columbia.

A provision was added in 1982 by which covered jurisdictions could apply for an exemption from §5 coverage, upon a showing of sustained compliance with the Act for a certain period of time. This exemption was called bailout.

In 2006, Congress overwhelmingly approved an extension of the Voting Rights Act's key preclearance and minority language provisions for another 25 years, enacting the *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.* In the most recent extension of the Voting Rights Act enacted in 2006, the bailout provision was contained in §4(a).

Two major voting rights decisions handed down by the Court in 2009, and each was a landmark in its own right.

Bartlett v. Strickland[i]:
Numerical "Majority" Required for §2 Districts

Bartlett v. Strickland, 128 S. Ct. 1648 (2009), was a redistricting case arising in Pender County, North Carolina. It provided the Court with an opportunity to refine and narrow the interpretation of geographically compact "majority-minority districts," one of the three threshold requirements that must be satisfied in order for a §2 vote dilution suit to survive a motion for summary judgment. In such cases, if all three *Gingles* preconditions are met and a §2 violation is established based on the totality of the circumstances, then and only then could majority-minority districts be required as part of the remedy.

Pender County challenged a 1991 legislative redistricting plan that had divided the county in order to increase a legislative district's minority voting strength.

The *Gingles* Preconditions

Under §2 of the Voting Rights Act, minority plaintiffs seeking to establish vote dilution must show that minorities "have less opportunity than other members of the electorate to ... elect representatives of their choice." In the first case to reach the Supreme Court after the 1982 amendments to the VRA, *Thornburgh v. Gingles*, 478 U.S. 30, 50 (1986), the Court held that three preconditions must be satisfied before plaintiffs can proceed:

(1) a geographically compact majority-minority district,

(2) minority political cohesion, and

(3) legally significant white racial bloc voting.

Bartlett v. Strickland focused on what must constitute a majority minority district. According to the county, creation of an intermediate, "crossover" district, in which the minority made up less than a majority of the voting-age population, but was large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate, nonetheless failed to satisfy the threshold *Gingles* precondition for §2 liability. This was because African-Americans were not a majority of the district's voting age population, but could get enough support from crossover majority voters to elect their preferred candidate.

When the lower court ruled that the §2 plaintiffs in *Strickland* were unable to prove the minority population in the potential election district at issue was greater than 50%, the stage was set for the U. S. Supreme Court to address whether there was a numerical majority requirement for majority-minority district under §2 of the Voting Rights Act

No *De Facto* Majority-Minority Districts

The U.S. Supreme Court held it was not enough for a district to be a "de facto" majority-minority district for purposes of §2 liability. Addressing an issue left open in earlier cases, the Court concluded that a minority group must constitute a numerical majority of the voting-age population in an area before it can satisfy the threshold *Gingles* preconditions for establishing §2 liability, and thereby to require or permit a remedy in the form of creation of a legislative district to prevent dilution of that group's votes.

While §2 can require the creation of a "majority-minority" district, in which a minority group composes a numerical, working majority of the voting-age population, it does not require the creation of an "influence" district, in which a minority group can

influence the outcome of an election even if its preferred candidate cannot be elected. Such a district was found legally insufficient in *Strickland.*

Trends Suggested by *Strickland*

Strickland suggests several interesting trends in voting rights litigation for which we should be watchful once the next round of redistricting commences after the 2010 census results are reports in the Spring of 2011.

1. White Majority Districts: The first trend is an increased focus on white majority districts in evaluating legally significant white racial bloc voting

Bartlett v. Strickland suggests the first trend we may find in voting rights litigation. Minority electoral success in white majority districts will continue to be a focal point for demographers and statisticians in evaluating legally significant white racial bloc voting. Indeed, minority electoral success is the antithesis of legally significant white racial bloc voting.

As the lower courts further refine *Strickland*'s strong reinforcement of a numerical majority in order to prove the hypothetical existence of a §2 district, that is, one meeting the definitional requirement for a geographically compact majority-minority district with 50% or greater minority population, proof of the second *Gingles* precondition of legally significant white racial bloc voting will necessarily entail an inquiry into the voting patterns of a majority white district. It will call for the court to examine whether the white district under scrutiny for racial bloc voting purposes is in fact "majority" white. This is a particularly significant complication for what most federal judges already classify as among the most difficult and challenging of federal civil actions. In light of our nation's rapidly changing demographic characteristics that render decennial census results arguably outdated by mid-decade, look for the battle lines to be formed at the second *Gingles* threshold condition.

Stated differently, satisfying the numerical majority requirement while establishing a hypothetical majority-minority district for purposes of the first *Gingles* precondition of geographical compactness may not necessarily lead to victory for plaintiffs in a vote dilution suit. This is true since the same type of evidence – a numerical majority vel non – may not be available to establish the existence of a majority white district in which minority candidates usually suffer defeat despite some degree of white crossover voting. Therefore, unless numerical majority status can be established for the white district under scrutiny, a plaintiff may be unable to satisfy the second *Gingles* precondition of legally significant white racial bloc voting. Attempting to satisfy that numerical majority requirement with anything less, like a functional white majority or de facto white majority district, could doom a plaintiff's §2 case based on the absence of legally significant white racial bloc voting and spell victory for the defense.

2. Safe Harbor: The second trend is that *Strickland*'s adoption of a numerical majority requirement will now provide a safe harbor for the redistricting process.

Before *Strickland*, there was no bright line rule in this area of the law. *Strickland* now provides a clear and objective 50% rule that should give state and local government legislative bodies some measure of relief in not having to defend every redistricting plan in court whenever they are faced with plaintiff's competing redistricting plans containing "opportunity" districts, and thus not having to devote scarce public funds to finance the defense of such plans. Contrary to outgoing Justice Souter's dissent in *Strickland*, race will become less and less of a determinant in state and local government redistricting decisions where plaintiffs are unable to satisfy the numerical majority requirement.

Under the bright line rule established in *Strickland*, absent satisfaction of the first *Gingles* precondition, minority voters like all other voters do not have any entitlement to constitutional protection from defeat at the polls. Nor do minority voters any more than other voters have a constitutionally or statutorily protected right to form coalitions with non-minority voters, absent satisfaction of the first *Gingles* precondition. Of course, they can pull, haul and trade, to borrow our departing Justice Souter's words in *DeGrandy*, and compete for votes and electoral support in the marketplace of political ideas. In short, absent satisfaction of the first *Gingles* precondition, §2 should not be applied post-*Strickland* to permit minority voters to benefit from special treatment.

3. No Opportunity Districts: The third trend is that *Strickland* will likely hasten the demise of "opportunity districts" by striking a class of potential §2 claims from §2 coverage.

Before *Strickland*, opponents of the numerical majority or "bright line" rule felt that the first *Gingles* precondition of geographical compactness could be satisfied by establishing the existence hypothetically of a district in which minority voters could be shown by reconstructed electoral data to have an "opportunity to elect" their preferred candidate. Use of an "opportunity district," however, would have armed Article III courts with a subjective standard and unbridled discretion to decide whether there are enough disparate racial minorities in a given district to support a finding that they have a "potential" to elect a representative of choice.

Further, in determining a racial minority's ability to vote by analyzing historical voter turnout differentials in a particular district, there may not be any remaining relevance to the question whether a less-than-50% minority group has an opportunity to elect. In the same sense, such a minority group's measured minority voter effectiveness will likely not be given any consideration in determining any of the *Gingles* preconditions, although it may have some limited relevance with respect to one or more of the Senate Report factors.

4. CVAP only: The fourth trend is found in the implementation of *Strickland*'s 50% rule as a numerical population standard. Under this new 50% rule, lower courts will likely have to determine whether non-citizen undocumented aliens or only the citizen voting

age population (CVAP) can or should be counted in determining that 50%. The greater weight of authority indicates that CVAP only will be counted.

The 50% rule is one that rests on a numerical population standard, but 50% of what? *Strickland* did not specifically address whether citizen voters only (citizen voting age population or CVAP) or non-citizen undocumented aliens would be counted. Nor did the Court address who should be counted as "African-American" under the 50% rule, an especially difficult question in light of the creation of the multiracial category first used in the 2000 Census and in light of the somewhat ambiguous questions on race and ethnicity used to determine who counts as African-American. Some have taken the position that the 50% rule can create the risk of skewing the percentages of racial groups who are actually eligible to vote.

Their argument is that a racial minority group in a district where they do not constitute 50% of the population, but nonetheless are able to elect their preferred representatives, should have access to §2's protections against vote dilution. Absent a 50% population in any hypothetical geographically compact district, a minority group should not be able to argue post-*Strickland* that because one of the purposes of §2 is to give minority groups more voting power, that group should be given more voting power than it would otherwise have. That argument is precluded now under *Strickland* and was already in doubt under earlier circuit authority.

5. No Packing or Fragmentation: The fifth trend is the *Strickland* should not encourage jurisdictions to engage in packing, cracking and fragmentation of minority voters, a fear suggested by critics of the decision.

Prior to *Strickland*, opponents of the numerical majority requirement raised the specter of jurisdictions rushing to pack as many minority voters as possible into districts in order to prevent them from electing candidates of their choice in surrounding districts, or to fragment or "crack" an otherwise compact minority population into multiple districts to dilute their vote. This cynical argument belongs to a bygone era and does anything but seek to minimize the role of race in politics. It puts race in the forefront by taking it into account more than necessary or factually justified, even to the point of trumping legitimate, racially neutral redistricting objectives. It exacerbates the risk of creating an even greater racial divide and eliminating the desire or foundation of trust essential to forming coalitions. This threadbare argument posits race as the predominant determinant of redistricting decisions. It ignores the political landscape of 2009, does nothing to encourage coalitions that discourage racial divisions and dooms racially polarized factions to retreat into majority-minority districts based on a quintessentially race-conscious calculus.

<u>*Reyes v. City of Farmers Branch, Texas*</u>

In one of the first appellate court decisions following *Bartlett v. Strickland,* the Fifth Circuit was confronted with the somewhat novel argument that *Bartlett v. Strickland,* had held that only voting-age population matters under the first *Gingles*

preconditions. *Reyes v. The City of Farmers Branch, Texas,* No. 08-11106 (5th Cir. Nov. 3, 2009), accessible online at http://www.ca5.uscourts.gov/opinions/pub/08/08-11106-CV0.wpd.pdf

Minority Plaintiffs argued that *Bartlett v. Strickland* had implicitly overruled Fifth Circuit precedent requiring a minority citizen voting-age population in a district proposed under §2 to exceed 50% of its total citizen voting-age population. The Fifth Circuit in this case was confronted with a §2 vote dilution challenge filed by Hispanic Plaintiffs in which they claimed that the City's numbered at-large system of electing its five city council members diluted minority voting strength of the Hispanic minority. As part of their threshold burden under *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), which held that 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. The Plaintiffs were thus required to show that Hispanics would comprise a majority of the citizen voting-age population. Under the City's at-large electoral system, all voters were permitted to vote for all five council positions, and there was no requirement that a voter be a resident of any particular district.

Plaintiffs argued that if the City were required to convert to single member residential districts that one "demonstration district" with 78% TPOP and 75%VAP, such a district would contain a sufficient number of Hispanics to satisfy the first precondition under Since Plaintiffs had failed to make the threshold showing that the Hispanic citizen voting-age population exceeded the non-Hispanic citizen voting-age population, and no actual data was available to reflect the actual number of Hispanic citizens of voting age living in the demonstration district, the Fifth Circuit held that the district court properly rejected Plaintiffs' claim for failure to show Hispanics would comprise a majority of the citizen voting-age population.

The Fifth Circuit also rejected Plaintiffs' argument that under *Bartlett v. Strickland,* only voting age population matters under the first *Gingles* precondition, not citizen voting-age population, and that the district court had erroneously applied too stringent a test when it rejected Plaintiffs' claim. The Fifth Circuit specifically rejected the argument that *Bartlett v. Strickland* had implicitly overruled Fifth Circuit precedent requiring a minority citizen voting-age population in a district proposed under §2 to exceed 50% of its total citizen voting-age population.

The Fifth Circuit's conclusion rested on four key grounds:

(1) The question of citizenship was not before the Court in *Bartlett v. Strickland,* but the question there was quantitative, how many, and not qualitative, what kind of people. The Court was focused on the question of whether a minority population in a demonstration district comprised less than 50% of the possible voters could nonetheless meet the first *Gingles* precondition by showing it can win elections with the help of a reliable crossover vote.

(2) Only voting-age citizens can be "voters" who could form a majority, and the plurality opinion in *Bartlett v. Strickland* evidenced the vitality of the citizenship requirement, particularly when Justice Kennedy concluded that "only when a geographically compact group of minority voters could form a majority in a single-member district has the first Gingles requirement been met." *Bartlett v. Strickland*, 129 S.Ct. at 1249.

(3) "[T]he jurisprudential backdrop belies the notion that the Court would hold that citizenship is irrelevant under Section2 of the VRA, particularly where several sister Circuits joined the Fifth in requiring voting rights plaintiffs to prove that the minority citizen voting-age population comprises a majority.

(4) The Court issued no binding opinion in *Bartlett v. Strickland,* only a judgment. There were only three justices who joined in the plurality opinion, and two others joined the judgment affirming that no voting rights violation existed while flatly denying that any voter dilution claim could be made under §2 of the VRA. "[T]hree justices a rule do not make."

NAMUDNO

The other case arose in Texas and was a direct assault on the constitutionality of one of the federal government's most formidable weapons in fighting racial and ethnic discrimination in elections, the §5 preclearance provision as it was renewed and extended for another 25 years under the VRARA of 2006. *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S.-, 129 S. Ct. -, 174 L. Ed 2d 140, 2009 U.S. LEXIS 4529 (U.S. June 22, 2009).

Course of Proceedings Below

The Northwest Austin Municipal Utility District No. 1 (NAMUDNO) was a small utility district in Austin, Texas, with an elected board of five members. While responsible for its own elections, it did not register voters. Since it was in Texas, a covered jurisdiction, the utility district was required by §5 to seek preclearance before it could change any aspect of its electoral process, although there was no evidence that the utility district had ever discriminated on the basis of race. The utility district attempted to change the location of its polling station to a public garage from a less convenient location. It considered this change in election procedure devoid of discriminatory intent.

NAMUDNO filed suit seeking relief under the "bailout" provision in §4(a) of the Act, which allows a "political subdivision" to be freed from the preclearance requirements if certain conditions are met.

In the alternative, NAMUDNO argued that, if §5 were interpreted to render it ineligible for bailout, §5 was unconstitutional since it exceeded Congress' 15th Amendment enforcement power. Its challenge to §5's continuing constitutional validity

was grounded in part on the fact that the systematic voting discrimination that existed at the time of the 1965 Act no longer existed. Alternatively, NAMUDNO sought bailout under §4(a) of the Act.

The Lower Court's Determination

The three-judge U.S. District Court for the District of Columbia, to which this action was transferred from federal court in Texas, upheld the constitutionality of the Voting Rights Act's 2006 extension[ii]. It also rejected NAMUDNO's alternative request for bailout since bailout under §4(a) was available only to counties, parishes, and subunits that registered voters, but not to an entity like this utility district that did not register its own voters.

The three-judge Court also concluded that the VRARA of 2006 that extended §5 for another 25 years was constitutional.

Calling Balls and Strikes and Dodging the Bullet

In an 8-1 decision handed down June 22, 2009, the United States Supreme Court reversed in part and held that the utility district was a political subdivision eligible to seek bailout under § 4(a) of the *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (VRARA) and thereby seek relief from the Act's preclearance requirement.[iii] Even though the utility district did not register voters, the Court reasoned that specific precedent, the Voting Rights Act's structure, and underlying constitutional concerns compelled a broader reading of the bailout provision, that all political subdivisions are entitled to seek relief from the Act's preclearance requirements, and NAMUDNO in particular was eligible to file a bailout suit.

NAMUDNO's broadening of the availability of bailout to "all political subdivisions"[iv] means that more state and local governmental entities will likely seek to be exempted from what critics have described as the "draconian" provisions of the Act.

Constitutional Avoidance

The issue before the Court whether §5 as amended and extended under the VRARA of 2006 could pass constitutional muster.

This was a far different political landscape compared to the conditions existing in 1965 when §5 was initially enacted. Preclearance in 1965 was a constitutionally valid requirement applicable primarily to southern states. Its constitutionality in 2006 was another matter entirely.

The Supreme Court in *NAMUDNO* did not reach the constitutionality of §5, the central provision of the Voting Rights Act and its many extensions. The Supreme Court

did not address the question whether there was a strong basis in evidence to support this most recent extension of §5 as remedial legislation.

Speaking for the majority, Chief Justice Roberts said that passing judgment on an act of Congress is "the gravest and most delicate duty that this court is called upon to perform," and such a momentous duty need not be undertaken at this time, particularly since a statutory claim also decide by the lower court and properly before the Supreme Court provided a sufficient vehicle for disposing of the entire case.

Finding that there was no need at this time to address the issue of whether §5 was still constitutional in light of fundamental changes that have swept across the South in recent decades, the Court declined to address the constitutionality of a central provision of the Voting Rights Act, passed originally for five years and repeatedly extended, that required covered jurisdictions to get approval from Washington for any change, no matter how trivial, to its voting procedures.

Bailout Under §4(a)

The bailout provision of the Voting Rights Act, according to the Court, must be interpreted to permit all political subdivisions, including the utility district in question, to seek to bail out from the preclearance requirements of §5. It was undisputed that the utility district was a "political subdivision" in the ordinary sense, according to the Court, but the Voting Rights Act also provided a narrower definition in §14(c)(2):

> " '[P]olitical subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

Some observers say the Court's ruling means that the subject utility district - and implicitly other political units as well — should have less difficulty applying for and obtaining bailout from § 5 preclearance provisions.

The Success of Bailout: By the Numbers

Over 12,000 jurisdictions are covered by §5. Since the bailout provision was inserted in the 1982 Voting Rights Act Amendments, 17 have succeeded in bailing out of the Voting Rights Act. In expanding the availability of bailout, the majority in *NAMUDNO* reasoned that it was "unlikely that Congress intended the provision to have such limited effect."

NAMUDNO's Potential Impact on Future Litigation

While the Court avoided addressing the issue of 5's constitutionality, the following passages in the majority opinion, an opinion joined in by eight Justices, may be

seen as potential building blocks for the core constitutional issues that may be framed in the next challenge to §5:

(1) "The evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance."

(2) "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions."

(3) "[T]he racial gap in voter registration and turnout is lower in the States originally covered by §5 than it is nationwide."

(4) "[T]he evidence that is in the record suggests that there is more similarity than difference [between covered and non-covered areas of the United States]."

(5) While the parties did not agree on the standard or test to apply in deciding whether Congress exceeded its 15th Amendment enforcement power in extending the § 5 preclearance requirements, "[t]he Act]s preclearance requirements and its coverage formula raise serious constitutional questions under either test."

(6) "[T]he Act imposes current burdens and must be justified by current needs."

(7) "The Act also differentiates between the States in ways that may no longer be justified."

(8) "Many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the [Voting Rights Act] have been eliminated."

(9) "Things have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels."

(10) "[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."

(11) "[T]he registration gap between white and black voters is in single digits in the covered states; in some of those states, blacks now register and vote at higher rates than whites."

(12) "Some of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome* have unquestionably improved."

In the closing words of the majority opinion, the Chief left the door open for another day, reminding us:

> More than 40 years ago, this Court concluded that 'exceptional conditions" prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system. ... In part due to the success of that legislation, we are now in a very different Nation. Whether conditions continue to justify such legislation is a difficult constitutional question we do not answer today."

Chief Justice John Roberts signaled that he thinks time has run out on the remedy that Congress concocted in 1965 to overcome the historical pattern of denying blacks access to the ballot box in much of the South. No sitting Justice disagreed with him on that point. *NAMUDNO* appears to be the canary in the coal mine for continued viability of such remedial policies as the law of the land.

<u>The 2010 Census Begins: April 1, 2010</u>

Article I, Section 2 of the Constitution of the United States provides that the "actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of 10 years, in such manner as they shall by Law direct."

The design of the 2010 Census should be much better than that of the 2000 Census, particularly with respect to the following:

(1) Bilingual questionnaires will be sent to 13 million households with high concentrations of Spanish speakers, which should lead to higher participation among Spanish-only speakers who receive it.

(2) A second questionnaire will be sent to non-responding households, since survey methodology hast found replacement questionnaires raise participation rates.

(3) A Coverage Follow-Up Operation will help improve the accuracy of the census count by taking advantage of two new questions designed to help the Census Bureau understand if people are being counted twice or if missing people may be residing elsewhere.

(4) A Group Quarters Validation Operation will involve visits to about 300,000 group quarters and will be used to better identify places like residence halls, group homes, campgrounds, marinas and other unusual living situations, addressing problems encountered in past censuses. Specially trained enumerators will visit all "other living quarters" identified during the Address Canvassing and will administer a detailed questionnaire to determine if they are in fact housing units or group quarters.

(5) The American Reinvestment and Recovery Act provides for an appropriation to the Census Bureau of $1 billion to increase the communications campaign, for early 2010 Census operations, for an increased Coverage Follow-up Program, and $120 million in additional funding for increased partnership efforts through a partnership program that,

unfortunately, has already come under fire because of the involvement of ACORN as one of the partner organizations. See the discussion *infra* regarding *Judicial Watch v. U.S. Census Bureau.*

(6) The Address Canvassing Operation will be enhanced by the Local Update Census Addresses (LUCA) being expanded to include an integrated review of both housing units and group quarters.

2010 Census Road Tour

The 2010 Census Portrait of America Road Tour is part of the largest civic outreach and awareness campaign in U.S. history -- stopping and exhibiting at more than 800 events nationwide. The National Road Tour vehicle will be traveling to Super Bowl events in South Florida and the NCAA Final Four to motivate America's growing and increasingly diverse population to complete and mail back the 10-question census form when it arrives in mailboxes March 15-17.

Traveling for a total of 1,547 days and more than 150,000 miles across the country, 13 road tour vehicles will provide the public with an educational, engaging and interactive experience that brings the 2010 Census to life.

At each event across the country, attendees will have the opportunity to learn about the 2010 Census and understand the benefits a complete count can bring to communities everywhere; view a sample 2010 Census form and learn how the collected information is used; and contribute stories and photos to the Portrait of America project to explain why "I count!" and view messages from other road tour participants.

http://2010.census.gov/news/releases/media-advisories/rt-super-bowl-xliv-miami.html

Demographic Analysis and the Census

Two principal means of learning about the size of the U.S. population are the decennial census and demographic analysis, which in turn uses the vital registration system of the U.S., compiling demographic information from historical data supplemented with the results from earlier censuses. The four sources of demographic information are:

(1) birth registrations,
(2) death registrations
(3) estimates of immigration and
(4) estimates of emigration.

This information provides another look at the size of the population, and all four of the data sources allow separate estimates of males and females, different age groups, and, traditionally, different racial groups.

In the past, demographic analysis has been used as one tool to evaluate the census. Past census publications present estimates of "net undercount" for age, gender, and race groups, under the assumption that differences between the demographic analysis and the census reflected census coverage weaknesses.

Through their ongoing research, Census Bureau demographers have found some weaknesses with demographic analysis to evaluate a census. First, the undocumented immigrant population is not included in the record systems, thus becoming subject to various survey-based, indirect sources of estimates. Second, the measurement of racial groups on the record has deviated from that of the U.S. decennial censuses, making estimation of individual racial groups different from what a perfect census might obtain with its racial measurements.

A recent conference at Census Bureau headquarters gathered experts to give advice about how the 2010 demographic analysis results should be presented. Based on this workshop the Census Bureau is assembling multiple estimates of population counts by age, gender, and race, to reflect the real uncertainties about the current status. Instead of one population count based on demographic analysis, in December, 2010, the Census Bureau will present several, an honest statement of what it knows and does not know. The Census Bureau will not refer to the differences between the demographic analysis estimates and the census counts as the net undercount of the census; rather, it is best to view demographic analysis as another way to estimate population sizes, with its own set of strengths and weaknesses.

Bertrand Russell, in commenting on how science progresses, once noted that the more scientists know, the more they also know what they don't know. By giving the country multiple estimates, we will be reflecting this higher state of understanding the difficulties of demographic analysis.

http://blogs.census.gov/2010census/demographic-analysis/

Undercounts: The Non-response Follow Up Category

It is estimated that in 2000 only about 70 % of the population returned their information, leaving several areas seriously under-counted and under-represented.

The final census counts will not be based solely on the questionnaires that are completed and mailed back by households.

If a household does not mail back the questionnaire by the third week of April 2010, a trained Census Bureau enumerator will visit the household, starting in May 2010. Enumerators will try six times if necessary to reach a knowledgeable household member, visiting housing units multiple days at different hours. When the enumerator makes contact, he or she will collect the census data by interview. If enumerators can't contact a household, they will seek information in any way possible to estimate the number of people in the household.

The Census Bureau expects that in order to get ready for non-response follow up, it will test about 3 million applicants for skills in map reading, arithmetic, and reasoning skills, perform FBI criminal background checks, fingerprint those who are hired for another check, and hopefully have a work force of a little over 1 million people at the end of the process. No other activity of this scale has ever been mounted in this nation.

The Census Bureau will continue to focus on hiring locally, and will try to ensure that the census taker and local resident relate to each other with a high degree of comfort, culturally and linguistically.

At the end of this process, every household will have some information about its occupants recorded.

Of course, the best and most cost-effective information the Census Bureau obtains will come from questionnaires mailed back by households. Returning the completed questionnaire is the best thing to do for the success of the 2010 Census.

http://blogs.census.gov/2010census/non-response-follow-up/

Census Coverage Measurement

The differential undercount of the census will be measure by a large sample survey known as Census Coverage Measurement. The problem is that the decision was made to place the interviewing of households in the sample survey late in the schedule of the census, which can lead to difficulty on the part of respondents trying to recall where they were on April 1, 2010.

Status Update of Key Decennial Operations for the 2010 Census

In a prepared statement to the Senate Subcommittee on Federal Financial Management, Government Information, Federal Services and International Security on October 7, 2009, U.S. Census Bureau Director Robert M. Groves provided a helpful assessment of the current status of preparations for the 2010 Census. The stark picture he painted was in part very negative, but transparent.

One of the key internal challenges or risks that Groves discussed was the fact that the Census Bureau has experienced significant retirements in its senior ranks, especially senior statisticians, forcing it to engage outside statisticians during key phases of the census process and leaving the Census Bureau with less senior experience in managing the census as compared to past censuses.

Another internal risk concern noted by the Director related to the Master Address File (MAF), the list that is the basis for the delivery of over 134 million questionnaires.

The accuracy of the 2010 Census will depend on a complete address list, since if the Census Bureau does not know a household's address, it will be much harder for it to know whether it has received its census questionnaire.

Other external challenges include greater uncertainties over the expected mail return rate, more daunting than in past censuses. This problem is exacerbated by the fact that when interviewing households do not return their questionnaires, this can be the most expensive component of the census, with scores of millions of dollars spent for each additional percentage point of the public that has to be visited during the Non-Response Follow-up. The accuracy of the Census Bureau's estimate of the mail response rate is further compromised by a higher vacancy rate than in previous censuses, fluctuating rapidly due to foreclosures and economic dislocations, the phenomenon of more families doubling up in single-family dwellings, an increase in the rate of people who are experiencing homelessness, and the ongoing public debate and tension over immigration issues.

American Community Survey Data

The Director of the Census Bureau noted that the American Community Survey Data is now being analyzed to simulate the mail response rates at low levels of geography, and census experts are being asked to review the impact of the replacement questionnaire and the Census Bureau's operations to enumerate people in transient living conditions or without conventional housing.

New Media Environment

Director Groves also described as unprecedented the new media environment, with people increasingly getting their news from such non-traditional media sources as blogs, YouTube, and Twitter, rather than from the television networks and newspapers of the past. The sheer volume of these nontraditional media sources makes it far more difficult for the Census Bureau to get out the fact about the 2010 Census. It is responding by launching a 2010 Census Blog to help strengthen census messaging.

Judicial Watch v. U.S. Census Bureau

Shortly after Barack Obama was sworn into office as President, an announcement was made that the Association of Community Organizations for Reform Now (ACORN) had signed as a national partner with the U.S. Census Bureau to assist with recruiting temporary census workers.

On March 20, 2009, Senator Richard Shelby of Alabama, a ranking member of the Senate Committee on Banking, Housing and Urban Affairs and Subcommittee on Commerce, Justice, Science and Related Agencies, wrote a letter to the President, in which he noted that "The people of this nation deserve a census that is conducted in a fair and accurate manner, using the best methods to determine the outcome, and that is free from political tampering. Senator Shelby then stated:

> Past allegations of fraud should raise great concerns about the accuracy of data provided by this organization. Washington State filed felony charges in 2007 against several paid ACORN employees and supervisors for falsifying 1,700 fraudulent voter registration cards. An ACORN worker in Pennsylvania was sentenced in 2008 for fabricating 29 falsified voter registration forms. In Ohio in 2004, a worker for one affiliate was given crack cocaine in exchange for fraudulent registrations that included underage, as well as dead, voters. ACORD has been implicated in similar voter registration schemes around the country and its activities were frequently questioned throughout the 2008 presidential election.
>
> To keep the census nonpartisan, we cannot allow a biased, politically-active organization taking any type of official role in the process, let alone recruitment. By over counting here, and under counting there, manipulation could take place solely for political gains. Using ACORD to mobilize hundreds of thousands of temporary workers can surely lead to abuses for those who want to gain political advantage, just as we saw with the voter registration issues in past elections. The laws that govern voter fraud were not enough to dissuade those with the intent to throw an election and it is doubtful that the laws governing fraud in the census will be any more effective against such deceitful intents.

Senator Shelby closed his letter with a plea for the U.S. Census Bureau not to partner with an organization that has systemic problems with both accuracy and legitimacy, stating "We must not let the census become a blatant political tool."
http://www.judicialwatch.org/files/documents/2009/Census_ACORN_Documents.pdf

Judicial Watch, Inc., a conservative, nonprofit educational foundation, filed a Freedom of Information Act (FOIA) request with the Census Bureau regarding all documents related to ACORN's role in the upcoming 2010 Census.
http://www.judicialwatch.org/judicial-watch-v-u-s-census-bureau

In its Complaint for Declaratory and Injunctive Relief, Judicial Watch sought judicial relief following the Census Bureau's failure to respond to a FOIA request in which the following records were sougtht:
1. All records regarding ACORN's possible involvement in the 2010 Census.
2. All communications between the U.S. Census Bureau and ACORN.
3. All third party communications concerning ACORN.

Included in the documentation that has now been made publically available was a copy of Senator Shelby's letter above, together with what appeared to be e-mails from officials of the U.S. Census Bureau's Public Information Office, the latter stating in part:

> Any charge or claim that a Census Bureau partner could influence or have direct input into census operations is baseless and inaccurate. The sole entity that will conduct the 2010 Census is the U.S. Census Bureau, along with its hundreds of thousands of dedicated workers. ... Further, the Census Bureau has strict quality

assurance procedures in every operation to prevent the introduction of errors and/or fraudulent information in the national count. The Census Bureau remains committed to producing an accurate 2010 Census count – counting everyone once, only once, and in the right place.

This litigation is in its early stages and presumably will still be ongoing when the 2010 Census officially gets underway on April 1, 2010. Bearing in mind that the results of the 2010 Census will be used to determine how $400 billion in federal tax money is spent in states and communities and will also play a key role in redistricting and reapportionment litigation, it will be of more than passing interest to see whether and to what extent the U.S. Census Bureau is allowed to withhold the information that is the subject of this litigated FOIA request..

Recent Decisions Involving Census Data, ACS Data, and CVAP

Fairley v. Hattiesburg, Mississippi (5th Cir. Sept. 29, 2009)

This Section 2 vote dilution case concerned the drawing of five wards, held by three white city council members and two black city council members, for municipal elections in the city. One of the wards was a majority-white Ward 1 that was home to the University of Southern Mississippi, and another was a majority-black ward that was home to William Carey College.

At issue was whether the 2004 redistricting plan left the City's black voters unable to control a third ward and to elect a third black city council member, allegedly caused by the plan's assignment of University of Southern Mississippi students to the majority white ward 1 and its unnecessary packing of black voters into the two black-majority wards.

The plaintiffs argued for the creation of a "swing" or "equal opportunity" third ward in which the black population would form a larger minority and make black candidates more competitive than they are now, an argument that the Fifth Circuit found was foreclosed by Bartlett v. Strickland, 129 S. Ct. 1231, 1246 (2009).

The principal thrust of the plaintiffs' claim was that the predominantly white USM dormitory students should be excluded from the City's population base for districting purposes, the USM dormitory students should be equally divided among all five wards instead of placing them in Ward 1, and the City's wards should be redrawn to create a third majority-minority district without excluding the students.

The district court found that the plaintiffs failed to carry their burden of proving the first *Gingles* precondition, in that they could not show the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.

Student Exclusion Plan

The Fifth Circuit affirmed this determination that the plaintiffs' claims were legally inadequate, noting that the plaintiffs' theory as embodied in their illustrative plan seemed to be that removing the dormitory students, whether or not they were legal residents, from districting calculations would reduce the ideal number of officially-counted residents per ward, and that because the excluded students were mostly white, that would have made it easier to create a third majority black ward. The Fifth Circuit further observed that any plan that split USM into multiple wards would be highly suspect on its face:

> Unless USM students living in Ward 1 dormitories were to be arbitrarily and counterfactually treated as residents of wards where they do not live, ... we see no way to divide those students among the five wards except by drawing ward lines through the campus. Slip Op. at 6, n 4.

The Fifth Circuit further concluded that the plaintiffs' expert had conceded at trial that depending on how many of the college students were City residents, dividing the students up might have led to impermissible variations between the ward voting populations, and that there was a failure on the part of the plaintiffs to present evidence constituting a redistricting plan that would have shown either the factual or legal possibility of creating a third majority-minority district by dividing the dormitory students among the wards.

> In short, the only plan the plaintiffs developed in the district court was the one involving exclusion of dormitory students, including an unknown number of City residents, from the City's population for redistricting decisions. Slip Op. at 11.

Finally, the Fifth Circuit reasoned that bona fide residents certainly may not be excluded for voter reapportionment purposes, in contrast to aliens, transients or temporary or short-term residents, but that in this case

> [t]he plaintiffs wished the district court to order the City to redistrict based on fictional population data, namely the pretense that a number of City residents were not there. Slip Op. at 12.

Benavidez v. The City of Irving, Texas (N.D. Tex. July 15, 2009)

The City of Irving's at-large City Council system of government was found violative of Section 2 of the Voting Rights Act in this case. The City had a 40% Hispanic population at the time of trial. At issue was whether the plaintiffs could carry their burden of proof by reliance upon illustrative single-member districts based on total population for district size rather than considering citizen-voting-age-population. 638 F. Supp. 2d 709.

While the defendants argued that these illustrative district s contained an extremely high number of non-citizens, which would result in the majority Hispanic districts exercising voting power substantially magnified relative to the City's other districts, the district court concluded that applying the total population standard on the illustrative districts was appropriate.

The plaintiffs' experts relied on data from the 2000 Census as well as the 2006 American Community Survey, a sample survey conducted by the U.S. Census Bureau. The court noted that the ACS was of recent origin and not intended to replace the Census long form, but was conducted annually with results averaging over time periods to get the same level of statistical sampling as the long form.

The 2006 ACS data was the most current data that had been release by the Census Bureau, and it was used by the plaintiffs' expert to prepare estimates of 2008 Hispanic and non-Hispanic percentages of citizen-voting-age-population for use in constructing illustrative districts that satisfied the *Gingles* preconditions. The plaintiffs' expert did not use the 2006 ACS data to estimate the actual, current population in the illustrative districts, since this would not be possible insofar as the ACS is a sample and is not good at determining the scale of population, although it is good for determining percentages or distributions within that population. As the district court noted, both the Census and the ACS yield total population numbers that do not come from the survey, but come from a different method, and the survey results are normalize or scaled to match those numbers. Moreover, the court found that the ACS data is accurate and reliable, is reported with sampling error that actually makes the data more reliable, and has a margin of error that serves as a measure that can be applied to judge its statistical accuracy relative to other data sources.

"ACS data *is* Census data."

As additional evidence of the reliability of ACS data, the district court pointed out that (1) in the upcoming 2010 Census, the Census Bureau would rely on multi-year ACS averages for demographic information, (2) the Census Bureau had recently published "A Compass for Understanding and Using American Community Survey Data – What State and Local Governments Need to Know" (Feb. 2009), providing detailed guidance on how ACS data should be interpreted and utilized by state and local governments, and (3) such published guidance suggested that the Census Bureau considered the ACS data reliable and intended it to be relied upon in decisions such as Voting Rights Act compliance. As the court noted, "ACS data *is* Census data." Slip Op. at 37.

Census Tract vs. Block Group Data

The experts for each party took different positions on whether Census tract citizenship data rather than block group data from a special tabulation should be relied on in constructing illustrative districts using citizenship information. They also parted

company over the methodology used in arriving at extrapolated growth rates in order to estimate the 2008 Hispanic CVAP, or citizen voting age population.

Spanish Surname Registered Voters

Further, the defendants' expert obtained voter registration data based on individual voter registration records and "geocoded" Spanish surname registered voters to their census block, thus using the Spanish surname as a proxy for Hispanic ethnicity when self-identification was not practical. This calculation led to an estimate of Hispanic share of the total CVAP for the proposed illustrative district in 2000, and was followed by the expert extrapolating the 2000 CVAP to 2008 at citywide growth rates. This led him to conclude that there was little or no growth in the Hispanic community VAP between 2000 and 2008.

The plaintiffs' expert took the defendants' expert's geocoded data that included additional areas of high Spanish surname registered voters, used block group citizenship rates and projected forward to arrive at a 2008 estimate of an illustrative district that was majority-minority, coupled with the further opinion that the Spanish surname registered voters in the City had nearly doubled between the 2005 and 2008 elections.

The district court found that the Spanish Surname Registered Voter data was unpersuasive, relying on Fifth Circuit precedent that Spanish surname data are disfavored and that Census data based upon self-identification provides a proper basis for analyzing claims that votes of Hispanics have been diluted in violation of Section 2 of the Voting Rights Act. The court noted that the defendants' expert had failed to consider factors that would tend to depress Hispanic voter registration rates, including the fact that low registration rates may be the result of non-representative or dilutive election systems and that low registration rates are often associated with low income populations. Finally, the court observed that changes in registration may lag behind changes in the population, as people often delay or fail to register when they become eligible upon moving to an areas, turning 18 or becoming a citizen.

Overcoming Census Data's Presumptive Correctness

Following an analysis of the *Gingles* preconditions, the Senate Report factors and the totality of the circumstances, the district court held that the plaintiffs had carried their burden of proving that the City's method of electing the mayor and members of its City Council violated Section 2 of the Voting Rights Act. It is significant to note that in reaching its ultimate conclusion and in its detailed analysis of the complex legal standard governing vote dilution challenges, the district court reasoned that while the ACS data that played such a pivotal role in this case may be regarded as distinguishable from presumptively accurate Census figures,

> ACS data meets the standard to overcome the prior decennial Census. ACS sampling errors are transparent; they may be accounted for using the margins of

error published by the ACS and the use of confidence intervals. The Court concludes that ACS data is thoroughly documented, had a high degree of accuracy, and is clear, cogent and convincing enough (to overcome the threshold presumptive validity of Census data). Slip Op. at 37.

Benavidez v. Irving Independent School District (N.D. Tex. Jan. 20, 2010)

Under similar facts, a different district court found that the seven-member board of trustees of the Irving ISD, located within the City of Irving, from which each trustee was elected at-large in district-wide elections, did not violate Section 2 of the Voting Rights Act. As in the *City of Irving* case decided less than six months earlier, the plaintiffs' expert relied on 2007 ACS data to estimate the proportion of the Irving ISD population that was Hispanic.

Only one Hispanic had been elected to the board in its history.

The district court found that none of the illustrative districts relied on by the plaintiffs had greater than a 50% Hispanic share of CVAP according to the 2000 Census data., and that the plaintiffs had failed to prove the reliability of the 2007 ACS data and consequently could not overcome the presumption that the 2000 Census is correct, citing *Fairly v. Hattiesburg Mississippi,*, supra.

In reaching its conclusion that was clearly the opposite of that reached in *City of Irving*, the district court reasoned that the ACS data had greater margins of error than do traditional census data, and that while larger margins of error do not indicate that all data are unreliable for all purposes, those margins of error must be taken into account, and the purposes for which the data may be used must be limited accordingly. Slip Op. at 11.

Further, the defendants' expert testified that due to the larger margins of error for the ACS data, the plaintiffs' expert's estimated growth rates were not reliable enough to apply them to the small population groups that comprised the individual school districts. According to the district court, the plaintiffs' expert derived a growth rate and applied the 2007 ACS data to such a small population in a manner that was not sufficiently reliable and accurate, and that the plaintiffs' expert would be required to rely on the 2000 Census data. As the court concluded,

> In summary, the court finds that Benavidez has failed to present proved changed (sic) figures that meet the high standard that they be thoroughly documented, have a high degree of accuracy, and be clear, cogent and convincing. Slip Op. at 19.

The district court also recognized that its decision reached a different result than did the court in *Benavidez v. City of Irving, Texas.* Noting that the boundaries of the Irving ISD and the City of Irving are not identical, but are substantially similar, and that

the same expert witnesses testified in both cases, that decision did not preclude the court from reaching a different result in this case.

Part of its rationale for reaching a different result was that the decision reached in City of Irving predated the Fifth Circuit's decision in *Reyes v. The City of Farmers Branch, Texas*, No. 08-11106 (5th Cir. Nov. 3, 2009), accessible online at http://www.ca5.uscourts.gov/opinions/pub/08/08-11106-CV0.wpd.pdf, in which a Section 2 challenge to the at-large electoral system of the City of Farmers Branch was rejected in part because the evidence did not preponderate in favor of the plaintiffs concerning the majority-minority requirement.

Citing *Threadgill v. Armstrong World Indus., Inc.*, 928 F. 2d 1366, 1371 (3d Cir. 1991), the court stated:

> [t]here is no such thing as the 'law of the district.' Even where the facts of a prior district court case are, for all practical purposes, the same as those presented to a different district court in the same district, the prior resolution of those claims does not bar reconsideration by this court of similar contentions. The doctrine of stare decisis does not compel one district court judge to follow the decision of another. Where a second judge believes that a different result may obtain, independent analysis is appropriate. Slip Op. at 20.

Moreover, in *Reyes*, the plaintiffs lacked data that reflected the actual number of Hispanic CVAP living in the demonstration district, and the Fifth Circuit has specifically upheld the district court's finding that the Dallas County Hispanic voter registration numbers could not be reliably applied to Farmers Branch. Similarly, in this case involving the Irving ISD, the growth rates for all of the Irving ISD could not reliably be applied to the illustrative districts, which had demonstrably different characteristics than the school district as a whole, including a large number of non-citizen Hispanics.

The district court thus concluded that the plaintiff, Benavidez, had failed to overcome the strong presumption that the 2000 Census data are correct, noting "This court has the benefit of the Fifth Circuit's decision in *Reyes*. Judge Solis did not."

Conclusion

Our nation has turned a corner since the enactment of the Voting Rights Act of 1965. That powerful legislation was enacted at a time one can truly call a political and moral watershed in the history of this nation. The Act reflected Congress' firm intention to rid the country of racial discrimination in voting.

As we have seen over the four decades of enforcement, implementation, reauthorization and extension of this landmark legislation, tremendous progress has been made in race relations. It has been slow but steady, and was made as a result of an

increasingly accessible electoral process. That progress, tempered by the continuing need for such remedial legislation, facilitated the Voting Rights Act's subsequent revisions, reauthorization and extensions, particularly with respect to Section 2 and Section 5, the chief components of the federal government's formidable arsenal against voting discrimination, electoral inequality, and denial of access to the political process.

Racial progress is palpable. Even to the gloomiest of observers, the glass of equal electoral and political opportunity is now more than half full. Notwithstanding the progress that few can honestly dispute, however, the need remains for the Voting Rights Act as one of the chief enforcement mechanisms for the protection of minority voting rights.

As our nation approaches the 2010 Census and the enumeration that will commence on April 1, 2010, perhaps this is a good time to reflect on what we have learned as one nation comprised of many states.

We have learned how to pull, haul and trade in the marketplace of political competition. The process has at times been two steps forward, one step back, but always moving forward. We have witnessed the transformation of *E Pluribus Unum* from a nice sounding phrase to a political reality.

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